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Ideological Basis of Indian State

Abstract

The Constitution of India has been lauded as a normative instrument towards social transformation. This viewpoint has led many to explore the philosophical underpinnings of the Constitution especially with respect to the Preamble. In this paper, I outline the basic values and ideals set out in the Preamble to the Constitution and the way it has impinged on the Indian state's evolution of its ideologies, programmes and policies. The paper also looks into the nuanced discussions on the 'basic structure' doctrine, particularly in terms of the debate between constitutionalism and democracy. This becomes important as the doctrine does unravel the complexities in the ideologies of the state as it tries to negotiate the tensions between Fundamental Rights and Directive Principles of State Policy that are vital for securing and promoting the values embodied in the Preamble. It also represents issues of reconciling parliamentary democracy with constitutionalism.

Introduction

The Indian Constitution is not only an outline of the framework of state and its institutions; it also embodies strategies and norms of social transformation. There is little disagreement that the Constitution of India is not only a descriptive statement; it also as a philosophy and an ethical

vision (see Austin 1966; Bhargava 2008; Mehta 2010). The Constitution of India is not only a bulwark against majoritarianism but also a peaceful and democratic means towards social transformation (Austin 1966; Bhargava 2008; Mehta 2010). As Bhargava writes:

The Indian Constitution was designed to break the shackles of traditional social hierarchies and to usher in a new era of freedom, equality and justice. Inscribed in the intentions of the framers of the Constitution was the potential to a breakthrough in constitutional theory: constitutions exist not only to disempower people in power but also to empower those who traditionally have been deprived of. Constitutions give vulnerable people the power to achieve collective good.

(Bhargava 2008: 15).

As Mehta rightly argues, at the moment of inception India hardly had anything but a vision for the future, and this vision was marked by three salient goals: national unity, social uplift and recognition in the international community (Mehta 2010). The 'constitutional moment' was far from revolutionary- "it was marked not so much by metaphors of novelty and revolutionary rupture as by those of transference and continuity" (ibid: 19).¹ However, what makes the Constitution of India a revolutionary document and a rupture with the past is the vision it embodies (see Mehta 2010).

Without doubt, the Constitution of India is also a document to guide the nation in its future towards a 'social revolution' (see Austin 1966). In other words, the Constitution provides a sketch or in fact a foundation for the ideologies that were to inform the working of the Indian state post-1950. The philosophy of the Constitution is widely acclaimed to be embodied in the Preamble to the Constitution. Before we analyse the philosophy of Constitution as outlined in the Preamble, it is also important to assess the philosophy in the Objectives Resolution moved by Jawaharlal Nehru on December 13, 1946 and unanimously adopted on January 22, 1947. The Objectives Resolution reflected the broad objectives of the Constituent Assembly; most of the

¹ Mehta here refers to the fact that much of the Constitution derived from the Act of 1935; the Constituent Assembly became the interim government, etc. these show that independence did not mean a complete break even with the colonial past (see Mehta 2010: 19).

objectives find place in the Preamble to the Constitution that came into force on 26 January 1950. The Objectives Resolution underlined amongst other things, the concept of popular sovereignty, equality, liberty and justice. Both the Resolution and the Preamble also focus on equality, justice and liberty in their multidimensional manifestations.

The Philosophy of the Constitution in the Preamble

The Objectives Resolution was the guiding document towards the formulation of the Preamble. The Drafting Committee replaced the expression “Sovereign Independent Republic” in the Objectives Resolution with “Sovereign Democratic Republic” in the Preamble. Similarly, the Committee also added a clause about ‘fraternity’ that was missing in the Resolution. By and large, otherwise, the Preamble has incorporated the same vocabulary and substance of the Resolution.

The philosophy of the Constitution cannot be understood without understanding and deciphering the Preamble which reads as follows:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation];

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION. ²

² The words ‘socialist’, ‘secular’, ‘unity and integrity’ were inserted by the 42nd Amendment Act, 1976.

Subhash C Kashyap (2011) underlines 11 values upheld in the Constitution by way of their emphasis in the Preamble: sovereignty, socialism, secularism, democracy, republican character, justice, liberty, equality, fraternity, dignity of individual, and unity and integrity of the nation (Kashyap 2011: 59).

Sovereignty

The Preamble declares India to be a sovereign state; it however does not pin the source or the locale of this sovereignty (Kashyap 2011: 60). The only place that suggests the locale in the entire Constitution is also the Preamble (ibid). “We the people” is the only hint in this direction. In other words, the Constitution is founded on the notion of “popular sovereignty”. The people hold the ultimate vestiges of power in independent India. It is popular will that decides the course of government policies and action. Democracy has also been appreciated as part of the ‘basic structure’ of the Constitution (discussed later). However, what is also interesting in the Indian case is that increasingly, sovereignty implies constitutional sovereignty, as the debates on ‘basic structure’ would show. In other words, India subscribes to a notion of popular sovereignty within the constraints of constitutional sovereignty.

A close reading of the Preamble, along with other parts of the Constitution however will also give us another aspect of this sovereignty. The sovereignty also consists in India’s powers to make or unmake any decision with respect to itself without external interference. This was iterated in the *Kesavananda Bharati* case (1973) as well (Kashyap 2011: 60). Subhash Kashyap also points to the implications of “We, The People of India”. Unlike in the United States Constitution, this statement in the Preamble to our Constitution also emphasises the weightage enjoyed by the Union government over the states. As the Supreme Court observed in the *Berubari Union* case (1960), “one of the attributes of sovereignty is the power to cede parts of national territory if necessary” (Kashyap 2011: 61).

Socialism

The Preamble does speak of equality and justice, which specifically also includes economic justice- a feature broadly identified with socialist pattern of society. However, the original

Constitution did not contain the term 'socialist', neither did it include 'any reference *inter alia* to socialism' (Kashyap 2011: 62). It was only in 1976 through the 42nd Constitution Amendment Act that the term 'Socialist' was incorporated in the Preamble next to 'Sovereign'. The term 'socialist' however has not been defined in the Constitution. Neither did India completely embrace the Soviet model of socialism. Indian state took pride in its democratic form of government; the existence of private sector was also encouraged as part of the politics of accommodation and consensus, giving way to 'Nehruvian socialism', a variant of Fabian socialism. The only attempt to define socialism was made by the Janata party government by way of 44th Amendment in 1978, which however was not passed due to opposition from the Council of States. Socialism however was a strong philosophy that guided the Indian State particularly in the first three decades after independence. The Five Year Plans, the attempts by the government to give primacy to Directive Principles, etc., public ownership of industries, etc were a few examples that projected the socialist credentials of India. However, with the rolling out of New Economic Policy in 1991, and the triplets of liberalization, privatization and globalization, the socialist ideology of the state also came under duress. Yet in 2008, a three-judge bench of the Supreme Court headed by Chief Justice K.G. Balakrishnan dismissed a PIL plea that the word 'Socialism' should be deleted from the Preamble since it was not part of the original text. The Supreme Court also iterated the importance of socialism in India's policy guidelines by broadly defining it as public welfare and not communism, as well as pronouncing it as a facet of India's democracy.

Secularism

One of the central issues that the Constituent Assembly was preoccupied with was the modalities of secularism for the nascent Indian state. The fact that India was a territory with religious pluralism, the challenge of Partition as well as the Hindu Right, and the aspirations to be a modern state defined the contours of secularism debates in the Assembly. The Assembly debates therefore included different versions of secularism ranging from a mere right to religious worship to a more nuanced concept of secularism that also justified state's intervention in religious domains (see Mahajan 2008; Bhargava 2008; Bajpai 2008; Jha 2008).³

³ Chandoke contends, the national movement itself gave impetus to the features of secularism that have informed our Constitution. Cultural rights were recognised as early as the Motilal Nehru Report of 1928. The Karachi Charter on

The Preamble in 1950 however did not include the term ‘secular’; neither does the Constitution define secularism in any other part. What the Preamble however did contain is liberty that included liberty of faith, belief and worship. This is a more narrow definition, as compared to the way Indian state implemented its policy of secularism. Shefali Jha (2008) argues that the Constituent Assembly rejected separate representation for minorities in favour of rights of minorities as embodied in Articles 29 and 30 of Part III (justiciable Fundamental Rights). What is certainly clear is that India’s secularism rejected the western definition of secularism given by Donald E. Smith- the wall of separation thesis-

The secular state is a state which gives individual and corporate freedom of religion, is not constitutionally connected to a particular religion, nor does it seek either to promote or interfere with religion.

(Smith, in Kashyap 2011: 63).

The word ‘Secular’ was also added by the 42nd Amendment Act, 1976. Prior to the amendment, the only mention of ‘secular’ was in Article 25(2) wherein “State had been empowered to regulate or restrict any ‘secular activity’ associated with religious practice” (Kashyap 2011: 67). In Subhash Kashyap’s view, secular here refers to ‘non-religious’, a very narrow clarification. This however reiterated the secular bedrock of the Indian state- India does not have an official religion; individuals and groups have freedom of conscience and worship; and the state follows what Rajeev Bhargava calls ‘principled distance’- “a value-based strategy that presupposes disestablishment and that enjoins the state to intervene in or abstain from such interventions depending upon whether specific values integral to the secular ideal are advanced” (Bhargava 2008: 10). In fact, the Constitution sought to recognise all communities as equal not by way of a wall of separation but by guaranteeing religious liberty to all (Mahajan 2008). Gurpreet Mahajan succinctly puts forth the distinctiveness of Indian secularism: the Constitution endorses the principle of non-establishment of religion but does not advocate the separation of religion from politics, or in fact the public domain (Mahajan 2008). Thus the state has no official religion (disestablishment) but this did not restrict religion into the personal or private domain.

Fundamental Rights of 1931 emphasised the commitment to right to religion and the freedom to profess and practice any religion. Also added in the Charter were rights of minorities to cultural autonomy and equal access to educational facilities. Most of these provisions were reiterated in the Sapru Report (1944) (see Chandoke 2002: 210-2).

The manifestations of India's secularism are visible in various provisions of the Constitution. Article 27 rules out public funding of religion; Article 28(1) prohibits religious instruction in educational institutions wholly funded by the state. Articles 25, 27 and 28 are guarantors of religious liberty (see Bhargava 2002: 111). On the other hand, equality of citizenship is established by Articles 14, 15 (1) and 29(2) (ibid: 112). In Bhargava's view, Articles 27 and 28(1) imply a strict wall of separation between state and religion. Articles 15, 16, 25, 29(2) also indicate separation. But Articles 30, 17 and 25(2) call for state intervention in religion.

That secularism has been one of the founding ideologies of the Indian state has been endorsed in the Supreme Court judgements in *Kesavananda Bharati* case (1976) and the *S.R. Bommai* case (1994), wherein the Court declared and iterated secularism as part of the 'basic structure' and 'basic features' respectively. Increasingly, the secular ideology of the Indian state is held as the accommodation and promotion of freedom of religion that is part of the original text of the Preamble as liberty of belief, faith and worship. This interpretation as in the case of *St. Xavier College Society case* (1974), *Shah Bano case* (1985), and the numerous debates on the Uniform Civil Code- has also paved way for the conflict between individual rights/freedom and group/community rights.

Democracy

The Objectives Resolution speech of Nehru did not mention 'democracy' as was the case with 'socialism' (see Khilnani 2002: 70). As Nehru himself assured, the omission of the term only indicated that it was obvious that India would choose democratic form of government (ibid). Thus democracy is an ideal that was much cherished by the national movement. As Bhargava argues, democracy came to India "in the guise of nationalism", the main instrument being universal adult franchise (Bargava 2008: 19).

The Constituent Assembly, despite the fiery debates on parliamentary v. presidential form of government was vociferous about a democratic polity for the Indian state. In *Kesavananda* case, the Supreme Court upheld democracy as a basic feature that cannot be amended or taken away by way of constitutional amendment. By democracy, the Constituent Assembly meant 'one person, one vote' or political democracy. Universal Adult Franchise regardless of sex, education, class, caste or community was revolutionary for a society that was embroiled in parochial social

divisions including untouchability. This is remarkable as the rights of citizenship in India are based on a 'categorical principle of inclusion', ie., "to be an adult member is sufficient qualification for full citizenship of the state" (Bhargava 2008: 16). This idea of citizenship vouched for "a uniform set of rights extended to all citizens and defended in the name of equality of rights, equality of treatment, and a single national identity" (Rodrigues 2008: 179).

For Ambedkar, this was however a 'contradiction' to have political democracy without social and economic democracy. Nehru, on the other hand, perceived political democracy as a means to an end- the good life; in other words, political democracy was to serve as an instrument for socio-economic democracy as well, which also suggested a proactive state for social and economic transformation. Indian state has upheld the plurality and representativeness of indirect or representative democracy. During the coalition era, it has been a vibrant debate- should India privilege stability over representation. Indian public opinion has been averse to privileging stability over representativeness despite underlining the perils of instability.

However, many scholars have also pointed to the possible tensions between constitutionalism and democracy. Sunil Khilnani (2002) underscores the opposition between the 'logic of constitutionalism' and 'the pressures of democracy'. Khilnani therefore supports a superior durability and authority to the Constitution, which would act as a bulwark against passions of democracy, or more specifically parliamentary majority. A similar concern echoes in the work of Sanjay Palshikar (2008) wherein he points to the opposition in the Constitution between a majoritarian conception of democracy and constitutionalism. After all, there have been cases when the Parliament had tried to change the foundations of the Constitution. This becomes a major concern in discerning the scope of Article 368 (amendment) and the debates on basic structure. This debate is cornerstone of the writings of Pratap Bhanu Mehta (2002) and Raju Ramachandran (2006) with regard to the 'basic structure' doctrine.

Republic

'Republic' entails a State in which the people are supreme; public offices are open to every citizen; the head of the State is elected for a fixed period and there is no hereditary office (Kashyap 2011: 71). The Preamble calls India a 'Democratic Republic'- "a State with an elected head and a government by representatives of the people" (ibid). With the commencement of the

Constitution in 1950, India ceased to be a dominion. India's membership in the Commonwealth of Nations does not infringe on her independence or sovereign status. The President is the head of the Republic of India and holds power for a fixed period of five years. The President is indirectly elected by the people. India is a republic therefore in the widest sense of the term (Kashyap 2011).

While 'Sovereign Socialist Secular Democratic Republic' serves as the foundational ideologies/philosophies of the Indian State, the Preamble also outlines the goals of the ideology or the state itself: Justice, Liberty, Equality and Fraternity. These ideologies and goals were part of Nehru's 'national philosophy of India' (Parekh 2008), and therefore accentuate their importance by way of their inclusion in the Preamble.

Justice- social, economic and political

Granville Austin (1966, 2003) explains the Indian Constitution as a document of 'social revolution'. Nehru, Ambedkar and most other luminaries in the Constituent Assembly envisaged the Constitution to be an instrument of social justice; the state itself was perceived as an agent of social change. In terms of the order in which they appear, the Preamble gives priority to justice over liberty and equality. The Preamble has a broad notion of justice; it is not restricted to the narrow notion of legal justice (Kashyap 2011: 73). This has also been a source of debate between a neutral state and a state that intervenes for social transformation and good life (Palshikar 2008). Suhas Palshikar (2008) is of the view that these 'overlapping' notions of a neutral state and interventionist state are complementary in the task of social change and justice, for the state is also expected to provide 'enabling' provisions besides formal equality (see Palshikar 2008: 157). Justice is also elaborated as social, economic and political. This also bears testimony to Indian state's conviction that mere political democracy does not usher in justice or common good. Political justice- the absence of discrimination and presence of equal opportunity- highlighted in the Fundamental Rights is important in the true spirit of liberal democracy; yet the founders were convinced that political justice is meaningless without socio-economic justice. The Preamble, Part IV and Part IV-A – all stand for human and social development that benefit the 'worst-off' citizens (Baxi 2010). In the light of the Objectives Resolution, socio-economic justice attains utmost priority in the Preamble although provisions of socio-economic justice were incorporated in the Directive Principles of State Policy that are non-justiciable.

The only exception in terms of social justice is the inclusion of removal of untouchability under Article 17 in Part III. The positive welfare rights contained in Part IV were also “effectively restrained by making the right to property a fundamental right” (Vaidyanathan 2002: 285). Others like Sanjay Palshikar also point towards the tension between negative rights in Part III and positive rights in Part IV (see Palshikar 2008). However, the Constitution made explicit provisions for mandatory reservation for Scheduled Castes and Scheduled Tribes in elected legislative bodies (Articles 330 and 332), and public employment and education in terms of Articles 15(4) and 16(4) (see Vaidyanathan 2002; Guru 2008; Mahajan 2008). Guru (2008) acknowledges this as a serious effort by the Constitution towards redistribution of positional good.⁴ This also adds to Indian Constitution’s philosophy of going beyond the rationale of equality as non-discrimination. Many scholars argue that affirmative action in the form of reservations in the Indian Constitution is a very radical proposition. Many believe that positive discrimination policies in India can be best justified by the group disadvantage argument that requires redistribution which stops short of equality of results (see Acharya 2008: 24).

Notwithstanding the tension between Part III and Part IV, the Indian State did live up to the expectations of Part IV as fundamental in the governance of the country. The conflict between Parliament and judiciary over the relative importance of Fundamental Rights and Directive Principles, and the basic structure doctrine testify to the importance the government accorded to socio-economic justice. The abolition of right to property as a fundamental right is yet another example. In the recent past, the State has translated many of the Directive Principles into entitlements and expanding the boundaries of justice by way of public policy. The best examples are the right to education and the right to work (see Baxi 2010; Sibal 2010).

Liberty

The Indian Constitution enshrines more a positive notion of liberty- that is liberty is not merely defined as restraints on the state, as in the classical liberal perspective; it is also spoken of as the

⁴ Gopal Guru (2008) notes a serious limitation in the Constitution’s philosophy of social justice- it is based on positional good but not sufficient for cultural/moral goods like dignity and recognition. For example, he argues that Article 17 makes untouchability a punishable offence; however, it only deals with the sites of untouchability and not its source- the mindset of the upper castes. In other words, legal measures are necessary but are inadequate . Thus one may be punished for not allowing Dalits to draw water from public wells, but nothing can ensure that the ‘touchables’ drink water from a Dalit household. Jaffrelot (2008) similarly argues that the Dalits did not gain much from political quotas owing to delimitation, etc.

presence of freedom or liberty for the citizens. Subhash Kashyap (2011) argues that the very fact that the Preamble explicitly speaks of liberty of thought, expression, belief, faith and worship- suggests a positive reading of liberty in the Preamble. For example, Article 19 guarantees freedoms of speech, expression, assembly, etc; Articles 25-28 protect rights pertaining to freedom of religion, while Articles 29 and 30 protect cultural and educational rights of religious minorities. All these rights, which are also justiciable, are in the language of positive rights and freedoms. Similarly, Martha Nussbaum (2009) argues that in contrast to the American Constitution that speaks of rights negatively- as domains where the state shall exercise restraint, the Constitution of India “typically specifies rights affirmatively” (ibid: 38). For instance, Article 19 says, “All citizens shall have the right to freedom of speech and expression...”. Nussbaum places emphasis on the locution ‘all citizens shall’ in lieu of ‘the State shall not’ as in the US Constitution. In her view, the Indian Constitution, by virtue of the affirmative ‘shall’ also suggests that non-state actors also cannot violate the liberty of individuals (ibid). Furthermore, Nussbaum asserts that the Constitution of India explicitly denies that affirmative action for the disadvantaged sections of society is incompatible with the idea of equality of opportunity.

Equality

The Constitution established a “regime of formal equality spanning a society of legendary hierarchy” (Galanter 2002: 306). This therefore warranted the government to take measures to “mitigate prevailing inequalities” (ibid). Indeed, the architects of the Constitution perceived socio-economic inequalities as an obstacle to the idea of India as a ‘cohesive nation’, its national identity (Parekh 2008: 46).

One of the primary goals of the Indian Constitution has been therefore to ensure equality of citizens. Articles 14-18 enlist several fundamental rights to equality including equality of opportunity, right against untouchability, abolition of traditional titles, etc. the Preamble specifies equality of status and opportunity. All these culminate in the notion of universal equality and citizenship, a citizenship not to be “encumbered with any particular markings”, a citizenship that “was to be unmarked except for universally shared claims and obligations with a common national identity” (Rodrigues 2008: 179).

This however is not a narrow idea of equality. Even as the Constitution upholds equality of opportunity, it also upholds protective discrimination for the disadvantaged. That is, parts of the Constitution strive towards equality of status and opportunity not merely in terms of equality of citizenship or procedural equality. Equality of status and opportunity in the Preamble is meant in a much broader substantive notion of equality. This is reflected in the sub-clauses of Articles 15 and 16 that uphold the constitutionality of reservations and other forms of affirmative action to the advantage of the marginalised. Similarly, by using a wide category ‘socially and educationally backward’ as the criterion for identifying beneficiaries of reservation, the Constitution also gives enough discretion for the State to extend the benefits of positive discrimination to categories other than the Scheduled Castes and Scheduled Tribes who were accorded quotas in the original Constitution. For instance, the ‘Other Backward Classes’ gained access to positive discrimination by way of the discretion by the State subsequently. As Valerian Rodrigues (2008) argues, differential treatment is a corollary to equality of treatment in the Indian Constitution. Group-affiliated disadvantages are duly recognised and group specific rights have been a cornerstone of Indian Constitution.⁵

Hence group-based notions of equality and community-based notions of justice have substantively informed the Indian Constitution albeit the stress on individual rights and dignity of individual. The idea of equality and justice is also evident in the cultural and educational rights for the minorities (Articles 29 and 30). Bhargava explains this as “*individualist egalitarianism*, a view committed to equality among individuals and marked by a drive towards abstract universalism and *communitarian egalitarianism* that forges a relationship of equal respect among communities” (Bhargava 2008: 20, italics in original). As Bhargava contends: “the rejection of community-specific political rights was entirely consistent with the acceptance of community-specific social rights” (Bhargava 2002: 123). Thus the Constitution rejected separate electorates, reservation in jobs and constituencies on the basis of religion, and organization of states on religious basis. However, Indian secularism is based on group-sensitivity and principled distance and “legitimized the practices of the state in which religion was alternately excluded and

⁵ Not all group-related disadvantages are equally treated in the Constitution. For example, religious minorities did not get political safeguards or separate electorates and quotas; they were however given socio-cultural rights (Jha 2008). A substantive notion of gender justice is absent in the Indian Constitution (Bhargava 2008) including reservations for women in spite of the label ‘weaker sex’. Valerian Rodrigues (2008: 181) contends that two social groups which required preferential considerations but were ignored were women and the disabled.

included as an object of state policy” (Bhargava 2002: 126). This makes secularism in India’s Constitution compatible with differentiated citizenship; it calls for strict intervention, non-interference or equidistance, as the case may be (ibid: 126-7).

Fraternity

In the Constituent Assembly, Ambedkar had remarked on the idea of fraternity: “Fraternity means a sense of common brotherhood of all Indians- of Indians being one people. It is the principle which gives unity and solidarity to social life” (Ambedkar, in Kashyap 2011: 78). Kashyap contends that “Provisions relating to common citizenship are directed towards strengthening Indian fraternal feelings and building a strong Indian fellowship” (ibid: 77). The idea of common brotherhood (and sisterhood) among Indian citizens is best articulated in provisions under Article 51A- Fundamental Duties.

Dignity of individual

The goals of justice, liberty and equality in their manifold dimensions should finally guarantee dignity to every individual. Fundamental Rights and Directive Principles are meant to enable individuals to enjoy equality in the fullest sense of the term. Part IV also provides measures for equitable redistribution that in turn should remove the economic hindrances towards dignity. Article 17 abolishes untouchability, one of the biggest practices non-conducive to dignity of people belonging to the lower rungs of caste hierarchy. Similarly, Article 23 abolishes forced labour. There are also references in other parts of the Constitution that discourage practices derogatory to the dignity of women. More recently, verdicts of the Supreme Court have liberally interpreted the right to life and liberty under Article 21 to mean a life with dignity (see Baxi 2010). Examples include the right to clean environment, the right to education, debates on euthanasia, manual scavenging, etc. When the Preamble invokes dignity, it is in a wider sense, for it also tries to de-stigmatise the experiences of an individual because she or he belongs to a disadvantaged group. Dignity as a moral good therefore finds concrete resonance not as a mere mention in the Preamble but also in various provisions in the Constitution.

Unity and Integrity of the Nation

The commitment to nation-building is reflected in this aspiration in the Preamble. As Bhargava contends, the Indian Constitution embodies a “centralized idea of national unity” (Bhargava 2008: 33). Article 51A makes it a fundamental duty of every citizen to uphold and protect the sovereignty, unity and integrity as well as to promote harmony and brotherhood. In fact, the Preamble suggests that the dignity of individual and her rights can be realized only in the framework of national unity (Kashyap 2011). This is also echoed by Upendra Baxi in his words:

The tasks of constitutional (in)justice have always been conceived within the discourse of state security.....The argument here is, and has always been, that failure to preserve the sovereign integrity and unity of the Indian nation is a form of collective injustice to Indian people. ‘India’ must exist and survive if tasks of justice for Indians are to be fully addressed.

(Baxi 2002: 36).

Enduring nationhood and cultural diversity were not at odds as far as the philosophy of India’s Constitution is concerned: “unity in diversity”. This is further exemplified in the ‘reasonable restrictions’ on fundamental rights to freedom of speech, etc- which includes amongst other conditions, the unity and integrity of the state. Thus one of the grounds for preventive detention, censorship, etc is the cause of unity and integrity. Similarly, the Constitution provides sanction for Emergency even in the case of ‘internal disturbances’ that can threaten national unity or integrity (Article 352).Unity and integrity were also a basic feature of the Constitution as outlined by Justices Shelat and Grover in the *Kesavananda* case. That the Constitution clearly rules out the right to secession is another vindication of the emphasis on national unity: “Deference to difference beyond a limit is perceived as a threat to national unity” (Rodrigues 2008: 182).

In other words, despite the loudness about rights, justice, liberty, etc. the Constitution of India also upholds the reasons of the state and this is articulated in the Preamble itself. Granville Austin underlines unity and integrity of the country, along with democracy and the imperative for social revolution, as the three principles that constitute the ‘seamless web’ of India’s Constitution (Austin 1966; 2003). The importance for national integrity is also a consequence of

the anxieties about territorial integrity in the wake of years of colonial rule and Partition. This also explains the thrust on a strong centre (see Alam 2002; Verney 2002) and the clauses dealing with autonomy to ethnic groups (Rodrigues 2008).

Philosophy of the Constitution and the 'Basic Structure' Doctrine

Constitutionalism generally refers to self-imposed limits (Palshikar 2008: 213). Many view constitutionalism therefore also as conflicting with popular sovereignty that is central to democracy. The relationship between constitutionalism and democracy is generally pictured as one of tension. On the other hand, Walter Murphy and others argue the sync between constitutionalism and democracy, for both try to protect dignity of individual though in different ways. Others have lauded the Indian Constitution for its constitutional logic that subjects ordinary law to the Constitution as well as providing for special conditions to amend various provisions- an unambiguous reconciliation of constitutionalism and democracy (Krisnaswamy 2009: 192). While democracy upholds dignity by ensuring equal participation, constitutionalism attempts to limit 'legitimate governmental action' so that no one's dignity is assaulted (Palshikar 2008: 223-4). In the Indian Constitution, the most manifest example of the tussle was between right to property (Article 31) before it was deleted by the 44th Amendment Act, 1976, and the Directive Principles as well as the policy of the government in the 50s and 60s that sought to institute radical redistributive measures like land reforms. This is also represented very often as a conflict between judiciary and legislature in India, for the Supreme Court is the final interpreter of the Constitution- the power of judicial review embodied in Article 32. This tussle between Parliament and judiciary also raises a large question- who is the final custodian of the Constitution?

Constitutionalism is hence a protection against the excesses of democracy and more clearly majoritarianism. This alludes to the fact that constitutionalism is necessary to safeguard the basic philosophy of the Constitution as well. The Indian Constitution presents a very interesting case in this context, because the Constitution does not state those features that are immune to amendment; in fact no part of the Constitution is immune to amendment as per the text of the Constitution (Mehta 2002). Unlike the American Constitution, the Indian Constitution presents a relatively easier procedure to amend the Constitution as given in Article 368. There is also a strong viewpoint that the Constitution is superior to ordinary legislation or of a "higher order"

(see Mehta 2002: 182). This ‘deeper entrenchment’ of the Constitution protects constitutional rules from amendments by simple majority (ibid).

Also implicit and explicit in this apparent conflict is the relative significance of Fundamental Rights and Directive Principles of State Policy- both central to the philosophy of the Constitution. While the Fundamental Rights in Part III are justiciable, not amenable to transgression by legislature or executive- safeguarding rights from state interference, the Directive Principles of State Policy in Part IV are more in the nature of positive socio-economic rights that warrant state intervention, but are non-justiciable.

The 50s and 60s were characterized by the state’s commitment to socio-economic justice that took the shape of ordinary legislations giving effect to land reforms, etc. even by undermining Fundamental Rights especially the right to property. In the first seventeen years of the Constitution, the Parliament enacted amendments to overturn the decisions of the Supreme Court if the latter declared any legislation unconstitutional and the Court did not intervene with the amending powers (Mehta 2002: 183). Raju Ramachandran (2006) refers to the period between 1951 and 1967 as ‘the unlimited amending power phase’. The Parliament thus had more or less an unlimited power to amend the Constitution. The First Amendment Act, 1951 itself bears testimony to this, as it created the Ninth Schedule, immune from judicial review even as it violated certain Fundamental Rights, especially the right to property. Article 31B inserted by the First Amendment states that none of the laws specified in the Ninth Schedule shall be void on the grounds of inconsistency with Fundamental Rights. A sense of conflict between the judiciary and the Parliament is visible in Justice Hidayatullah’s statement that we are the only Constitution that ‘needs protection against itself’ (Baxi 2010).

In *Sankari Prasad vs Union of India* (1952) and *Sajjan Singh vs State of Rajasthan* (1965), the Court upheld the amendments legitimizing land reforms, which interestingly were to circumvent the Court’s invalidation of ordinary land reforms laws. These verdicts also upheld the constitutionality of the First Amendment and the Ninth Schedule. For instance, in *Champakam Dorairajan* case (1951), the Court upheld that Article 46 that provides for special provisions for education of backward classes violates Article 15. The Court here added that Part IV should be subsidiary to Part III. This was met by the Parliament with the First Amendment in 1951 that added Article 15(4) to overturn the decision of the Court. In a similar vein, the 4th and 17th

Amendments Acts in 1955 and 1964 respectively, validated land reform legislations in West Bengal and Kerala even as they curtailed Article 31. The Parliament moved these laws into the Ninth Schedule, removing them from the ambit of judicial scrutiny.

In the 60s and 70s, during Indira Gandhi's first term as Prime Minister, as many as 20 amendments were enacted to legitimize and consolidate nationalizations, abolition of privy purses, etc. (Sibal 2010). However, with the *Golaknath* case (1967), this view of 'parliamentary prerogative' underwent change (Mehta 2002: 183; Ramachandran 2006). In the said case, the Court held that Article 368 did not permit amendment to Fundamental Rights. The Court invoked the doctrine of 'prospective overruling'⁶. The Court upheld that Article 368 did not contain power to amend but only its procedure; that amendment was a law within Article 13 and would be void if it contravenes Fundamental Rights (see Ramachandran 2006: 111). This has been explained by many as a response to the political uncertainties of Indira Gandhi's regime⁷. Thus since *Golaknath*, the Supreme Court placed limits on Parliament's powers with respect to Article 368: "The principal contention in *Golaknath* was this: no constitution could allow for its own subversion" (Mehta 2002: 183).

The 25th Amendment that was passed in 1971 to overturn the *Golaknath* decision was radical in the sense that the amendment inserted Article 31C disabling judicial invalidation of laws made to give effect to Article 39 on the ground that they violate Article 14 or 19. This amendment was therefore to establish the priority of Directive Principles of State Policy over Fundamental Rights as well as parliamentary sovereignty over the Constitution.

Kesavananda Bharati vs. State of Kerala (1973) and afterwards

The 25th Amendment Act, along with the 24th and 29th were challenged in the *Kesavananda* case. The Supreme Court's view was different from the previous cases due to the phenomenon of 'committed judiciary' in the 70s (see Sibal 2010). As Sibal writes,

..the Supreme Court sought to take a 'balanced' view: it upheld the validity of the first part of Article 31C, while striking down the latter part,¹⁸ and restricted Parliament's

⁶ This meant that the Court's decision will be operational only in the future; it does not apply to the existing amendments till the *Golaknath* verdict.

⁷ See Sibal (2010).

power to amend the Constitution by propounding the 'basic structure doctrine', that broadly speaking, Parliament did not have power to make amendments that altered the 'basic structure' of the Constitution.

(Sibal 2010).

The Court held that there is no 'antithesis' between Fundamental Rights and Directive Principles of State Policy; in fact they are supplementary (ibid). The Court revoked the *Golaknath* judgement that had made Fundamental Rights immune to amendment. Instead it argued that the Directives are the goals and the Fundamental Rights the means to achieve them. Justice Chandrachud opined that the difference between the two lie in their enforceability and not in their relative importance. This was a breakthrough in Indian constitutional law, for the *Kesavananda* case limited Parliament's powers to amend the Constitution- it cannot alter the basic structure of the Constitution: "It represents the high point of judicial innovation and alters the very basis on which the constitutional power is divided between the plenary amendatory bodies and the judiciary" (Ramachandran 2006: 108). In other words, while acknowledging the supremacy of the Constitution, the Court also made its say final in matters of constitutionalism. Even as it upheld the validity of the 24th and 29th and parts of the 25th Amendment Acts, the verdict gave the SC "the power to scrutinize any amendment to see if it violated the basic structure, which it did not define, except illustratively" (ibid: 114).

The *Kesavananda* bench indeed kept room for expanding the Court's interpretive powers by not giving a consensual or coherent definition of 'basic structure'. Different judges illustrated different elements as part of basic structure. For Justice Sikri, basic structure included supremacy of Constitution, republican and democratic form of government, separation of powers, secularism, Fundamental Rights and federalism. Justices Shelat and Grover also added unity and integrity, dignity of individual under Part III as well as the mandate of the welfare state under Part IV- leaving no solution for the conflict between Fundamental Rights and Directive Principles of State Policy. Justice Reddy enlisted 'a sovereign democratic republic', parliamentary democracy and the three organs of the state as the 'basic structure' of the Constitution. Justice Khanna gave the list that basically enhanced the powers of the Court- democracy, secularism and *judicial review* (emphasis added). Unlike the others, Justice Khanna suggested that the power to amend does not include the power to abrogate the Constitution and

replace it with another- the 'basic structure' of the Constitution cannot be destroyed (Ramachandran 2006: 115).

At the height of Emergency, the 42nd Amendment Act, 1976 was passed, to restrict judicial review and to give an edge to Directive Principles of State Policy. It added the words 'Secular' and "Socialist" in the Preamble. More importantly, it sought to amend Article 31C to the effect that "no law enacted to give effect to any of the Directive Principles would be rendered void for being inconsistent with Articles 14, 19 or 31" (Sibal 2010). In other words, this makes Part IV superior to Part III and also accords legislations giving vent to Part IV immune to judicial review and constitutionality. However, this part of Article 31C was struck down by the Supreme Court in the *Minerva Mills* case (1980). The Court observed that the harmony between Fundamental Rights and Directive Principles of State Policy is an 'essential feature' of the 'basic structure' of Constitution and therefore it is a mistake to give absolute primacy to one over the other (Ramachandran 2006: 120). Justice Chandrachud echoed this when he said:

Part III and Part IV together constitute the core of our Constitution and combine to form its conscience, ...just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms.

(Justice Chandrachud, in Sibal 2010).

In Ramachandran's (2006) opinion, the *Minerva Mills* case consolidated the 'basic structure' doctrine and limited the scope of Article 368. Time and again, one would see the 'harmony' between Part III and IV as part of 'basic structure' without indicating the modalities if there is a conflict between the two. The 'basic structure' doctrine was further strengthened in *Waman Rao vs. Union of India* (1981). A major contribution of this case was that the Court held that any amendment after 1973- after the *Kesavananda* judgement- which also included the laws added to the Ninth Schedule after 1973, would have to stand the test of constitutionality with respect to the basic structure (Ramachandran 2006: 121). However, the number of Acts and regulations that were sought to be protected from judicial review only increased after 1981; in fact many of them did not have much to do with the goals of Part IV, as was originally intended by the creation of

the Ninth Schedule. This led to another instance of invoking 'basic structure' in 2007 in favour of the judiciary on the lines of *Waman Rao*. In *I.R. Coelho vs State of Tamil Nadu and Others*, a nine-Judge Bench sought to resolve a constitutional issue pertaining to the immunity provided by Article 31B to laws added to the Ninth Schedule of the Constitution. The Supreme Court appropriated to itself the power to pronounce on the legality of the aforesaid laws. That is, the laws included in the Ninth Schedule after 1973 are subject to judicial review for their consistency with Fundamental Rights; the standards of this consistency is the prerogative of the Supreme Court.

Another case where the basic structure doctrine was invoked, however, controversially, was the *S.R. Bommai* case (1994). The Supreme Court upheld the imposition of President's rule in three BJP-ruled states- Rajasthan, Madhya Pradesh, and Himachal Pradesh on the ground that they would fail to protect secularism. This case was immediately in the aftermath of the demolition of Babri Masjid and the resignation of the Uttar Pradesh government. In the said case, the Court cited secularism as a basic feature. However, as Raju Ramachandran argues, this was one of the cases where the basic structure doctrine was used to strike down ordinary legislation.⁸ Moreover, the desirability of justifying President's rule on the ground of threat to secularism is also not without controversies (see Ramachandran 2006). This adds to the questions on legitimacy of applying 'basic structure' to ordinary legislations. In response to this Sudir Krisnaswamy (2009: xxix) argues that 'basic structure' doctrine is "an independent and distinct type of constitutional judicial review which applies to all forms of state action to ensure that such action does not 'damage or destroy' 'basic features of the constitution.'" This implies that while some dispute the veracity of applying basic structure review to ordinary laws and even denying legitimacy to 'basic structure' for it is not explained in the Constitution⁹, others like Krisnaswamy accord it legitimacy to check the constitutionality of any state action¹⁰.

Conclusion

⁸ Other cases include the *Indira Nehru Gandhi* case and the *Ismail Faruqui* case.

⁹ One such view is seen in the works of Pran Copra (see Krisnaswamy 2009: xxvii-xxviii).

¹⁰ Krisnaswamy (2009) admits that there is no express provision in the Constitution for 'basic structure' review. However, he resorts to the logic of 'implied meanings' – the 'doctrine of implied limitations' in Constitution to establish the legitimacy of basic structure doctrine.

The 'basic structure' doctrine has remained a topic of discussion vis-à-vis its possible undermining of popular democracy and popular sovereignty. As an instance, Raju Ramachandran (2006) argues that the 'basic structure' doctrine is 'anti-democratic' and 'counter-majoritarian' in character; "unelected judges have assumed vast political power not given to them by the Constitution" (ibid: 108). On the contrary, Pratap Mehta argues that judicial review is not necessarily against democracy. The argument that Parliament should have the final say since it is elected only subscribes to procedural democracy; in fact, the real dimensions of democracy- the 'substantive liberal values'- needs judicial review and 'entrenched' Constitution for the very protection of democratic credentials against transient majorities (see Mehta 2002). A defence of basic structure review is also provided by Sudhir Krishnaswamy who lauds the doctrine for deeply entrenching certain constitutional values but retains the room for 'radical constitutional change by the people' (Krishnaswamy 2009: 193). Krishnaswamy thus points out that the doctrine "envisages a dualist model of democracy which distinguishes between a decision by Parliament and a decision by the people" (ibid), indicating the possibilities of Parliamentary majorities usurping the true spirit of peoples' aspirations and thus democracy. While in the early decades, amendments were popular owing to their thrust on socio-economic equity in terms of land reforms, reservations, etc, in the 90s, there were clear dangers of excesses of amendments that could have challenged the secular fabric of the Constitution as well, especially in the context of the Hindu Right gaining parliamentary majorities as well as the economic policies taking a neo-liberal turn post-1991. The concerns regarding the Swaran Singh Committee and the National Commission to Review the Working of the Constitution (2002) bear testimony to the dangers of majorities that can thwart true democracy. It is also noteworthy that while judicial review was perceived as an assault on parliamentary sovereignty in the earlier period, post-1980s, judicial review and activism are welcomed by public opinion more as a response to the ineffectiveness and unaccountable nature of institutions based on majorities (Mehta 2008: 187), or as a resource for Indian democracy and the 'worst-off' citizenry at a time when the elected government is committed to neoliberal policies at the cost of people's rights, livelihood and social justice¹¹ (see Baxi 2010). However, the votaries and critics of 'basic structure' are quick to point out the lack of clarity regarding 'basic structure'. Pratap Mehta, for example, points out

¹¹ Amit Sibal (2010) explains this changing trend in the judiciary as a shift from positivist jurisprudence to 'transcendental' jurisprudence, a shift from 'niti' to 'nyaya' for social justice.

that the SC benches never stated the reasons as to why certain features were enlisted by them as basic features. Rajiv Dhavan similarly points out the lack of ‘a clear ratio decidendi’ and uncertain authority emerging from the plurality in the *Kesavananda* decision (Dhavan, in Krishnaswamy 2009:xix). Also, the courts have been applying ‘basic structure’ inconsistently. The Court could not evolve a definite notion of the ‘basic structure’. This gives the judiciary ample powers of interpretation that may vary from case to case. Even as secularism was invoked as ‘basic feature’ in *S R Bommai*, why did the courts fail to invoke this in several other cases pertaining to communalism and secularism? (see Mehta 2002). In other words, perhaps the ‘entrenched’ Constitution in the form of ‘basic structure’ is important to protect the basic ideas and values outlined as the guiding framework for the state towards democratic social revolution. There are yet others who have been votaries of changes in Constitution itself to reflect changing political contexts (see Baxi 2000; Kashyap 2004). However, it is also important to evolve with clarity what constitutes the ‘basic structure’ and once again who decides that in a parliamentary democracy with the Supreme Court as the final interpreter of the Constitution.



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