



Basic Structure in the Constitution of India

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ABSTRACT

The present study intended to focus upon the issue of amending the constitution and the doctrine of basic structure with the help of a doctrinal method, the proposed exercise attempted to know that, Every provision of the constitution can be amended or not? Is there any specific restriction on parliament for amending the constitution? Whether fundamental rights can be amended under article 368? A systematic probe into some of these questions has made in the study. Beside the study also endeavored to find the procedure for amendment. And the amendment of the constitution cannot have the effect of destroying or abrogating the basic structure or framework of the constitution. The issue of amendment of constitution has been examined in light of significant judgment. The court represented the pinnacle of judicial creativity and set a benchmark for other constitution courts around the world has been included. How the future difficulties of constitution have been resolved. Finally the research took critical view of Kesavananda Bharti case. The study has been geared up by the doctrine of basic structure.

INTRODUCTION

Constitution is a product of its times and circumstances. India has often faced with situation where its paramount democratic institution has closed. One such run in was the struggle for power between the judiciary and the legislature which reached its boiling point in the mid 1970s. In the back drop of the struggle for constitution supremacy. The Supreme Court delivered what is arguably the most monumental decision in its history on 24 April 1973 Kesavananda Bharti vs State of Kerala¹ is a case unique in the history of the international constitutional

law for several reasons :the unprecedented no. of separate opinion delivered by the court as well as the sheer length of the judgment itself The basic structure doctrine formulated by the court represented the pinnacle of judicial creativity and set a benchmark for other constitution courts around the world. The term Basic structure was displayed in the decision of such in Kesavananda Bharti Case. SC observes the doctrine in two type of assertion.

- That every provision of the constitution can be amended provided in the result the foundation and structure of the constitution remain the same.
- That the amendment of the constitution cannot have the effect of destroying or abrogating the basic structure or framework of the constitution. Which hereby state that features of the constitution cannot be destroyed.²

Procedure for Amendment

A bill to amend the constitution may be introduced in either house of parliament. As the bill is passed by both the house it needs president assent and there upon the constitution shall stand amended.³ But a bill which seeks to amend the provision mentioned in article 368 requires in addition to special majority which ratified by the 1/2of the states. Thus it is cleared that most of the provision of the constitution can be amended by an ordinary legislative process.

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<https://googleweblight.com/i?u=https://www.lawtecher.net/free-law-essays/constitutional-law/basic-structure-debate-in-constitution.php&hl=en-IN&tg=142> (Jun. 15, 2018,3:18 PM)

³ The Constitution (24th Amendment Act,1971)

¹ AIR1973 SC1461:(1973)4 SCC 225

Only a few provision which deal with the federal principle require a special majority.⁴

Restriction on parliament for amendment provision in the constitution

While framing the constitution the framers have adapted a middle course which is neither flexible nor rigid. They frame on the basis that every person should be equal, and no one be discrimination on the basis of caste, creed, sex and religion. Main aspect of our constitution is fundamental right and provides us Independent Judiciary. But if the law made by the parliament violates the provision of the constitution the supreme court has power to declare such a law invalid or ultra virus. Process of judicial scrutiny of legislature act is called Judicial Review.⁵ Article 368 impression the parliament amending powers are absolute here so act as breaker of parliamentary power. So this jurisdiction of Supreme Court is essential for protection of basic feature of the constitution.⁶ Due to Article 368 the Indian constitution neither be called rigid nor flexible but in fact it is partly rigid and partly flexible. Article of the constitution be amended by a simple majority in the parliament (second schedule) article 100(3), 105, 11, 124, 135, 81, 137 or by special majority of not less than two third of the member of the each houses present and voting, or by ratification by the state legislature after special majority (article 73,762,chapter-4 of part 5,chapter 5 of part VI,seventh schedule representation of the state in parliament and provision dealing with the amendment of the constitution.

Amendment of fundamental right

The question whether fundamental right can be amended under article 368 came for the consideration of the supreme court in instant case.

Shankari Prasad vs. Union of India⁷

In that case the question arose concerning about the right to property, which (until 1978) was fundamental right under the article 31 As soon as the constitution entered into force, agrarian land reform legislation

⁴ Dr. J. N. Pandey, The Constitutional Law of India 809 (50th ed.2013)

⁵ <http://www.legalservicesindia.com/article/309/Basic-Structure-of-Constitution---Myth-or-Reality.html> (Jun.15 2018, 3:56 PM)

⁶ www.legalserviceindia.com/articles/thyg.htm (Jun. 15, 2018,4:06 PM)

⁷ AIR 1951 SC 458

was enacted in Bihar, UP. Madhya Pradesh. Consequently the zamindar, who hold significant portion of the land filed petitions in different high courts alleging that their fundamental right has been

infringed.⁸ When Bihar land reform Act 1950 was invalidated by the Patna high court in 1951, the constitution (amendment) Act 1951, which insert two provisions -:

One of these provisions, article-31B created the 9th Schedule could not be challenged for being inconsistent with fundamental right.⁹

Thus zamindars then challenged the amendment itself in Shankari Prasad V. Union of India which challenged on the ground that it purported to take away or abridge the rights conferred by part 3rd which fell within the prohibition of article 13(2) and hence was void. It was argued that the “state” in article 12 included Parliament and the word “Law” in article 13(2) Therefore, must include constitution amendment. The Supreme Court, however rejected the above argument and held that the power to amend the constitution including the fundamental right is contained in article 368 and that the word “Law” in article 13(8) included only an ordinary law made in exercise of the legislative powers and does not include constituent power. Therefore, a constitution amendment will be valid even if it abridges or take any of the fundamental right.¹⁰

Sajjan Singh V. State of Rajasthan¹¹

The Validity of the constitution (17th Amendment) Act 1964 which inserted 42 statutes into 9th Schedule was challenged before another 5 judge bench of Supreme Court. Unlike in Shankari Prasad, the parliament’s right to amend fundamental right wasn’t question in Sajjan Singh. Instead the case challenged the procedure prescribed to amend the constitution. In Shankari Prasad, the judges unanimously dismissed the petition.¹² However, held that the word “Amendment of constitution” means amendment of all the provisions of the constitution. Gajendragadkar C.J said that if the constitution makers intended to

⁸ Zia Mody, 10 Judgements that changed India 2 (1st ed.2013)

⁹ Supra note 6

¹⁰ Dr. J. N. Pandey, The Constitutional Law of India 811 (50th ed.2013)

¹¹ (1965) 1 SCR 933

¹² Zia Mody, 10 Judgements that changed India 3 (1st ed.2013)

exclude the fundamental right from the scope of the amending power they would have made a provision in that behalf.¹³

Cordoning off Fundamental Right from constitution

Could the parliament can amend fundamental right? This issue was received in the case **I.G.Golak Nath V. State of Punjab**¹⁴. The petitioners, landowner again deprived of their surplus land holding under state land reform legislature which challenged the validity of the 1st, 4th, 7th Amendments. An eleven judge bench panel again sat on question whether constitution amendment could be passed to take away or abridge fundamental rights and whether courts could review such amendment. By a slender majority of 6:5, The Supreme court ruled that the distinction between constitution power and legislature power was laid down. It explicitly means, constitution amendment fell within the purview of 'law' under Article 13(2) and courts could review them if they violated. The fundamental rights of citizens, the court found fundamental are so sacrosanct and transcendental that even a unanimous vote of all members of the parliament would be sufficient to weaken or undermine them.¹⁵

Subba Rao C.J. supported his judgment on the following reasoning's

- The C.J rejected the argument that power to amend the constitution was a sovereign power and power was supreme to the legislative power and that it did not permit limitation and those amendment made in exercise of the power involve political question and that therefore were outside of judicial review.
- The power of parliament to amend the constitution is delivered from article 245, and not from Article 368. Article 368 lays down the procedure for amendment is a legislative process.
- An amendment is a 'law' with the meaning of article 13(2) and therefore, if it violates any of the fundamental right it may be declared void. The word 'law' in article 13(2) includes every kind of law, statutory as well as constitutional amendment which contravened Article 13(2) will be declared void.

¹³ Supra note 9

¹⁴ (1967) 2 SCR 762

¹⁵ Zia Mody, 10 Judgements that changed India 4 (1st ed.2013)

The C.J said that fundamental right are assigned transcendental place under our constitution, so they are kept beyond the reach of parliament and applied the doctrine of prospective overruling¹⁶ and held that this decision will have only prospective overruling and held that this decision will have only prospective operation 1st, 4th, 7th amendment will continue to be valid. It means all before it shall be remain valid.

The minority held that 13(2) here "law" referred to only ordinary law and not a constitution law, hence Shankari Prasad's and Sajjan Singh case rightly decided and article 368 deal with the procedure and power to amend the constitution.

24TH Amendment Act 1971-

The parliament sought to reconcile the question of whether constitutional amendments were 'law' under article 13 by passing the constitutional (24th Amendment) Act, 1971 and inserting Article 13(4) – That nothing in this article shall apply to any amendments were 'law' under Article 13 by passing the constitutional Amendment Act, 1971 and inserting Article 13(4) – that nothing in this article shall apply to any amendment of this constitution Amendment from the ambit of Article 13.¹⁷ Through this amendment the parliament nullified the Supreme Court decision in Golak Nath and ensured that amendment to constitution could once again not be reviewed by court even if they violated the fundamental right of citizens.¹⁸

Kesavananda Bharti: The Lead- Up

The Petitioner Swami Kesavananda Bharti Sripadagalvaru was the head of Edneer math in Kerala. The Kerala Land Reform Act 1963 had affected the property of his religious institution leading him to challenge state land reform legislature in Kerala in 1970. The parliament has passed (29 Amendment) Act 1972, inserted in 9th schedule, and affect the Kesavananda. Petitioner challenged the constitution validity of the twenty fourth, twenty fifth, twenty ninth Amendment in constitution.

¹⁶ Prospective overruling is a device invented by the sc to avoid reopening of settled issues and to prevent multiplicity of proceedings. In prospective overruling the court does not grant relief to the petitioner even after holding in his favour

¹⁷ www.legalservice.india.com/article/170-Article368.html (Jun. 20, 2018 6:20P.M.)

¹⁸ Dr. J. N. Pandey, The Constitutional Law of India 812 (50th ed.2013)

Each of the amendment which was challenged:

1. 24th Amendment (enacted in 1971 to nullify Golak nath case), Article 13, doesn't include constitutional amendment as a 'law' and parliament had the power to amend or repeal the provision of the constitution.
2. 25th Amendment (enacted in 1971) gave article 39(b) and 39 (c) described as 'classify socialist' by Austin in directive principle of state policy precedence over the fundamental right to equality. It took away the court's power to decide whether a law was actually passed to further the policy laid down in these article.
3. 29th Amendment (enacted in 1972) added two land reforms statutes to 9th schedule of the constitution.

The question involved- what was the extent of amending power conferred by article 368 of the constitution? And whether that power was unfettered or could court review amendments? On behalf of Union of India it was claimed that amending power was wide but not unlimited.¹⁹

Under Article 368 Parliament cannot destroy the basic features of the constitution. A special bench of 13 judges was constituted to hear the case. Out of 13 judges delivered separate judgment. Bench sat for almost five months to consider that stood to define constitutionalism and the exercise of democratic power in India.

Basic Structure Doctrine: Judging the constitutionality of Constitutional Amendments

Separate judgment was delivered by each 13 judge on every issue. For the first time in the court's history, the judges gave a summary of their decision which four judge refused to signature because they said it was inaccurate.

The view of the majority on each issue was as follows:

1. The 24th Amendment o the constitution was valid
2. The 25th Amendment to the constitution was valid, except for the clause 2.
3. The 29th Amendment to the constitution was valid.
4. The Golak nath case judgment, fundamental right could not be taken away or nullified by the parliament was overruled.

5. There was no implied limitation on the parliament's power to amend the constitution under article 368.

However, the court's most significant decision, made by a thin majority of 7:6²⁰

Scope of Amending Power

The six judges held that there are inherent or implied limitations on the amending power of the parliament and article 368 doesn't allow to damage or destroy the essential elements or basic features of the constitution. Amending power doesn't include the power to abrogate the constitution.²¹ The remaining six judges held that there are no limitations express or implied on the amending power. Thus by majority 7:6 held parliament has wide power of amending the constitution and it extended to the entire article, but amending power isn't unlimited and doesn't include the power to destroy or abrogate the basic feature of the constitution.

Basic Features

In the constitution word 'Amendment' or 'Amend' has been used in various places to mean different things. In some article, the word amendment has a wide meaning and another context it has a narrow meaning.

C.J Sikri listed the following feature as encompassing the basic structure of the constitution Supremacy of the constitution, republican, democratic form of the government, secular character of the constitution, separation of the power between the legislature, executive and judiciary, the federal character of the constitution. According to Shelat and Grover J.J .,the following are the illustration of the basic structure of the constitution i.e. Supremacy of the constitution Republic and Democratic form of the government and sovereignty of the country Secular and federal character of the constitution, Demarcation of power between the legislature, the executive and the judiciary, Dignity of the individual secured by various freedoms and basic right in part 3 and the mandate to build a welfare state contained by part 5th ,Unity and integrity of the nation.

According to Hedge and Mukherjee JJ- Sovereignty of India, The democratic character of our policy, the

¹⁹ Zia Mody, 10 Judgements that changed India 6 (1st ed.2013)

²⁰ Supra note 17

²¹ Supra note 16

unity of the country, Essential features of individual freedoms secured to the citizens, Mandate to build a welfare state. However, they said that these limitations are only illustrative and not exhaustive.

According to Mr. Jagmohan Reddy J- A sovereign democratic republic and Parliamentary democratic certainly constitute the basic structure.²²

Minority view of 6 judges out of 13 the amending power of constitution was unlimited. Delivered by Mr. Justice A.N Roy, Beg dwivedi, Paleker.

The Supreme Court has thus list down the basic features

1. Rule of Law
2. Judicial Review
3. Democracy, which implies free and fair election

It has been held that the jurisdiction of the Supreme Court under article 32 is the basic feature of the constitution.

CONCLUSION

India got Independence after prolong struggle with the cost of numerous patriots. They knew the substantial value of the freedom, so the maker of constitution embodied the feature of equality without discrimination on the basis of caste, creed, sex, religion and asked for welfare state. If a law made by parliament violates the basic feature of constitution then SC has power to declare invalid. Since Independence SC has acted as a breaker of legislative enthusiasm with intention to preserve the ideals of constitution. In the led up case i.e. Kesavananda Bharti Case which has ruled upon the parliament power's of amendment wasn't absolute and it could not amend the basic structure of constitution which consist of democracy, rule of law, secularism, separation of power, Judicial Review. It cannot alter or destroy the basic structure of the constitution. Doctrine has served to bring revolutionary change in constitutional of India. So it our duty to protect the welfare state, integrity of the nation, and Sovereign democratic, unity, republic, fundamental rights and for liberty of thought, expression, belief, faith, and worship, interpretation of judiciary is mandatory. Hence above constitution even parliament and judiciary can be resided.

²² Dr. J. N. Pandey, The Constitutional Law of India 814 (50th ed.2013)