

Article 368: Power to amend the constitution and the Fundamental Rights of India

Sarika Bilung¹

¹Department of Political Science, Rajendra University, Balangir, Odisha, India,

Author Email: sbilung@rajendrauniversity.ac.in

Abstract— A countries aim and objectives are reflected by its constitution. It is the legal framework of a country that defines the rules, regulation, laws and governing process of a country. The Fundamental rights are those rights that are essential for the fullest development of an individual as well as to lead a civilised life. These Fundamental Rights are protected by the judiciary of India. This article emphasized on Article 368 of Indian Constitution which empowers the parliament to amend the constitution with maintaining its basic structure. The objective of the study is to understand the basic structure of the constitution and the procedure of amendment process and the jurisdiction of Article 368. This article will be helpful for complete understanding of evolution of basic structure of constitution of India.

Keywords: Amendment, Article 368, Basic structure, Constitutions, ,Fundamental rights, India

I. INTRODUCTION

“ To live by the rule of the Constitution will not be called slavery but the salvation”-**Aristotle.**

Aristotle the father of Political Science argues that Law is salvation rather than slavery (Trott.A.M.2017). A sovereign country must have its own constitution. The constitution is the fundamental law of land, on the basis of which the country operates its all administrative activities. A country will be called as a sovereign body when it has its own working constitution. Accordingly the Constituent assembly was framed in 1946 under the scheme of Cabinet mission Plan to draft the Constitution of India. The constitution of India was adopted and enacted on the 26th day of November 1949 and came into force from 26 January 1950, therefore every year 26 January is observed as Republic Day. It took 2 years 11 months and 17 days to draft a complete constitution. It is the world's longest written constitution which contains 448 Articles, 25 parts and 12 schedules. The Indian Constitution is one of the borrowed constitutions, a combination of the best features of other countries. The law making procedure or legislative procedure has been borrowed from the country Britain while the amendment power with two-third majority has been brought from the constitution of South Africa. The framers of the Indian constitution had high ambition of making it the best one. One of the basic features of the Indian Constitution is the combination of both rigidity and flexibility. Flexibility in the sense that some parts or provision of the constitution can be easily modified, and the opposite of this is rigidity.

II. NEED FOR AMENDMENTS OF THE CONSTITUTION

Amendment means to bring change in the statute by way of addition, variation or repeal. Law must be dynamic because in the future the working of law may face challenges. The time is not static, it continues evolving. Accordingly the socio economic and political conditions of individuals as well as society changes. If the law is static then it would not fulfill the changing needs of society. Therefore to adjust with changing conditions of people in developing countries there must be the provision of amendment of the law.

The power of amendment of law is vested in the hands of Parliament which consists of The President, the Lok sabha and the Rajya sabha according to Article 79. There are three different ways to amend the Indian Constitution. Such as (i). By simple majority, (ii). By special majority, (iii) by special majority with half of state legislature ratification.⁷

By simple majority means more than 50% of the members present and voting viz. Article 100(3), 105, 11, 124, 135, 81, 137. Such as abolition or creation of state legislative council, second schedule, salary and allowances of MPs, formation of new states, changing the boundaries of state.

Special majority means two-third member of present and voting and the two-third member should be above the 50% of the total member of the house viz. The provision of Fundamental Rights and the provision of DPSP.

Ratification by half of the State Legislatures after special majority viz, Article 73, 162, Chapter 1V of Part V, Chapter V of Part V1, Seventh Schedule.

III. AMENDMENT OF FUNDAMENTAL RIGHTS AND THE DOCTRIN OF BASIC STRUCTURE

Article 32 (2) of Fundamental Rights of Indian Constitution says that the state shall not make any law that abridges the fundamental rights . In this context the term state refers to the parliament, the legislature of state , local authority or any authority of government. The “Law” in Article 13 of the constitution would include the constitutional amendment. At the same time Article 368 says the parliament has the power to amend the constitution and it describes procedures. Here the question arises that if the Parliament brings any amendment in Fundamental rights in accordance with Article 368 then can the law be valid according to Article 13(2) ?

III.I. 1ST CONSTITUTIONAL AMENDMENT

This dispute arose when the parliament made its 1st Constitutional Amendment Act 1951 and repealed some provisions of fundamental rights. By this amendment the parliament added Article 31A, 31B and 9th schedule in the Indian constitution.

Article 31A of the constitution says “the government can acquire the property of people”.

Article 31B says that none of the acts placed in the 9th schedule shall become void on the ground that they violate rights under Part III and no judicial review is possible.

9th schedule:- the list of central and state laws which can't be challenged in the courts.

Right to property was a fundamental right. At that time land distribution was the major political agenda, and its achievement implicated the Right to Property, a right guaranteed by Part III of the Constitution. There was an uneven distribution of land during British rule, so the government started abolishing the Zamindari system to redistribute land among landless peoples. The new independent government was unable to implement any of the provisions of DPSP for socio economic development because of unavailability of land. Whenever the Govt. was taking land from anybody to establish a developmental enterprise, people were moving to the Supreme court. Therefore by 1st constitutional amendment the parliament added Article 31A and 31B to bring amendment in Right to Property and it wouldn't be considered as violation of fundamental rights. It curtailed the fundamental rights of the people. The basic structure doctrine emerged through cases on the Right to Property. Therefore to challenge this amendment act a case registered in the Supreme Court i.e **Sankari Prasad Vs. Union of India-1951**. But the judgment of the Supreme court was in favor of the Government and said Parliament can amend the whole of the constitution including fundamental rights and Article 13(2) does not cover amendment .

In this context the court's recognition of parliament's exclusive and supreme power to amend the constitution was based upon the distinction between constitutional law and ordinary law. The constitutional law is an expression of constituent power and couldn't itself be subject to challenge. As the constitution had vested parliament with the authority to exercise Constituent Power, there was no place for any institution to intervene in the exercise of this power.

III.II. 17TH CONSTITUTIONAL AMENDMENT ACT 1964

17th Constitutional Amendment Act 1964 enacted and brought some changes in Article 31A. Again this decision was challenged by **Sajan Singh Vs State of Rajasthan 1965**. In the decision of this case also the Supreme Court preserved the same decision or ruling of Sankari Prasad. Here the Parliament clarifies that the term ‘Law’ does not denote ‘amendment’.

III.III. GOLAKNATH VS. STATE OF PUNJAB CASE

Again the decision was challenged by **Golaknath Vs. State of Punjab Case**. in this case the Supreme Court by a majority of 6:5 overruled the earlier decision which had held that Parliament had the power to amend any parts of the Constitution including the portion of Fundamental rights. The decision of the court was that Parliament had no capacity to remove or abridge any of the rights ensured by Part III of the constitution. The central idea to this is, a constitutional amendment was simply a legislative act like any other, ‘Parliament’ is a legislature and ‘amendment’ is a legislative process. Hence it is argued that the Amendment is also a law.

III.IV 24TH CONSTITUTIONAL AMENDMENT

In 1971, the 24th Constitutional Amendment was brought by Parliament to change the verdict of the Golaknath case and added Article 13(4) and 368(4) in the constitution.

Article 13(4) says that any of the amendments made in article 368 of the Indian Constitution would not be challenged under Article 13.

Article 368(4) says no constitutional amendment made (including Part III) shall be called in any court on any ground.

This demonstrated the supreme capacity of Parliament. It clearly shows the intention of Parliament that it can bring changes and curtailed Fundamental Rights. It has the ability to annul any Fundamental Rights and there would be no legal survey.

III.V. 25TH CONSTITUTIONAL AMENDMENT 1971

The said amendment curtailed the Fundamental Rights of the Property, and provided that any law made to give effect the provisions of DPSP shall not be challenged to court on the basis of violation of Fundamental Rights. By this amendment DPSP was made stronger against Fundamental Rights. The provision in this amendment was that to implement DPSP fundamental rights can be amended.

III.VI. KESHAVANANDA BHARATI VS. STATE OF KERALA 1973

This 24th and 25th Constitutional amendment was challenged by the landmark case Keshavananda Bharati Vs. State of Kerala 1973. The case was decided by the largest bench of the Supreme Court, consisting of 13 judges. The decision was taken with a 7:6 majority. The decision of the Supreme Court was that the Parliament has capacity to correct any parts of the constitution, however the basic structure of the constitution should be kept up. It denotes that the basic structure of the Constitution could not be abrogated even by the constitutional amendment. This is the origin of the basic structure of the Indian constitution which developed from case to case. The basic structure includes the rule of law, democracy and judicial review.

III.VII. THE 39TH CONSTITUTIONAL AMENDMENT 1975

This amendment says that the election of the President, Vice President, Prime minister and the speaker of Lok sabha can not be challenged by the Supreme Court. It means it curtailed the judicial review power of the Supreme Court. In this regard the amendment act was challenged by the case Indira Gandhi Vs. Raj Narain. In this case the court reaffirmed the judgment in Keshavananda Bharati case and said that rule of law and judicial review is the basic structure of our constitution.

III.VIII. MINERVA MILL VS. UNION OF INDIA 1980

In this case the court decided that harmony between Fundamental Rights and DPSP, Judicial Review, and the independence judiciary is the basic structure of the constitution.

III.IX. INDIRA SAWHNEY VS. UNION OF INDIA-1993

The court's verdict was that the rule of law is the basic structure of the Indian Constitution.

III.X. S.R BOMMAI VS. UNION OF INDIA 1994

The Supreme Court gave the landmark decision regarding the Basic structure of Indian Constitution. As per the decision the federal structure, unity and integrity of India, secularism, socialism, social justice and judicial review

IV. EVOLUTIONS OF DOCTRIN OF BASIC STRUCTURE BY A SERIES OF CASES

Sl.No	Case	Court's decision
1	Sankari Prasad Vs. Union of India-1951	Parliament can amend the whole of the constitution including fundamental rights and Article 13(2) does not cover amendment
2	Sajan Singh Vs State of Rajasthan 1965	Court preserved the same decision or ruling of Sankari Prasad. Here the Parliament clarifies that the term 'Law' does not denote 'amendment'
3	Golaknath Vs. State of Punjab Case	Parliament had the power to amend any parts of the Constitution including the portion of Fundamental rights
4	Keshavananda Bharati Vs. State of Kerala 1973	Parliament has capacity to correct any parts of the constitution, however the basic structure of the constitution should be kept up. The basic structure includes the rule of law, democracy and judicial review.
5	Indira Gandhi Vs. Raj Narain	court reaffirmed the judgment in Keshavananda Bharati case and said that rule of law and judicial review is the basic structure of our constitution
6	Minerva Mill Vs. Union of India 1980	Harmony between Fundamental Rights and DPSP, Judicial Review, and the independence judiciary is the basic structure of the constitution.

7	Indira Sawhney Vs. Union of India-1993	The rule of law is the basic structure of the Indian Constitution.
8	S.R Bommai Vs. Union of India 1994	The federal structure, unity and integrity of India, secularism, socialism, social justice and judicial review are the basic structure of the Indian Constitution.

Figure 1. Important cases

V. CONCLUSION

Alexander Hamilton, one of the chief supporters of development of modern Constitutionalism argued that without a bill of rights, the government would become corrupt and destroy the freedom of individuals. To him, the Constitution is the law of the land. The power of Parliament to amend the Constitution is derived from Article 245, 246 and 248 of the constitution, not from Article 368 which only deals with procedure of amendment. While making the constitution amendment the basic structure should be kept up. The Basic structure doctrine emphasizes that the values and principles must exist for constitutionalism itself to exist. Upendra Baxi once argued that 'if you do not impose brakes, the engine of amending power would overrun the constitution, from here the basic structure doctrine emerged. It is protected by the Supreme Court by the capacity of Judicial Review.

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