Contradictory Statement of Article 13 and 368

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Abstract

Legal battle between the Indian Judiciary and the parliamentary bodies of the country started in the early 1950s. Perhaps no issue of Indian constitutional law has received more scholarly attention than the basic structure doctrine. The notion that courts can invalidate constitutional amendments poses difficult questions about the scope of judicial review and the nature of India's democracy. This 'basic structure doctrine' today is a settled part of Indian constitutional Law, though only in five further cases the Supreme Court has invoked the doctrine to strike down constitutional amendments. The basic structure doctrine is a form of implicit unamendability – the Constitution of India has no explicitly unamendable provisions, and the Supreme Court has inferred protected principles from the Constitution's structure. This paper will focus on the giving structure to the basic structure of Indian Constitution. This paper is divided into three parts; first part is the basic provisions and the evolution of the 'basic structure doctrine,' second part is about the Amendment powers as under Article 368, third part focus on the Judicial review of Constitutional Amendments as under Article 13.

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Introduction

On one hand Article 13(2) protects its citizens against any law that may be created and has the characteristics of being violative of part III of Indian constitution[i], on the other hand Article 368 empowers the legislature to amend any part of the constitution.[ii] The point of contention was whether the amendment made under Article 368 fall under the ambit of Article 13(2).

In the case of "IC Golaknath and others Vs. State of Punjab."[iii] The majority bench held that nothing in Article 13(2) applies to any amendment made under Article 368. The court observed that the amendment made under Article 368 are not law and therefore it is not prescripted by the limitation of Article 13(4) in response of this Judgement the legislature brought forward 24th Constitutional amendment[iv] stating that Article 368 which givers the power to the legislature to make amendment to the Constitution and protecting it against the Doctrine of Separability[v] and Doctrine of Eclipse.[vi] The supreme court found that the constitutional amendments violated the constitution and declared them null and void.

The amendment was further challenged in the landmark judgement of, "kesavananda bharati v State of Kerala."[vii] The 13 Judge bench acknowledged that the legislature has the power to amend any part of the constitution including Part III that deals with Fundamental rights. However it imposed a limitation that while making amendments the legislature can't pass any such law that violates the Basic Structure of Indian Constitution. In the event of any law being in contention it is the responsibility of judiciary to look into the spirit of the constitution and the intention with which, it was drafted.

In the so-called election case "Indra Ghandhi v. Raj Narain, 1975,"[viii] the supreme court held that free and fair elections is an essential requirement of democracy which itself is a basic feature of Constitution that even the amending power must respect. Since then, the basic structure doctrine has attracted much attention, nationally and internationally, and has become a controversial issue of first rank in the constitutional discourse in India.

According to Krishnaswamy, the basic structure Doctrine is a 'legitimate doctrine in Indian Constitutional law' that has 'a sound constitutional Basis' (p. xxxiii). The latter statement is meant to defend the Supreme court against the accusation of widening the scope of judicial

review beyond constitutional boundaries, to the detriment of democratically elected decision – makers.

"Basic structure doctrine is a common law doctrine that are developed on a case-by-case basis."[ix] And the contours of the doctrine are hazy, as the Supreme Court has not specified which features of the constitution made up its basic structure.

Basic provisions and the evolution of the 'Basic Structure Doctrine'

The basic structure doctrine is a form of implicit unamendability – the Constitution of India has no explicitly unamendable provisions, and the supreme court has inferred protected principles from the constitution's structure. The doctrinal development of basic structure against the fraught political backdrop the 1960s and 70s. Also, the doctrine from *Shankari Prasad* (1951),[x] which rejected implicit unamendability, to the landmark *kesavananda* judgement (1973), which adopted the basic structure doctrine.[xi] Some unamendable aspects identified in *kesavanada* include secularism, democracy, federalism, judicial independence, and the rule of law, but this is a non-exhaustive list that is subject to addition or modification.[xii]

In most recent cases, the court has included general features of representative democracy, such as free and fair elections, and foundational rights, like equality, within the basic structure.[xiii] The Fifteenth Amendment Act (2011) made the constitution's preamble, fundamental rights, fundamental principles of state policy, and "provisions of articles relating to the basic structure" immune from amendment.[xiv]

A decision of Special Bench of 11 Judges, by a majority of 6-5, on February 27, 1967, that "Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights" (IC Golak Nath & Ors. Vs. The State of Punjab & Ors.)[xv]. Which was further overruled in the landmark judgement, On April 24, 1973, a Special Bench comprising 13 Judges of the Supreme Court of India ruled by a majority of 7-6, that Article 368 of the Constitution "does not enable Parliament to alter the basic structure or framework of the Constitution" (Kesavananda Bharati vs. The State of Kerala)[xvi].

Instead, the court pronounced what has come to be known as "the basic structure" doctrine. Amy part of the Constitution may be amended by following the procedure prescribed in Article 368. But no part may be so amended as to "alter the basic structure" of the Constitution. It is unamendable. Following India's lead, many other countries – in Asia, Africa, and Latin America – Adopted implicit unamendability into their constitutional schemes.[xvii] In South Asia, Bangladesh fully adopted the basic structure doctrine in *Anwar Hussian Chowdhury* (1989), which referenced *kesavananda.*[xviii] However, unlike in India, the Bangladesh Constitution was later amended to explicitly insert and entrench the basic structure doctrine. Roznai demonstrates that recent constitutions are more likely to include unamendable provision.[xix] He shows that while only 17 percent of the world's constitution from 1789 to 1944 had unamendable provisions, 27 percent of constitutions enacted from 1945to 1988 had such provision.

The Amendment powers under Article 368

Power of Parliament to amend the Constitution and procedure therefor

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in

(a) Article 54, Article 55, Article 73, Article 162, or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those

Legislatures before the Bill making provision for such amendment is presented to the President for assent

(3) Nothing in Article 13 shall apply to any amendment made under this article

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article PART XXI TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS[xx].

Both the common and civil law traditions recognise a distinction between constituent power and constituted power. Constituted power derives from a higher source – often from "the people" – and establishes the constitutional order. Constituted power, by contrast, operates within the constitutional framework and is limited by it. Ordinary legislative authority is the prototypical example of constituted power. The amendment power does not fit neatly into either category, which poses theoretical challenges.

Amendment procedures are usually extraordinary, and amendments alter the parameters under which constituted power is exercised. Thus, the amendment power is procedurally and substantively distinct from the legislative power. The amendment power is *sui generis* and contains elements of both constituent and constituted power.[xxi] The amendment power is a "secondary constituent power" that is delegated by the primary constituent power.[xxii]

"Since the amendment power is delegated, it ought to be regarded as acting as the trustee of 'the people' in their original constituent power. True, it has the 'supreme' amendment power, but it is only a *fiduciary power* to act for *certain ends*."[xxiii] The amendment track – fits between the other two and serves as "an ordinary track of constitutional politics" in which the secondary constituent power is exercised.[xxiv] Unlike the primary constituent track, which is not bound by prior constitutional rules and may "exercise its authority de novo",[xxv]the amendment track must proceed according to the rules established by the primary constituent power: it is a "trustee of the people."[xxvi]

Within a "three-track democracy," the paradox of unamendability disappears. The primary constituent power may deem certain constitutional provisions unamendable and therefore beyond the pale of the powers delegated to the secondary constituent power. Thus, the most fundamental constitutional principles should be the most difficult to amend. Roznai provides examples of constitutions that require popular referendums to amend certain principles or to revise the constitution entirely but impose less burdensome requirements to enact ordinary amendments.[xxvii]

Such procedures more closely resemble "the people's" primary constituent power and therefore have greater legitimacy to enact constitutional change than those more akin to ordinary legislative procedures. For instance, in Ireland, constitutional amendments are ratified by referendum and the Irish Supreme Court has held that "no organ of the state…is competent to review or nullify a decision of the people."[xxviii]

Judicial review of Constitutional Amendments under Article 13

Judicial review of amendments appears undemocratic, only if we view judges as silencing "the people."[xxix] If the amendment power were a true expression of the original constituent power, this objection would have great force. The amendment power to be *sui generis*, secondary constituent power, which lies between the primary constituent power and the ordinary legislative power. Thus, when judges hold amendments unconstitutional for violating core aspects of the Constitution, they are keeping faith with the primary constituent power and are "vindicating, not defeating, the will of the people."[xxx]

Judicial enforcement of unamendability can be an institutional "trump card," applied selectively by courts to aggrandise their authority vis-à-vis the elected branches of government.[xxxi] The Indian Supreme Court's use of the basic structure doctrine has been criticised along these lines.[xxxii]

Judicial review of constitutional amendments must be conducted with restraint and according to set guidelines. Roznai sets forth a three-part process for courts to follow in reviewing the constitutionality of amendments. They should: (1) identify which provisions or principles in

the Constitution are protected from amendment; (2) develop a theory of unamendable principles; and (3), establish an interpretive method through which to decide particular cases.[xxxiii]

The Indian Supreme Court confronted a similar issue in *Supreme Court Advocates-on-Record Association v. Union of India* (2015).[xxxiv] In that case, Parliament had created a National Judicial Appointments Commission (NJAC) through the Ninety-Ninth Amendment to the Constitution. The NJAC would, among other things, take over appointments to the higher judiciary. Such appointments were originally vested in the President of India, acting on the advice of his cabinet and sitting justices. But over a series of judgments in the 1980s and 90s, the Supreme Court vested final appointment authority in a group of senior justices known as the "collegium". It vested the appointments power between Supreme Court justices, the Union Minister of Law and Justice, and two "eminent persons." However, the Supreme Court held the NJAC unconstitutional for violating judicial independence. Its judgment fails to establish how the basic structure of the Constitution is violated by a more deliberative, institutionally independent judicial appointments process.

Unconstitutional Constitutional Amendments is a work of great breadth and theoretical sophistication. It may well be the final word on the coherence of constitutional unamendability and the legitimacy of judicial review of amendments. Judicial review is a principle or a legal doctrine or a practice whereby a court can examine or review an executive or a legislative act, such as law or some other governmental or administrative decision, and determine if the act is incompatible with the constitution. In some countries, like the United States, France and Canada, judicial review allows the court to invalidate or nullify the law or the act of the legislature or the executive if they are found to be contrary to the constitution. In the United Kingdom, judicial review powers are restricted; the courts do not have authority to nullify or invalidate legislation of the Parliament. Likewise, there may be other countries where courts may have different kind of restrictions and may review only one branch.[xxxv]

Judicial review is one of the essential features of the Indian Constitution; it has helped preserve the constitutional principles and values and the constitutional supremacy. The power of judicial review is available to the Supreme Court and the High Courts in different states in the matters of both legislative and administrative actions. Largely, this power has been applied for the

protection and enforcement of fundamental rights provided in the Constitution. To a lesser extent, judicial review has also been used in matters concerning the legislative competence with regards to the Centre State relations.

With respect to judicial review on matters of executive or administrative actions, courts have employed doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness', and the 'principles of natural justice'. Essentially, the scope of judicial review in courts in India has developed with respect to three issues: 1) protection of fundamental rights as guaranteed in the Constitution; 2) matters concerning the legislative competence between the centre and states; and 3) fairness in executive acts. Discussed below are some of the salient features, issues, as well as examples of the ways in which judicial review is practiced by the Supreme Court of India.

Conclusion

The Supreme Court has extended the practice of judicial review to the matters concerning the constitutional amendments by developing the doctrine of the basic structure of the Constitution. Article 368 confers power to the Parliament to amend the Constitution: "by way of addition, variation or repeal any provision of this Constitution" This Article in its wordings does not provide any limitation on the power of the Parliament to amend the Constitution. And as discussed earlier, Article 13(2) states that "the State shall not make any law which takes away or abridges the rights conferred by this Part (Part III - Fundamental Rights)." Article 13(2) limits Parliament's amending authority in matters of fundamental rights. In order to overcome this restriction, in 1971, the Parliament adopted the 24th Amendment to the Constitution altering Articles 13 and 368 in a way that allowed itself with unlimited powers of amendments including authority to amend the fundamental rights provisions.

The landmark 1973 Supreme Court case of Keshavananda Bharathi v. State of Kerela,[xxxvi] discussed the question about the unlimited constitutional amendment powers of the Parliament and established the doctrine of the basic structure or feature of the constitution. This doctrine invalidates any constitutional amendments that destroys or harms a basic or essential feature of the Constitution, like secularism, democracy, and federalism. Supreme Court has also held

judicial review to be the basic structure or feature of the Constitution; as a result, it can nullify any constitutional amendment that abolishes or disregards judicial review in issues concerning to fundamental rights of citizens.

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[xi] *Kesavananda Bharati v. State of Kerala*, (1973) SCC 225.
[xii] *Kesavananda* (n 8) 366.
[xiii] Roznai (n 2) 47; Krishnaswamy (n 1) 160-61.
[xiv] Roznai (n 2) 49.
[xv] AIR 1967 SC 1643, (1967) 2 SCJ 486.
[xvi] AIR 1973 SC 1461, (1973) 4 SCC 225.
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