AMENDMENT OF THE CONSTITUTION: A COMPREHENSIVE ANALYSIS OF ARTICLE 13 CONTROVERSY AND COMPARISON TO AUSTRALIA

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INTRODUCTION

The ability to amend the Constitution is a key feature of constitutional democracy, enabling the legal framework to evolve in response to changing social, political and economic realities. However, when it comes to amending the Fundamental Rights, a new debate arises, where Article 368 gives Parliament the power to amend the Constitution and Article 13[1] ensures that no law can amend the Fundamental Rights. To deal with this situation, judicial review has emerged, which is enunciated in the ongoing development of the Doctrine of Basic Structure.[2] It seeks to preserve the fundamental principles of the Constitution. This apparent contradiction has prompted a critical role for judicial review, culminating in the development of the Doctrine of Basic Structure. Introduced through judicial interpretation, this doctrine acts as a safeguard against arbitrary amendments, preserving the essential principles that define the Constitution's identity. It ensures that while the Constitution evolves, its core values such as democracy, secularism, and the rule of law remain inviolable.

In contrast, the Australian Constitution uses a more stringent amendment mechanism under section 128, which emphasizes public approval through referendum. That requires a majority vote nationwide and in most states.[3] This rigid mechanism prioritizes democratic consensus and institutional stability, This ensures that any changes to the Constitution reflect broad public support. However, this rigidity often limits the ability to respond rapidly to emerging social needs, creating a trade-off between stability and adaptability.[4] The combination of these two

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[1] Constitution of India, Article 368; Article 13

[2] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

[3] Commonwealth of Australia Constitution Act, Section 128.

[4] *George Williams and Sean Brennan, Australian Constitutional Law and Theory 357* (6th edn, Federation Press 2014)

models highlights the diverse approaches that constitutional democracies take to manage the delicate balance between change and continuity.

MODES OF AMENDMENT

There are two modes of amendment firstly Informal method and secondly formal method.

- ***Informal method:***

It is not called amendment in simple words because it does not change the basic elements of the constitution but it is interpreted and this happens through the process of court.[5]

- ***Formal method:***

In this process, the amendment is made by the Parliament and after the amendment is passed, it becomes a Constitution. It is also classified into two parts, first modification by flexible process and second modification by rigid process.

- ***Flexible constitution***

A flexible constitution is one in which the process of amendment is quite easy. The constitution can be changed by ordinary legislative process. It is just like enacting an ordinary law. For example, the British Constitution can be amended by ordinary law of Parliament.[6] In a flexible Constitution, there is no distinction between the ordinary legislative process and the constituent process.

- ***Rigid Constitution***

In a rigid constitution, the process of amendment is more elaborate and difficult. The Constitution cannot be amended like an ordinary law. A different set of procedures is laid down for the amendment of the Constitution.[7] In a rigid constitution, there is a difference between the ordinary legislative process and the constituent process.

[5] M.P. Jain, *Indian Constitutional Law*, 8th edn. 132 (LexisNexis, 2018).
[6] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 143(10th edn. Macmillan 1959) .
[7] Ibid

FORMAL AMENDING PROCESS IN INDIA

Our Constitution attached different degrees of rigidity to different provisions of the Constitution. For the purposes of amendment, the provisions of the Constitution fall under 3 categories. The procedure for each category is laid down in the Constitution under Article 368.[8] They are:

- Simple majority
- Special majority
- Special majority and ratified by legislatures of half of the States.

AMENABILITY OF THE INDIAN CONSTITUTION

"Since the commencement of the Constitution, a constitutional battle has been fought, in this regard, both in the Courts as well as, inside the Parliament. It appears that Parliament has been asserting its supremacy as enjoyed by the British Parliament, but the Supreme Court has been interpreting Parliament as a creature of the Constitution, exercising powers under and not beyond the Constitution. The Constitution, though expressly confers amending power on the Parliament, but it is the Supreme Court, which is to finally interpret the scope of such power and to spell out the limitations, if any, on such amending power."

"Since 1951, questions have been raised about the scope of the Constitutional amending process contained in Article 368. The basic question raised has been whether the Fundamental Rights were amendable so as to dilute or take away any fundamental right through a Constitutional Amendment. Since 1951, a number of amendments have been effectuated in the Fundamental Rights."

"The worst affected Fundamental Right has been the right to property contained in Article 31 which has been amended several times. The basic trend of these amendments has been to immunize, to some extent, state interference with property rights from challenge under Articles 14, 19 and 31 as well as to seek to exclude the question of compensation for acquisition or requisitioning of property by the state from judicial purview. The constitutional validity of these amendments has been challenged a number of times before the Supreme Court."

[8] Constitution of India, Article 368.

THE FIRST PHASE

The question of whether fundamental rights can be amended under Article 368 came for consideration before the Supreme Court in the case of *Shankari Prasad v. Union of India, AIR 1951 SC 458*,[9] wherein the validity of the Constitution (First Amendment) Act, 1951 was challenged.

Constitution (1st Amendment) Act, 1951: The Constitution (1st Amendment) Act, 1951 was enacted to remove certain difficulties brought to light by judicial pronouncements in regard to Fundamental Rights and the Directive Principles of State Policy. The amendment added new Articles 31A and 31 B along with the Ninth Schedule to the Constitution. Article 31B immunizes the laws included in the Ninth Schedule, from an attack on the ground of their inconsistency with any of the Fundamental Rights.[10]

In the case of *Shankari Prasad v. Union of India, AIR 1951 SC 458* the validity of the Constitution (First Amendment) Act, 1951, curtailing the right to property guaranteed by Article 31 was challenged. The Act curtailed the right to property. The question before the Constitution Bench of the Court was whether an amendment of the Constitution made under Article 368 was included in the term law in Article 13.[11] It was argued that Article 13 prohibited enacting a law infringing or abrogating fundamental rights. A law amending the Constitution must conform to Article 13. So, the Amendment Act is void as violating Article 13. The Supreme Court did not accept the argument. It held that Article 13 is not applicable to Acts that amend the Constitution. Article 368 permits the Parliament to amend any provision of the Constitution. It stated that a constitutional amendment will be valid even if it abridges or takes away any of the fundamental rights. The Supreme Court distinguished between the ordinary legislative power and the constituent power. The Court held that, in the context of Article 13, "law" must be taken to mean rules or regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power. The Supreme Court, thus, laid down that Article 368 conferred constituent power on the Parliament, in the exercise of which, it could amend every provision of the Constitution, including the Fundamental Rights.[12]

[9] AIR 1951 SC 458
[10] Constitution of India, Articles 31A, 31B; Constitution (1st Amendment) Act, 1951.
[11] Constitution of India, Articles 13, 368.
[12] AIR 1951 SC 458.

In 1965, in the case of *Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845*,the validity of the Constitution (17th Amendment) Act was challenged. The challenge was not against the power of the Parliament to amend the fundamental rights but on procedural non-compliance. The Supreme Court by majority of 3:2 adhered to Shankari Prasad's judgment and held that the words "Amendment of the Constitution" means amendment of all the provisions of the Constitution. The Court held that the constituent power conferred by Article 368 on the Parliament, included even power to take away fundamental rights under Part III.[13]

THE SECOND PHASE

A year later the question of amendability of fundamental rights again came before the Supreme Court in the case of *I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643.* [14]In this case, the validity of the Constitution (17th Amendment) Act which inserted certain State Acts in the Ninth Schedule was again challenged. The validity of the 1 Amendment Act, of 1951 and the 4th Amendment Act, of 1955 was also questioned. In this decision 11 judges participated. 6 judges overruled Sajjan Singh and Shankari Prasad. Subbarao C.J. delivered the leading majority judgement. He held that Article 368 contained only the procedure for amendment. The power to amend is located in Article 248 i.e., residuary power. The power to amend the Constitution should be found in the plenary legislative power of Parliament. All legislative power was subject to the provisions of the Constitution. Article 13(2) constituted a bar. "Fundamental Rights cannot be abridged or taken away"[15]. Hidayatullah J. held that Article 368 provided a procedure which when followed resulted in the amendment of the Constitution. Constitutional Amendment was a law and was subject to Article 13(2). No amendment could abridge or destroy a fundamental right. The majority now took the position that the Fundamental Rights occupy a "transcendental" position in the Constitution, so that no authority functioning under the Constitution, including Parliament exercising the amending power under Article 368,[16] would be competent to amend the Fundamental Rights.

The minority, however, held that the word 'law' in Article 13(2) referred to only ordinary law and not a constitutional amendment and hence Shankari Prasad and Sajjan Singh cases were

[13] AIR 1965 SC 845.
[14] AIR 1967 SC 1643.
[15] Ibid.
[16] M.P. Jain, *Indian Constitutional Law* (8th edn, LexisNexis 2018) 133.

rightly decided. According to them, Article 368 deals with not only the procedure of amending the Constitution but also contains the power to amend the Constitution.[17]

Thus, the 24th amendment not only restored the amending power of Parliament but also extended its scope by adding the words to amend by way of the addition or variation or repeal any provision of this Constitution in accordance with the procedure laid down in this Article. The amendment also made a change in the marginal note to Article 368.[18] "This amendment recognizes the distinction between an ordinary law and a constitutional amendment. The amendment thus, conferred absolute, unlimited and uncontrolled amending power on the Parliament."

THE THIRD PHASE

The validity of the Constitution 24th Amendment Act, 1971 was challenged in the case of Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461,[19] wherein a writ petition was filed initially to challenge the validity of the Kerala Land Reforms Act, 1963. It is also popularly known as the Fundamental Rights case or the Basic Structure case. The petitioners were permitted to challenge the validity of the 25th, 26th and 29th Amendment Acts also. The question involved was to what was the extent of the amending power conferred by Article 368 of the Constitution?

Chief Justice Sikri constituted a special bench of 13 judges to hear the petitions. The court by majority overruled Golak Nath's case which denied the Parliament the power to amend the fundamental rights of the citizens. The conclusion of the majority 7 judges has been summarised by the Court. The views taken are:

- The judgment in the Golaknath case has been overruled.
- Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.
- The 24th Amendment Act is valid.

[17] H.M. Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing 2015) 186.
[18] Constitution (24th Amendment) Act, 1971.
[19] AIR 1973 SC 1461.

- Part of the 25th Amendment (and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy occurring in Article 31C) is invalid.

- The 29th Amendment Act is valid.

Keshavananda case stated that Fundamental Rights may be amended by the Parliament. But not all of them. Those Fundamental Rights which constitute the basic structure of the Constitution cannot be abridged or abrogated. Keshavananda recognises that some other provisions in the Constitution may be equally important. If they form the basic structure they are unamenable. Under Article 368 the Parliament cannot rewrite the entire Constitution and bring in a new one. The power of judicial review shall remain with the courts. Legislative declaration cannot destroy it. Keshavananda is an example of judicial creativity of the first order. It protected the nation from the attacks on the Constitution by a transient 2/3 majority, which may be motivated by narrow party or personal interests. The basic features cannot be mauled. [20]

What is basic structure?

"The fact that many amendments have been made merely to amend amendments justifies the conclusion that on some occasions Parliament has lost its credibility in such a manner and to such an extent that the judiciary has been forced to import the concept of immutability of fundamental features. Although the judges in Keshavananda's case enumerated certain essentials of the basic structure of the Constitution, they also made it clear that they were only illustrative and not exhaustive. They will be determined on the."

Criticism of basic structure:

"The doctrine has been vehemently criticised. It has been said that the Court has not precisely defined as to what are the essential features of the basic structure and if this doctrine is accepted every amendment is likely to be challenged on the ground that it affects some or the other essential features of the basic structure. However, criticism of the doctrine cannot be justified on the ground that it lays down a vague and uncertain test."

[20] M.P. Jain, *Indian Constitutional Law* 140 (8th edn, LexisNexis 2018).

THE AMENDMENT PROCESS IN AUSTRALIA

The amendment process in Australia, outlined in **Section 128** of the Constitution, is a meticulously designed mechanism that emphasizes stability, democratic participation, and federal balance.[21] It begins with a proposal introduced in either House of Parliament, where it must secure an **absolute majority** of votes to proceed. If the proposal passes one House but is rejected by the other, a special provision allows the originating House to pass it again after a three-month interval. In such cases of persistent deadlock, the Governor-General has the authority to bypass the second House and directly refer the proposal to a referendum.[22]

The referendum stage is the cornerstone of Australia's amendment process, ensuring that any constitutional change reflects the collective will of both the nation and its constituent states. For an amendment to succeed, it must meet the stringent **double majority** requirement: a majority of voters across the entire country and a majority in at least four of the six states must approve the proposal.[23] This dual threshold safeguards the interests of smaller states, preventing them from being overshadowed by the more populous ones, and reinforces the federal character of the Australian Constitution.[24]Once the referendum is successful, the proposed amendment is presented to the **Governor-General** for royal assent. Upon receiving this formal approval, the amendment becomes an integral part of the Constitution. Despite its democratic and inclusive nature, this process is highly rigid, making constitutional change exceptionally difficult. Since the Constitution came into effect in 1901, only **8 out of 44 proposed amendments** have been approved. [25]Notable successes include the 1967 referendum that removed discriminatory references to Aboriginal Australians and the 1977 amendment ensuring casual Senate vacancies are filled by members of the same political party.[26]

The stringent nature of the process has attracted both praise and criticism. On the one hand, it ensures stability, prevents hasty or politically motivated changes, and upholds the sanctity of the Constitution.[27] On the other hand, it poses significant challenges to necessary reforms, as even widely supported proposals can falter under the double majority requirement. Moreover,

[21] Commonwealth of Australia Constitution Act, Section 128.
[22] G. Lindell and C. Saunders, *Australian Constitutional Law and Theory 101* (7th edn, Federation Press 2018).
[23] Ibid.
[24] I B. Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia 96* (University of Queensland Press 1987).
[25] Ibid
[26] R.D. Lumb, *The Constitution of the Commonwealth of Australia Annotated 119* (6th edn, Butterworths 2012).
[27] G. Winterton, *Parliament, The Executive, and The Governor-General 55* (Melbourne University Press 1983).

the high threshold can discourage politicians from proposing amendments due to the substantial effort and resources needed to secure public and state-level support. Overall, Australia's amendment process reflects a cautious approach to constitutional change, prioritizing careful deliberation and widespread consensus over ease of adaptation.[28]

COMPARISON

The constitutional amendment processes in India and Australia differ significantly in their flexibility, public involvement, and federal considerations, reflecting their distinct constitutional philosophies. India's process, governed by **Article 368**, is relatively flexible, offering three tiers of amendments: simple majority, special majority, and special majority with state ratification.[29] This gradation allows for varied scrutiny based on the significance of the amendment, enabling frequent changes to address evolving needs. In contrast, Australia's process under **Section 128** is rigid and uniform, requiring a proposal to pass both Houses of Parliament by an absolute majority before being subjected to a **referendum**.[30] The referendum mandates a **double majority:** approval by a majority of voters nationwide and a majority in at least four out of six states, ensuring federal balance and public consent.[31]"While India's process relies on representative democracy, with citizens indirectly participating through elected representatives, Australia's system emphasizes direct democracy, giving voters a decisive role in constitutional amendments. Consequently, India has successfully enacted over **105 amendments** since 1950, reflecting adaptability, whereas Australia has approved only **8 out of 44 proposals** since 1901, prioritizing stability. These differences highlight India's emphasis on flexibility and responsiveness and Australia's focus on deliberation and democratic legitimacy."

CONCLUSION

"In conclusion, the amendment processes of India and Australia reflect contrasting approaches to constitutional change, shaped by their unique democratic and federal structures. India's flexible, multi-tiered system under **Article 368** allows for frequent amendments, enabling the Constitution to evolve in response to societal and political developments. This adaptability

[28] J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth 875* (Legal Book Company 1901).
[29] Constitution of India, Article 368.
[30] Commonwealth of Australia Constitution Act, Section 128.
[31] J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* 875 (Legal Book Company 1901).

ensures responsiveness but carries the risk of overuse or politically motivated changes. In contrast, Australia's rigid process under **Section 128** prioritizes stability and democratic legitimacy, requiring both parliamentary approval and a public referendum with a double majority. This structure safeguards the Constitution against hasty amendments but can impede timely reforms, even for widely supported proposals. Ultimately, these systems demonstrate a balance between adaptability and stability, with each catering to the specific needs and historical contexts of its nation. Both models offer valuable lessons on safeguarding constitutional integrity while remaining attuned to the demands of a changing society."