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DOCTRINE OF BASIC STRUCTURE: CONSEQUENCE OF TUSSE BETWEEN PARLIAMENT AND JUDICIARY

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ABSTRACT

The Constitution of India has some basic rights under Part III which are called Fundamental Rights. These rights play a crucial role to live a life with dignity. Now, the question raised in front of the court was that *whether fundamental rights can be amended or not*. The solution came as the ‘Doctrine of Basic Structure’. This article deals with the various cases which led to the emergence of ‘Doctrine of Basic Structure’. The whole article evolves round the power of judiciary to review laws under Article 13 of the Constitution of India and the power of Parliament to make amendments under Article 368 of the Constitution of India. This article shows the consequence of tussle between parliament and judiciary which came out as the “Doctrine of Basic Structure”.

Keywords: Articles 13, 368, 245, 246, 248, 366(2) of the Indian constitution, 9th Schedule, 1st, 17th, 24th, 25th, 26th, 29th, amendments of the Indian constitution, fundamental rights, basic feature, basic structure

INTRODUCTION

Whenever we talk about Doctrine of Basic Structure, what flashes firstly in our mind is the Article 13 and Article 368 of the Constitution of India. Article 13 gives power of judicial review to the Supreme Court (SC) and High Court (HC). Accordingly, SC and HC can review any law passed by the parliament and state legislature respectively that “Whether the law is violative of fundamental rights or not” but the Article 13 does not talk about constitutional amendments. If any law violates fundamental rights then the court can declare it as unconstitutional. Article 368 gives power to the parliament to amend the constitution but it does not talk about the extent of that power. Therefore, it gives rise to a number of questions:

- i. Whether fundamental rights can be violated by constitutional amendment?

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- ii. If any constitutional amendment violates fundamental rights then whether it is reviewable by court under Article 13 or not.
- iii. Whether constitutional amendment is law as Article 13 only talks about law?

The above questions lead to a tussle between Judiciary and Parliament. This tussle is solved by a series of case laws which will be discussed further.

In 1951, many laws were passed inter alia, Mysore land Reform Act and Bihar Land Acquisition Act. These acts gave power to the government to acquire property of any person for the public benefit and in return the government used to give some monetary value to the respective property owner. However, the amount of monetary value was not fixed and also it was not mentioned in the act. The government was also not bound to give the same. At that time *Right to property* was one of the fundamental rights and therefore such laws were violating the fundamental rights of people. People's contentions were that

- i. There is no specific power mentioned in the Constitution which allows government to acquire property and
- ii. *Right to Property* is a fundamental right therefore, any law violating fundamental rights is unconstitutional as per Article 13 of the Constitution of India.

To deal with the above issues, parliament amended the Constitution in 1951, which was the first amendment of the constitution. This amendment added inter alia, Article 31A and 31B. Article 31A allows the government to acquire land of any person for the benefit of public, without giving any reason. Article 31B added 9th Schedule to the Constitution and accordingly, any law included in the 9th Schedule of the Constitution is not reviewable, that is, court cannot review any law included in the 9th Schedule.

After this amendment, all laws which is violative of *Right to Property*, were added in 9th Schedule so that SC and HC court cannot review it.

The first amendment of the Constitution was challenged in the case of **Shankari Prasad Deo v/s Union of India**² on the ground that it violates the Part III of the Constitution. In this case the question raised before court was "*what is the extent of the amending power of the*

² Shankari Prasad Deo v/s Union of India, AIR 1951 SC 458

parliament". The court used two terminology, 'legislative power' and 'constituent power' and said that parliament uses its legislative power while making laws where as it uses its constituent power while amending the constitution. Article 13 only talks about the judicial review of law and not about the constitution amendment, thus, the court held that constitution amendments are not judicially reviewable.

After it, many states were passing laws to abolish *Zamindari System*. These laws were added to the 9th Schedule of the Constitution by the Constitution (Seventeenth Amendment) Act, 1964, so that these could be barred from the judicial review. In the Case of **Sajjan Singh v/s State of Rajasthan**³, the 17th Constitutional amendment was challenged and again the same question was raised, that is, "*what is the extent of the amending power of the parliament when it comes to fundamental rights and judicial review*". The court held that parliament makes amendments by exercising its constituent power so, constituent amendments are not laws and thus, it is not reviewable by court.

In **Sajjan Singh v/s State of Rajasthan** the crucial part of the judgement which was in the ratio 3:2, was the dissenting opinion given by Justice Mudholkar and Justice Hidayatullah. According to Justice Hidayatullah, if the parliament is making laws then its capacity will not change even when they are amending constitution and therefore, constitutional amendment is also law and hence judicially reviewable. Justice Mudholkar's opinion was based on a Pakistani Supreme Court case **Mr. Fazlul Quader Chowdhry v/s Mr. Mohd. Abdul Haque**⁴ in which the then Chief Justice Cornelius of Pakistani SC, held that Pakistani Constitution has some basic feature which cannot be amended by Pakistani Parliament. Influenced by this judgement Justice Mudholkar used it in his dissent and opined that the Preamble of Constitution of India has some basic features which cannot be amended by the parliament using its constituent power.

The above judgements had increased the power of the Parliament as parliament had passed numerous legislations in the name of Article 368 since 1950's. Punjab Security and Land Tenures Act, 1953 and Mysore Land Reform Act, 1962 was also added to the 9th Schedule of the Constitution by 17th Constitutional Amendment. In **I.C. Golaknath & Ors. v/s State of**

³ Sajjan Singh v/s State of Rajasthan, AIR 1965 SC 845

⁴ Fazlul Quader Chowdhry v/s Mohd. Abdul Haque, PLD 1963 SC 486

Punjab & Anrs.⁵ Once again 17th Constitutional amendment was challenged. In this case 11 judge bench was constituted to decide “*whether power of parliament to amend the Constitution is subject to any limitation*”. The court observed that Article 245 allows Parliament and State Legislature to make laws for the Union and State respectively. Also, Articles 246 and 248 also gives power to the Parliament to make laws. Therefore, these are the law-making power of the Parliament. Besides this Article 368 provides only procedure to amend the constitution (at that time). The word “power” was nowhere mentioned in the Article 368. The court held that Article 368 does not give power to the parliament to amend the Constitution and it is the Article 245 which gives the Parliament to make laws, anything made under Article 245 is law and hence, judicially reviewable.

Therefore, it overruled the earlier discussed two cases. In its judgement the court also included two things that.

- Parliament will have no power, from the date of this decision, to amend any provision of Part III of the Constitution.
- It also explained the meaning of the word ‘amend’ and said that, amend does not mean addition, variation or repeal rather it means improvements and alteration.

So, it can be said that the judgement of the I.C. Golaknath case was a blow on the face of the Parliament by the SC.

In 1970, the Prime Minister Indira Gandhi introduced a bill to abolish Privy Purse but the bill was not passed due to one vote. Then she asked the then President, V.V. Giri to pass an order under Article 366(22) to unrecognise all the rulers. Article 366(22) defines ruler and gives power to the president to recognise and unrecognize anyone as a ruler. The presidential order was passed and accordingly there were no more ruler in the country and so the issue of Privy Purse was solved.

This presidential order was challenged in **Madhav Rao Scindia v/s Union of India**⁶ and the presidential order was struck down by the Supreme Court. It is also called Privy Purse case.

⁵ IC Golak Nath v/s State of Punjab.....AIR 1967 SC 1643

⁶ Madhav Rao Sindhia v/s Union of India, AIR 1971 SC 530

After the above judgement, Indira Gandhi Dissolved the Parliament and again came into power with more majority which resulted into the Constitutional 24th amendment. Inter alia, the 24th amendment added the word 'power' to the Article 368 which reads as "*power to the parliament to amend the constitution and procedure therefor*". It also added clause I, which defines the word 'amend' as variation addition or repeal and clause 3, which says that article 13 will not apply on any amendment made under Article 368. In Article 13 clause 4 was also added, according to which Article 13 will not apply on any amendment made under Article 368 of the Indian Constitution.

Thus, 24th constitutional amendment overruled all the three points of the judgement of I.C. Golaknath case. Article 31C was also added through 24th constitutional Amendment. According to Article 31C if parliament has to violate fundamental rights to uphold Directive Principle of State Policy then it will not be declared void on the ground that it is inconsistent with the fundamental.

There were also numerous amendments were made after 24th amendment like 25th, 26th, and 29th amendments. 25th constitutional amendment permitted government to acquire property of any person for the benefit of public, on the payment of the compensation but the amount of compensation was not fixed. This curtailed the Right to Property. 26th amendment nullified Privy Purse Judgement that the judgement of **Madhav Rao Scindia v/s Union of India**. 29th amendment added Kerala Land Reforms Act, 1963 and amendment to the Kerala Land Reforms Act, 1963 to the 9th Schedule. So, these two acts were also beyond the ambit of judicial review.

By invoking Kerla Land Reforms Amendment Act which came in 1969, the government tried to acquire the property of Keshvanand Bharti who was the owner and manager of Edneer Mutt. Therefore, he challenged this in 1970 in the SC, saying that this is the violation of his Right to Property. In this case, **Keshvanand Bharti v/s State of Kerala**⁷, a 13-judge bench was constituted to decide what is the extent of the power of the Parliament to amend the Constitution? The judgement was passed with the majority of 7:6 on 24th April, 1973. The majority judges include CJI S.M. Sikri, Justice Shelat, Justice Hegde, Justice Grover, Justice Jaganmohan Reddy, Justice Mukherjea, and Justice H.R. Khanna whereas minority judges include Justice A.N. Ray, Justice DG Palekar, Justice SN Dwivedi, Justice KK Matthew,

⁷ Keshavanand Bharati v/s State of Kerala, AIR 1973 SC 1461

Justice MH Beg, and Justice YV Chandrachud. The court upheld the validity of 24th amendment and said that parliament can amend any part of the Constitution under Article 368 but it cannot alter the Basic Structure of the Constitution. Also, any constitutional amendment can be challenged on the ground that it is violative of fundamental rights.

OPINION OF MAJORITY JUDGES

According to **Justice Sikri**, there are certain inherent limitations on the amending power of the parliament. The parliament has power to amend the constitution but it cannot abrogate fundamental rights or change the basic features of the constitution. Though Justice Sikri has not mentioned basic features of the Constitution but he mentioned fundamental features which include “supremacy of the constitution, the republican and democratic form of government, and separation of powers, the secular and federal character of constitution”.

Justice Shelat and **Justice Grover** gave joint judgement. According to them, in the light of the Preamble, there are implied limitations on the amending power of the parliament. They also said that basic features of the constitution is not vague and it includes “the supremacy of the constitution, republican and democratic form of government and sovereignty of the constitution, secular and federal character of the constitution, demarcation of power among the legislature, the executive and the judiciary, the dignity of the individual, the unity and integrity of the nation”.

Justice Hegde and **Justice Mukherjea** also gave joint judgement. They said that the power of parliament to amend the constitution does not include the power to destroy or weaken the basic element of the constitution, but they did not mention what basic elements constitutes and said that it will be decided by the court time to time. Justice Hegde also mentioned about the 9th Schedule of the Constitution and said that laws under 9th schedule is also judicial reviewable and their validity will be determined on the basis of circumstances of the cases. He also added that all laws under 9th Schedule is valid unless and until these are declared unconstitutional by specifically challenging these laws.

According to **Justice Jagannmohan Reddy**, Parliament can also amend fundamental rights but it cannot abrogate or destroy the fundamental lights or the essential elements of the basic structure of the constitution. He also mentioned basic features of the constitution which

includes “sovereign, democratic, republic; justice, social, economic, and political; liberty of thought, expression, belief, faith, and worship; Equality of status and of opportunity.

Justice Khanna has propounded the term “the basic structure”. He was inspired by a Pakistani case **Mr. Fazlul Quader Chowdhry v/s Mr. Mohd. Abdul Haque**, which I have mentioned earlier, and by the theory of Dieter Conrad, a German Jurist, which is called “theory of implied limitations” mentioned in his book “Limitation of Amendment Procedure and the Constituent Power”. According to the “theory of implied limitation” amending power of parliament is subject to certain restrictions and it cannot change fundamental pillars of the constitution, supporting its constitutional authority. Justice Khanna said that essential features of the constitution are those features which will keep basic structure of the constitution unharmed and said that parliament can amend any part of the constitution but the basic structure of the constitution must be retained.

OPINION OF MINORITY JUDGES

Justice AN Ray, Justice Palekar, Justice Matthew, Justice Dwivedi gave similar judgement. They said that Article 368 gives power to the parliament to amend the constitution. The parliament amend the constitution while exercising the constituent power not by legislative power, so, constitutional amendment is not law and thus, will not come under the purview of Article 13 and therefore, constitutional amendment is not judicially reviewable. They said that there are no express or implied restrictions on the amending power of parliament and also said that there is no distinction between essential and inessential feature of the Constitution, so, no hindrance can be raised as to the power of amendment.

Justice Beg added his extra opinion to the above and according to him, the word ‘amendment’ in Article 368 includes varying repealing or abrogating and said that parliament has power to amend any part of the constitution even Part III of the constitution. Justice Beg also gave his separate test which is called ‘effect test or the test of consequences’ according to which if the effect of any amendment is positive then it is irrelevant that whether it is inconsistent with the constitution or not.

Justice Y.V. Chandrachud also added his point to all the above minority opinions and said that, the Preamble is also the part of the constitution and therefore, it also comes under the ambit of amending power of the parliament

Thus, “the doctrine of basic structure” is propounded according to which, parliament can amend any part of the constitution as long as it is not altering the basic structure of the constitution. However, the court did not define what exactly basic structure includes and said that it will depend on the circumstances of the case. Some of the features of Basic Structure are Equality, Democracy, Federalism, Sovereignty, Free and Fair Election, Judicial Review, Republican Government.

CONCLUSION

In the light of above case laws and discussion, it can be concluded that no one can alter the Basic Structure of the Constitution so that, one cannot defy the very essence of the Constitution. On the one hand the Constitution gives power to the Parliament to make laws and amendments, on the other hand it also provides certain reasonable restrictions so that it cannot work arbitrarily. Judiciary has the power to interpret laws and while doing the same, judiciary can declare the law unconstitutional in case if it is inconsistent with the constitution and if it alters the Basic Structure of the Constitution. Thus, constitution is the supreme and all are bound to work within the ambit of the constitution. Judiciary has the power to interfere time to time to when any law or amendment will be inconsistent with the constitution or will defy the basic structure of the constitution and can declare it void. Thus, the judgement of Keshvananda Bharti case worked as a saviour of the very essence of the Constitution.

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