

THE BASIC STRUCTURE DOCTRINE AND THE POWER TO AMEND THE CONSTITUTION IN INDIA: A COMPARITIVE ANALYSIS

Written by Anuragsheel Gupta

3rd Year BA LLB Student, School of Law, Christ (Deemed to be University)

ABSTRACT

The Indian Constitution is the longest written Constitution in the world and consists of 448 articles, which are grouped into 25 parts. With 12 schedules and five appendices. The Indian Constitution is the supreme law of the country and thus is basis of all governance in the country. The Constitution is the safeguard of the rudimentary character of the modern Indian democracy. The legislature in India is responsible for formulating new laws, amending the old ones and in some cases squashing irrelevant ones. The amendability of the Constitution clearly raises the issue of there being a chance of misuse of powers given to the government in order to destroy the democratic values of the nation. This paper tends to look into the evolution of restriction on the amending powers of the Constitution given to the government and compare them to other common law countries.

Keywords: *Constitution, Amendment, Restrictions, Democracy, Essence, Common Law*

INTRODUCTION

The Constitution of India was adopted on 26th January, 1950 after years of debate and drafting by the Constituent Assembly which consisted of various scholars and representatives of various sections of the Indian society. The Indian Constitution is the longest written Constitution in the world and consists of 448 articles, which are grouped into 25 parts. With 12 schedules and five appendices. The Indian Constitution is the supreme law of the country and thus is basis of all governance in the country.

The Constitution restricts and prevents the government from going against the democratic character of the nation and balances powers to not let arbitrary usage of power happen. India is a nation with a strong parliamentary structure and all legislative decisions are taken by such group of elective representatives at centre and state levels. The Constitution can be called the safeguard of the rudimentary character of the modern Indian democracy.

The legislature in India is responsible for formulating new laws, amending the old ones and in some cases squashing irrelevant ones. The Constitution, inherently being a legislation can also be amended. The amendability of the Constitution clearly raises the issue of there being a chance of misuse of powers given to the government in order to destroy the democratic values of the nation. The government's powers to amend the constitution has always been a question of debate and has been greatly disputed over the years. Various amendments have been challenged in the past and the judiciary has stepped in as the custodian of the Constitution to give various principles as to the government's powers in this case and also to protect the values upon which India persists.

Article 368 of the Indian Constitution talks about the power given to the government to amend the Constitution. It provides for the parliament to amend, add or repeal any provision of the Constitution by introducing a bill in either of the houses of the Parliament and the said bill needs to be passed with special majority (two-thirds) of the total membership of the house and the upon the assent of the President, the provisions of the Constitution will be said to be amended in accordance with the bill. Under Article 368, ratification of one-half states needs to be taken in case of matters related to state list or certain objects mentioned under said article. Herein, there is no criteria to decide upon the validity or the constitutionality of the amendments in terms of the Constitution and its essence and thus the interpretations and doctrines

propounded by the judiciary are majorly enforced as restrictions and basis of testing the constitutionality of an amendment.

AMENDING OF CONSTITUTION IN OTHER COUNTRIES

The Indian Constitution is a rather modern and young Constitution in comparison to other common law countries like the United States of America and the United Kingdom. India has been held to be a unitarily federal country¹, i.e. the Centre can overpower the State in case of conflict but there is also separation of powers which differentiates areas of governance into lists under Schedule VII of the Constitution and in case of amendments made to certain provisions of the Constitution, ratification of half of the states is needed for said bill to pass. This makes the states a part of the amending procedure in certain cases and the participation of the states is eminent in passing of said amendments.

In the United States, the authority to amend the Constitution is derived from Article V of the Constitution. After Congress proposes an amendment, the Archivist of the United States, who heads the National Archives and Records Administration (NARA), is charged with responsibility for administering the ratification process under the provisions of 1 U.S.C. 106b. The Constitution provides that an amendment may be proposed either by the Congress with a two-thirds majority vote in both the House of Representatives and the Senate or by a constitutional convention called for by two-thirds of the State legislatures. None of the 27 amendments to the Constitution have been proposed by constitutional convention. The Congress proposes an amendment in the form of a joint resolution. Since the President does not have a constitutional role in the amendment process, the joint resolution does not go to the White House for signature or approval. Thirty-three amendments to the United States Constitution have been proposed by the United States Congress and sent to the states for ratification since the Constitution was put into operation on March 4, 1789. Twenty-seven of these, having been ratified by the requisite number of states, are part of the Constitution. The first ten amendments were adopted and ratified simultaneously and are known collectively as the Bill of Rights. Six amendments adopted by Congress and sent to the states have not been ratified by the required number of states. Four of these amendments are still technically open

and pending, one is closed and has failed by its own terms, and one is closed and has failed by the terms of the resolution proposing it.

The Constitution of United Kingdom can be called to be a flexible one. A flexible constitution is one that may be amended by a simple act of the legislature, in the same way as it passes ordinary laws. The 'uncodified' constitution of the United Kingdom consists partly of important statutes, and partly of certain unwritten conventions. The statutes that make up the United Kingdom constitution can be amended by a simple act of Parliament. United Kingdom constitutional conventions are held to evolve organically over time.

On comparison of the amending procedures in relation to the Constitutions of the three countries, it can clearly be seen the United States' procedure is the most time consuming and difficult based upon the sheer need for every amendment needing states' ratification. The Indian procedure is in between then other two countries in terms of the difficulty involved as to the amending of Constitution as the Centre has all power to amend the Constitution and the ratification of states is only needed on certain amendments involving the interests of the state governments. This makes the procedure less time consuming than the one in United States. The procedure in the United Kingdom is the least time consuming and easiest of the three. The Constitution of United Kingdom is not a written document and the political set up of United Kingdom leads to there being no need for state participation per se. The House of Commons and House of Lords can vote and make decisions and thus there isn't a case wherein a bill proposing the amendment may not be ratified. This comparison clearly reflects upon the political character of the nations and the working of the government there.

EVOLUTION OF AMENDABILITY OF INDIAN CONSTITUTION

There isn't a set limit as to the powers of the government in terms of the amending powers in relation to the Constitution. This has led to a lot of disagreements since the adoption of the Constitution between the legislature and the judiciary. The judiciary has acted as the custodian of the Constitution and protected it from being destroyed by arbitrary amendments done by the legislature.

The question as to limitation on the powers of the government has been brought before the court and there have been a series of overruled judgements until the landmark judgment of *Kesavananda Bharati v. State of Kerala*ⁱⁱ. The interpretation used by the court herein considers the Constitution as a dynamic body and gives the government powers to amend it whilst keeping the basic essence of the legislation alive and protecting the values upon which it was drafted by the Constituent assembly.

In the cases of *Shankari Prasad Singh Deo v. Union of India*ⁱⁱⁱ and *Sajjan Singh v. State of Rajasthan*^{iv}, the Supreme court ruled in favour of government giving them unlimited powers to amend the Constitution. It was further held that Constitutional amendments under Article 368 were said to be outside the definition of 'law' under Article 13 (2).

In the case of *Golaknath v. State of Punjab*^v, Constitutional amendments under Article 368 were held to be within the meaning of 'law' under Article 13 and the government had limited powers as to the amendability of the Part III of the Constitution. This judgement overruled the previous judgements and put restrictions upon the amendability of the Constitution.

BASIC STRUCTURE DOCTRINE

The Basic Structure Doctrine was propounded in the landmark judgement of *Kesavananda Bharati v. State of Kerala*^{vi}, wherein the largest constitutional bench of 13 judges went on to look into the powers of the government as to the amendability of the Constitution and the extent to which the Constitution could be amended. The judgement provided for procedure to adjudge upon the validity of a Constitutional amendments based on them not going against certain features of the Constitution. The Supreme Court herein limited the powers of the government to amend the Constitution by making certain features of the Constitution unamendable. This doctrine was propounded but no the list has been non-exhaustive and the Courts have read several new features as a part of the basic structure from time to time.

In *Kesavananda Bharati v. State of Kerala*^{vii}, features like Supremacy of the Constitution, Republican and Democratic form of governance, separation of powers, secular and sovereign character were found to be part of the basic structure. In the cases of *Indira Gandhi v. Rajnarian*^{viii} and *Kihoto Hollohan v. Zachillhu and ors.*^{ix}, Rule of Law was considered to be a

part of the basic structure. In the *S.R. Bommai v. U.O. P*, Federalism was held to be an essential feature of the Constitution and hence part of the basic structure. The *Minerva Mills v. U.O. P* case recognized judicial review as a part of the basic structure of the Constitution. In *Re: The Berubari Union case*^{xii}, the court found the preamble to not be a part of the Constitution, which was overruled in the *Kesavananda Bharati v. State of Kerala*^{xiii} and the preamble could only be amended in terms of the basic structure doctrine.

The basic structure doctrine has thus substantiated limitations as to the amount of amendability is allowed. The government can amend any part of the Constitution but the amendment cannot be affecting any of the features under the basic structure doctrine. Hence the Constitution can be kept updated and irrelevant things can be removed but the essence or the soul of the Constitution cannot be fiddled with. This also makes the Constitution indestructible and thus it neither be taken down completely at any point of time nor can it be superseded to gain unsanctioned powers. There is hence no way to dismantle the Indian Constitutional setup and to get away with the Constitution.

CONCLUSION

The Indian Constitution was made to be a dynamic legislation to hold validity over a number of years without being outdated and still look after the interests of the varied groups in the Indian population. It can clearly be seen to have been drafted by taking into consideration the best features from Constitutions around the world. The Basic Structure doctrine propounded by the honourable Supreme Court is the guiding principle to safeguard these values and keep the essence of the Constitution intact. Further the comparison with other countries shows the clear balance in the amount of difficulty and procedural working required to amend the Constitution in India, making it one of the best examples of its kind.

REFERENCES

-
- ⁱ *S.R. Bommai v. U.O.I*, AIR 1994 SC 1918.
 - ⁱⁱ AIR 1973 SC 1461.
 - ⁱⁱⁱ AIR 1951 SC 458.
 - ^{iv} AIR 1965 SC 845.
 - ^v AIR 1967 SC 1643.
 - ^{vi} Id note 2.
 - ^{vii} Supra 2.
 - ^{viii} AIR 1975 SC 2299.
 - ^{ix} AIR 1993 SC 412.
 - ^x AIR 1994 SC 1918.
 - ^{xi} AIR 1980 SC 1789.
 - ^{xii} AIR 1960 SC 845
 - ^{xiii} Supra 2.

