History Research Journal

ISSN:0976-5425
Vol-5-Issue-3-May-june -2019

Amending Powers and Doctine of Basic Structure of The Constitution

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Abstract
The farmers of the Indian Constitution were well versed in the Constitutional systems of the world. Therefore, they visualized an India in which the organism and dynamics must be the accepted maxim. The Architect of the constitution wanted to make it living, organic and responsive to the needs of the developing society of our own. This is why, writes, D.D. Basu at this place that.1 The nature of the amending process envisaged by the makers of our constitution can best be explained by referring to the observation of Pandit Nehru When says." While we want this constitution to be as solid and permanent we can make it there is no permanence in the constitution. 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 way, we could not make this constitution as rigid that it cannot be adopted a changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do today may not be wholly capable tomorrow. This reveals the meaning that the constitution should not be so rigid that it cannot be adapted to the changing needs of national development and strength.
Keywords: Indian Constitution,National development,Flexibility, Growth,Architect.

Introduction

"Elements of flexibility say. D. D. Basu, "were therefore, imported into a Federal Constitution which is inherently rigid in its nature. According to the traditional theory of federalism either the process of amendment of the constitution is entrusted a body other than the ordinary legislature or a special procedure is prescribed for such amendment in order to ensure that the federal compact may not be disturbed at the will of one of the parties of the federation, viz, the federal legislature. The framers of our constitution were also inspired by the need for the sovereignty of the parliament elected by universal suffrage to enable it to achieve a dynamic national progress. The Architect of the constitution, therefore prescribed an easier mode for changing those provisions of the constitution which did not primarily affect the federal system"

Thus, under the scheme of the constitution, every organ of the government was to act within the frame work of the apex law of the land as specified for the particular organ to perform. But the actual working of the constitution has created some uneasy situation in which the race for supremacy between the organs of the government took a formidable tone. This period of uneasy full particularly since 1967 created confusion and chaos in the minds of the masses of Indian society. The constitutional law of India became the playground for the legal jurists, constitutional lawyers and political leaders for grinding their axes leaving aside and undermining the supreme interest of the nation. The texts of the constitution were attempted to define so as not to suit the interest of the mass citizen and harmony in the society.

This situation of chaos came to surface after the Golaknath case. In this case as interpreted above, the Supreme Court took the view of conservatism and as result of the construction of the Supreme Court, the socio-economic changes in the country were negative.

The majority in the Golaknath case rested its conclusion on the view that the power to amend the constitution was also a legislative, power conferred by Article 245 by the constitution, that a constitution Amendment was also a law within the purview of Article 13(2).

It is proper to quote D.D. Basu when he comments that "Afler the Golaknath decision,

ISSN:0976-5425
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Parliament sought to supersede it by amending Article 368 itself by the constitution (24th Amendment) Act 1971 as a result of which an amendment, of the constitution passed in accordance with Art. 368 will not be law within the meaning of Art. 13 and the validity of constitution Amendment Act shall not be open to question on the ground that it takes or affects a fundamental right (Art.368(3)). Even after this specific amendment of the constitution, the controversy before the Supreme Court did not cease because the validity of the 24th Constitution Amendment Act itself was challenged in a case from Kerala (Keshvanand vs. State of Kerla) which was heard by a full Bench of 13 Judges. The majority of the Full Court upheld the validity of the 24th Amendment and over ruled the case of Golak Nath. Now the net result of the Keshivanand case is that fundamental rights in India can be amended by an act passed under Art. 368 and the validity of a constitution amendment Act cannot be question on the ground that Act invades or encroaches upon any Fundamental Right.

Another question says Basu, which has been mooted since the case of Golaknath is whether outside part III (Fundamental Rights) there is any other provisions of the constitution of India which is immune from the process of Amendment in Art. 368, it has affirmed another proposition asserted by the majority in 'Golaknath case,' namely that:

(i) There are certain Basic features of the constitution of India which cannot be altered in exercise of the power to amend it under Art.368. If therefore, a constitution Amendment Act seeks to alter the basic structure or frame work of the constitution the court would be entitled to amend it on the ground of ultravires because the word amend in Art. 368 mean only changes other than altering the very structure of the constitution which would be tantamount to making a new constitution.

(ii) These basic features without being exhaustive are sovereignty and territorial integrity of India, the federal system, judicial review, parliament system of government.

(iii) Applying this doctrine that judicial review is a basic feature to the constitution of India, the majority in Keshvanand9 held the second part of S.3 of the constitution (25 the Amendment) Act, 1971 relating to Article 31C as invalid.

Thus, says, Sundar Raman that the Golaknath case judgment and the amendment which sought to nullify its effect when came up for the Supreme Court's scrutiny in the case of Keshvanand Bharti against the State of Kerals and other allied petitions in 1973 it propounded the doctrine of implied powers and the doctrine of basic structure which were better unknown in India.

The validity of 24th Amendment came up for discussion in Keshvanand Bharti vs. State of Kerala, wherein a writ petition was filed initially to challenge the validity of the Kerala Land Reforms Act of 1963 as amended in 1969. But as the Act was amended in 1971 during the pendency of the petition and was placed in the Ninth Schedule by the 29th Amendment, the petitioner was permitted to challenge the validity of 24th, 25th and 29th Amendment to the constitution also. The petition was heard by a bench consisting of all the thirteen judges of the Supreme Court. It was argued by the petitioner that if the power of amendment is to be construed power of the people and authoring it to destroy or abrogate the essential features, basic elements and fundamental provisions of the constitution such as a construction must be held illegal and void. This is so because:

(i) Having only such constituent power as is conferred on it by the constitution which is given by the people into themselves. Parliament cannot enlarge its own power so as to abrogate the limitation in the terms on which the power to amend was conferred. Being a functionary created under the constitution, parliament cannot abrogate to itself the power of amendment so as to alter or destroy any of the essential features of the constitution.

(ii) Purporting to empower itself to take away or abridge all or any of the fundamental rights,

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parliament doesnot become competent to destroy the basic human rights and the fundamental freedoms which were reserved by the people for themselves when they gave to themselves the constitution and

(iii) Initially having no power to alter or destroy any of the essential features of the constitution and also recognizing implied and inherent limitations on the amending power. Parliament has no power to alter or destroy all or any one of the fundamental rights or in other words, Parliament cannot abrogate the limits of its constituent power by replacing those limitations and thereby purporting to do what is forbidden by this limitation.

All 13 judge of the Supreme Court upheld the validity of the 24th Amendment. The court held that 24th Amendment does no more than to clarify in express language that was, however, held by the majority that Parliament's power of Amendment was subject to implied limitation namely, Parliament could not amend the constitution to bring about change in the basic feature of the constitution. This majority pronouncement was made by S.M. Sikri, C.J. Shel at, Hedge, Grover, Jagan Mohan Reddy and Mukherjee, JJ. Six of them (excluding justice Khanna) thought that the fundamental rights ensurined in Part III relate to the basic structure or framework of the constitution and therefore, are amendable. Six Judges (Ray, Palekar, Mathew, Beg. Dwivedi and Chandrachut, JJ.) were by and large not prepared to accept any limitation on the plenary power of Parliament to amend the constitution. H.R. Khanna, J. however, held that the right to property doesnot from part of the basic structure or framework of the constitution and tilted the balance in forming the majority with Ray, Paleker Methew, Beg, Dwivedi and Chandrachud, JJ.

Inherent and Implied Limitation

In the Keshvanand Bharari's case the majority of Judges held that the amending power was a limited one even though they knew that the legislature was bent upon giving unlimited amending power to itself. "This courageous and independent stand was taken on the basis of the principle called inherent and implied limitations".

Indubitably, our constitution doesnot provide any provision for drafting a new constitution, but that does not mean that legislature can destroy, reshape or restructure the constitution. It is, therefore logical to assume that the implied limitation restricts the legislature in changing the constitution unidentifiably. An argument stating that' Parliament's will is people's will and therefore, Parliament still have an unlimited amending power is preposterous because the electorate does not take into account the constitutional amendments while voting in the Parliamentary elections. Had people's will been Parliament's will, the Australian electorate would not have approved only five out of thirty two changes in the constitution proposed by Parliament in 74 years.

Therefore, what has been clearly understood is that article 368 allows the legislature to make amendment only to the extent that the constitution does not lose its identity. The destruction of the constitution is as necessary corollary, prohibited. Parliament by passing the 24th amendment altered Article 368 to enlarge the ambit of its amending power under that very Article. This is a clear violation of the principle of implied limitation. A creature of the constitution, however, its powers cannot regard itself superior to the constitution. N.A. Palikiwala rightly says that" It cannot install itself as the master and make the constitution subservient; it cannot convert a controlled constitution into a controlled one.

Here, then, it may be submitted with respect that the validity of an amendment can always be judged on the touchstone of the constitution. The original constitution remains what it was made out to be by the constituent Assembly whereas an amendment without being questioned can sufficiently damage or destroy the constitution. The constitution prescribes the procedure for amendment and empowers the legislature to pass an amendment. The consequences of the plea of unlimited power were considered in the Keshvanand Bharati's case in which the

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question of validity of the 24th amendment was gone into by the Supreme Court.
The Supreme Court of India has re-affirmed its faith in the doctrine of basic structure and the Janta Government through its 45th Amendment Bill attempted to pay down the basic features of the constitution, which as per the Bill couldnot be amended without the approval of the people. Again, to the criticism that the concept of basic structure lacks reality as it has not been enumerated fully and has not been put in cut and dry form and further that the element of certainty in so vital a matter as the amendments of the constitution, it is most undesirable, Justice Khanna, has beautifully stated that there are two ways of dealing with the problems. According to him, one way, is to leave the provisions of Article 368 of the constitution as they were at the time of decision in Keshvanand Bharati and before their announcement day 42nd Amendment of the constitution. The effect of this would be that the concept of basic structure of the constitution would not be put in straight jacket and would permit a certain measure of flexibility to meet the various situations. In this connection, it may be mentioned that the provisions of some constitutions, like that of the United stated, are brief and coached in general terms which avoids the risk of rigidity. The second method is to enumerate in the constitution the features which pertain to its basic features. According to Sundar Raman, of two suggestions made by Justice Khanna, it appears that not to put the concept in a straitjacket and to permit a certain amount of flexibility to meet the various situations is a better one. The Supreme Court in the Elections case too did not specify the basic features31 of the constitution as it did not do so in Keshvanand.
When we analyse the whole affair in the Keshvaand case, some general observations, may be made as under:
(i) Golaknath affected only the fundamental rights enshrined in Part III of the constitution of the ground that the amendment abrogates or destroys the basic structure or framework of the constitution yet it is not possible to ascertain precisely from the illustration or enumeration in the various opinions delivered as to which of the provisions form part of the basic structure or framework of the constitution.
(ii) All the Judges held that the twenty fourth Amendment is valid and consequently by virtue of amended Article 368, the power of Parliament to amend extends to all the provisions of the constitution including those as enshrined in Part III. In this respect, Golaknath is overruled. However, the opinion of seven Reddy. Khana and Mukherjee JJ. in Keshvanand Bharati revitalised Golaknath by treating fundamental right as being outside the purview of an amendment made under Article 368. Khana J. would agree to do so only if the amendment affects the bacis structure or framework of the constitution. In this respect, the validity of amendments which were held beyond the amending power of Parliament in Golaknath, may be reopened for consideration on the ground whether they affect the basic structure or framework of the constitution.
(iii) Seven of the Judge (Skri C. J. Shelat, Grover, Hedge, Jagan Mohan, Reddy, Khanna and Mukharjee, JJ. held that the power of parliament to amend cannot be exercised so as to affect the 'basic structure' or framework of the constitution. However, they have not been able to explain satisfactorily the impact of the words, named by way of addition, variation, repeal and in particular the "impact of the repeal", in the amended Article 368. This makes it difficult to appreciate fully the scope of the power of amendment in the constitution.

Doctrine of Basic Structure Reaffirmed

Another epoch making case, Indira Nehru Gandhi versus Rajnarain came up before the Apex Court. The Court had another occasion to examine the concept of basic structure of the constitution and the contents of constituent power contained in the amended Article 368. This election case arose out of the appeal filed by Smt. Indira Gandhi against the invalidation of her election by the Allahabad High Court on the ground that she was guilty of corrupt

ISSN:0976-5425
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practices. Cunningly to overcome the effect of the Allahabad Judgement, the congress Government enacted the 39th Amendment Act, Art. 329A was added to the constitution. The new article contained the following provisions.
(1) The elections of persons holding at that time of election, later assuming the offices of prime Minister and speaker of the House of the People could only be questioned before such authority and in such manner as Parliament might by law prescribe.
(2) The validity of such a law was not open to judicial review.
(3) Pending election petitions should abate on the assumption of that office by persons against whom the petitions had been filed.
(4) (a) No existing law on election petitions and other connected matters should apply or should be deemed to have applied to or in relation to those persons.

- (b) Such elections should not deem to be void or to have become void under the existing law.
- (c) Not withstanding any courts order issued before this amendment declaring such election to void, it should continue to be valid in all respects.
- (d) Such an order of a court and finding on which it was based should be deemed to void.
- (e) All pending appeals and cross appeals against such an order should be disposed of on the basis of the law in clause IV, which should have effect not withstanding anything in constitution.

The Supreme Court accepted the majority opinion of the Keshvanand case on the doctrine of basic structure or framework of the constitution. The Supreme Court held that the principle of free and fair election, being essential postulate of democracy is part of the basic structure of the constitution. Chief Justice A.N. Ray said that the clause(4) of Art. 32nd (A) was bad for four seasons-(1) it has wiped out not merely the judgment but also the election petition and law relating to it.
(ii) It has deprived the defeated candidate of his right to raise a dispute about the validity of the election by not having provided another forum.
(iii) There is no judgment to deal with and no right or dispute to adjudicate upon and,
(iv) The constituent power of its own legislative judgement has validated the election.
Khanna and K.K. Mathew, JJ. held that democracy was an essential feature forming part of the basic structure of the constitution. The exclusion of judicial review in election dispute in this manner damaged the basic structure. Justice Beg said that according to the majority in Keshvanand Bharari case, supremacy of the constitution and separation of power were basic features. Justice Chandrachud held the exclusion of judicial review by the amendment was an outright negation of the right to equality.

Conclusion

With due respect to the above observation, it may be concluded that the constitutional history of India in recent past gives the impression that the confrontation between the Parliament and the judiciary was sign of decay of our political system. The confrontation over more than a decade, now, is certainly unfortunate. The Parliament should enact laws with greater restraint and the more continuously in case of amending the constitution. The restraint in all power should not be used for political stunts and manoeuvrings. The judiciary too should realize that it will not be in a position to defend the doctrine of basic structure for long, if the people and their government do not want it, when the Indian electorate becomes politically alert and conscious of their rights, the government of the day will not be able to destroy the basic

ISSN:0976-5425
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structure of the constitution through the process of amendment, the role of judiciary in this regard will also automatically come to an end. Thus, the strong political will is indispensable to undo evils creeping in the Indian Body Politic.

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