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THE CONSTITUTIONAL AMENDMENTS THAT CHANGED THE COURSE OF INDIA

Authored By- Nirupama Mahapatra

ABSTRACT

There has been a recent explosion of academic commentary on the form and limits of Constitutional Amendments. These constitutional amendments refer to the changes or modifications in the constitution and it may also include the introduction or addition of new development, articles, parts or schedules in the constitution of the world's largest democracy. The change or addition in the constitution is done by the supreme legislative body. These amendments are essential because they remove hurdles or shortcomings of the constitution and satisfy the aspirations and demands of the changing society and its people. The society and its needs are dynamic and ever-evolving. If the constitution will not keep pace, it will become redundant or lead to a breakdown of law and order.

More than 100 amendments have been done in the constitution of India. It is necessary for amending provisions in the constitution with the view to overcoming the difficulties which may encounter in the future in the working of the constitution. The time is not static; it goes on changing. The social, economic, and political conditions of the people go on changing so, the constitutional law of the country must also change in order toward it to the changing needs and changing life of the people. If no provisions were made for amendment of the constitution, the people would have recourse to extra constitutional method like revolution to change the constitution. The framers wanted to have a document which could grow with a growing nation, adapt itself to the changing circumstances of a growing people. The constitution needs developments at every interval of time because if it stated as static then it will become a big hurdle in the path of the progress of nation. Therefore, the developments are the core part for the Indian citizens and the bedrock of the constitution.

The paper will also discuss about the procedure and effects of the different types of amendments along with an overview of the nature and legal status of the power of Parliament to amend the Indian Constitution.

Keywords: Constitution, Overview, Amendment, Parliament

INTRODUCTION

The Constitution of India was adopted on 26th November in the year 1949 and came into force on 26th January, 1950. A special committee was gathered to draw and outline the constitution. The Constitution is the supreme law of the India which gives all the details related to what is legal and what is illegal in the country. It is a continuous process of evolution, reformation and recreating the existing system of governance by the eminent scholars, experts and judges. No constitution can remain static. It must respond to new challenges and take into an account for the unforeseen events which were not within the contemplation of the framers of the constitution. Therefore, constitution is also subject to the changes which require the amendment from time to time according to the changes which were taking place in the society.

The Constitution makers gave the power to amend the constitution in the hands of the parliament by making it neither rigid nor too flexible with the idea that the parliament will make amend it as to cope up with the changing needs and demand of 'we the people'. Parliament in the exercise of its constituent power under Article 368¹ can amend any of the provisions by the way of addition, alteration, variation or repeal of the constitution. On its simple terms Article 368 is plenary and is subject to limitations of basic structure doctrine. However, this means that the power of parliament is not absolute. The Supreme Court has the power to declare any law that it finds unconstitutional void. The Constituent Assembly debates indicate that the founding fathers did not envisage any limitation on the amending power.

Bringing alteration to the Constitution provisions by the Parliament was an easy process before Keshavananda Bharati's case, because as there was no implied or express limitation on its amending power exercised under the constitution. But in the Keshavananda Bharati case² uncontrolled power of the parliament was controlled and curtailed by the Doctrine of basic structure. Though, we don't have this doctrine at the commencement of India. But as per this doctrine, any amendment that tries to change the basic structure of the constitution becomes invalid. The 'Doctrine of Basic Structure' is a judge made doctrine which puts a limitation on the amending powers of the parliament so that the basic structure of the basic law of 'the land' cannot be amended in exercise of its constituent power under the constitution.

¹ As per article 368, the provision stated that the power of parliament to amend the constitution and procedure therefore as per the latest amendment, the subs. By the constitution (24th Amendment) Act, 1971, sec3 (a), for "procedure for amendment of the constitution"

² Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India).

HYPOTHESIS

Amending the Constitution of India is the process of making changes to the nation's fundamental law or supreme law. In India, the constitutional amendment plays a very important role because they help to adopt new methodologies with the time in favor of the citizens. After the enactment of the Indian constitution, several provisions have been added to the list with time to make the functioning of the country smoother. For example, as an act of amendment third tier has been added such as the local government and also the instance of directive principles. The procedure of amendment in the constitution is laid down in Part XX³ (Article 368) of the Constitution of India. This procedure ensures the sanctity of the Constitution of India and keeps a check on arbitrary power of the Parliament of India. The Indian parliament has plenary powers to amend the constitution as per the Article 368. This research paper aims to highlight the problems and procedure of amending the constitution and the role it play in formation of modern constitution as it is today.

Research Methodology

This research work has been designed as a doctrinal study. The authors have relied upon the various articles, published research paper, case studies, and precedence to interpret the law and understand the provision.

The Constituent Power Of The Parliament

Constituent power is the power to propose amendments or revision of the constitution. Article 245 of the Indian constitution declares that the parliament can makes laws for the whole or any other part of the territory of India whereas state legislatures can make laws for the whole or any part of the state. The legislative powers are distributed under the seventh schedule of the constitution between the centre and the state by putting subject into union list, state list and concurrent list. The centre has power to make laws on any of the subjects in the union list or in the concurrent list. The parliament has authority to override the laws of state on a subject listed in concurrent list. Therefore, this shows that the parliament holds the pre-eminent position and subject to the procedure laid down in Article 368 it can claim a sovereign status. Also, in addition, the residuary powers are also vested with the parliament. The constituent amending power is conferred upon the

³ Part XX of the constitution of India stated as the Amendment of the Constitution

parliament by Article 368 but this power is a derivative power and not independent. Only parliament has power to initiate any proposal for amendment of the constitution. A bill for amendment can be initiated in both the Houses of the Parliament. Although the state legislature can pass a resolution requesting the parliament for the creation or abolition of the legislative council in the state Based on this resolution, acts for amending the constitution can be made by the parliament for the same purpose. The constitution amendment requires three types of bills, mainly:

- 1) Simple Majority: Majority of members present in voting in each house is required that is Simple Majority.
- 2) Special Majority: Majority of the House and two-third of the members present and voting in each of the House are required to pass the bill.
- 3) Special Majority and consent of half of all state legislature: Each bill is require in addition to atleast half of the state legislature giving the consent to the bill.

Does Law Include ‘Constitutional Amendment’?

Since 1951, various cases raised the questions regarding to the constitutional amending process as given in article 368. The basic question was whether the Fundamental Rights were amendable? The question regarding the amendability of the Indian Constitution started back in the year 1951 with respect to Right to property which was contained in Article 31 as a fundamental right and has been challenged number of times before the Supreme Court.

Shankari Prasad Singh Case

The first case of amendability of the constitution was seen in the year 1951 in the constitution (First Amendment) Act in the case of *Shankari Prasad Singh v Union of India*⁴ which guaranteed Right to Property under Article 31⁵ of the Indian Constitution. The basis of the argument was against the validity of the First Amendment, Article 13 prohibited the enactment of law infringing or abrogating the Fundamental Rights. In Article 13 the word law includes any law, even a law amending the constitution. Thus, the validity of such law could be judged and analyzed with respect to Fundamental Rights which could not be infringed.

This started a conflict between Article 13 and 368. The Supreme Court upheld the First Constitution Amendment to be valid, and rejected the contention and limited scope of Article 13 by

⁴ Shankari Prasad Singh v. Union of India, A.I.R. 1951 S.C. 458 (India).

⁵INDIA CONST. art. 31. As per the article 31 compulsory acquisition of property [Rep. by the constitution (forty-fourth Amendment) Act, 1978, sec. 6

Article 31 was earlier amended by the Constitution (Fourth Amendment) Act, 1955, Sec. 2 and by the Constitution (Twenty-Fifth Amendment) Act, 1971, Sec. 2.

stating that the word 'law' in Article 13 would not include within its compass a constitution amending law passed under Article 368. The Court stated on this point that the Article 13 law is in the exercise of ordinary legislative power and not in the exercise of constituent power. Hence, Article 13 (2) does not affect amendments made under Article 368.

The Parliament was empowered to amend the constitution without any exception and the fundamental Rights are not excluded or immunized from the process of constitutional Amendment under Article 368. The court, disagreed with the view that the Fundamental Rights are inviolable and beyond the reach of the process of constitutional Amendments, and insisted that there is clear distinction between ordinary law which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power.

Sajjan Singh Case

Following the Shankari Prasad case the same question was again raised in 1964 in *Sajjan Singh v State of Rajasthan*⁶ when the validity of the constitution (seventeenth Amendment) Act, 1964 was called in question. Sajjan Singh's case mainly brought up two issues: Firstly relating to the entrenchment of the Fundamental Rights and secondly concerning to the concept of basic structure of the constitution. The majority Judgement viewed this aspect in the context of socio-economic progress and development of the country. However, the minority Judgement of Justice Hidayatullah and Justice Mudholkar came up with the opinions that helped in the Golak Nath and Keshavananda Bharati case. Also in the instant case Chief Justice Gajendragadkar held that the amending power of the parliament conferred on it by Article 368 can be exercised over all the provision of the constitution. As well as the amending power of the parliament is not only unambiguous but specific and therefore the power can be exercised both prospectively and retrospectively. The authorship of Doctrine of Basic structure can be attributed to Justice Mudholkar as it was his formulations that were subsequently utilized in the later cases of the Supreme Court. Hence, the verdict upheld the decision delivered in the Shankari Prasad case making the parliament the soul repository of constituent power.

⁶ Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845 (India).

Golak Nath Case

In the case of *Golak Nath v state of Punjab*⁷ constitution (seventeenth Amendment) Act was challenged in a very vigorous and determined manner. Eleventh Judges Bench gave the decision in the ratio of 6:5. The majority refused to give parliament carte blanche power to pass whatever it deemed appropriate. Overruling the earlier cases of Shankari Prasad and Sajjan Singh the fundamental rights were declared non amendable through the constitutional amending procedure as mentioned in Article 368. The court argued that the parliament could not curtail any of the fundamental rights in the constitution, while the minority upheld the line of reasoning in the two earlier cases.

Golak Nath's case discussed whether an amendment was "law" within the meaning of article 13(2). It was ruled that the term "law" in a comprehensive sense would include constitutional law as well. Definitions of "law" as mentioned in Article 13(2) would include constitutional law. This scheme of constitution postulates the inviolability of part III thereof, article 368 shall not be developed so as to destroy the structure of our constitution.

The power of amendment is not subject to any express or implied restriction. The Judges refused to accept the Doctrine of prospective overruling as proposed by Chief Justice Subba Rao in his judgment. We were of the view that if the constitution makers had wanted to make the fundamental rights unamendable they could have easily made a provision in the constitution for the same.

Four major propositions can be drawn from the majority opinion in the instance case:-

1. Article 368 does not contain the substantive power to amend but only contains the procedure to amend the constitution.
2. A law made under article 368 would be subject to article 13 (2) like any other law.
3. The word "amendments" contemplates only minor modification but not any major alterations in the existing provisions.
4. A Constituent Assembly ought to be conveyed by parliament to amend the Fundamental Rights.

⁷ Golak Nath v. State of Punjab, A.I.R. 1967 H.C. 1643 (India).

Kesavananda Bharati Case

In the case of *Kesavananda Bharati v State of Kerala*⁸ the constitutional validity of two Constitution Amendment Acts, namely, the 24th and the 25th Amendments Acts, was challenged in this case before the Supreme Court.

The constitution (24th Amendment) Act, 1971, amended article 13 and 368 of the constitution, to restate the power of the parliament to amend any provision of the constitution, including the Fundamental Rights.

The constitution (25th Amendment) Act, 1971, made changes to Article 31 by substituting the clause (2) with a new clause, and by inserting a new (2B) clause therein: a new Article 31C was also inserted.

In this instant case, the majority held that certain basic features of the constitution cannot be destroyed or damaged while amending it. Thus, the power to amend any provision of the constitution by following the procedure mentioned under Article 368 was not absolute. So that the basic features of the constitution could not be destroyed during such an amendment.

The majority was of following opinion:

1. The power to amend the constitution lies in Article 368 itself and is hidden in the residuary legislative power of the parliament. Hence the decision of *Golak Nath v State of Punjab* was overruled.
2. A clear distinction between ordinary law and constitutional law was established, and the word law used in Article 13 did not include constitutional law. Thereby meaning that an amendment under Article 368 could even abridge or take away a Fundamental Right. To this extent, the decision of *Golak Nath v State of Punjab* was overruled.
3. The concept of employee limitation on the amending power clarified certain basic features of the constitution which cannot be destroyed or damaged while amending it. This meant that the constitution could be amended under Article 368 as much as the basic features of the constitution remain intact.
4. The court discussed some of these basic features while refusing to give an exhaustive list of all the features saying that it was to be decided by the court on a case to case basis. Some of these basic features are :
 - Supremacy of the Constitution.
 - Republican and democratic form of government.

⁸ *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India).

- Secular character of the constitution.
- Separation of power among legislature, executive and judiciary.
- Federal character of the constitution.
- The dignity of individual secured by the various freedom and basic rights in part III and the mandate to build a welfare state contained in part IV.
- Unity and Integrity of the nation.

The constitution (24th Amendment) Act, 1971, was held to be valid. Judges pointed out that the said amendment Act by amending Article 368 made explicit what was already implicit in the unamended Article 368.

This landmark decision changed the complete nature of the amending power in the Indian constitution. All Fundamental Rights except those considered by the court to be part of the basic feature of the constitution. The question regarding to what these basic features of the constitution were left for the Court to decide when a particular amendment was challenged before the court. Uncertainties such as Parliament not knowing whether the amendment provisions were going to survive the test of the basic feature theory when challenged in the court remained.

INDIRA GANDHI CASE (39th AMENDMENT ACT, 1975)

FOR LEGAL RESEARCH & ANALYSIS

Indira Nehru Gandhi v Raj Narain⁹ case brought up the question about the width of the parliament power of amendment of the Constitution. This case challenged the scope and authority of the 39th amendment which attempted to insert Article 329¹⁰ A in the constitution. This Amendment was aimed to decide the election petition in favor of Ms. Indira Gandhi by the legislative action. Before the appeal could be heard by the Supreme Court.

Chief Justice Ray, in this case, regarded the constituent power as sovereign power and said that the power being *sui generis* in character's was different from the legislative power to due to its sovereign characters. Further, he also attributed the constituent power with the power of creating

⁹Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299 (India).

¹⁰INDIA CONST. art. 329. As per the article 329 "Bar to interference by courts in electoral matters".

Sub. By the Constitution (Thirty-Ninth Amendment) Act, 1975, sec. 3, for certain words.

The words, figures and letter "but subject to the provisions of Article 329 A" omitted by the constitution (forty- fourth Amendment) Act, 1978, sec.35

organs and distributing powers and so itself it became independent of the fetters imposed by the doctrine of separation of power.

In relation to validation of the election under clause (4) of Article 329 A. Ray CJ said:-

The nature of the constituent power is legislative power or a purely executive. The constituent power cannot exercise judicial power. Exercise of judicial power or a purely executive is not the power of amendment to change the constitution. The constitution may be amended to change constitutional provisions but the constituent power cannot enact that a person is declared to be elected.

The Supreme Court upheld the contention and declared clause 4 as unconstitutional. On the basis of the following things mentioned under clause (4):

- It wiped out not merely the judgment but also the election petition and law relating to it.
- It deprived the defeated candidate of his right to challenge the validity of the election.
- As the election had passed a declaratory legislative judgment and not a law, there was no judgment to deal with and no right or dispute to adjudicate.

Also if at all the constituent amending body droops over to exercise the judicial power so that the power has to be exercised on the principles of natural justice of *audi alteram partem*.

Justice Beg puts forward the premise of 'Supremacy of the constitution', stating that in India it is the constitution and not the constituent power that is supreme; the constitutionality of the constitution cannot be called into question before the Supreme Court, but the exercise and the validity of the exercise of the constituent power can be put to test of the constitutional provision by the Supreme Court.

Justice Beg brought out another aspect of the constituent power of the parliament by comparing the amending power with the constitution. The preference should and would be given to the sovereignty and supremacy of the whole constitution rather than any part of it; it appears more reasonable and respectable to swear allegiance to the whole constitution, rather than to Article 368 or to the amending power contained in it.

Several judges also stated that judicial review was not a basic feature of the constitution and that a constitutional amendment could exclude judicial review of a matter. But these proposition have now been overruled and both judicial review as well as equality are regarded as the basic features of the constitution.

Minerva Mills (42nd Amendment Act, 1976)

In *Minerva Mills Limited v Union of India*¹¹ the scope and extent of the Doctrine of Basic Structure was again considered by the Supreme Court. In a unanimous decision by the court, it was held that any amendment that seeks to convert the constituent power in Article 368 into an unlimited, uncontrolled barrel is highly violative of the Doctrine of basic structure. Amongst various changes brought about in Article 368, the court observed that no constituent power conferred by the Clause (5) of the amended article for it even empowers Parliament to: 'Repeal the provisions of this constitution'. The power to destroy is not the power to amend.

This is one of the cases where the Doctrine of Basic Structure lays down three propositions as it has become an indispensable part of the Indian Jurisprudence they are:

- The Indian Constitution has a basic structure doctrine and also the constituent amending power which cannot be destroyed.
- The 'limited' constituent amending power is a part of basic structure and the amending body cannot convert this limited power into unlimited power.
- Part III and Part IV is very important and no one is less than the other as they act like twin formula for achieving social revolution.

This proposition was made in the context of an amendment to article 31C for saving of laws made in pursuance of the DPSP in Part IV even if they are inconsistent with or take away the or abridge the fundamental rights conferred by the Article 14 and 19 of the constitution.

Judicial Review: Counter Majoritarian Problem Or Promise?

Judicial review means checking of the lawfulness of a decision or action reviewed by the judge in an Administrative Court. It is available, when all the effective means of challenge have been perished. The basic concept behind judicial review is that whether the laws and procedures have been correctly followed. The main objective of judicial review is to guard the rights of the public and implementation of the fundamental rights.

Article 13 of the Indian Constitution declares that all laws which are inconsistent with or in derogation of any of the fundamental rights shall be considered void. The Supreme Court and the

¹¹ *Minerva Mills Limited v. Union of India*, A.I.R. 1980 S.C. 1789 (India).

High Court have the power conferred to declare a law unconstitutional and invalid on the ground of contravention of any of the fundamental rights. The term 'law' in Article 13 has been given a wide scope so as to include the following:

1. Permanent laws enacted by the parliament or the state legislation.
2. Temporary laws.
3. Statutory instruments in the nature of delegated legislation.
4. Non-legislative sources of law.

*Marbury v Madison*¹² was the case from which the concept of "judicial review" was evolved. Judicial Review was based on the idea that the judiciary, in order to uphold the constitution could extend its authority into the territory of the legislature, and to resolve issues through interpretation and adapt it to the changing times. The idea of changing the constitution by the judiciary in order to maintain its utility law has been subjected to various criticisms and an amendment which was proposed to curtail this power. Judicial Review includes judicial activism, judicial overreach, and judicial over activism. When the parliament was struggling to ensure that its constitutional power under Article 368 should be untouched and absolute, this was an attempt to restore the spirit of majoritarianism and to prove that the judiciary is a "Counter Majoritarian Power". The Counter Majoritarian Problem may be the best known problem in constitutional theory which was given by the Alexander Bickel. In a phrase by Alexander Bickel he said that judicial review is a Counter Majoritarian Problem as the legislature are the representatives of the majority and considered as the voice of people. The act of judicial review according to him is an act of countering the voice of people. Being as Counter Majoritarian Problem Ronald Dworkin has a contrasting view on judicial review. According to him, it is not a Counter Majoritarian Problem but a Counter Majoritarian Promise. Through judicial review the judiciary safeguards the rights of the people from any arbitrary act of the state by ensuring the best for the people by taking the best decision. Thus, keeping the promises given to the people Judiciary always tries to act for the welfare of the people.

¹² *Marbury v. Madison*, 5 U.S. (1 Cranch)137 (1803).

THE WAY AHEAD

The constitution is the fundamental law within which the government must operate. Through various amendments the constitution of India has developed several distinctive features. India has a parliamentary democracy and it provides fundamental rights which are justifiable. The Directive Principles of state policy give a concrete shape to the welfare concept. The preamble of the constitution sets out the aim and aspirations of the people of India and these have been translated into various provision of the constitution as a welfare state as India is committed to the welfare and development of the state. Social scenarios are always changing. Hence, every constitution needs amendment because these amendments are like updates as they fix the issues, add new features which are needed, and remove features which are no longer relevant. It is important as they protect our one of the most important freedoms and make us to overcome with the hurdles or shortcomings in the future.

One such case regarding the 99th amendment was of Supreme Court advocate on record association, which was held unconstitutional as it violated the 'Basic Structure' of the constitution because it compromise judicial independence. This judgment does not make a persuasive case as to why the constitution requires judicial primacy in appointments. The constitutional texts and constitutional assembly debates also failed to provide any support for this position. It also fails to explain how judicial primacy forms a part of the unamendable Basic Structure. The judgment does not explain why judicial primacy promotes or secures judicial independence. The NJAC judgment represents the Indian judiciary's reluctance to seed its supremacy to the executive and legislative branches. With reference to constitutional Assembly debates several member of constituent assembly proposed amendment to the provision of draft article 103 which closely resembles the present article 124 regarding the judicial appointment process.

Dr. B. R Ambedkarsaid that there could be no question that the judiciary must me both "Independent of the executive" and yet competent in its own right. In the NJAC judgment the Supreme Court largely relied on Ambedkar in its analysis of the term 'consultation'. However, Ambedkar's statements do not support that 'consultation' essentially requires the president to follow the 'Chief Justices' advice.

Justice Khehar was of the view that Ambedkar was skepticalof proposal that vested appointment authority solely in the executive or jointly in the executive and legislature because of the political influence.

In contrast the finance minister back then was of the opinion that Doctrine of basic structure including elected government and parliament's sovereignty, cannot be 'dismantled' to save only independence of judiciary and favored reconsideration of the verdict.

