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AMENDING POWER IN THE INDIAN CONSTITUTION

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ABSTRACT

The evolution of constitutional and human rights jurisprudence in India reflects a dynamic and progressive transformation shaped by judicial creativity, socio-political developments, and an expanding understanding of fundamental rights. Since the adoption of the Constitution of India in 1950, the Supreme Court of India has played a pivotal role in interpreting and redefining the scope of rights, moving from a formalistic to a more purposive and rights-oriented approach. Initially, in cases like *A.K. Gopalan v. State of Madras*, the Court adopted a narrow interpretation of personal liberty. However, this approach underwent a significant shift in *Maneka Gandhi v. Union of India*, where the Court introduced the doctrine of substantive due process, thereby expanding the ambit of Article 21.

Over time, the judiciary has developed innovative doctrines such as the Basic Structure Doctrine in *Kesavananda Bharati v. State of Kerala*, ensuring that the core principles of the Constitution remain inviolable. Public Interest Litigation (PIL), pioneered in cases like *S.P. Gupta v. Union of India*, democratized access to justice and enabled the protection of marginalized groups. The Court has also interpreted fundamental rights to include socio-economic entitlements, as seen in *Olga Tellis v. Bombay Municipal Corporation* and *Unni Krishnan v. State of Andhra Pradesh*, thereby bridging the gap between Part III and Part IV of the Constitution.

I. INTRODUCTION

Within a period of 67 years from the date of coming into force, the Constitution of India is amended about 101 times. The Constitution of the USA is amended 27 times in its life of more than two centuries. It cannot be said that respect for the Constitution is high when it is amended less. The need for amendment arises when a provision therein stands in the way of action proposed to meet a genuine requirement.[1054]

Through the amending process the defects in the existing Constitution can be removed and also the safeguard provided against unforeseen and strains put on it by the onward march of time. It is, therefore, quite possible that a Constitution drafted in one era and in a particular content may be found inadequate in another era and another context. Times are not static, they change and, therefore, the life of a nation is dynamic, living and organic; it's political, social and economic conditions change continuously from time to time. Social morels and ideals change which create new problems and alter the complexion of the old ones.[1055]

A Constitution which is drawn up to meet the needs of a community during a particular period cannot meet the changing needs of a community. Hence the necessity for prescribing the method of affecting a change in the Constitution so as to secure the stability

[1054] Jawaharlal Jasthi, *The Constitution-Defied and Defiled* 11 (2017).

[1055] Verinder Grover, *The Constitution of India* 597 (1999).

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of the State and at the same time make the fundamental law sufficiently flexible to keep pace with the time and needs of a changing society. Thus, the amending provision in a Constitution is of great importance for it may enable the country to develop peacefully, the alternative to which may be stagnation and revolution.

The moment the Constitution of a State is reduced to writing, its amending provision assumes great importance because the very object of writing a Constitution depends upon it. In fact, the essence of a written Constitution lies in its mode of amendment. According to John Burgress, the amending process envisaged in a Constitution is the first of the three fundamental parts of a Constitution; the second and the third being the Constitution of liberty and the Constitution of Government.

II. INDIAN CONSTITUTION - AMENDING PROCESS

The Indian Constitution is a federal Constitution and is a written one. Jenningshas said that the Indian Constitution is too long and detailed and too rigid. What makes the Constitution so rigid, he explains, "is that in addition to somewhat complicated process of amendment, it is so detailed and covers so vast a field of law that the problem of constitutional validity must always arise."[1056] Long and detailed it certainly is on sound grounds in the eyes of the Assembly members, but rigid it hasnot proved to be. Nor was it the intention of the Constitution makers to make it rigid. The method of amendment is not complicated as Jennings holds it to be. It is simple, though not far from easy. It has sought to avoid the difficult processes laid down by the American and Australian Constitutions. KC Wheare says that the Indian Constitutions strikes a good balance between extreme rigidity and too much flexibility. Nehru explained the reasons for it. He told the Constituent Assembly, "While we want this Constitution to be as solid and as permanent as we can make it, there is no permanence in the Constitutions. There should be certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living vital, organic people. In any event, we could not make this Constitution so rigid that it cannot be adapted to changing conditions. When the world is in turmoil and we are passing through swift period of transition, what we may do today may not be wholly applicable tomorrow."

It is important to note that the rigidity or flexibility of the amending process essentially depends upon in practice, on the complex of political parties at the Centre and in the States, and the attitude of Supreme Court may take in the final analysis. In the absence of a single party commanding a dominant majority in both Houses of Parliament, as in the case of Congress (I) minority Government headed by PV Narsimha Rao, no amendment can succeed as it would be impossible to secure the requisite majority-absolute as well as two-thirds in each House-as required under Article 368 of the Constitution. The Janata Party assumed office in April 1977, was committed to repealing the Constitution (Forty-Second Amendment) Act, 1976, in toto. Though the Janata Commanded a comfortable majority in the House of the People (Lok Sabha), it was in minority in the Council of States (Rajya Sabha). The Constitution (Forty-third Amendment) Bill, 1977, was introduced in the House of the People and it passed therefrom. But the amendment bill was allowed to languish in the Council of States on fear to be outvoted there. It was after prolonged discussions with the leaders of the opposition and with a good deal of give and take with the leader of the Congress Parliamentary Party that the Forty-third and Forty-fourth Amendments could pass in both the Houses of Parliament and in this process the Janta had to depart from its electoral commitment and that, too, on some crucial provisions of the Forty-Second Amendment.

In case different political parties and groups constituting United fronts were to form

[1056] WI Jennings, *Some Characteristics of Indian Constitution* 9-10 (1953).

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coalition governments, both at the Centre and in the States, the probabilities of such a contingency not being remote, the amending process in regard to the entrenched provisions can hardly operate as they require for their amendment not only a majority of total membership in each House of Parliament and a majority of not less than two-thirds of members present and voting but also ratification by at least one-half of the number of State Legislatures. Such a situation had arisen after the 1967 General Election when the Constitution remained static till 1971 mid-term elections tothe House of the People. One of the reasons which can convincingly be assigned for dissolving the Assemblies of the nine Northern States by the Janata Party Government in April, 1977 was the obvious apprehensions that the process of ratification by the States of the various provisions inserted in the Constitution by the Forty-second Amendment, and to which the Janata Party was committed to repeal would not be forthcoming if the Congress Party remained in majority in all those states. It was exactly the same apprehension when Mrs. Gandhi's Government dissolved the Assemblies of those states once again in February 1980; political vengeance besides.

Judiciary also plays a key role in determining the rigidity of the Constitution. The majority decision in *Golak Nath* case nearly paralysed the amending process. Five to six judges majority held that in future Parliament would not abridge or abrogate fundamental rights through the normal procedure prescribed in Article 368 for amending the Constitution. The Constitution (Twenty-fourth Amendment) Act, 1971 restored to Parliament the power to amend the Constitution on fundamental rights. In *Kesavananda Bharti*, popularly known as *Fundamental Rights case,* the Supreme Court reversed the stand taken by the Court in the *Golak Nath* case, but it put a rider on the power of Parliament by ruling that it had no power to change basic structure or framework of the Constitution.

III. PROCEDURE FOR CONSTITUTION AMENDMENT IN INDIA

The Constitution of India is extraordinary for many wonderful features which will distinguish it from other Constitution even though it has been prepared after following all the known Constitutions of the world and most of its provisions are borrowed from others. As Dr. Ambedkar observed;

"One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More then hundred years have rolled when first written Constitution was drafted. It has been followed by many other countries reducing their Constitution to writing .... given these facts, all Constitution in their main provisions must look similar. The only new things if there be any, in a Constitution framed so late in the day are the variations made to remove the faults and accommodate it to the need of the country"

The Constitution of India provides for a distinctive amending process as compared to the leading Constitutions of the world. It may be described as partly flexible and partly rigid. The Constitution of India provides for a variety in the amending process—a feature which has been commended by Prof. K.C. Wheare for the reason that uniformity in the amending process imposes "quite unnecessary restrictions" upon the amendment of parts of a Constitution.

IV. PARLIAMENTARY PROCEDURE FOR AMENDMENT

The Lok Sabha had made rules providing that except in the matters specified, the procedures for a Constitution amendment bill shall be the same as for other bills.[1057] The matters for which special provisions have been made are:

Each clause or schedule, or clauses or schedules as amended, as the case may be of a bill seeking to amend the Constitution shall be put to the vote of the House separately and

[1057] Rules of Procedure and Conduct of Business in Lok Sabha (New Delhi, Lok Sabha Secretariat,1971), Rule 159.

shall form part of the bill if it is passed by a majority of the total membership of the House and by a majority of not less than two-thirds of the members present and voting.

Provided that the Speaker may, with the unanimous concurrence of the House put clauses and or schedules, or clauses and or schedules as amended as the case may be, together to the vote of the House in which case the result of the voting shall be taken as applicable to each clause or schedule separately and so indicated in the proceedings.

Provided further that if a member requests that any clause or schedule, or any clause or schedule as amended, as the case may be, be put separately, the Speaker shall put that clause or schedule, or clause or schedule as amended, as the case maybe, separately:

Provided further that the short titles, the enacting formula and the long title may be adopted by a simple majority.

The Rules further provide that "amendments to clauses or schedules shall be decided by a majority of members present and voting in the same manner as in the case of any other bill.

The rules also ordain that if the result of the voting shows that the majority of the total membership of the House and the majority of not less than two-third of the members present and voting are in favour of the motion, the Speaker shall, while announcing the result, say that the motion is carried by the majority of not less than two-thirds of the members present and voting.

A bill for amendment of the Constitution by a private member is governed by the rules applicable to private members bills in general. So, the period of one month's notice applies to such a bill also. In addition, in Lok Sabha, such a bill has to be examined and recommended by the committee on private members bills and resolutions before a motion for leave to introduce the bill is included in the list of business.

The Rules of the Rajya Sabha, however, do not contain any provision with regard to amendment bills. The rules relating to ordinary bills apply subject to the requirements of Article 368 of the Constitution.

V. JUDICIAL RETROSPECTION

The constitutional history relating to adaptability of the Constitution, partly as a result of a constitutional amendments and partly as a result of judicial decisions may be grouped under four broad heads.[1058] The first period begins in 1951 with *Shankari Prasad* v. *Union of India*[1059] and ends in 1967 with *IC Golaknath* v. *State of Punjab*[1060]. The second period begins with *Golak Nath case*[1061] and ends in 1973 with *Kesavananda Bharti* v. *State of Kerala.*[1062] The third period begins with *Kesavananda case* and ends with *Indira Nehru Gandhi* v. *Raj Narain*[1063] and its aftermath. The fourth period begins with the passage of Forty-second Amendment Act in 1976.

In *Shankari Prasad case*, the validity of the Constitution (First Amendment) Act, 1951, which was passed by the Constituent Assembly, functioning as provisional Parliament under Article 379, as a sequel to a decision which held the Bihar Land Reforms Act, 1950 to be void, as violating Articles 14 of the Constitution was challenged. Patanjali Shastri, J.[1064] held though a constitutional amendment was a law, there was a clear distinction between 'legislative' and 'constituent' power and "Law" in Article 13(2) did not include an amendment of the Constitution made in the exercise of constituent power with the result that Part III of the Constitution was not outside the scope of amending power. The above view was affirmed by the Supreme Court in *Sajjan Singh* v. *State of Rajasthan*[1065] where Constitution

[1058] H.M. Seervai, *Constitutional Law of India* 1511 (1976).
[1059] *Shankari Prasad* v. *Union of India,* AIR 1951 SC 456.
[1060] *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643.
[1061] *Ibid.*
[1062] *Kesavananda Bharti* v. *State of Kerala,* AIR 1973 SC 1461.
[1063] *Indira Nehru Gandhi* v. *Union of India,* AIR 1975 SC 2299.
[1064] Speaking for himself, Kania, CJ. Mukerjee, Das and, Chandrashekhra, Aiyar JJ.
[1065] *Sajjan Singh* v. *State of Rajasthan,* AIR 1965 SC 845.

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(Seventeenth Amendment) Act, 1964 was challenged. The seventeenth Amendment Act was again challenged in *Golak Nath case* whereby a majority of six to five it was held that Parliament had no power to amend fundamental rights. Subba Rao, CJ. speaking for himself, Sikri, Shelat, Shah and Vaidyalingum JJ. overruled *Shankari Prasad case* and held that there was no distinction between legislative and constituent power and since a constitutional amendment was a law, Article 13(2) barred any amendment which abridged or took away the right enshrined in Part III of the Constitution. The decision also proceeded on the ground that Article 368 related only to the 'procedure' for amending the Constitution, but did not confer on the Parliament any 'power' to do so. Thus, the *Golak Nath case* turned on the language of Article 368 as originally enacted and it was felt that when government was pursuing dynamic social welfare programme, the judiciary failed to appreciate the currents of the society and was posing deliberate challenge before Parliament not to assert its new deal programmes.

VI. KESAVANANDA BHARTI v. STATE OF KERALA

The Constitution Twenty-fourth Amendment Act was passed to get over the decision of the Supreme Court in *Golak Nath case* on both the points. It expressly empowered the Parliament to amend any provisions of the Constitution including those relating to fundamental rights and further made Article 13 of the Constitution inapplicable to an amendment of the Constitution under Article 368. But, it was plain that so long as *Golak Nath case* stands, the above amendment would itself be impeachable on the same ground on which the Supreme Court held in *Golak Nath case* that the Parliament had no power to amend the Constitution so as to take away or abridge Part III of the Constitution. It was also clear that the *Golak Nath case* would come in the way of the validity of all other constitutional amendments affecting Part III of the Constitution. The Constitution Twenty-fifth, Twenty-sixth and Twenty- ninth Amendment Acts, all fell under this category. Hence, writ petitions were filed in *Kesavananda Bharti* v. *State of Kerala* by some of the affected persons questioning the validity of the above constitutional amendment Acts including the Twenty-fourth Amendment Act. The petition was heard by a bench consisting of all the thirteen judges of the Supreme Court. All the thirteen judges unanimously were of the view that the Twenty-fourth Amendment Act is valid and that by virtue of Article 368 as amended by the Twenty-fourth Amendment Act is valid and that by virtue of Article 368 as amended by the Twenty-fourth Amendment Act, Parliament has power to amend any or all the provisions of the Constitution including those relating to the fundamental rights. However, Seven of the judges held that the power of amendment under Article 368 is subject to certain implied and inherent limitations and that Parliament cannot amend those provisions of the Constitution which affect the basic structure or framework of the Constitution. Six of them excluding Khanna J. propounded that the fundamental rights enshrined in Part III relate to the basic structure of the Constitution and therefore, are not amendable. Six judges objected to any limitation on the plenary power of the legislature to amend the Constitution. A summary of the view of the majority of the special bench was issued after the judgments had been delivered. The summary which was signed by nine judges reads that "the view by the majority in these writ petitions is as follows: (1) *Golak Nath case* is overruled, (2) Article 368 does not enable Parliament to alter the basic structure or the framework of the Constitution, (3) The Constitution (Twenty-fourth Amendment) Act, 1971 is valid, (4) Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid, (5) the first part of section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second part, namely, 'and no law containing a

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declaration that it is for giving effect to such policy shall be called in question in any court on the ground that does not give effect to such policy is invalid, (6) The Constitution (Twenty-ninth Amendment) Act, 1971, is valid. The Constitution bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law.

VII. RATIO-DECIDENDI

The above position might have been accepted as distinct ratio decidendi of the *Kesavananda case* but these are not accepted as such by several jurists. A careful reading of six majority judgments does not give a clear and precise idea as to what exactly and definitely constitute the basic features which are not mentioned anywhere in the Constitution. HM Seervai submits that the summary signed by nine judges has no legal effect at all and is not the law declared under Article 141 of the Constitution. It is not even an expression of obiter dicta binding on the courts. The law declared by the Constitution bench must in future be stated by the court. The learned writer thinks Khanna's judgment as crucial although he chides him at several places. Dr. Tripathi seems to agree in the first instance with Serrvai but comes to entirely different conclusion[1066]. He regrets Ray's Six skip over certain appoints made by the petitioner and dealt with at length by Sikri's Six and makes his own conclusions.[1067] He notes with regret that Sikri's Six fail to lay down any clear picture of essential features while they use vague terms and dissimilar expressions and any enumeration made by them is illustrative and not exhaustive. A peep into Sikri's judgment forces a contrary conclusion in as much as his whole labour is to provide a juridical basis for the doctrine of implied and inherent limitations caused by the unchallengeability of the essential features. Dr. Baxi reaches entirely divergent conclusion in the difficult task of finding the ratio decidendi of the *Kesavananda's case.* He feels that the construction placed by the judges is not wholly irrelevant and their pronouncement must be taken seriously. He appreciates Mathew, J. who provides the proper perspective, in his opinion, by observing that the fundamental rights are "liable to be limited for the common good of the society."

CONCLUSION

One who has to study the Indian Constitution today may come to grief if he has in his hand only a text of the Constitution as it was promulgated in November, 1949, for momentous changes have been since introduced not only by numerous Amendment Acts but by scores of judicial decisions emanating from the Supreme Court. Nearly every provision of the original Constitution has acquired a gloss either from formal amendment or from judicial interpretation, and an account of the working of the Constitution, over and above this, would be in itself be a formidable one.

> Desirous of protecting the permanent will, rather than the temporary whims, States have reasserted higher law principles through written Constitutions. Thus, the constitutional Justice has in a sense combined the forms of legal justice and the substance of natural justice. When the positivised higher law principles were sought to be defeated by means of constitutional amendments, the least dangerous branch has thus entered into the arena by performing its role as sentinel on qui vive to restore the higher law principles.[1068]

A Constitution is a system of fundamental laws or principles for the government of a nation. It differs from a statute in that a statute must provide, at least to a certain degree, the details of the subject it treats, whereas a Constitution usually states the general principles and framework of the

[1066] P.K. Tripathi, *Kesavananda Bharti* v. *State of Kerala: Who Wins* 3(1974).
[1067] Upendra Baxi, *The Constitutional Quicksands: Kesavananda Bharti and the Twenty-fifth Amendment* 45(1974).
[1068] A. Lakshminath, *Basic Structure and Constitutional Amendments – Limitations and Justifiability* 1(2011).

law and the government. Indian Constitution is a well built document. It assigns different roles to all the three wings of government the legislature, executive and the judiciary. There is no ambiguity about each wings power, privilege and duties. Parliament has to enact law, executive has to enforce them and the judiciary has to interpret them. There is supposed to be no overlapping or overstepping.

In brief, a Constitution must be viewed as an organic document the purpose of which is to serve as a guide to the solution of emerging problems which the courts may have to face from time to time. Naturally, in a dynamic society the shape and appearance of these problems are bound to change with the inevitable consequence that the relevance words used in the Constitution also undergo a change in their meaning and significance. This calls a dynamic rather than static response to constitutional problem. Even the debate took place in the Constituent Assembly shows that the framers never contemplated the present Constitution to be immutable and unamendable. Pandit Jawaharlal Nehru argued for a flexible Constitution to promote the nation's growth. It shows a clear intention for framing a flexible Constitution which could adapt the changing circumstances of the nation.

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