Constitutional Law and Public Administration in India

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Amendments to the Constitution

There are certain other aspects of the Constitution of India, which in one sense lays down certain aspects of public administration and will also tell us how the Constitution lays down the public policy and public administration, because there are certain parts that are relevant and important to understand how the public policy dimension has been designed, structured and has evolved over a period. Starting with the amendment to the Constitution of India, the Indian Constitution is a written constitution and hence it does provide for amendments.

Amendments are kind of a process in which the constitution is changed over a period. There is a very interesting juristic saying that the constitution must reflect the aspirations of every generation. So, our forefathers who gave us this constitution had a particular type of thought, a process, they had their own ideals and aspirations at that given point of time and the current generation may have its own aspirations and hence the constitution ought to resonate with the aspirations of the current generation and hence we have to say that the constitution must be a reflection of the public society or the public policy of current times.

Generation to generation may determine what the public policy of the constitution should be and hence we can say that the Indian Constitution is a mix of the Constitution in Britain and the Constitution of America. In Britain the constitutional change is very easy as compared to the United States where it is very rigid. The rigidity of the American Constitution is very well known, it is not easy to change the American Constitution whereas it is quite easy to change the British Constitution. So, India adopted a middle path and we have created a kind of a synthesis between rigidity as well as flexibility. We have certain parts of the constitution that are rigid, which should not be touched or amended that is precisely what basic structure theory laid down and certain parts of the constitution which ought to be flexible and they are allowed to be changed from time to time.

The Indian Constitution is one of the largest written constitutions of the world and hence there are so many parts in the constitution that can be changed without touching the basic fabric of Indian society or the Indian public policy. Article 368, in Part XX of the constitution deals with the power of the Parliament of India to amend the constitution and

it also lays down the procedure in which such amendment can be done. In the exercise of the constitution power, the constitution through an amendment can do an addition, or variation or it can repeal any provision of the constitution in accordance with the procedure laid down for that particular purpose. However, as we all know this kind of an amendment to the constitution is not a blanket power, nor an absolute power and it is not a power that can amend the entire constitution or replace every part of the constitution. That unfortunately is not present as the power to amend the constitution.

So, the parliament does not have an absolute power to change the constitution or amend the constitution as stated in the *Kesavananda Bharati* case of 1973, a landmark judgment that lays down the scope and ambit of Article 368. Now the procedure for amending the constitution is as follows and is quite an elaborate procedure. A few things about it are, an amendment to the constitution can be initiated by introducing a bill in either house of the parliament. But such a bill cannot be introduced in the state legislature. So, it is only the central government or the federal government that has the power to change the constitution and the state governments have not been given that power.

Second, an amendment can be introduced either by the government through its minister, or it can be introduced by a private member who is a member of the parliament, who is not part of the government. And the introduction of this kind of an amendment bill does not require the prior permission of the president. The bill must be passed in each house that is Lok Sabha and Rajya Sabha by a special majority sometimes and sometimes by a simple majority, or sometimes by a special majority and ratification of one half of the state legislature, that is three processes. Sometimes it will require a two thirds majority as the case or special majority. Simple majority is more than half what is known as. Such a kind of a bill to amend the constitution cannot be done through a joint sitting of both the houses. It shall be passed in each house separately. And in case there is a disagreement between both the houses, then in an ordinary bill, a joint session of both the houses can be called in. But for a constitutional bill, no such provision of holding a joint sitting of both the houses is provided for. There is a requirement that the president's assent is required. The president must give his or her assent and in case the president withholds his or her assent, then the bill cannot be sent back to the president once again.

So, the constitution would stand amended once the president gives such an assent. The role of both the houses and the president is critical in bringing about any such constitutional amendment. There are three ways in which the amendment process in the constitution can be brought about. One is by a simple majority of both the houses. Some of the provisions of the constitution may be amended through a simple majority can be for example, establishment of a new state or admission into a new state.

So, formation and alteration of the boundaries of the state can also be done by a simple majority. Quorum in a parliament can also be decided, salaries and allowance of the

members of the parliament can also be decided by the simple majority rule. Privileges of the parliament and its members, sometimes use of English language in the parliament was also passed through simple majority. Conferment of more jurisdiction of the Supreme Court and not otherwise can also be done by the simple majority. Recognizing official languages was done through a simple majority. Citizenship, defining Union territories, Fifth schedule, Sixth schedule of the constitution etc. Were also done through simple majority.

Most of the other provisions of the constitution require a special majority. A special majority means two-third of the members of each of the houses must agree. Two-thirds of the total membership means that the total number of members comprising the house irrespective of the fact that there were any vacancies or absentees. So, it is not two-thirds of those who are present, but two-thirds of the number of members in the house.

So, absentees and vacancies cannot be looked into to decide two-thirds. It is two-thirds of the total membership. That is very critical to bring in the rule of special majority and special majority usually requires a voting. It would require voting after the third reading of the bill in the parliament. And this must be provided through the various procedures and groups of the house. This two-thirds majority applies to fundamental rights, it could apply to the directive principle of state policy. And it provides, to all the provisions which are not covered by the first and third category. So, usually two-thirds majority will be insisted upon.

When is the special majority and the ratification of half of the state legislatures required? There are constitutional powers that are granted to the states, that are certain provisions in the constitution that determine center state relationship. And hence, unless more than half of the state legislatures have given their consent, the formality of amending the constitution will not be completed. To get the ratification of half of the states, now 28 states, 14 states will have to agree to this kind of an amendment being processed by the constitution. There is no time limit that is fixed.

The states may agree within six months or six years, but nevertheless, unless that kind of a consent is given, the amendment bill does not come into operation at all. So, the following provisions would require not only a simple majority of the Lok Sabha, Rajya Sabha and the assent of the president, it also requires the ratification of half of the state legislatures. They are the following. First, election to the office of the president and manner of the same. This, if it must change from the existing structure in the constitution, will require a simple majority and half of the state legislatures' consent. Extent of the executive power of the union or the state, changes in Supreme Court and High Court, distribution of legislative powers between the union and the state, especially in terms of the 7th schedule of the constitution, something like the goods and service tax concept etc. anything as per the 7th schedule will be covered here. Representation of states in the parliament, especially in the

Rajya Sabha and the amendment process itself in Article 368, all of these would require the consent of at least half of the states. So that is how the amendment to the constitution can come into place. The amendment process under 368 has its own advantages and sometimes does not fit into the very role of what critics would want the amendment process to be.

What have critics said about the amendment process or procedure to the constitution is that while India in its constitution has balanced between rigidity and flexibility, sometimes it would be required that the joint sitting of both the houses of the parliament need to be brought in, because this is the only way in which deadlocks on certain crucial aspects can be resolved. So, it was important that the procedure for amendment could have a joint sitting, because sometimes the party in majority is a party that is having majority only in the Lok Sabha, not in the Rajya Sabha. Therefore, it may disturb the public policy vision of the ruling party because it requires that kind of majority in both the houses independently. So, it is ideal to allow for a joint sitting was one of the criticisms that was brought into place. If one views Article 368, it is more or less, like a procedure, that every legislation in the parliament is enacted or brought into existence.

There is no special treatment to an amendment process. An amendment to the constitution will be like an ordinary bill or should it be something different, or should have been brought as a procedure is another criticism as to Article 368. While one has looked at the judicial review of the amendment to the constitution, one would come to this conclusion that Article 368 and the wordings in it have left an ample scope for the judiciary to intervene and test the constitutionality of every amendment, either on the procedural aspect or on the substantive aspect. The judicial review has often been kind of a superseding power to Article 368, thereby, giving legislative competence, a second door than the judicial wisdom.

Trying to strike a balance between flexibility and rigidity, Article 368 does not give any kind of a special power to the legislature or any exclusive power to the legislature to amend the constitution. The legislature represents the will of the people and represents the aspirations of the society, because that is through direct voting or franchise that these people are brought to the parliament. The criticism about the amendment procedure under 368 is that the states have no role at all in deciding the framework of the constitution.

States cannot introduce any bill or proposal to change the constitution on their own, unless they are part of a coalition in the government, and they play a role regarding the same. One benefit of the US Constitution is because the United States is a union of states, and there are two constitutions there, the states can also make a proposal to change the public policy dimension in their own state by bringing a change to the constitution. But that is not possible in India, because states do not have their own constitution and neither can they

contribute and participate in reflecting a constitution that is required as per public policy of the times. So that is one final criticism as to the process and procedure of 368.

The Constitution is a very organic, dynamic and vital document that decides the lives of people. It should be like a living and breathing document, solid, permanent and at the same time, it should result in showing the kind of flexibility that is required to draw the rights of people and the duties of the state. And hence, there must be enough sense of accountability of the ruling party and the government of the day, there must be a sense of transparency in the decision-making process. Rule of law and not rule of men should be something that the constitution should be able to fulfill from time to time. One of the aspects of the Constitution is that it is flexible. However, certain parts of the constitution are rigid, meaning these parts have been given a special status called the basic structure of the basic features of the constitution. And these features cannot be changed or be amended at all. And the law has continued to stay the same.

We can see how constitutionalism grew from the constitution. Constitutionalism means the working of the constitution, and this has been over a period of years. One of the first cases that was decided in 1951, in case of *Shankari Prasad v. Union of India* wherein the first constitutional amendment that was brought in 1951 was challenged. The First Amendment to the Constitution curtailed the right to property under Article 31 of the Constitution. And hence the first amendment to the constitution itself was challenged. The Supreme Court had stated that the power of the Parliament to amend the Constitution includes Part III as well. Article 13 provides a definition of law which includes any ordinance, order, byelaw, rule etc. So, the word that was used in Article 13, includes only ordinary law and not constitutional amendments. And therefore, the parliament can abridge and take away any fundamental rights by enacting the Constitutional Amendment Act and as such, a law will not be void under Article 13. The court held that the constitutional amendment law is not ordinary law, and it is not covered under Article 13. So, it can abridge fundamental rights, but any other law cannot abridge fundamental rights. That is the law, which is defined in Article 13, it can include rules, regulations, ordinance, notifications, orders and bylaws, they cannot abridge your fundamental rights.

A constitutional amendment abridges the fundamental rights as held in *Shankari Prasad v. Union of India* in 1951, because that is not covered under Article 13; this is a higher law and fundamental rights can be affected by the amendment of the constitution, it can be abridged. And hence the court said, it will not intervene with the parliamentary power. So it meant that in 1951, just after independence and constitution being adopted, the parliamentary supremacy was established by the court and the court said the parliament and the legislature are supreme, they can change the constitution as they wish and whichever part they wish. So, amendment power was absolute.

And in 1967, in *Golaknath v. State of Punjab*, the Supreme Court reversed its earlier decision. From 1951 till 1967, 17 amendments to the constitution were already brought into place. This procedure of amendment was used to amend the constitution from time to time and making it over flexible would have resulted in diluting the constitution and the principles of the constitutionalism of the fundamental law of the land and treating the constitution like any other bill or act was happening during those days. The Supreme Court in the *Golaknath* case in 1961 ruled that fundamental rights are given a very important position in the constitution and hence, the parliament cannot abridge or take away these fundamental rights. So, they said the constitutional amendment is also included under Article 13 under the definition of law and hence, such a law can be held to be void by the Supreme Court in a judicial review, as the same law may decide to abridge the fundamental rights of citizens. So any law that is in violation of fundamental rights is void to the extent it is unconstitutional to that extent and hence the *Golaknath* case held that amendment to the constitution is a law that is covered under Article 13 of the constitution of India.

Once the *Golaknath* case was pronounced in 1967, the supremacy enjoyed by the parliament was reduced, namely the supremacy to decide about public policy in the constitution, whatever is required. So, the parliament reacted by bringing in the 24th Amendment Act in 1971. It amended Article 13 and Article 368 and declared that the parliament has the power to abridge or take away fundamental rights under Article 368 totally and as such, the Constitutional Act will not be law under Article 13. So, the parliament reacted very strongly to the Golaknath case superseded this case by bringing a new amendment to the constitution which is called the 24th Amendment to the Constitution. This amendment said that the Parliament has all the powers including taking away fundamental rights and the same cannot be included in Article 13. They neutralized whatever the Supreme Court decided in the *Golaknath* case.

The *Kesavananda Bharati* case was a very important turning point, wherein the issue was whether parliament is supreme or the Supreme Court is supreme and the Supreme Court had to lay down certain restrictions or limitations on the parliamentary power. A constitutional bench in the Bharati case, said that the parliament is empowered to change fundamental rights. However, it said that there is something called the basic structure and you cannot always allow parliamentary supremacy over the constitution because such supremacy will result in abuse of power. It will allow too much discretion to the parliament. So, certain parts of the constitution should not be touched at all, and the parliament should have some kind of conscience. Parliament must affirm their faith in the basic structure theory. They must say these are the parts that shall continue to remain and some of these parts can be changed. So, the case on the Bharati, judges allowed the parliament to decide but they said, decide everything else except the basic structure. The court decided to give the power to decide fundamental rights but without touching the basic features of the constitution.

In 1975, in *Indra Nehru Gandhi v Raj Narain*, the 1975 very famous case where Raj Narain challenged the election of Indira Gandhi. It is a very popular turning point in the Indian constitution. Raj Narain said that Indra Gandhi had not won fairly in her elections. In that case the Supreme Court invalidated the 39th Constitutional Amendment to the Constitution which was brought in by Indira Gandhi to say that the election to the prime minister or the speaker of the Lok Sabha is outside the jurisdiction of the court itself. So, if there are any election disputes to the elections of the prime minister of the Lok Sabha then the courts cannot intervene at all. So, a new provision in the constitution itself was added through what is known as the 39th amendment act. Now the court here then had to step in because the rule of law was completely dislodged here. Rule of law says everyone is equal before law. This is the basic feature of the rule of law. Everyone is equal. Despite or despite your status, however high you are, you are equal before the law, equal before the courts of law, equal before the justice provision. Here, the prime minister put herself as being beyond the ordinary scrutiny or supervision of law. So, at this point of time the supreme court had to intervene, they had to step in, and they said that this provision was beyond the amending powers of the parliament. The parliament could not bring such an amendment, and this violated the basic structure of the Constitution. In *Indira Gandhi v. Raj Narain*, the court held that the basic structure of the constitution is rule of law. Rule of law is important. Equality before law and equal protection of law is the basic feature of the constitution. You cannot assume a role of being a superhuman and not being subject to the scrutiny and supervision of law. The basic structure or feature of the constitution was slowly elaborated, explained, and brought into existence through this case.

The basic structure theory was laid down in the *Kesavananda Bharati* case, but it was expanded in later cases to say what basic structure of the constitution meant. So, in 1976, the parliament passed the most major amendment to the constitution called the 42nd Amendment. And this act amended article 368 and declared that there is no limitation on the constituent powers of the parliament and no amendment can be questioned in any court of law on any ground including those dimensions of fundamental rights. So, one of the amendment features of the 42nd amendment was to reiterate parliamentary supremacy on the amending powers and reiterating the powers of 368 as being absolute power with the parliament of India and the Supreme Court or any court could not intervene on those grounds was laid out.

However, in the Supreme Court in a case called the *Minerva Mills* case of 1980, they invalidated this provision in the 42nd Amendment and the Supreme Court said that excluding judicial review is not something that is possible by the constitution amendments. Judicial review is a basic feature of the constitution. So, the judiciary can question anything and everything and that cannot be taken away at all. The court applied the basic structure theory in the *Minerva Mills* case and reiterated court supremacy to decide the constitutionality of any legislation or any constitution amendment bill as the case may be.

So, in 1980, things slowly started settling down about who is supreme, the parliament or Supreme Court.

It was very clear by this time that the Supreme Court was winning the battle in trying to protect the constitution and the document of the constitution to protect rights in the constitution, to protect citizens interest in the constitution and also to lay down a new principle of constitutionalism saying that judicial review and rule of law is the basic structure of the constitution. So, the court in the Minerva Mills case very clearly says that amending power always is a limited power and it must be exercised when only there is an absolute need for the same. They say that any power that is granted, even amending power if is given to enlarge the scope or ambit then that would be a misuse of the power itself. And if absolute power is given to the parliament to do anything with the constitution, this power would lead to a destruction of the basic tenets of the constitution; the same being with political parties who are unfortunately driven by a lot of ideologies and thoughts.

There are a lot of clamors to individual leaderships. And sometimes this tends to be abused by the political leadership. And hence, a limited power means maximum governance, a limited power means uncorrupt government. A limited power is very important to protect the rights of the people. A Government that has restrictions and limitations will also do good governance. A lot of development has happened on the basic feature. With many cases, one would say that the basic structure or the basic feature of the constitution has been decided by the court of law. And they have added to what this basic structure means. The basic structure of the constitution means rule of law; it also means supremacy of the judicial review process. And that was very clearly laid down. The sovereignty of the country is a basic structure, democracy is a basic structure. Republicanism is the nature of Indian politics. India is a republic, which is not going to have someone as the king or the throne or the monarch in our nation. So, that is a basic feature. So, a presidential form of government is not going to be a choice with the king in place. President is a position that is there in the constitution, and it must be respected as it is.

Free and fair elections are a basic structure. Federalism is a basic structure. Secularism is a basic structure. So, federalism, secularism, democracy, unity and integrity of the nation, social justice and judicial review are all basic structures of the constitution. These six aspects were laid down in the most famous case called *S.R. Bommai* case of 1994. Which also was a very important turning point in our constitutional history. In L Chandra Kumar in 1997, the power of the High Court and the Supreme Court under Article 226 and 232 was held as the basic structure of the constitution. The importance of equality has always been reiterated as basic structure. Freedom and dignity of the individual has been accepted as the basic structure of the constitution. Access to justice is also a basic structure. The welfare state is also a basic feature of the constitution of India. So, through various decisions, the basic structure has been laid down from time to time. And one of the latest cases on basic structure that was pronounced was in 2014. It is called the *Madras Bar*

Association v. Union of India, where judicial review and the power under 226 and 32 were reiterated by the courts. So, it is now very clear that the basic structure theory is part of the Indian constitution. It has emerged as one of the most important pillars of constitutional democracy that has very clearly clarified how there ought to be a balance between the power of the parliament and judicial review.

The judiciary is the custodian of the constitution. This very theory called the basic structure theory reiterates that and holds it to its firm position. And the judiciary has been able to check and balance the power of the parliament and the legislature. That is precisely what checks and balances theory is. And through the basic structure theory, we kind of find out how the Indian constitution becomes a very robust public policy document. So, whatever is the basic feature of the constitution is the public policy of this land which cannot be compromised, which cannot be amended, which cannot be abused, which cannot be at any stage, resulting in abridging the fundamental rights of the citizens.