

First Amendment to Constitution of India

C K MATHEW

India's Constitution has been amended over a hundred times since its inception in 1950. The landmark amendments are discussed with special emphasis on the first amendment, which altered the way the freedom of speech and expression was originally understood by the framers of the Constitution.

The 100th amendment to the Constitution was passed after due process in Parliament, and was notified on 28 May 2015 by the Ministry of Law and Justice. The amendment enables the transfer of certain properties of India to Bangladesh and certain other properties of Bangladesh to India, thereby resolving an issue that was as old as independent India itself. It received the unanimous support of all political parties, and was widely welcomed by the peoples of the two countries, especially those living in the areas concerned, and those adjoining the transferred places.

Undoubtedly, India is the only country in the world with a written constitution that has been amended so many times in the six and a half decades since its inception in 1950. The fact that the Constitution has indeed been amended a hundred times sometimes gives rise to two conflicting trends of thought. One school of thought derides the constant and unending process by which the Constitution is being mutated and, some would say, mutilated, to suit the needs of the political party in power. Such criticism is often made with reference to the controversial 42nd amendment brought in by Indira Gandhi at the height of the Emergency, when her powers were supreme. Yet others argue that the Constitution is a living document and must reflect the growing aspirations of the people of India from time to time. Hence, it is argued that amendments to the Constitution are not merely reflective of such aspirations but also emphasise and translate the will of the people to carve out their own destiny.

The procedure for such amendment is laid out in Article 368 of the Constitution and indeed can be said to protect the sanctity of the Constitution as well as to check the arbitrary power of Parliament. Nevertheless, it cannot be denied that Parliament, through the

42nd amendment, did try to arrogate to itself supreme unfettered powers to amend the Constitution.

The introduction to the statement of objects and reasons for the amendment, laid on the table of the Lok Sabha on 1 September 1976, reads:

Parliament and the State Legislatures embody the will of the people and the essence of democracy is that the will of the people should prevail. Even though article 368 of the Constitution is clear and categorical with regard to the all inclusive nature of the amending power, it is considered necessary to put the matter beyond doubt. It is proposed to strengthen the presumption in favour of the constitutionality of legislation enacted by Parliament and State Legislatures by providing for a requirement as to the minimum number of Judges for determining questions as to the constitutionality of laws and for a special majority of not less than two-thirds for declaring any law to be constitutionally invalid. It is also proposed to take away the jurisdiction of high courts with regard to determination of Constitutional validity of Central laws and confer exclusive jurisdiction in this behalf on the Supreme Court so as to avoid multiplicity of proceedings with regard to validity of the same Central law in different high courts and the consequent possibility of the Central law being valid in one State and invalid in another State (The Constitution (Forty-Second Amendment) Act 1976).

Parliament achieved this purpose by inserting a new article, namely, Article 131A, after Article 131, which removed the powers of the high courts in matters related to validity of constitutional matters and gave exclusive jurisdiction for the same to the Supreme Court. The new article reads as follows:

Article 131A. Exclusive jurisdiction of the Supreme Court in regard to questions as to the Constitutional validity of Central laws. (1) Notwithstanding anything contained in any other provision of the Constitution, the Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine all questions relating to the constitutional validity of any Central law.

Concurrently the 42nd constitutional amendment, through a new article, Article 228A, also curtailed the powers of high courts by restricting their jurisdiction over central laws; "Article 228 A(1). No high court shall have the jurisdiction to declare any Central law to be constitutionally invalid."

In order to ensure that Parliament remains supreme, Article 368 was suitably

Views expressed are personal.

C K Mathew (mathew@pacindia.org), retired from the Indian Administrative Service, was former Chief Secretary, Government of Rajasthan, and is presently Senior Fellow in the Public Affairs Centre, Bengaluru.

amended by the insertion of the clauses (4) and (5) as reproduced below:

Article 368 (4) No amendment of this Constitution... made or purporting to have been made under this article...shall be called in question in any court on any ground.

(5) For the removal of any doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of parliament to amend by way of addition, variation or repeal the provisions in this Constitution under this article.

Indeed the promulgation of Emergency in the country was hugely unpopular and its most controversial issue was the 42nd amendment. In time, judicial pronouncements restricted the power of Parliament for making constitutional amendments only in such cases as where the basic structure of the Constitution is not altered.

In this regard, we may in passing mention three judgments which addressed this contentious issue:

(i) The *Golaknath v State of Punjab* (AIR 1967 SC 1643), where it was upheld that constitutional amendments through Article 368 were subject to fundamental rights issue;

(ii) The *Keshavananda Bharathi* judgment (1973) 4 SCC 225, where the doctrine was espoused that the Constitution has a basic structure of constitutional principles and values and that the judiciary has the power to review and strike down amendments which conflict with, or seek to alter, this basic structure of the Constitution; and

(iii) The *Minerva Mills Ltd and Ors v Union of India and Ors* judgment (AIR 1980 SC 1789), that applied and evolved the basic structure doctrine of the Constitution, unanimously ruling that Parliament cannot exercise unlimited power to alter this basic structure or tread upon the fundamental rights of individuals, including the right to liberty and equality.

The Janata Party government, led by Morarji Desai, sought to rectify these excesses made at the height of the Emergency by the 43rd constitutional amendment, but was only partly successful.

Most Valued Fundamental Right

Having discussed the background in which the entire issue of constitutional amendments was agitated and how the dictates of the immutable basic structure of the

Constitution would hold precedence, it is now the right time to examine how the very first constitutional amendment did succeed in abridging the most valued of fundamental right of a citizen, namely that of freedom of speech. Of course, these actions took place before the contentious issues brought to the fore by the 42nd amendment. The first constitutional amendment was brought in by the Government of India's first Prime Minister Jawaharlal Nehru in 1951. He moved the bill on 12 May 1951 and the same was enacted by the Provisional Parliament of India (called thus until as when the full-fledged Parliament was constituted through adult franchise in 1952) on 18 June 1951.

The first amendment of the Constitution, officially known as the Constitution (First Amendment) Act, 1951, made several changes to the Fundamental Rights provisions of the Constitution and other important provisions. It provided against abuse of freedom of speech and expression, validation of zamindari abolition laws, and clarified that the right to equality does not bar the enactment of laws which provide "special consideration" for weaker sections of society. The device of the Ninth Schedule to protect certain legislations from judicial review also found its origins in the first amendment.

In fact, this amendment set the precedent for amending the Constitution to overcome judicial judgments which purportedly impeded the fulfilment of the government's responsibilities to particular policies and programmes. The amendment's language gave it retrospective and prospective effect: this feature was used by Jawaharlal Nehru's daughter, and heir to the chair of Prime Minister, Indira Gandhi, when, as we have just seen during the Emergency she attempted to render constitutional, the actions that had been both illegal and unconstitutional.

We will only examine the crucial issues related to the amendment on the Constitution with regard to the fundamental right of freedom of speech and expression as enunciated in Article 19(1)(a). A brief extract from the statement of Objects and Reasons at the introduction

of the First Amendment Bill reads as follows:

During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights. The citizen's right to freedom of speech and expression guaranteed by Article 19 (1) (a) has been held by some courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions, freedom of speech and the press is not regarded as debarring the State from punishing or preventing abuse of this freedom. (The Constitution (First Amendment) Act 1951).

Colonial Censorship

From where did this concern arise? Before we address this issue, it would be relevant to take a quick look at the various measures that were imposed by the British government prior to independence. This is necessary because it would give an idea of the kind of suppression of speech and expression that the Indian newspapers, and indeed the nationalist movement, had to face against a foreign government.

We are aware of the censorship that the British government imposed on the people of India ever since the days of the first war of independence, derisively referred to by the British as a sepoy mutiny. Immediately thereafter, a "Gagging Act" was passed by the new British government that took over the reins of administration of the country. Its aim was unabashedly to regulate the printing presses and restrain them from printing inflammatory matter in the papers. All presses, English and vernacular, had to have a licence issued by the government. The act proscribed all printed material

Permission for Reproduction of Articles Published in EPW

No article published in EPW or part thereof should be reproduced in any form without prior permission of the author(s).

A soft/hard copy of the author(s)'s approval should be sent to EPW.

In cases where the email address of the author has not been published along with the articles, EPW can be contacted for help.

which criticised the motives of the British Raj, and which incited hatred, contempt and unlawful resistance to its orders. Not satisfied with the impact of this act, the British government created an even more forcible law known as the Vernacular Press Act. There is an apocryphal story that the Lieutenant Governor of Bengal, Ashley Eden, had summoned the editors of the various vernacular newspapers demanding that he be given final editorial approval for matter printed in these papers. Sisir Kumar Ghose, editor of the *Amrita Bazaar Patrika* refused, remarking that “there ought to be at least one honest journalist in the land.” The Vernacular Press Act might be said to have been sparked from this incident. In justification of the enactment, Ashley commented that 45 seditious writings published in 15 different vernacular papers were presented to him before the act was finalised.

The Vernacular Press Act 1878 stated that any magistrate or commissioner of police had the authority to call upon the printer or publisher of a newspaper to enter into a bond, undertaking not to print any material deemed objectionable. What was seditious news was to be determined by the police, and not by the judiciary and no redress could be sought in any court in the land. Under this act many of the papers were fined, their editors jailed.

There were other regulations and statutes that the British government brought in, including the Newspapers (Incitement to Offences) Act 1908, which targeted extremist nationalist activity, and empowered magistrates to confiscate press property with objectionable material that was likely to cause incitement to murder or acts of violence. Similarly there was the Indian Press Act, 1910, which empowered the government to demand a security at registration of a newspaper with the penalty to deregister it if it was proved to have printed offending material: the printer had to submit two copies of each issue to local government free of charge.

During the World War I too, the Defence of India rules imposed a gag on free public criticism and political agitation. More importantly, the Indian Press

(Emergency Powers) Act, 1931 gave sweeping powers to provincial governments to suppress any material used for the Civil Disobedience Movement. It was further amplified in 1932 to include all activities calculated to undermine government authority. In the World War II period, existing laws were reviewed and made more stringent. At one time, publication of all news related to Congress activity was declared illegal.

Post-independence Censorship

It is in this light of continuous imposition of restrictions in the pre-independence days, personally experienced and suffered by Indian freedom fighters, that we must look at the reasons for a free India to resort to a similar, if not identical, restrictions on free speech and expression. A brief look at the backdrop in which the first constitutional amendment was introduced would be helpful. In 1950, a journal in English with admittedly leftist leanings called the *Cross Roads*, published by Romesh Thapar, was banned by the Madras State for publishing critical views on Nehruvian policy. In fact, the Nehru government’s original grievance was against another publication, called the *Organiser*. Regarded as right wing, the *Organiser* had published some cartoons depicting Pakistan, which was viewed by the union government as being communal and inflammatory in its import. The government, therefore, wanted to impose restrictions on *Organiser*. However, *Organiser* was seen as a patriotic publication whose cartoons reflected the views of many Indians who

had lost everything when India was partitioned to create Pakistan.

Though Thapar’s *Cross Roads* was a stridently secular publication, in order to counter any charge of bias, the government banned *Cross Roads* at the same time as the *Organiser*. According to *Cross Roads*, the new government was a collaborative regime which had not succeeded in ushering in social and political reformation which was, according to the magazine’s radical views, necessary for India’s real emancipation. At this same time, a communist movement was gathering strength in the western parts of Madras state (which areas later became Kerala) and this prompted the local administration to take the unilateral step of banning this magazine.

Thapar petitioned the Supreme Court to overturn the ban. The case was heard together with *Brij Bhushan v the State of Delhi*. This led to the landmark judgment of the Supreme Court in *Brij Bhushan v the State of Delhi* on 26 May 1950 (AIR 1950 SC 129). The Court found that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19(1)(a). The executive orders for banning the journal were shot down.

Piqued by this judgment, the Nehru government decided to take action to enable the executive to place curbs on the unfettered freedom of expression where issues of public tranquillity and order are involved. This led eventually to the First Amendment of the Constitution,

Oral History Archives

On behalf of EPW, the Centre for Public History, Srishti School of Design, Bengaluru, has put together extended interviews of 30 individuals associated with *Economic Weekly* and EPW.

These are interviews with present and former staff, readers, writers and trustees, all closely associated with the journal.

The interviews cover both the EW and EPW years, some are of the 1950s, others the 1960s and some even later. Each interview lasts for at least an hour and a few are multi-session interviews.

The interviews maintained in audio files (with transcripts) are available at the EPW offices in Mumbai for consultation by researchers.

Individuals interested in researching those times and the history of EW/EPW may write to edit@epw.in to explore how the files may be heard and used.

when Parliament amended Section 19(1) (a) of the Constitution of India to place restrictions on the freedom of speech and expression by making it a crime to incite public disorder. The case brought attention to *Cross Roads*, which had been unknown up to that point of time, but also caused a number of its advertisers and contributing writers to distance themselves from the publication.

Let us now look at Article 19 of the Constitution in its original form, while, of course, restricting our examination only to the matter of the freedom of speech and expression.

Article 19. Protection of certain rights regarding freedom of speech, etc.-

(1) All citizens shall have the right-

(a) to freedom of speech and expression;...

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

The above clause (2) was deleted by the first amendment, and replaced by the following:

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

It would be interesting to conjecture the idealistic vision that may have prompted the framers of the Constitution of 1950 to originally provide for freedom of expression. The first of the fundamental freedoms elucidated in Article 19 is indeed the freedom of speech and expression. The leaders of the fledgling nation may have been moved by the need to have sweeping freedom of speech and expression in view of the difficulties they themselves faced while battling for independence for the country. The deleted clause (2) of the Article 19 provided only for some measure of protection for laws relating to "libel, slander, defamation, contempt of court or any matter

which offends against decency or morality or which undermines the security of, or tends to overthrow, the state," even though it may militate against the unfettered and unrestricted freedom of speech and expression. The newly inserted clause stipulates that reasonable restrictions can be imposed by the state in "the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

Toning Down Idealism

The idealism brought in by the freedom movement and the new Constitution with regard to freedom of speech and expression had to be toned down in the face of the real problems and issues that were unleashed in the new country in its day-to-day management. The amended clause (2) has taken into account the situation that had arisen out of the *Organiser's* critical comments against Pakistan. But it also generated fear of legal action which could be taken against those papers or journals which dared to make any observations that could be adversely interpreted as challenging the sovereignty and integrity of India as well as affecting public order, decency, etc. It can be seen that the powers now with the executive to proscribe or prohibit free speech, even though such observations may have been made in the genuine interests of the country and its democratic principles and values, could be open to interpretation and punitive action. It is also clear that the reason behind the first amendment was not only the need to preserve friendly relations with foreign states (in this case, Pakistan), but also to prevent future critical comments against the government, the likes of which had been made by Romesh Thapar's *Cross Roads*.

It is an irony that the very freedom fighters who protested against the many restrictions that the British government had imposed on freedom of speech and expression during the struggle for Independence, had, on assuming the governance of the country themselves, to

impose much the same restrictions in a free and independent India against its own citizens. Indeed, the foreign colonial government had taken these actions for gagging speech and expression to perpetuate their control and supremacy over a vassal country. But on attainment of Independence too, the nature of realpolitik made it incumbent on the government to restrict speech and expression, even at the cost of amendment to the Constitution in the most primary and supreme of fundamental rights.

Out of this constitutional amendment came the Press (Objectionable Matter) Act, 1951 which empowered the government to demand and forfeit security for publication of "objectionable matter." Aggrieved owners and printers were given the right to demand trial by jury. It remained in force till 1956. Of course, the gagging of the press during the dark days of the Emergency needs no reiteration here when the Prevention of Publication of Objectionable Matter Ordinance 1975 was promulgated. After the defeat of the Indira Gandhi government in 1977, the new government restored freedom of expression and speech through the restoration of the Parliamentary Proceedings (Protection of Publications) Act 1956. The Supreme Court in a wide range of judgments have clarified its views on each of the causes mentioned in the amended clause (2) of Article 19 of the Constitution, that can be purported to grant justification to the executive to impose restriction on freedom of speech and expression.

To summarise, in the wake of the 100th constitutional amendment, this article was but an exercise to understand how the process of such amendments to the Constitution were initiated by way of the first amendments and the important issues involved in the same that had wide-ranging implications on the liberty and freedom of the citizens of the country.

REFERENCES

- "The Constitution (First Amendment) Act (1951)," India Code, <http://indiacode.nic.in/coiweb/amend/amendi.htm>.
- "The Constitution (42nd Amendment) Act (1976)," India Code, <http://indiacode.nic.in/coiweb/amend/amend42.htm>.