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# Revisiting Amendability of Fundamental Rights

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## ABSTRACT

*This article delves into intricate question of amending fundamental rights within Constitution of India, pressing its historical development and judicial precedents. Despite being one of the lengthiest constitutions, it incorporates mechanism for amendment. There is Constitutional tassel between article 13(2) and Article 368, examining key precedents such as Shankari Prasad, Sajjan Singh, and Golak Nath. The Keshavanand Bharati case solidified the doctrine of basics structure, establishing that while Parliament possesses the power to amend, it cannot alter the fundamental essence of the Constitution. The journey of amenability unfolds against the backdrop of the sacredness of fundamental rights and the socio economic needs of society. The doctrine of basic structure, though a legal fiction, acts as a safeguard against arbitrary alterations to the fundamental principles of the constitution. This article offers a comprehensive exploration of the dynamic interplay between constitutional amendments and the preservation of the constitution's essence.*

**Keywords:** Fundamental Rights, Amendment, Article 368, Constitution, Amenability.

## I. INTRODUCTION

Constitution of India is outcome of decades of struggle of independence movement. It is not just a piece of paper but contains noble ideals on which freedom fighters struggled for years and many laid down their lives. Constitution of India is one of the lengthiest constitutions in the world. Constitution reflects political, social, and economic conditions of its drafting period. But time is not static, socio-economic conditions change. The constitution has amending provision which enable to amend it as per suitable conditions of time.

During British rule in India, Rights of the people were violated on a large scale and this made it strong case to declare fundamental rights in part III of constitution. Fundamental rights are most significant parts of constitution. This article specifically discusses parliament's power to amend fundamental rights and evolution of basic structure doctrine through series of classic constitutional precedents.

**There are three modes** of constitutional adaptation. Firstly, the Constitution is a dynamic

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document. Its interpretation keeps on evolving by judiciary without changing the original text. US constitution being one of the shortest around the globe, offers vast scope for judicial creativity. Contrary case with Indian Constitution, being very detailed and language being specific, opportunity for judicial interpretation is relatively small. Secondly, conventions of constitutional practice can evolve out of repeated usage over time. Some Supreme Court judges have even denied distinction between text of constitution and established convention.<sup>1</sup> Third formal mode is constitutional amendment. However rigid or flexible, almost every constitution has some procedure embedded for its amendment. A constitution which is not capable of change shall fail to sustain socio-political flux. This amending process is also called as ‘constituent’ process.

## **II. ARTICLE 368: AMENDMENT OF CONSTITUTION**

Amendment provisions in Indian Constitution are combination of flexibility of British constitution and rigidity of US constitution. Depending on importance of provision, rigidity of amending procedure is divided into three parts:

1. Some of the less significant provisions can be amended with ordinary legislative process of parliament. These provisions are immune from special procedure provided in section 368. Some of these provisions are Article 11 (acquisition and termination of citizenship) , Articles involving Second Schedule which contains salaries and allowances of certain officers<sup>2</sup>, Article 105(3) parliamentary privileges etc.
2. Second category amendment includes some of the vital provisions, for which Bill has to be introduced in either House of Parliament. Bill has to be passed in each house by majority of total membership and not less than two third of members of House present and voting. After President’s assent, Constitution stands amended. This special majority rule is provided in Article 368.
3. Third category includes provisions related to federal character of the Nation. Amendment to these provisions need special majority and above all, it require assent of half of the State legislature. Some of the ‘entrenched’ provisions are as follows :
  - President’s election : Article 54 and 55
  - Executive power of Union and State : Article 73 and 162
  - Supreme Court and High Court
  - Power sharing between Union and State.(legislative, administrative, Financial)

- Article 368 itself.

Surprisingly, Constitution makers did not put the fundamental rights under third category. Here question arises that whether they wanted fundamental rights to be abridged or they intentionally did not put fundamental rights in Article 368 because they expected fundamental rights not to be removed or amended forever.

### **III. AMENABILITY OF FUNDAMENTAL RIGHTS: THUG OF WAR BETWEEN ARTICLE 13(2) AND ARTICLE 368**

Article 13 (2): The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. Supreme Court has given few important decisions on whether amending scope of article 368 include fundamental rights or not ?

#### **1. Shankari Prasad Singh v UOI, 1951<sup>4</sup>**

Court checked validity of the Constitution (First Amendment) Act, 1951 which added Ninth Schedule to Constitution and added many state land law reforms to Ninth Schedule which are immune from challenge in the court. It was argued that article 13 bars State to make laws which contravene the Fundamental Right, and the word ‘law’ in Article 13 also include constitutional amending law. Therefore validity of such law should be scrutinized.

Court adopted the literal interpretation of provisions upheld the validity of the First Amendment. Court ruled that the ‘law’ in Article 13 does not include amending law. Court stated that the context of Article 13 require rules and regulations to be in accord with fundamental rights and article 13(2) does not dilute power of Parliament under Article 368. Therefore power under article 368 can be stretched to amend Fundamental Rights as well. Court here clearly distinguished between ordinary legislative power and constituent power to amend. Both the articles were taken in harmonious construction.

#### **2. Sajjan Singh v Rajasthan, 1965<sup>5</sup>**

In this case, Constitution (Seventeenth Amendment) Act, 1964 was in question. Numerous statutes which affected property rights were placed in Ninth Schedule to give effect to agrarian reform. Court dealt with same question of relation between Article 13(2) and Article 368. The court made distinction between ‘ordinary law’ and ‘constitutional law’ made in constituent power and reiterated the decision in Shankari Prasad with majority. Still, in dissenting opinion, Justice Hidaytullah expressed, “the Constitution gives many assurance in Part III that it would be difficult to think that they were play-things of a special majority.” While Mudholkar, J.

signified that every Constitution has certain fundamental features which could not be changed. His views became ground for Basic Structure Doctrine.

### **3. LC Golak Nath v State of Punjab, 1967<sup>6</sup>**

Taking hopes from dissenting opinions from Sajjan Singh case, eleven judges bench was formed to look into the same issue of validity of Constitution (Seventeenth Amendment) Act. Over seventeen years of working of constitution, fundamental rights were heavily amended. Worried on such situation, the court overruled earlier Shankari Prasad and Sajjan Singh and took the position that fundamental rights are beyond Parliament's constituent power to amend them.

Majority Judges made creative lines of arguments to declare that Fundamental Rights are beyond amendment.

- They observed that Article 368 (Prior to 24<sup>th</sup> Constitution Amendment) provide only procedure for constitutional amendment and not confer substantive power to amend. The power to amend the constitution was located at Article 248 which is residuary legislative power of Parliament. Therefore, amendment to Constitution would be 'law' within Article 13.
- Court interpreted Article 13 inclusively and broadly, in its comprehensive sense, term 'law' in Article 13(2) shall include Constitution Amendment law. Therefore, part III of Constitution shall remain untouched from Article 368.
- Article 368 provides amendment procedure which requires either special majority or 'entrenched provisions' which require special majority with assent of half of the state legislatures. Fundamental Rights which are considered as soul of Indian Constitution do not find its place under any of such articles. From this line of arguments, intent of Constitution makers can be perceived as they wanted Fundamental Rights to be excluded from any of the procedure under Article 368 therefor not amendable.

Interesting question arisen that whether power to amend also include power to rewrite or destroy the original text of Constitution. Majority did not give clear answer to this but only underlined that Article 368 does not give such drastic power to Parliament. This thought became crucial matter of discussion in Kesavanand Bharati. The decision was divided by 6:5. Minority was of the opinion that amending power shall include power to add, alter, substitute, or delete any provision in the Constitution without any limitation. Dissenting judges made a point that it will create stagnation and will work as hurdle in way of social welfare legislations.

Overall, Golak Nath judgment was crucial in legal history and challenging as well. Crucial in

the sense that it declared Fundamental Rights to be non-amendable after series of cases and challenging because now court have to interpret Fundamental Rights narrowly while checking validity of welfare legislations which are enacted to ameliorate the poor masses. Court took the view that the judgment would apply prospectively because several legislations were passed to bring out land reforms and it would have been created inconvenience.

#### **4. Kesavanand Bharati<sup>7</sup>**

It all started when Smt. Indira Gandhi brought two amending bill after winning 1971 general elections. These bills sought to neutralize effect of Golak Nath and asserted “Supremacy of Parliament”. Silent Features of Constitution (Twenty-fourth) Amendment Act:

- It added clause to Article 13 that Article 13 shall not apply to constitutional amendment made under Article 368.
- It added clause to Article 368 that Article 13 shall not apply to any amendment made under Article 368.
- It also changed marginal note to Article 368 from “Procedure for Amendment to the Constitution” to “Power of Parliament to amend the constitution and Procedure therefor”.

Constitution (Twenty-fifth) Amendment Act which made following changes –

- Inserted Article 31C which declared that Articles 14, 19 and 31 shall not apply to a law enacted to effectuate the policy underlying Articles 39(b) and (c) and such law shall not be challenged in the Court.
- It also substituted word “compensation” to “amount” from Article 31(2).

As expected, both the acts were challenged in Supreme Court by Swami Kesavanand Bharti and 13 Judges Bench was formed and arguments for over 60 days.

- (a) Court held that the power to amend the constitution is to be found in Article 368 and not in residuary power under Article 248. Such view in Golak Nath was overruled.
- (b) Court made distinction between ordinary legislative law and constitutional law made under constituent power. Therefore, constitutional amending law shall not come under preview of word ‘law’ in Article 13(2). Thus, parliament’s power to amend the Constitution shall be stretched to amend the Fundamental Rights.
- (c) Court interpreted the expression “amend” in strict sense and cleared that power to amend shall not include fundamental change in the Constitution. Amending act should not

result in destroying basic structure of constitution.

(d) Following are the features regarded as part of basic structure therefore non-amendable:

- (i) Supremacy of Constitution
- (ii) Democratic Form of Government
- (iii) Secularism
- (iv) Separation of Power
- (v) Federalism

Above list is not exhaustive. Court may add further features as and when case arise on validity of particular amendment. In case fundamental rights are amended or abrogated, court shall adjudicate on which fundamental right to be regarded part of basic structure.

(e) Twenty-Fourth Amendment which gave power to Parliament to amend the Fundamental Rights was held valid by the court as it only express that which is already there in the constitution. Parliament has power to amend Fundamental Rights as long as it does not touch the basic features of Constitution.

(f) Twenty-Fifth amendment was held valid subject to –

- (i) The ‘amount’ for property acquired should be adequate and should not be ‘illusory’ or ‘arbitrary’.
- (ii) First part of Article 31C was held valid on the ground that it exempt limited class of legislations from application of Articles 14, 19 and 31. Second part of 31C was held invalid on reason that court have power to go into the question whether law made to effectuate the policy under Article 39(b) and (c) achieve its purported objectives.

Supreme Court reserved its power to handle future major interference with Fundamental Rights or other constitutional provisions. It was conscious decision to propose quite vague term ‘fundamental features’ so that it shall give fairly good scope of interpretation. Constitution derives its original power from “People of India” and even special majority by 2/3 vote in Parliament does not represent national consensus, as only less than half of registered voters cast their vote.

Basic philosophy of Doctrine of Basic Structure was beautifully explained by Hedge and Mukherjee JJ as follows: “Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every

religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a constitution like ours contains certain features which are so essential that they cannot be changed or destroyed.”

Basic Structure Doctrine is legal fiction created by judicial minds. It was highly creative and rescuing decision. The doctrine has now very well embedded in minds of people of this country and law makers as well. The doctrine was also adopted by the Supreme Court of Bangladesh in 1989, by expressly relying on the reasoning in the Kesavananda case, in its ruling on Anwar Hossain Chowdhary v. Bangladesh.<sup>8</sup>

#### **IV. CONCLUSION**

In conclusion, the journey of amendability of fundamental rights reflects dynamic interplay between the sacredness of fundamental rights and socio-economic need of society. The early decisions, such as Shankari Prasad and Sajjan Singh outlined ‘supremacy of parliament’. However, situation changed with the landmark Golak Nath case, where court, in daring move, declared fundamental rights as ‘transcendental’. The subsequent Kesavanand case marked a turning point which established the doctrine of basic structure. Court delicately balanced the parliament’s power to amend the constitution and imperative to preserve the essence of constitution. Doctrine of basic structure though legal fiction works as defensive wall against arbitrary alterations of fundamental principles of the constitution.

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