

Popular Sovereignty And The Indian Constitution

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The principle of popular sovereignty denotes that the source of governmental power or the sovereignty lies with the people. The concept of the social contract is the base of this principle as it believes that the government should work for the benefit of the people governed. The English philosopher Thomas Hobbes in his book **The Leviathan** wrote that in the 'state of nature' people were selfish and brutish, thus in order to survive they gave over their rights to a ruler who in turn provides them with protection and security.

This theory laid down the first basis of popular sovereignty. The idea of popular sovereignty can even be found in Rome way back in 45BCE where Julius Caesar was said to derive his authority from general public. In the modern period the concept of popular sovereignty has been adopted by the French philosopher Jean-Jacques Rousseau according to whom, people willingly gave legitimate authority to the government in the form of **social contract** for reciprocated preservation.

A group of citizens must make the laws, while their selected government guarantees their daily implementation. Thus, the people act as a sovereign, protecting the common welfare as opposed to the desires of an individual. Therefore, it may be said that popular sovereignty is the core basis for a democratic

government. The standard understanding of democracy dictates that the people must enjoy equal representation and adequate opportunities in the participation for the process of law making, revision or abolition.

The idea of popular sovereignty denotes that, the subjects of the state i.e the people must be equally represented in the rule making body; failure of which would not amount to popular sovereignty but perhaps a hybrid with majoritarianism in some form. Additionally, for the people to be truly sovereign they themselves must 'determine the constitutional form, the juridical and political identity, and the governmental structure of a community in its entirety'.[1]

Thus, it is necessary that the rule by the people must predate the legal system as a whole. Accordingly the people must have had equal opportunity of representation, to be present and participating during the conception of the legal system.

The Indian Constitution

A constitution is understood to be a body of fundamental principles to which the state is to be governed and it acts as a norm for all other laws to abide by, due to which it is also often referred to as Grundnorm. So, one may say that the equal representation of the people, in the making of the constitution of a state is the first crucial step to implementing the principle of sovereignty into a legal framework as a whole.

The constitution, being a text without any authors or many authors represents the voice of the people, crystallised and codified the aspiration behind various movements and struggles for freedom from the British prior to the constitutional making process. In the Indian scenario, the preamble of the Indian constitution states that 'We the People of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic' [2] thus implying that the people are sovereign as the governing body derives its legitimacy from the people itself.

Therefore this article attempts to answer the following questions:

1. Whether the principle of popular sovereignty is embedded into the framework of the Indian Constitution from its very conception?
2. Whether the people are sovereign in the contemporary framework of the Indian Constitution?

The creation of the Constitution

As the British Raj was coming to an end, there was a need for a constitution to determine the power-dynamic between the citizens and the government, due to which the Constituent Assembly was formed with the task of drafting the constitution. Mahatma Gandhi, as early as 1922 have demanded for the future of the country to be decided by elected representatives of the people. For the thread of the principle of popular sovereignty to be woven into the Indian constitution, it is essential that the population are equally and appropriately represented in the constituent assembly itself, as this was the very first step for building a legal system.

The members of the constituent assembly were indirectly elected by the members of the Provincial Legislative Assembly, in accordance to the scheme recommended by the Cabinet Mission.

The arrangement was as follows

1. 292 members were elected through the Provincial Legislative Assemblies;
2. 93 members represented the Indian Princely States;
3. 4 members represented the Chief Commissioner's Provinces[3].

There were a total of 389 members in the assembly. However, as a separate Constituent Assembly was set up for Pakistan, as a result of Mountbatten Plan of 3rd June 1947 the Muslim league boycotted the Indian Constituent Assembly; leaving behind an imbalance in the representation of the masses in this crucial hour of building the constitution.

Additionally, the absence of the Muslim League was not the only notable absence, according to Aditya Nigam, 'the three great absence that haunted the constituent assembly were the Muslim League, the representatives

of the so-called Indian states and the 'Father of the Nation', Mahatma Gandhi'[4]

In addressing the absence of the Muslim league from the assembly the chairman Rajendra Prasad states 'Our brethren of the Muslim League are not with us and their absence increases our responsibility, we shall have to think at each step what they would have done if they were here'[5].

This denotes that the absence of these groups were to be compromised with the version of what the present members think they would want in certain situations, this is perhaps not practical, as a version of what I think you want, compared to what you actually want may drastically differ. Accordingly, we can see that there is a lack of equal representation of the population in the assembly. Moreover, the interim government itself was already exclusive and not inclusive of all people, this dictates that from its very conception, the constitution tilted towards majoritarian behaviour as it is largely based on a set of exclusive ideology.

Majority vs Minority

The domination of the majority over the minority is a common trait of any decision making, it was no different in the Constituent Assembly. In reading the Constituent assembly debate, it can be seen that resistance were put up by the nationalist elites against minority rights, because of a desire of creating a new homogenous modern nation.

As observed by Aditya Nigam the constituent assembly was actually functioning within a certain code, the language of which was forged largely outside the precincts of the assembly itself and members of the minority were under tremendous pressure to act according to these codes[6]. Furthermore, the phrase **We the People**, in the preamble of the constitution may not be in its truest form inclusive of the entirety of the population as it leans towards the ideology of the majority; for the reason that, when the discussion on subjects were undergone, the majority rule often undermine some cultural, social and economic values of the minority, even when taking the rights of the minority into consideration.

In support of this argument, the controversy around the drafting of Article 25 of the Constitution may be cited as an example; the two Sikh representatives in the constituent assembly Sardar Hukam Singh and Bhupinder Singh Mann, they refused to sign the constitution draft over a sense of injustice and a plea that Article 25 clause (2) sub clause (b) states that 'the reference to Hindus shall be construed as including a reference to person professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly'[7] is anti-Sikh, unjust and communal[8].

However, despite such protest from the minority, the majority's ideologies have a heavier weightage as the article was nevertheless adopted. This again shows the presence of the behaviour of majoritarianism in the constitution making itself.

However, one cannot say that the principle of popular sovereignty is absent in the making of the constitution based on these mere arguments. The basis of popular sovereignty dictates that the state acquires its legitimacy from its people and this legitimacy is created and sustained by the will of the people. The principle of popular sovereignty is used as a base in the making of the Indian constitution, which is not different from how the principle was used in the making of the American Constitution. Even though the American Constitution is known to shape the modern concept of popular sovereignty, it is arguable that the masses in totality were equally represented in the constitution making body as people were divided into different classes similar to how the Indian Constitution was build. Thus, it is undeniable that the principle of popular sovereignty has been infused into our constitutional framework from its very conception although it may not be accumulated in its truest form.

The Contemporary Constitutional Framework

We have seen that the principle of popular sovereignty played an important role in the making of the Indian Constitution, but once it comes into force, will the supremacy of the Constitution clash with the sovereignty of the people? It is often argued that popular sovereignty and constitutionalism are conceptually incompatible as they exclude each other, on the basis that the people are (properly) sovereign only before the establishment of a constitution, and once a constitution is in place, the people are either powerless, or the power they enjoy is not sovereign at all as their power is govern by the constitution[9].

It is true that the power to make laws reside in the legislative assemble which consist of members that are the representative of the people, thus the people still holds the power to make the law. However, is this power absolute? In contemporary, India the Judiciary has played a big role in underpinning and shaping of the constitutional framework. In support of this statement an important judicially implemented element of the constitution, 'the doctrine of the basic structure' may be highlighted.

The Basic Structure Doctrine

The basic structure doctrine developed over a number of cases in the Supreme Court, but the most significant landmark judgement in the case of Kesavananda Bharati v. State of Kerala gave birth to the doctrine. It is based on the idea that some of the provisions of the constitution which are a part of the basic features should not be altered as that may cause to loss the very identity of the Constitution. The basic structure doctrine is a centre to number of discussions relating to its violation of the people sovereignty.

The opponents of this doctrine argue that the doctrine is 'undemocratic' on the ground that it places limitations on the powers of the political majority acting through the legislature.[10] However, in protecting the basic structure of the Constitution, the most basic individual right of the individual such as the right to life, right to equality etc. are protected. According to Gautam Bhutia, 'these are matters to be governed by individual autonomy, central to how an individual decides to order and determine his own life, cannot be subjected to external majoritarian authority (legislature)'.[11]

The purpose of the basic structure doctrine is to protect the interest of the people, but in this world of hypotheses and what ifs: What if the citizens collectively want a change so drastic that it may contradict the basic feature of the constitution? Will it be so protected by the basic structure doctrine that such a change will be impossible?

According to the basic understanding of the doctrine, such a change will not be possible; although one cannot argue against the fact that this doctrine protects the basic fundamental rights of the people, it still highlights the supremacy of the Constitution against the rights of the people. Thus, it can be seen that specific features of the Indian Constitution makes it impossible to accommodate the principle of popular sovereignty into the contemporary Indian Constitutional framework.

Conclusion

The Preamble to the Indian Constitution affirms that on 26 November 1949, the people of India adopted, enacted and gave to themselves the Constitution, 'having solemnly resolved to constitute India into a sovereign democratic republic'[12] which indicates that the power of the constitution is derived from the people giving the sovereignty to the people. According to the principle of popular sovereignty, the people's united will is the supreme authority of the land and for the principle to be accumulated into the legal framework of the country, the supremacy of the people must predate the law of the land.

However, tracing back to the making of the constitution, there is no doubt that the people had supremacy in framing the law; although the constitution building process was influenced by certain document and pre-existing laws, it is certain that the process have had certain setbacks, such as the failure to make equal representation of the masses in totality and the assembly decisions leaning towards majoritarianism. Still, the accumulation of the principle of popular sovereignty into the Constitutional framework is irrefutable.

However, in the contemporary framework of the Indian Constitution and the introduction of the **Basic Structure Doctrine**, the characteristic features of the Indian Constitution make it impossible for the contemporary Indian constitutional framework to accommodate popular sovereignty in practice. As the written Constitution possess the **validity of a statute emanating from the sovereign people**, which is superior to the present elected members of the legislative. In conclusion, the principle of popular sovereignty was woven into the Constitution and the people were sovereign in making the constitution. Although, after the functioning of the constitution the people are provided ample of power, in the contemporary Constitutional framework there is Constitutional Sovereignty.

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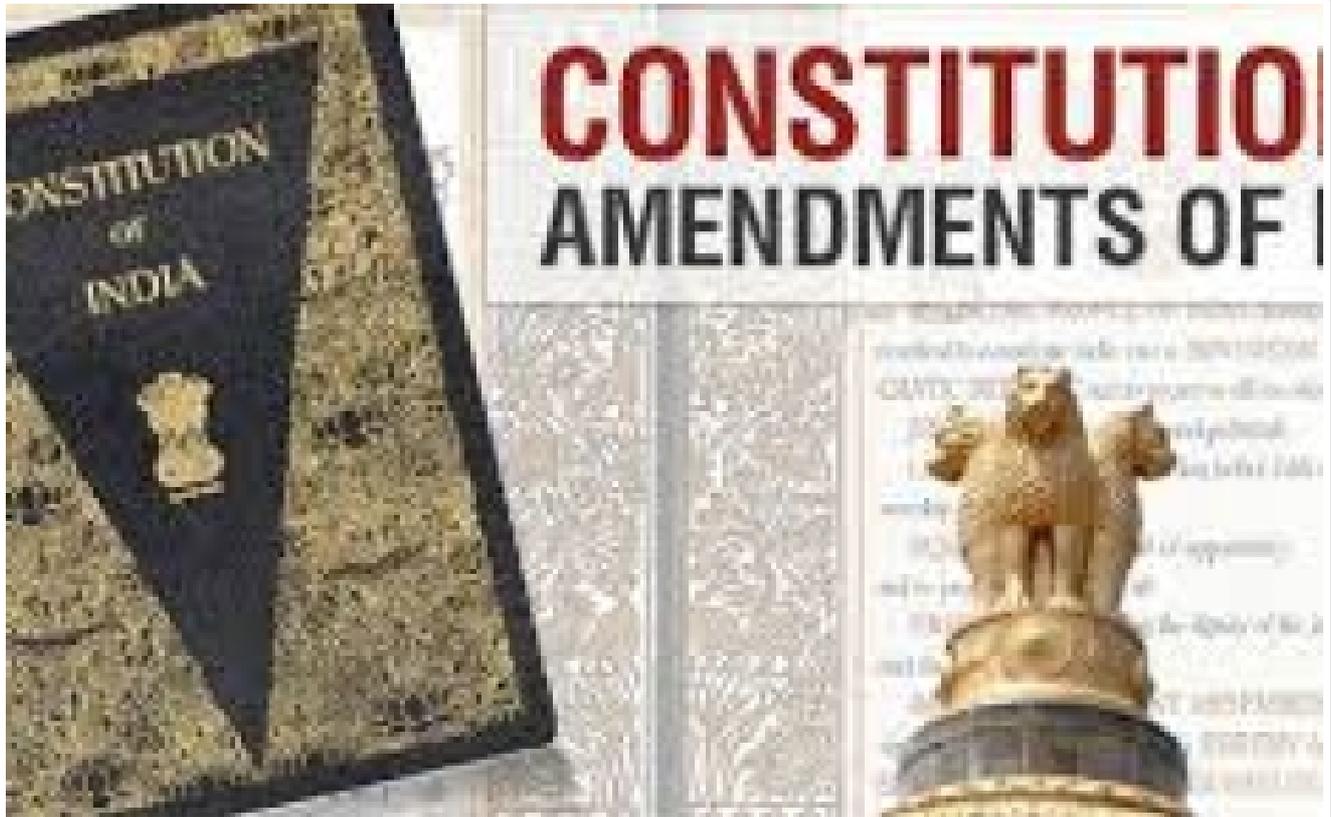
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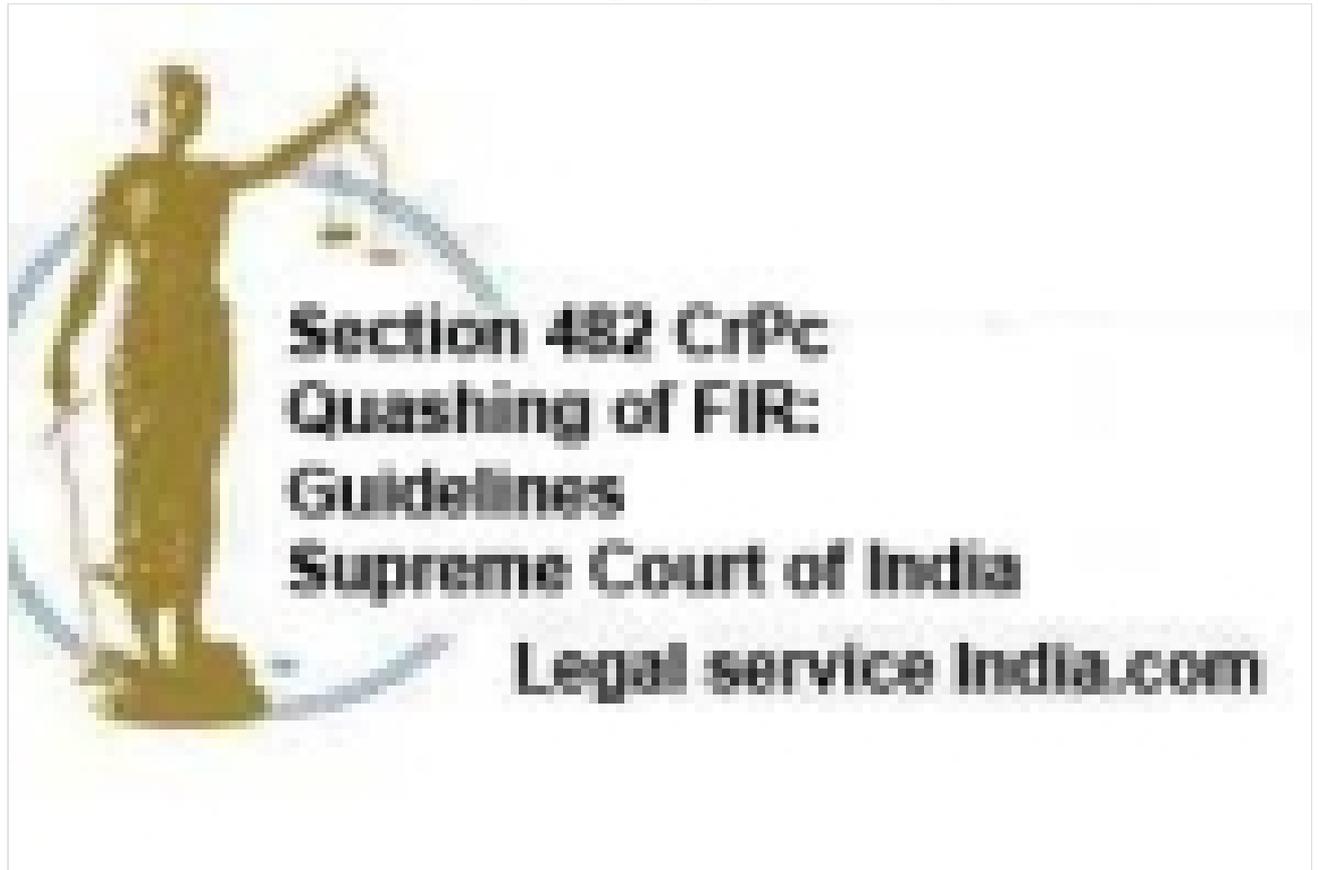
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