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ARTICLE 368 AND THE CONSTITUTIONAL ISSUES: TRACING THE ORIGINS AND COURSE

AUTHORED BY - AJAY KRISHNA S P & SAYANA M S[1]

"Amend as you may even the solemn document which the founding fathers have committed to your care, for you knew best the needs of your generation. But the Constitution is a prestigious heritage; therefore you cannot destroy its identity."[2]

Though not uncommon in modern Constitutions, amending provisions have always been subjected to critical scrutiny and have been the fulcrum for quite controversial dispositions to revolve around the Indian example too not being an exception. The article attempts to address a few such preliminary points of conflict primarily by exposing them to the Constituent Assembly Debates, thereby putting up a challenge to the judicial and other theoretical reasoning on these matters by analysing its validity by juxtaposing the same with those of the reasoning accorded by Constituent Assembly.

Introduction

The amending provision of the Indian Constitution, Article 368, may fairly be seen as one of the most controversial provisions within the Constitution, not particularly for its contents, but rather for its interpretation and the conflicts in opinion on its jurisprudential foundations. The Constituent Assembly was so apt in its finding that it would be an unpardonable crime to bind their successors to their mistakes and legal customs; and to remedy any such difficulties that may arise in the future and also to fashion and remodel the provisions of the Constitution to tether to the dynamic socio-political structures, the amendment provision was added. While the whole or considerable energy on debates concerning Article 368 (Article 304 in the draft Constitution) was spent on the rigidity-flexibility debate, the later contentions regarding the Article were on the nature of the amending power and the existence

[1] Assistant Professors, School of Law, VISTAS, Chennai
[2] Minerva Mills v. Union of India, AIR 1980 SC 1789.

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of implied limitations on the same. To be noted, it wouldn't be wrong to state that though these were not explicitly discussed during the origins of the Article, the debates had sown seeds to provide answers to these questions too. The article considerably addresses this by analysing the above-mentioned latter concerns from the views of Constitution makers. Thus, the major points of contentions may be summarised as follows:

1) Whether the Constitution makers envisaged a flexible or a rigid Constitution with near-to-unlimited powers of amendment;
2) Whether the amending powers amount to unlimited constituent powers or limited constituted powers; and
3) If there exists limitations, are those only expressed or whether implied limitations may be read into keeping in line with the interests of the Constitution makers?

A bare introspection would reveal that all three questions substantially revolve around the nature and extent of the power as provided within the Article. While the Constituent Assembly Debates provide for a settled proposition concerning the first question, the latter two gained relevance much later in history. It's not the contention of the author that these are unsettled nor is the intention of the author to unsettle the settled (to whatever extent these have been settled) propositions, but to analyse the already found answers by putting them to the test offered by the minds of the makers of the Constitution.

The Rigidity-Flexibility Conundrum: Ambedkar's Headache

Placing the Resolution on Report of the Draft Constitution before the Constituent Assembly, Dr B R Ambedkar confess that he had faced a 'virulent attack' on provision relating to amendment for its 'difficulty to amend.[3] Further debates on the substantive provision when the draft Constitution was taken up for discussion validate this remark. While Pandit Govind Malaviya proposed a statutory revision in the provision to include a clause for revision via amendment of the constitution post a stipulated period with a simple majority, as termed by him, an easy method, which is to be resorted to for once, post which amendments are to be made 'difficult and rigid as may be possible'.[4] Prof. N G Ranga also makes a similar suggestion for the first ten years not wishing for such flexibility post that honeymoon period.[5] Many concurred with this emotion, an idea floated by the Prime Minister himself to make the Constitution as flexible as possible to make it easier within the first ten years to make

[3] Constituent Assembly Debates, Vol. VII, 04.11.1948.
[4] Constituent Assembly Debates, Vol. VII, 08.11.1948.
[5] Constituent Assembly Debates, Vol. VII, 09.11.1948.

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amendments to incorporate learnings from experience.

It was not of any surprise that almost every single amendment proposed to the draft Article as put forth by Dr B R Ambedkar was aimed at this length to incorporate a provision for a simple majority for initial years. Some even suggested such recourse for eternity too. Dr P S Deshmukh proposed to remove the stipulation mandating a clear majority of both houses to bring in more flexibility to correct probable difficulties and also proposed a simple majority be the norm for the first three years.[6] Even Shri. Brajeshwar Prasad vehemently attacks the rigidity of the provision. Both feared revolutionary and anarchy forces emerging out of dissatisfaction and inability to remedy the same through amendment. He goes on to predict a violent subversion as happened in France in the absence of a flexible provision.[7]

At this juncture, Shri. H V Kamath's proposed amendments are worth addressing. If one is to glance through the same, it is not unlikely that one may note the uncanny resemblance it shares with the Twenty-Fourth Constitutional Amendment which defined amendment as 'variation, addition or repeal'. He further proposed that President shall give assent and vouched for unlimited flexibility.[8] The reasoning accorded is rather interesting, yet flawed. According to him, though it is a settled principle that the Constituent Assembly is superior in status to the future Parliament (a reference to the doctrine of constituent power, though not expressly mentioned), in the Indian context, this may not be true as while the future Parliament would be elected through the adult franchise, the Constituent Assembly was elected through a limited franchise, thus giving the Parliament the advantage of supremacy.

Thus, from the above discussions, one may see that most of the amendments proposed and the deliberations primarily revolved around the flexibility-rigidity conundrum. Most members were apprehensive of the rigidity proposed by Dr B R Ambedkar, particularly when Nehru's amendment suggesting a simple majority for the first five years wasn't even moved. The dissent sentiment was heavily placed on Ambedkar by Shri. Mahavir Tyagi as such:

> "*...earth belongs in usufructs to all the living equally, and the dead have neither the powers nor the right over it. From this maxim, it is construed that a generation is disabled morally to bind its succeeding generations*

[6] Constituent Assembly Debates, Vol. VII, 17.11.1948.
[7] *Id*.
[8] *Id*.

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> *either by inflicting on them a dent or a Constitution that is not alterable. I, therefore, emphasise that a Constitution which is unalterable is practically a violence committed on the coming generations*".[9]

He goes on to comment that while we adopted the British Parliamentary system, we chose to conveniently ignore the very essence of such a system, the flexibility of their Constitution. He further goes on to be very harsh in stating that the Constitution essentially is a one-party Constitution by the Congress, furthering their ideals and in the event of other parties coming to power in future, such rigidity will stand in their way in removing the difficulties and bringing in convenient changes, leading to altercations with Shri. R K Sidhwa. But little knowledge did Shri. Tyagi had that his very reasoning was the primary reason why Dr Ambedkar never supported a purely flexible Constitution.

In fetching replies to these arguments[10], Dr Ambedkar first goes on to compare the amendment provisions of those Constitutions relied on by his opponents. While the Canadian Constitution provides for no provision for amendment despite discontent over clauses and on interpretation by Privy Council, Irish Constitution stipulates simple majority and referendum, whereas according to the Swiss Constitution, an amendment does not have operative force unless the majority of cantons accept it and a referendum to be conducted over the same and Australian Constitution takes it a notch higher by mandating absolute majority, approval of electorate to lower house, referendum, ratification by the majority of States, all conditions acting simultaneously. Thus, he rests his case that hardly any Constitution has a simpler procedure.

Further, he throws light on the fact that provisions may be classified into three categories viz., those which can be amended through a simple majority, those which can be amended through a special majority and those which can be amended through special majority and ratification by states. Ambedkar laments that the first category of provisions surpassed everyone's attention and states that it is an absolute misconception to say that there is no Article in the Constitution which could not be amended by parliament by a simple majority. He also contends that the third category was necessary to compensate for the already committed intrusions into provincial autonomy and to ensure that further digs on federal set-up are not attempted.

Something that the author has always been fascinated about Dr B R Ambedkar's contribution

[9] *Id.*
[10] *Id.*

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to the Constitutional scheme is his servile attachment and incessant attempt to instil Constitutionalism:

> "*In fact, the purpose of a Constitution is not merely to create the organs of the State, but to limit their authority, because if no limitation was imposed upon the authority of the organs, there will be complete tyranny and complete oppression. The legislature may be free to frame any law; the executive may be free to take any decision; and the Supreme Court may be free to give any interpretation of the law. It would result in utter chaos.*"

Thus, according to him, such unlimited flexibility would have offered unimaginable powers resulting in unpardonable oppression and chaos for power is a dangerous tool.

The Ghost of Constituent Theory

"Constituent power is one of the most ['dreadful'] puzzles in Constitutional theory".[11] Such an addition of the adjective 'dreadful' is strictly conscious for the concept poses the most nuanced philosophical dilemmas. Constituent power, put simply, is the power which seeks to establish a Constitution.[12] Thus, in democratic nations, such constituent power flows from the people and is greater than the legislative power given to the Parliament formed by representatives of the people.[13] First arisen in the 1789 political pamphlet 'Qu'est-ce qui le tier-elat?' by Abbe Sieyes, the distinction between constituent and constituted powers was drawn based on its extent and nature whereby the former is extra-legal and unlimited with no confines, while the latter is essentially limited legal powers.[14]

The fundamental dilemma as tried to be encapsulated within 'dreadful' is succinctly brought out by Conall Towe that the academic rigour of the theory of constituent powers becomes stretched when applied to the power of constitutional amendments.[15] The controversy here is that if amending powers were to have the nature of constituent power, then the whole argument of having any limitation on it would be futile. On the other hand, if amending power is like

[11] M LOUGHTEN, N WALKER (EDS), THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Oxford University Press, 2007).
[12] CARL J FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND POLITICS, NATURE AND DEVELOPMENT 113 (Friedrich Press, 2007).
[13] Joel J et. al., *Constituent Power and its Institutions*, 20 Contemporary Political Theory 926, 933 (2021).
[14] Emmanuel Joseph Sieyes, Qu'est-ce qui le tier-elat? (Political pamphlet, Paris, Jan 1789).
[15] Conall Towe, *Constituent Power and Doctrines of Unconstitutional Constitutional Amendments*, Trinity College Law Review's Joint Edition on Constitutional Law Series 34, 35 (2019).

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legislative power, then it has to stop short of making any massive changes.[16]

The very existence of the Constituent Assembly and the factum of Constitutional Assembly Debates being the operational form of the sovereignty of the people, through which the Constitution was adopted, read along with how the Preamble has been framed with its magnanimous opening '*We, the people*' and thereby bestowing it unto themselves forms the rationale of such constituent power being said to be enjoyed by the people.[17] Hence the conclusion is apt in the *Election case*[18] that the latter power is a class on its own and not a reincarnation of national sovereignty; much credit is to be given to Conrad for his exposition of the doctrine of implied limitation, and the nomenclature 'governmental constituent power'.[19] Here, the author finds much validity in Grimm's argument[20] that even after presupposing the fiction of constituent power being attributable to people, while bringing in amendments, people cannot be said to have been acting in the capacity of the sovereign. Therefore, amending power should ideally be seen as an intermediate power between the constituent power and the legislative power. It is in this context that the Kelsian Pure Theory also gains ground. Equating constitution to the grundnorm, "*any power conferred by it cannot go beyond the point where it begins to question the validity of the very instrument which has led to its creation, far less replacing the said instrument with a creature of its own*".[21]

Tracing this debate through the musings of the Indian Supreme Court, one finds that initially such a distinction was seen as unwarranted, as in *Shankari Prasad Singh Deo v. Union of India*[22], the Supreme Court reasoned that 'if the constituent authority and the [constituted] legislative authority are two different entities', then the many articles which treat them simultaneously would be meaningless. However, laying down the seeds of basic structure in *Sajjan Singh v. State of Rajasthan*[23], in his dissent opinion, J R Mudholkar, J., maintains that the sovereign Constituent Assembly didn't create a sovereign parliament and for that reason, such a parliament could not have been given the power to challenge the will of the Constituent

[16] Snigda Nahar, Abhishek Dadoo, *Constituent Power and Sovereignty: In light of Amendments to the Indian Constitution*, 1 NUJS L. Rev. 559, 567 (2008).
[17] Shouvik Kumar Guha, Moiz Tundawala, *Constitution: Amended it Stands?*, 1 NUJS L. Rev. 542, 542 (2008).
[18] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 1590.
[19] Dietrich Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6 Delhi Law Review 1-24 (1977).
[20] Dieter Grimm, *Constituent Power and Limits of Constitutional Amendments*, Relazione al Convegno 1,5 (2015).
[21] *Supra* note 16 at 544.
[22] Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.
[23] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

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Assembly in modifying basic features. Though a specific remark on constituent power is not made, the imposition of limits suggests the amending power being construed as a constituted power. In *I C Golaknath v. State of Punjab*[24], the debate seems to have been finally put to rest when the court ruled that 'Parliament today is not the constituent body as the Constituent Assembly was' and that 'as a constituted body (must) bear true allegiance to the constitution', only to be left open by Parliament through the 24th Constitutional Amendment. Though *Keshavanda Bharati v. State of Kerala*[25] settled the matter once again, the ghost of constituent power theory was let loose by the 42nd Constitutional Amendment. The Supreme Court decision in *Minerva Mills Ltd. v. Union of India*[26] enjoys a supreme position in the constitutional history of India as it conjectured finality to this debate thus:

> "*...the amending power is a 'limited' one, conferred upon it by the Constitution –a 'constituted' power –and that the parliament, under the exercise of that limited power cannot enlarge that very power into an unlimited power... the donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one. If by constitutional amendment, parliament were granted unlimited power of amendment, it would cease to be an authority under the constitution, but would become supreme over it. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed.*"

Basic Structure and the Pandora's Box

As mentioned earlier, one of the notable issues that was pronged upon alongside the discussion on the nature of amending power was if such power is limited, are those to be subjected to implied powers too. The doctrine of basic structure came up as a solution to the same. Barring its critical opposition, the article tries to explore the sanctity of its application based on Constitutional Assembly Debates. Defending the vehement attacks on the amending provision in the Assembly, Dr B R Ambedkar goes on to substantiate how the Indian counterpart is much simpler as compared to those in other constitutions and how only the special majority and in certain cases, ratification are the only limitations. The rationale for such a limitation is explained further along the following lines. According to him, such a condition is necessitated

[24] I C Golaknath v. State of Punjab, AIR 1967 SC 1643.
[25] Keshavanda Bharati v. State of Kerala, AIR 1973 SC 1461.
[26] Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.

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by the distinct positions of the Constituent Assembly and the future parliament:

> "*Parliament will have an axe to grind while the Constituent Assembly has none. That explains why the Constituent Assembly though elected on the limited franchise can be trusted to pass the Constitution by simple majority and why Parliament though elected on adult suffrage cannot be trusted with the same power to amend it*"[27]

This very rationale stands testimony to the constitution makers' intent to limit the powers of amending. Now, some may argue that such limits are to be confined to the special majority stipulation. However, a closer reading negates this argument.

> "*The future Parliament if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some Article of the Constitution which has acted as an obstacle in their way*".

Thus the very rationale was to prevent any sort of colourable action to subvert the basic tenets of the constitution. The use of the phrase 'some Article of the Constitution which has acted as an obstacle in their way' impliedly states that the existing limits cannot be taken away by the Parliament - which was rightly pointed out in *Minerva Mills*[28]. To manifest this, such an explicit limitation of a special majority would not suffice.

From the Debates, it is clear that such an amendment provision was included as the Constituent Assembly was apprised of the need to further the organic nature of the document to tether to the dynamicity of the society. Therefore, any questions of the nature of limitations imposed cannot be addressed in isolation of possible circumstances in the future that may allow the parliament to subvert the constitution.

As pointed out earlier, the primary rationale for the stipulation of limitations on amending powers was to ensure that no colourable actions are resorted to eliminate such limitations nor the Constitution's identity. When we are to assume that there exists only an express limitation of a special majority, then in an overwhelmingly majoritarian Parliament, such a special majority will have no tooth, thereby failing the objective. It is in this context that one is to look deeper and understand that there exist implied limitations too for only that will serve the

[27] Constituent Assembly Debates, Vol. VII, 04.11.1948
[28] Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.

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purpose as envisaged by the makers of the Constitution.

It is for this reason that the author does not fault the formulation of basic structure doctrine as it is the opinion of the author that though never named in the debates or in the actual Constitution, the doctrine had always been intertwined into those in the form of ideological perceptions and formulations. Even when there exist confusion concerning the contents of 'basic tenets', one may with utmost surety approve of the finding in *Minerva Mills*[29] that limited power of amending is one.

Conclusion

Analysing the various concerns upon Article 368 of the Constitution as addressed by academic pursuits and judicial interventions through the lens of Constitutional Assembly Debates, one concludes that the Debates offer substantial closure to these, though one may have to dig deep into it. It would only be a surprise if such a thought-out provision is not hailed as 'one of the most ably conceived aspects of the Constitution'.[30] It's often credited as the most sophisticated one for its peculiar model of variable rigidity or even flexible rigidity[31], a creditworthy of it only as Dr Ambedkar had defended it so passionately in the Assembly. Even when the exposition of basic structure doctrine emanating from the constituent power theory is welcomed, it is no doubt that it is not devoid of faults. No claim may be made to the finality of the contents of the basic structure, but they should also not remain so vague that any and every amendment of the Constitution is subjected to challenge on the ground of breach of the basic structure resulting in the unworkability of the Constitution and its ultimate death.[32] Thus, the basic structure of the fine balance between flexibility and rigidity given to the Constitution by its makers has been well preserved by the basic structure doctrine, as is evident from the number of amendments since *Keshavananda Bharati*.[33]

[29] Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.
[30] G. AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 255 (Oxford University Press, 1966).
[31] D. OLIVER, C FUSARO (EDS.), HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY 425 (Hart Publishing, 2011).
[32] MAHENDRA PAL SINGH (ED.), V N SHUKLA'S CONSTITUTION OF INDIA 1101 (13th ed., EBC, 2015).
[33] Keshavanda Bharati v. State of Kerala, AIR 1973 SC 1461.