

CONSTITUENT POWER & SOVEREIGNTY: IN LIGHT OF AMENDMENTS TO THE INDIAN CONSTITUTION

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This article attempts to explore the links between sovereignty and constituent power. Both these concepts have deep-rooted links to amendments affected in any Constitution. Accordingly, their interplay with respect to the Indian Constitution is explored in this paper. The first section is concerned with a general introduction to the subject. The second section provides a jurisprudential understanding of the concepts explaining their relevance individually and further to different theories notably that of Carl Schmitt, linking sovereignty with constituent power. The third section is devoted to understanding the link between sovereignty and constituent power, and the amending power. The fourth section works through a tentative solution suggesting that the amending power is something akin to constituent power and discusses briefly how sovereignty could be protected by exercise of the amending power. The concept of implied limitations is discussed with reference to the position prevailing in different countries, furthered with the aid of the basic structure doctrine prevailing in India. The conclusion ends on a cautionary note: that judges, who propose to be the self-designated guardians of sovereignty and the Constitution, could need some guarding as well.

I. INTRODUCTION

In the introduction to their volume on *The Paradox of Constitutionalism*, the editors Martin Loughlin and Neil Walker suggest that at the core of modern constitutionalism there exists an apparent paradox – the paradox

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of constituent power and constitutional form.¹ This paradox expresses the struggle between public and private autonomy. The right to security of the majority vis-à-vis the right to individual freedom are topics that have formed the subject matter of many debates. However, constituent power is ideally supposed to cover laws made for both the purposes. Constituent power has always been a hybrid creature in modern constitutional theory, with its character oscillating between legally unbound sovereignty on one hand, and the paradox of the legal force of a constitution on the other, creating a very uncomfortable situation for lawyers.² The character of sovereignty as absolute and over-arching is well-known;³ it is the link between the sovereign and the constituent power that we seek to establish. The best known understanding of such ‘sovereign and sovereignty’ has been provided by Austin. His basic maxim of ‘*Law as the command of the sovereign*’ is too well-known to require explanation at this stage and it is from this that his concept of sovereignty flows.⁴ According to Salmond, this sovereignty consists not in having power, but in having authority.⁵

According to Carl Schmitt’s radical understanding of constituent power, it is a characteristic of, and connected to a people and its substantial ‘being’ as a *Volk*.⁶ However, if it is to be accepted that human rights are inalienable rights, then the above reading of constituent power would be inconsistent with the same.⁷ Schmitt’s proposed idea of political form would appear to have pervaded the majority decision in *Kesavananda Bharati v. State of Kerala*,⁸ where if it be deemed that the Legislature is the ‘sovereign’ chosen by the political form, (i.e. the Constitution has been made in exercise of the constituent power) then the Legislature cannot exercise powers which would fundamentally supersede the constituent power of which they are the product. It is slightly paradoxical and flawed in the democratic context though, to consider the Legislature as ‘sovereign’ separate from the people who are the real sovereign according to the Indian Constitution. This idea would be more suited to Schmitt’s Dictator.

The case of *Indira Nehru Gandhi v. Raj Narain*,⁹ is often regarded as the case which consolidated the Basic Structure Doctrine in India. In relation to

¹ M. LOUGHLIN & N. WALKER, *THE PARADOX OF CONSTITUTIONALISM* 1 (2006).

² M. LOUGHLIN, *THE IDEA OF PUBLIC LAW* 99 (2003).

³ In his famous definition of sovereignty, Jean Bodin described it as ‘the highest power of command’ in J. JEAN BODIN & J.H. FRANKLIN (trans), *ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS ON COMMONWEALTH* 1 (1992).

⁴ See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1995).

⁵ See generally P.J. FITZGERALD, *SALMOND ON JURISPRUDENCE* (1999).

⁶ C. SCHMITT, *VERFASSUNGSLEHRE* 22 (2003) as translated by Rainer Nickel, *Private and Public Autonomy Revisited: Jürgen Habermas’ Concept of Co-Originality in Times of Globalisation and the Militant Security State*, EUI Working Paper Law No. 2006/27.

⁷ J.J. ROUSSEAU, *A TREATISE ON THE SOCIAL COMPACT OR THE PRINCIPLES OF POLITIC LAW* 1 (1791). J.J. Rousseau is a defender of inalienable, equal rights of man.

⁸ AIR 1973 SC 1461.

⁹ AIR 1975 SC 2299.

the same, the eminent legal scholar, Upendra Baxi has made the following comment, “*Nowhere in the history of mankind has the power to amend a Constitution thus been used.*”¹⁰ In this case, Mrs. Gandhi, by taking advantage of the emergency situation¹¹ introduced the thirty-eighth amendment which shielded from judicial review any laws adopted during the emergency that might conceivably impinge upon fundamental rights. It has been argued that Gandhi’s ideas were Schmittian in the extreme.¹² In essence, the constituent power as an expression of the sovereign will of the people, was all-embracing and at once judicial, executive, and legislative. As such, according to her, this rested fully in the Legislature.

II. A JURISPRUDENTIAL UNDERSTANDING OF THE KEY CONCEPTS

There is a reason why an automobile engineer is always paid more than a car-mechanic. Essentially, a mechanic knows a car inside out, and if such a mechanic is good at his job, he might even know how to put together a car from the spare parts. But, as is clear from his name, he knows and does everything *mechanically*. On the other hand, the engineer knows the theory behind *how* something came to be where it is, and *why* something works better a certain way. He knows the beginning so he can change the end to suit his purposes if such change is required in the future. The one lesson which can be derived out of the aforementioned paragraph is that although practical knowledge might be essential for the present, but in order to really prepare for the future, one needs a bearing as to how and why it all began. This is where jurisprudence becomes indispensable to law,¹³ and especially with reference to, modifying law so as to adapt to future needs.

A. SOVEREIGN AND SOVEREIGNTY

The concept of a sovereign is preceded by the concept of the State. Holland defines a State as follows:¹⁴

¹⁰ UPENDRA BAXI, COURAGE CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES 70 (1985).

¹¹ The emergency was characterized by the suspension of most fundamental rights which was subsequently challenged in a number of decisions.

¹² Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J CONST. L. 460 (2006).

¹³ The importance of jurisprudence has been recognized by a number of authors. See Generally Neil Duxbury, *English Jurisprudence between Austin and Hart*, 91 VA. L. REV. 1 (2005); JAMES POPPLE, A PRAGMATIC LEGAL EXPERT SYSTEM 7 (1996); Julius Stone, *The Province of Jurisprudence Redetermined*, 7 MOD. L. REV. 97 (1944); Nathan Isaacs, *The Schools of Jurisprudence, Their Places in History and Their Present Alignment*, 31 HARV. L. REV. 373 (1918); See also Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911).

¹⁴ V.D. MAHAJAN, JURISPRUDENCE AND LEGAL THEORY 109 (1987).

“The numerous assemblage of human beings, generally occupying a certain territory amongst whom the will of the majority or of an ascertainable class of persons, is by strength of such a majority or class made to prevail against any of their number who oppose it.”

Now when it comes to the definition of a sovereign and sovereignty, the classical problem of jurisprudence surfaces its head: the multiplicity of opinions and views.¹⁵ One of the first notable understandings of the concept of sovereignty was provided by Austin, who was a member of the imperative or positivist school of law.¹⁶

According to Austin, all law flows from the ‘*command*’ of a ‘*political sovereign*’ and is backed by a ‘*sanction*’ in case of non-performance of the law. Now, all the aforementioned terms have various implications, but a detailed analysis of the same is outside the scope of this paper. Hence, only the concept of sovereign will be discussed in greater detail. To Austin, a sovereign is *any* person or body of persons whom the bulk of a political society habitually obeys, and who does not himself obey some other person or persons. There are a number of criticisms that are leveled at such a definition but all that is undertaken in this section is to see how this definition holds up in a democratic modern society especially in the context of popular sovereignty as prevalent in India.

Morgan provides an insightful look into how the source of ultimate power passed from the ‘*monarch*’ who was regarded as ‘*God on Earth*’ to the people or popular sovereignty.¹⁷ He also noted that the transmission of ultimate sovereignty from the King to the people was a repudiation not of the sovereignty of God, who remained the ultimate source of all governmental authority, but of the monarch as the sole object of divinely delegated authority. After this analysis, it was his firm belief that though the Parliament might seek to rule in the name of the people, in fact its members and chief officers act in a manner often wholly detached from those people upon whose authority their power purportedly rested.¹⁸ In fact, according to him popular sovereignty came onto its own in America even before the American War of Independence. According to his detailed analysis America attains most of its vestiges of popular sovereignty through their direct elections. His continuing dissatisfaction with popular sovereignty in practice is evident in his concluding statement: although governments may be, in Abraham Lincoln’s

¹⁵ See Robert Lansing, *A Definition of Sovereignty*, Proceedings of the American Political Science Association, Vol. 10, Tenth Annual Meeting 61- 75 (1913).

¹⁶ Before him there were some others, such as Bodin and then later Hobbes, who attempted a definition.

¹⁷ EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 13 (W.W. Norton, 1988); Reviewed in Richard Beeman, *Self-Evident Fictions: Divine Right, Popular Sovereignty, and The Myth Of The Constituent Power in the Anglo-American World*, 67 TEX. L. REV. 1569 (1989).

¹⁸ J. C.D. CLARK, *REVOLUTION AND REBELLION* 92 (1986).

words, ‘of the people’ and ‘for the people’, they can never be ‘by the people’ in any literal sense, because the multiple distances that separate representatives and the constituency will always prevent an exact identity of sentiment in the governors and the governed.

It is suggested by some that the Constitution of India can be more meaningfully understood by adopting a more *complex* concept of democracy: one that is able to distinguish between popular sovereign power in the hands of the people themselves, and in those of their agents in government.¹⁹ It is here that the concept of constituent power emerges.

B. CONSTITUENT POWER AND LINKS WITH SOVEREIGNTY

Constituent Power, put simply, is the power which seeks to establish a Constitution.²⁰ This power was manifested in America when people as a whole adopted the Constitution through the Convention.²¹ The Convention made the Constitution superior to the laws enacted by legislatures. This same concept is often applied *mutatis mutandis* to India. So it follows that it in democratic nations, the constituent power flows from the people and is greater than the legislative power given to the representatives of the people in Parliament. The theoretical roots of Catholic, and later Nazi legal theorist Carl Schmitt, have often baffled later scholars.²² Despite his ardent support and enthusiasm for Hitler’s policies and the Weimar Constitution, we believe that this was mere ‘lip service’ and essentially Schmitt was in agreement with the Rule of Law and hostile towards the core of Nazi doctrine.²³ In any case, his writing provided the crucial, albeit occasionally, antagonistic links between sovereignty and constituent power.

In *Die Diktatur*,²⁴ Schmitt states that the concept of sovereignty is clearly associated with absolute freedom from constitutional constraints, and with the power to create a constitutional order *ex nihilo*, that is to say, with constituent power.²⁵ In

¹⁹ See generally SARBANI SEN, *THE CONSTITUTION OF INDIA: POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS* (2007).

²⁰ CARL JOACHIM FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND POLITICS, NATURE AND DEVELOPMENT* 113 (Friedrich Press, 2007); See also Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 *LAW AND PHILOSOPHY* 327 (1990-1991).

²¹ Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, available at <http://law.wustl.edu/uploadedFiles/Schlanger/ConstituentPowerConstChangeAmConstUSver.pdf> (Last visited on December 15, 2007).

²² See WAYNE MORRISON, *JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM* 45 (Cavendish, 1997).

²³ See William E. Scheuerman, *The Fascism of Carl Schmitt: A Response to George Schwab*, 29 *GERMAN POL. & SOC.* 71 (1993); See also William E. Scheuerman, *After Legal Indeterminacy: Carl Schmitt And The National Socialist Legal Order*, 19 *CARDOZO L. REV.* 1743 (1988).

²⁴ See generally CARL SCHMITT, *LA DICTATURE* (Le Seuil, 2000) (1972).

²⁵ Lior Barshack, *Constituent Power as Body: Outline of a Constitutional Theology*, 57 *U. TORONTO L.J.*, 1 (2006).

another book of his, *Political Theology*,²⁶ written in 1922 however, his concept of sovereignty is slightly weaker. Schmitt has a queer definition of who the sovereign is; a ‘*Sovereign is he who decides on the exception*’²⁷. In fact, a number of scholars criticize such a definition simply because in modern times, there would be different sovereigns at different times, perhaps the Court in one situation and the President in another.²⁸ His assertion that emergency powers are limitless suggests that, in *Political Theology* at least, that sovereignty approximates constituent power. Eventually, this confusion created and cultivated by Schmitt is sorted out to an extent by way of his 1928 book, *Constitutional Theory (Verfassungslehre)*,²⁹ where the two terms are distinguished. Constituent power is the author of the founding decision about the political form of the state, while the sovereign is the supreme authority designated by the political form chosen by the people, and the supreme guardian of that form.

The above apparent clarification, of Schmitt’s vacillating ideas, has been embraced by other authors who have in fact designated the two terms to be referring to essentially the same thing.³⁰ A tentative observation can be made to the effect that constituent power seems to be an adjunct of the inherent sovereignty of the people which is normally dormant, but surfaces at times to make certain important constitutional decisions. What requires to be seen is whether making amendments to the Constitution mandates such a situation.

III. SOVEREIGNTY VIS-À-VIS CONSTITUENT POWER: ACCORDING TO AMENDMENTS TO THE CONSTITUTION

This segment would attempt to be a link between the concepts discussed in the previous segment and amendments to the Constitution. The most obvious link is deciphering the nature of amending power both, generally as well as according to the Indian Constitution.

A. THE NECESSITY OF AMENDMENTS IN ANY CONSTITUTION

An amendment is defined as a formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specifically, a change made by addition, deletion, or correction; especially, an alteration in

²⁶ See generally CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (MIT Press, 1985).

²⁷ *Id.*

²⁸ Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006); See also Mark Tushnet, *Meditations on Carl Schmitt*, 40 GA. L. REV. 877 (2006).

²⁹ CARL SCHMITT, *CONSTITUTIONAL THEORY (VERFASSUNGSLEHRE)* (Dumcker & Humblot, 1928).

³⁰ SCHEUERMAN, *supra* note 23, the author decided to use the two terms ‘sovereignty’ and ‘constituent power’ interchangeably to ‘designate the power of the group as an absolute unity, a single collective body, to author and breach the constitution’.

wording.³¹ Most constitutions declare the primacy of popular sovereignty and proclaim that ultimate power resides with *'the people'* through the democratic process. At the same time, in keeping with the notion of limiting democratic government, most constitutions also describe what the legislature, the representative of the people, cannot do.³² By definition, democracy is antithetical to the concept of inalienable rights. The amending process helps maintain the delicate balance between democracy and limited government.

Amendments are often described as the *'pressure valve'* of the Constitution. Most Constitutions today have provisions of being amended in one way or the other, but that was not always the case. In fact, it has been said that the idea of incorporating within a constitution a provision for its own amendment was largely an invention of the Constitutional Convention in Philadelphia.³³ It is well known that now there exists a standard of testing the rigidity or otherwise of a Constitution on the basis of ease of amending power. There are perils in leaning too closely to either side. If it is too difficult to change the Constitution, the people may become frustrated and resort to extra-legal behaviour. If on the other hand, it is too easy to change, the Constitution's status may merely equal that of any simple statute and the Constitution's values will not rise above other more ephemeral political decisions.³⁴ Hence a cautious approach is mandated and usually the amendment procedure is not so much used to right a wrong, than to modify the existing provisions in accordance with the changing times. As Garner James had observed far back in time, *'Human societies grow and develop with the lapse of time and unless a provision is made for such constitutional readjustment as their internal development requires, they must stagnate or regress.'*³⁵

B. AMENDMENTS AND AMENDING PROCEDURE IN INDIA

Even before the Indian Constitution came into being, in *T.H. Vakil v. Bombay Presidency Radio Club Ltd.*,³⁶ Blagden J. made certain pertinent observations regarding the scope of the term 'amendment' which affirms the above-mentioned understanding of the concept:

'I understand the general rule on the point to be this: first, that amendments must be germane to the subject-matter of the proposition and, secondly, that they must not be, in substance,

³¹ BLACK'S LAW DICTIONARY (Bryan A. Garner et al ed., 2004).

³² Katz Elai, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251 (1996).

³³ Douglas Linder, *What in the Constitution Cannot be Amended?*, 23 ARIZ. L. REV. 717 (1981).

³⁴ Louis Henkin, *Constitutions and the Elements of Constitutionalism*, Occasional Paper Series/ Center for the Study of Human Rights (Columbia University, New York, N.Y.), Nov. 1992, at 10 says that a democratic Constitution should be amendable, yet not too easily.

³⁵ KANAHAIYALAL SHARMA, RECONSTITUTION OF THE CONSTITUTION OF INDIA 358 (2002).

³⁶ (1945) 47 BOMLR 428.

*a direct negative of it. If, for example, a resolution were that a particular piece of business be now considered, it would be in substance a direct negative to move that it be considered 999 years hence.*³⁷

Presently, the procedure of amendment and amending power,³⁸ is enshrined under Article 368 of the Indian Constitution.³⁹ An elaborate understanding of this procedure is not needed here except to observe that amendments in India require a special majority. As the procedure is different from the regular legislative process it is more difficult to make amendments in India as compared to say a country like the UK where the absence of a written constitution allows for parliamentary supremacy and a simple amending process. On the other hand, it is easier than in a country like the USA where certain changes cannot be affected through the ordinary amending process laid down in Article V of the American Constitution.

The definitions of the term, amendment, given by the judiciary after independence, have continued to be similar to the ones given before independence. This can be best explored through the different expression by various justices in the landmark *Kesavananda Bharati* case⁴⁰. In that rather complex verdict, Sikri C.J went on to say that the word amendment ‘*has a narrow meaning*’ and Shelat J. and Grover J. concurred with the same. The scope of the term was further sought to be limited to a great extent by Justices Mukherjee and Hegde who proclaimed that the words ‘amendment’ and ‘amend’ are used to confer a narrow power, a power merely to effect changes within prescribed limits. Ray J. also shed some light on the way amendments can be used by stating that amendment is to be by way of variation, addition or repeal. The same line of thought was enunciated by Justice Chandrachud as well.

C. THE NATURE OF AMENDING POWER

Constituent power as discussed hereinbefore contains within it the power to make or change the Constitution in a fundamental sense. If amending power were to have the nature of constituent power, then the whole argument of having any limitation on it, however slight it might be, would be futile. This is

³⁷ ¶ 2, *Id.*

³⁸ The debate regarding whether power of amendment is actually enshrined in Article 368 as alleged in *Golaknath v. State of Punjab* has now been said to be conclusively settled through the *Kesavananda Bharati* case and subsequent decisions.

³⁹ The present intense discussion on amending process and Article 368 would have seemed a trifle peculiar to the drafters of the Constitution because they did not allot much time to the formulation of amendatory process and procedure. This can be seen from the fact that the proposals formulated by the Sub-Committee were not even debated in the Constituent Assembly. So it seems as if the Constitution framers had taken it for granted that amendatory process served the purposes of both flexibility and control.

⁴⁰ *Supra* note 8.

because in that situation as constituent power is a function of the sovereign and the will of the people, an amendment would have the same force as the Constitution itself. On the other hand, if amending power is in the nature of legislative power then it has to stop short of making any massive changes.⁴¹ When it comes to a link between amending power and constituent power, it would first be advisable to look at the American Constitution which had been established by a Convention constituted exclusively for that purpose. Hence the American Constitution was deemed to have the sanction of the sovereign, the people who wielded the constituent power. Now, after the Constitution has been made, through Article V, they could either amend the Constitution, or as a means of radical change, even institute another Constitutional Convention.

Thus, the conventional meaning of constituent power within American constitutionalism is the power of the people to change the Constitution through amendment or a constitutional convention.⁴² A plain reading of this shows that amending power is considered to be a sub-set within constituent power of the sovereign according to the American Constitution. However there is a hierarchy between these two sorts of changes. The normal amendment usually requires the Congressional Method while the major changes require a 'Convention' method which would be properly discussed in the subsequent segment. When Parliament amends the Constitution, it does so in exercise of its constituent power as distinguished from its ordinary legislative power.⁴³ In fact, Article 368(1) itself states: '*...Parliament may in exercise of its constituent power...*' This, at least serves to make the legal and governmental stance on the issue clear. It is imperative to look at what the courts have to say in this regard.

In *Sankari Prasad v. Union of India*,⁴⁴ Justice Patanjali Sastri distinguished '*constituent law*' from ordinary '*legislative law*' and equated amending power with constituent power. After this, in both *Golaknath*⁴⁵ and in *Kesavananda*⁴⁶, the problem was discussed but was not explicitly tackled. However it received the most sustained attention in the controversial *Indira Nehru Gandhi v. Raj Narain* decision.⁴⁷ Firstly, we can look at Chief Justice Ray's comment in which he regarded constituent power as a '*sovereign power*' as because the '*Constitution flows from the constituent power*'. Another reason why he calls it '*sovereign*' is because constituent power is independent of the '*Doctrine of Separation of Powers*'. But the

⁴¹ Upendra Baxi speaks of a similar analogy in Upendra Baxi, *The Perils and Politics of the Amending Power* in UPENDRA BAXI, RECONSTRUCTING THE REPUBLIC 177 (1999).

⁴² Stephen M Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, Tulane University School of Law, Public Law and Legal Theory Working Paper Series, Working Paper No. 06-12A.

⁴³ See <http://www.rajyasabha.nic.in/rajya/19/94/i5/ch21.htm> (Last visited on December 21, 2007).

⁴⁴ [1952] 1 SCR 89.

⁴⁵ AIR 1967 SC 1643.

⁴⁶ AIR 1973 SC 1461.

⁴⁷ ¶ 49 AIR 1975 SC 2299.

Chief Justice also observed that the nature of constituent power is intrinsically legislative and not judicial or executive. Further, in essence, he also agrees that amending power is vested in the Parliament by virtue of the ‘*constituent power*’. In the same case, Justice Matthew expressed that to categorize constituent power as one belonging to only ‘*100% sovereign*’ i.e. the people and the amending power to ‘*lesser sovereign*’ or parliament would be to deny impermissibly the power to transform the Constitution.⁴⁸ He stated that amending power was a species of constituent power but did not explicitly mention it as such.

The above two judgments rendered the distinction between ‘*amending power*’ and ‘*constituent power*’ very ambiguous. It is Justice Beg who finally asked the pertinent question: ‘*Is the constituent power supra-constitutional?*’⁴⁹ He then regarded amending power as the only manifestation of sovereign power which is judicially recognized. It was in this way that he acknowledged the fact that normally sovereign power would not be judiciary amenable but this amending constituent power is intra-constitutional and not extra-constitutional and hence it would be subject to limitations imposed by the Constitution and interpreted by the judiciary. Even though there are still some scholars like Carl Friedrich,⁵⁰ who believe that constituent power is basically for making and removing a constitution. It is on the above-mentioned tentative premise that we would proceed towards ascertaining what limitations placed on amendments and the reasons behind the same.

IV. TOOLS FOR PROTECTION OF SOVEREIGNTY IN THE EXERCISE OF AMENDING POWER: IMPLIED LIMITATIONS

Limited Sovereignty is implicit in the concept of democracy. However sometimes some amendments make a direct attack on the sovereignty and will of the people as manifested in the Constitution. This chapter is concerned with whether there are certain entrenched provisions in Constitutions which cannot be touched.

A. THE CONCEPT OF IMPLIED LIMITATIONS: A COMPARATIVE PERSPECTIVE

‘Reforming’ a constitution is, as Walter F. Murphy has pointed out, different from re-forming a constitution.⁵¹ This is the reason that it is much tougher to amend the written Constitution or the fundamental law in most countries. Now the argument is that, if it is possible or rather desirable to make it difficult to amend the fundamental law of the land or the Constitution, then the sovereign should be justified in treating certain basic and ‘higher’ principles in the Constitution as

⁴⁸ ¶ 327 *Id.*

⁴⁹ ¶ 528. *Id.*

⁵⁰ Carl Friedrich said that “Constituent power bears an intimate relation to revolution”, as quoted in Upendra Baxi *supra* note 40.

⁵¹ Walter F. Murphy, *Slaughter-House, Civil Right, and Limits on Constitutional Change*, 32 AM. J. JURIS. 17 (1987).

even more difficult or almost impossible to amend. Judicial Supremacy is the catchword for many countries, the foremost among them being the United States of America where the opinion delivered by Justice Marshall in *Marbury v. Madison*,⁵² is in fact thought to be at the origin of the concept of Judicial Review. The American Constitution provides for its own process for amending the document and contains no explicit limitations regarding the same.⁵³ There are of course voices like that of the distinguished nineteenth-century treatise writer, Thomas Cooley who argued that there are limitations beyond those specified in Article V. According to Cooley, amendments that removed states from the Union, applied different tax rules to different states, established nobility, or created a monarchy, would be impermissible.⁵⁴ Then again according to Selden Bacon, the 10th Amendment to the Constitution limits the amending power of Article V to the effect that any change to the Constitution that infringes the reserved powers of the states and the people must be done by amendments ratified by state conventions, not by state legislatures. Generally in the USA, the States or the Congress proposes the amendment and not the people as a whole.⁵⁵ So the ordinary amending power enshrined in Article V originates in legislative power and not in constituent power. This argument makes a distinction between what is essentially the constituent power bestowed on the general public and the special amending power as an offshoot of the legislative power exercised by the Federal and State Legislatures.

In such a system, the problem of declaring an amendment to be unconstitutional is that once the amendment has been ratified by three quarters of the States, then it becomes part of the Constitution itself, so the question arises how a part of the Constitution itself could be declared unconstitutional. This is a problem which has been grappled with by scholars, lawyers, judges and legislatures alike. There have even been proposals at different points of time to introduce amendments which would make certain portions of the Constitution unamendable.⁵⁶ Although an unamendable amendment may be technically legal, it is argued that it would be imprudent to make such an amendment.⁵⁷ The strongest argument for the same lies in the reason for making constitutions flexible to change in the first place: if there is

⁵² 5 U.S. (1 Cranch) 137 (1803).

⁵³ This can be gathered from a strict reading of Article V. Article V has only one explicit limitation when it comes to the amendment of the Constitution that is still relevant today: 'The equal suffrage of any state in the Senate may not be altered without that state's consent.'

⁵⁴ Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747 (2005). Other people like Walter Murphy have argued that fundamental or natural rights limit the ways in which the Constitution may be changed.

⁵⁵ Amendments to the U.S. Constitution may be proposed in one of two ways: Either two-thirds of both houses of Congress must approve a proposed amendment and submit it to the states (the 'congressional method'), or two-thirds of the states may petition Congress to call a constitutional convention which would then submit a proposed amendment to the states (the 'convention method').

⁵⁶ The proposed Corwin Amendment if it would have come into existence would have eternally forbidden Congress from abolishing or interfering with slavery.

⁵⁷ Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251 (1996).

no possibility of change in the Constitution, the possibility of revolt by the common people is very acute. So it is obvious that making something impossible to amend is not the solution to the dilemma of entrenchment and perhaps some other path needs to be trodden. The solution might lie in making certain portions much more difficult to amend as compared to others. One suggestion was put forth by Elihu Root who argued in favour of the appellant in the National Prohibition cases, although this argument was not accepted.⁵⁸ His theory leaves amendments that do not alter the character of the Constitution to the traditional amending mechanism – the congressional method, and requires an amendment process similar to the constitution-making process for amendments that seek to change the fundamental character of the Constitution. For this purpose he feels that there should be a convention where the people of at least two-thirds of the states should ratify the proposed amendment.⁵⁹ As a theoretical suggestion, it seems to be the perfect solution. It is the practicalities that form the main concern. Though the United States has never had a national Convention, a number of States have had conventions in case of amendments which might bring in sweeping changes to the State constitution.

In contrast to the implicit entrenchment in the U.S. Constitution, one can look towards the present German Constitution which had in its immediate backdrop the experience of the Nazi tyranny. So, one of the primary aims of the Constitution-makers was to eliminate any such future regimes which may come to power by exploiting the Constitution. This is the reason that the German Constitution has an explicit entrenchment clause. Article 79 of the Basic Law of the Federal Republic of Germany, 1949 contains a relatively easy amendment process. Paragraph 3 of Article 79 limits this process by prohibiting changes to the basic organization of the federal system and the principles of human dignity, democracy, the rule of law, and the right to resist attempts to destroy the constitutional order. The one country which exhibits a complete disregard of any attempts to entrenchment or implied limits to constitutional amendments is Ireland. This was apparent in the case *State (Ryan) v. Lemmon*⁶⁰ in which an amendment to The Irish Free Constitution was widely known to be “*too radical fairly to be considered anything other than a de facto repeal of the constitution*”. However the majority opinion rejected the argument of the sole dissenting judge Justice Kennedy.⁶¹ Consequently it can be seen that the only limitation in case of amendments in Ireland are procedural, no substantive provisions are seen to be sacrosanct by the judiciary. Such a result is often viewed as an affirmation of the Schmittian perspective: In *Die Diktatur*,⁶² Schmitt says that the concept of sovereignty is clearly associated with

⁵⁸ National Prohibition Cases, 253 U.S 350 (1920).

⁵⁹ This is because the Congressional method gives no scope to the people to express their will even if their representatives in the Congress and the State Legislatures do so. Abraham Lincoln is also believed to have favoured the Convention method over the Congressional method for amendments which had the potential of altering the Constitution.

⁶⁰ [1935] 170 I.R. 197.

⁶¹ His argument was that any purported amendment repugnant to natural law would necessarily be unconstitutional and hence null and void. The majority asserted a judicial incapacity to determine what constitutional features were fundamental and what were not, which left the legislature, within the constraints of correct procedure, with total freedom to amend in any manner it saw fit.

⁶² See generally CARL SCHMITT, *LA DICTATURE* (2000).

absolute freedom from constitutional constraints. Freedom from constitutional restraints would mean an absolute freedom to change or even overturn the Constitution using the support of constituent power. However such a position is not accepted in any other country as can be seen from the positions in United States or Germany, and as shall be seen subsequently in greater detail, in India as well.

B. IMPLIED LIMITATIONS IN INDIA: THE BASIC STRUCTURE DOCTRINE

It is an accepted fact that the Indian Constitution was designed to accomplish the goal of radical social reconstruction. The provision for amending the document was shaped expressly to conform to the Jeffersonian idea that each generation should be free to adapt the Constitution to the conditions of its time.⁶³ However from the decision in *Kesavananda Bharati* case till the recent decision in *I.R. Coelho v. State of Tamil Nadu*,⁶⁴ the concept of implied limitations has been embraced in differing degrees by the judiciary. This assumes the form of a doctrine known as the Basic Structure Doctrine in India which basically means that the amending power cannot be exercised in such a manner as to destroy or emasculate the basic or essential features of the Constitution.⁶⁵

Detailed analysis of this doctrine is beyond the scope of this paper. It would be sufficient to note what this doctrine hopes to achieve is the protection of the Constitution. As an illustration one can look at a proposal, albeit unsuccessful, by the Bharatiya Janta Party (BJP) to abandon the current parliamentary form of government and to opt for a pattern akin to the presidential form.⁶⁶ Let us for once assume that such an amendment actually came through and the constitutionality of such a gigantic change was raised before the Supreme Court. This is obviously a contortion of the Constitution and major upheavals might occur in a country which is not ready for the same,⁶⁷ together with the fact that this was explicitly rejected by the founding fathers in the Constituent Assembly debates. However the surprising part is that none of the elements that have been identified so far in all the decisions would be useful in rejecting such an amendment. So if this amendment actually did come up, the judiciary would have to either use one of the wide clauses like 'essence of rights' test to strike it down or evolve a new test or justification for the same.

The undefined ambit of the basic structure doctrine is the precise reason why scholars criticise the basic structure doctrine as being vague, however it is still the only bulwark to prevent the basic tenets of a liberal social justice constitution from being totally obliterated.

⁶³ JACOBSON, *supra* note 12.

⁶⁴ AIR 2007 SC 861.

⁶⁵ One of the jurisprudential justifications of this theory is given through Kelsen's theory of Higher Law or Grund-norm.

⁶⁶ See Rajeev Dhawan, *Amending the Constitution*, THE HINDU (Chennai), May 8, 1998.

⁶⁷ See Vijayashri Sripati, *Toward Fifty Years Of Constitutionalism and Fundamental Rights In India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413 (1998).

V. CONCLUSION: *QUIS CUSTODIET IPSOS CUSTODES*⁶⁸

In the American case of *Coleman v. Miller*,⁶⁹ four judges of the American Supreme Court felt that the Congress exercised ‘sole and complete control over the amending process, subject to no judicial review’. Dellinger is of the opinion that it is only through judge-made rules and regulations concerning amendments that there can be a check on the uncertainties that would otherwise prevail over the practice of amending the Constitution.⁷⁰ The question that then arises and which prompts further research is whether this position is as clear-cut and impenetrable as Professor Dellinger argues it to be. Are judges the sole guardians of the amending process, the so-called ‘watchdogs’ of the Constitution and is Congress the ‘necessary evil’ to be kept in its limits? Or could it be the other way round? There have been numerous examples wherein the legislative process has been utilized effectively to override the judiciary imposed sanctions or regulations. One of the first which comes readily to mind is the Muslim Women (Protection of Rights on Divorce) Act, 1986 passed by the Parliament in the wake of the controversy generated by the *Ahmed Khan v. Shah Bano* case.⁷¹ Amendments have served a similar function to the Constitution (100th Amendment) Act in 2005 which resulted in vacating the ruling in the case of *P.A. Inamdar and Ors. v. State of Maharashtra and Ors.*,⁷² wherein private educational institutions had been declared to be exempt from the folds of reservation. Article 15(5) introduced by way of amendment mandated the absolute opposite. Thus continues the eternal battle between formal and informal sources of legal change.

But our initial question still remains unanswered. The answer lies for the greater part in this traditional struggle between the legislature and the judiciary. It has been noticed by Professor Tribe that,

*“The resort to amendment—to constitutional politics as opposed to constitutional law—should be taken as a sign that the legal system has come to a point of discontinuity, a point at which something less radical than revolution but distinctly more radical than ordinary legal evolution is called for.”*⁷³

Even he accepts that the Constitution provides a guiding role – certain ideals are upheld resolutely by the Constitution and while amending the Constitution, and not discarding it, these ‘fundamental norms’ need to be adhered to. This is akin to our domestic policy of implied limitations enshrined in the Constitution itself – in other words – the Basic Structure Doctrine. To uphold our constitutional values, there is therefore an immediate need for a symbiotic balance between the judiciary and the legislative. The fate of sovereignty hangs in the balance.

⁶⁸ This is a Latin maxim which means ‘Who will guard the Guardians’.

⁶⁹ 307 U.S. 433, 459 (1939) (Black, J., joined by Roberts, Frankfurter & Douglas, JJ., concurring).

⁷⁰ Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV.L.REV. 395 (1983).

⁷¹ AIR 1985 SC 945.

⁷² (2005) 6 SCC 537.

⁷³ LOUGHLIN, *supra* note 2.