

## **CONSTITUTIONAL AMENDMENTS-VALIDITY AND LIMITATIONS: INDIAN PERSPECTIVE**

*Written by Dr. Banamali Barik*

*Asst. Professor, Mayurbhanj Law College, Odisha*

---

### **ABSTRACT**

The legislature has the power to amend the Constitution. However, this power is confined within the purview of validity and limitations of Constitutional provisions. The power to amend the Constitution is a legislative process and within legislative power of parliament and state legislatures. Indian Constitution makers have included extreme flexi-bile/formal and rigid/informal provisions in Article 368 to meet the growing need of society. The amendment procedure falls under three categories like a simple majority (required for the passing of an ordinary law and it specifically excluded from the purview of Article 368), a special majority (as laid down in Article 368(2)), and in addition to the special majority (as ratification by resolution passed by not less than one-half of the state legislature). The present paper examines the broad contours of the basic structure/features which balance (AIR 1973 SC 1461) the supremacy of parliament (AIR 1951 SC 455) and the judicial (AIR 1971 SC 1643) power of judicial review.

## INTRODUCTION

A Constitution is a system of fundamental laws or principles for the governance of a nation. This Constitution usually states the general principles and framework of the law and government (American Jurisprudence). A Constitution may be either written Constitution born at one instance and therefore it is not born but grows by amendment which themselves become part of it by incorporation.<sup>1</sup> No Written Constitution is complete without amending provisions. In some respects, the amending provision is the most important part of any Constitution.<sup>2</sup> “An un-amendable Constitution is the worst tyranny of time or rather the very tyranny of time”<sup>3</sup> The amending provision in written Constitution assumes great importance because it gives chance to successive generation to grow it as per their needs. In fact the essence of a written Constitution lies in its mode of amendment. The amendment process is an opportunity to express democratic conceptions of basic Constitutional values without derogating from the fundamental Constitutional principles.<sup>4</sup>

A Constitution is a fundamental law of the land, but it cannot be regarded as permanent and immutable. The Constitution of India that has withstood the test of time is a product of socio-economic and political forces which were operating at the time of its formulation. After a hard battle of ideas favoring rigidity on one hand and flexibility on the other, the final shape of Article 368 emerged as the fine blend of rigidity and flexibility. The controversy between plenary power of Parliament under Article 368 and the Supreme Court’s control mechanism through the ‘Basic Structure Doctrine.’”

The flexibility and rigidity depends upon the nature and importance of the provisions of the Constitution. While referring to the need to amend the Constitution to the changing socio-economic and political conditions, Pandit Jawaharlal Nehru said,<sup>5</sup>

---

<sup>1</sup> CHATURVEDI, Amendment to the Constitution 29 (1985).

<sup>2</sup> JAMES WILFORD GARNER, Political science and Government 528.

<sup>3</sup> ASHOK DHAMIJA, Need to Amend Constitution 12 (2007).

<sup>4</sup> SUDHIR KRISHNASWAMY, Democracy and Constitutionalism in India 3 (2d ed. Oxford University Press 2011).

<sup>5</sup> PARLIAMENTARY DEBATES, 9616-17 (vols. XII-XIII, Part-II, 1951, India).

“It is the one of the utmost importance that the people should realize that this great Constitution of ours, over which we labored so long, is not a final and rigid thing. A Constitution which is responsive to the people’s will, which is responsive to their idea, in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it.”

Dr. B.K.Ambedkar said<sup>6</sup> “it is the right and privilege of the highest Court of the land to interpret the Constitutional law, however, at the same time; it is also the duty of the Parliament to see that objects aimed at in the Constitution are fulfilled or not by the judgment comes in the way, it is the provisions of the Constitution here and there.”

Sir Ivor Jennings<sup>7</sup> took the elaborate character of the Indian Constitution into consideration when he observed:

“What makes the Indian Constitution so rigid is that, in addition to a somewhat complicated process of amendment, it is so detailed and covers so vast a field of law that the problem of constitutional validity must often arise.”

Undoubtedly, the legislature’s power includes amendment, but is this power of amendment, especially that pertaining to the Constitution, unlimited? If not, what are the limits and who limits this power? Does judiciary’s prerogative of interpreting a law entitle it to judicially review the Constitutional amendments? If yes, what are the limits of this power of judicial review and who imposes these limitations? In this situation between the legislature and the judiciary, especially where the Constitution itself is silent, like in India, about the limitations on the powers of both. Where there are no built-in safeguards against the plenary power of the legislature, the judiciary is compelled to evolve strategies to limit that power. And the Basic Structure doctrine is one such strategy devised by the Indian Supreme Court to prevent the Parliament from usurping power which it thinks it should possess and to limit the overstrained exercise of the power which it already possessed and central to this struggle is the concept of ‘law’ itself.<sup>8</sup>

---

<sup>6</sup> D. K. NAIKAR, Working of Indian Constitution reflections of a Parliament 74 (Society for Human Rights law Dharwad 2000).

<sup>7</sup> IVER JENNINGS, Some characteristics of the Indian Constitution (Oxford University Press 1953).

<sup>8</sup> A. LAKSHMINATH, Basic Structure and Constitutional Amendment: Limitations and Justifiability 3 (Deep & Deep Publications 2002).

The Parliament has power to make laws for the whole of India. This legislative power is different from constituent power which enables amendment of the Constitution. A Constitution, if rigid, stops the Nation's growth and growth of 'living vital organic people'. The Constitution has to be amended to meet the needs of the dynamic society and to maintain socio-economic and political solidarity of the country. In Shankari Prasad's case,<sup>9</sup> Supreme Court ruled that Parliament can amend any provision of the Constitution including fundamental rights in accordance with Art. 368. In Golaknath's case,<sup>10</sup> the Supreme Court by a majority of 6:5 overruled the previous decisions and held that Parliament has no power to take away or abridge the Fundamental Rights. In Kesavananda's case,<sup>11</sup> by a majority of 7:6 the court overruled Golaknath and held that Parliament cannot in exercise of the amendatory power under Art. 368 of the Constitution alter the Basic Structure of the Constitution. There is a limitation on the power of amendment by necessary implications. Thus, there are two theories like the theory of 'Basic Structure' and the theory of 'Implied Limitation' on amending power of the parliament.

According to T.R. Andhyarujina's who was the part of day to hearing of Kesavananda Bharti case in the Apex Court:<sup>12</sup>

"The concept of the structure of the Constitution as a limitation on the amending power of Parliament had in fact been argued in the Golak Nath case by Counsel M.K.Nambyar for the petitioners who had derived support for it from a German academician, Prof. Dieter Conrad who had delivered a lecture on 'Implied Limitations on the Amending Power' to the law faculty in the Banaras University in 1965."

Amendment in the American Constitution can made in accordance with the provisions of Article V. The Constitution of the United States contains one of the most complex procedures for amendments.<sup>13</sup> So, after independence of two hundred thirty years, only thirty three amendments are to the United States Constitution, twenty seven ratified and six un ratified. But in India, after

---

<sup>9</sup> A.I.R 1951 S.C. 458 (India).

<sup>10</sup> A.I.R. 1967 S.C. 1643 (India).

<sup>11</sup> A.I.R. 1973 S.C. 1461 (India).

<sup>12</sup> T. R. ANDHYRUJINA, *The Kessavananda Bharati Case* 41-42 (Universal Law Publishing Co 2012).

<sup>13</sup> D. GEORGE KOUSOULAS, *Government and Politics* 75 1971.

independence of sixty eight years, total number of amendment Bill (as on 2017) is one hundred twenty three and total number of amendment Act (as on 2016) is one hundred one.

## **DEFINITION OF AMENDMENT**

The word amendment is the synonyms of revision, alteration, change, modification, qualification, adaption or adjustment. The term ‘amendment’ derives from the Latin word ‘amendere’. The term ‘amend’ means to make right, to make correction or to rectify. In common parlance “amendment” conveys the sense of slight change.

According to the Webster’s new dictionary and Funk and Wagnall’s standard dictionary the word ‘amendment’ when used in relation to a Constitution, carries all meaning such as alterations, revision, repeal, addition, variation or deletion of any provision of the Constitution.<sup>14</sup>

Oxford dictionary of law says<sup>15</sup> “Amendment means changes made to legislation, for the purpose of adding to, correcting or modifying the operation of the legislation.”

Black’s Law Dictionary defines,<sup>16</sup> ‘Amendment’ as “A formal revision or addition proposed or made to a statute, Constitution, pleading, order, or other instrument; a change made by addition, deletion or correction specially an alteration of wording”. And “In Parliament law, it means a ‘motion that changes another motion’s wording by striking out text, inserting or adding text, or substituting text” But legally speaking amendment denotes adjustment, amelioration, betterment, change, elaboration, emanation, enhancement, improvement, notification and refinement etc<sup>17</sup>

The meaning of the word amendment was for the first time sought to be explained in Sajjan Singh case.<sup>18</sup> The court held “the amendment provision of Constitution may include the delectation of any one or more of its provisions and substitution in their place of new provision”. The said

---

<sup>14</sup> DR. HARICHAND, Amending Process in the Indian Constitution 18 1972.

<sup>15</sup> Oxford Law Dictionary 45.

<sup>16</sup> GARNER, Black Law Dictionary 89 (8th ed.).

<sup>17</sup> BURTON & WILLIAM C, Legal Thesaurus.....Complete and Unabridged 23 New York.

<sup>18</sup> A.I.R. 1965 S.C. 845.

meaning given was restricted in Golaknath case,<sup>19</sup> the majority of judges held that “In amendment only major changes or improvements can be made and not includes total repeal of the provisions already existing in this Constitution.”

But Kesavananda Bharati case provided the best explanation as to the scope and definition of the word ‘Amendment’. It proposed that “A broad definition of the word ‘amendment’ will include any alteration or change. The word ‘amendment’ when used in connection with the Constitution may refer to the addition of a provision on a new and independent subject, complete in itself and wholly disconnected from other provisions, or to some particular article or clause, and is then used to indicate an addition to, the striking out, or some change in that particular article or clause.”<sup>20</sup>

## **CONSTITUTIONAL AMENDING PROCEDURES IN HISTORICAL PROSPECTIVE**

The amending procedures of the Constitutions of U.S.A., Canada, Australia, U.K., South Africa, Switzerland and Ireland were considered for formulating the draft Constitution and to incorporate an amending mechanism therein.

When the drafting of the amending process began in June, 1947 the framers laid great stress on the concept of constitutional dynamics while framing the amending clause. Dr. Ambedkar referred to the Constitutions of United States, Canada and Australia while making observations on the amending procedure. Those who compared the amending procedure with its counterparts in said Constitutions felt that Indian Constitution is flexible whereas those who describe the Constitution as rigid did so on the consideration of the practical difficulties involved in securing an amendment.

The constitutional adviser Sir B.N. Rao provided for amendment in two ways. He recommended passages by 2/3 majority in Parliament and the ratification by a like majority of provincial legislatures. In order to make temporary provisions for removal of difficulties that might arise, B.N. Rao provided that Parliament could make “adaptations” and “modifications” in the

---

<sup>19</sup> A.I.R. 1967 S.C. 1643 (India).

<sup>20</sup> (1973) 4 S.C.C. 225 (India).

Constitution, notwithstanding anything in the amending clause. This was similar to the Irish Constitution having a “removal of difficulties clause”. This idea of easy amendment was rejected by the drafting committee, while the principle was adopted in regard to amending certain clauses of the Constitution by a simple majority in the Parliament.

From the survey of the amending provisions it is evident that all or any of the provisions of Constitution can be amended provided the specific procedure for amendment is followed. It is unique position of the India Constitution that different procedures have been laid down for amending different provisions of the Constitution.<sup>21</sup>

The machinery of amendment should be like a safety valve, so devised as neither to operate the machine with too great facility nor to require, in order setting in motion, an accumulation of force sufficient to explode it. The Constitutional makers have, therefore, kept the balance between the dangers of having non-amendable.<sup>22</sup>

Dr. Ambedker said; “*One can, therefore, safely say that the Indian Federation will not suffer from the faults of rigidity of legalism. Its distinguishing feature is that it is a flexible federation.*”<sup>23</sup>

For the purpose of amendment the various Articles of the Constitution are divided into three categories:

- (1) Amendment by simple Majority- Articles that can be amended by Parliament by simple majority as that required for passing of any ordinary law. The amendments contemplated in Articles 5, 169 and 239-A, can be made by simple majority. These Articles are specifically excluded from the purview of the procedure prescribed in Article 368.
- (2) Amendment by Special Majority- Articles of the Constitution which can be amended by special majority as laid down in Article 368. All constitutional amendments, other than those referred to above, come within this category and must be effected by a majority of the total membership of each House of parliament as well as by a majority of not less than 2/3 of the members of that House present and voting.

---

<sup>21</sup> LAKSHMINATH, supra note 8, at 82-83.

<sup>22</sup> A.I.R. 1973 S.C. 1461 (India).

<sup>23</sup> DR. AMBEDKER, C A D 1569 Vol. IX.

(3) By Special Majority and Ratification by States- Article which require, in addition to the special majority mentioned above, ratification by not less than ½ of the State Legislatures. The States are given an important voice in the amendment of these matters. These are fundamental matters where States have important power under the Constitution and any unilateral amendment by Parliament may vitally affect the fundamental basis of the system built up by the Constitution. These classes of Articles consist of amendments which seek to make any change in the provisions mentioned in Article 368 itself.

In India, A Bill to amend the Constitution may be introduced in either House of Parliament. It must be passed by each House by a majority of the total membership to that House and by a majority of not less than 2/3 of the members of that House present and voting. When a Bill is passed by both Houses it shall be presented to the President for his assent who shall give his assent to Bill and thereupon the Constitution shall stand amended.<sup>24</sup> But which seeks to amend the provisions mentioned in Article 368 requires in addition to the special majority mentioned above the Article 368, however does not constitute the complete Code. The process of amending the Constitution is the legislative process governed by the rules of that process.<sup>25</sup>

Amendment procedure in a Constitution requires skilful drafting because in the absence of such a mechanism a Constitution can be converted into a ‘frozen’. The changes in the Constitution on which countries base their political institutions are brought about by two different processes which may be classified as:

- (a) De jure or formal modification and
- (b) De facto or informal modification.<sup>26</sup>

In U.S.A., amendment of the Constitution may be proposed only by Congress, with the approval of two-third of majority of both Houses and a convention summoned on an application from two-thirds of the members of both Houses. The proposed amendment must subsequently be ratified by

---

<sup>24</sup> The Constitution (24<sup>th</sup> Amendment) Act, 1971.

<sup>25</sup> J.N. PANDEY, *The Constitutional Law of India* 728-29 (45<sup>th</sup> ed. CLC 2008).

<sup>26</sup> MASSEY I. P, *The Process of Amendment and the Constitution: A study in Comparatives*, 407 (14 JILJ 1972).



at least three-fourths of the total number of the State Legislature or by conventions in three-fourth of the total number of the States.

In Switzerland, no alteration of the Constitution can be effected without resorting to a referendum. It is also quite detailed and complicated.

In Australia, the Constitution can be altered only by an Act passed by an absolute majority in both Houses, or in case one House refuses to pass it, by an Act passed by an absolute majority in either House, for the second time, after an interval of three months. But in either case, the Act must be subjected to a referendum in each state. If in a majority of the States, a majority of the voters approve the amendment, and if a majority of all the voters also approves, it shall be presented to the Governor-General for the Royal assent.<sup>27</sup>

From the above, it is clear that the amending procedure in Australian and the American Constitution is much more difficult than in Indian Constitution. So, it may be said that the Indian Constitutional-makers have sought to find two ways-extreme flexibility and extreme rigidity, as this, it is meet the needs of a growing society.

## **BASIC STRUCTURE DOCTRINE AND ITS VALIDITY AND LIMITATIONS**

The doctrine of basic structure has essentially emanated from the German Constitution. Therefore, we may have a look at common constitutional provisions under German law which deal with rights, such as freedom of press or religion which are not mere values, but are justiciable and capable of Interpretation. The values impose a positive duty on the state to ensure their attainment as far as practicable. The rights, liberties and freedoms of the individual are not only to be protected against the state; they should be facilitated by it. They are to be informed overarching and informing of these rights and values is the principle of human dignity under the German basic law. Similarly, secularism is the principle which is the overarching principle of several rights and values under

---

<sup>27</sup> V.N.SHUKLA, *Constitution of India* 998 (11<sup>th</sup> ed. EBC 2010).

the Indian Constitution. Therefore, axioms like secularism, democracy, reasonableness, social justice etc. are overarching principles which provide linking factor for principle of fundamental rights like Art.14, 19 and 21.<sup>28</sup> The principles are beyond the amending power of the Parliament.<sup>29</sup> The doctrine of basic structure has played not only in India but also our neighboring countries like Bangladesh, Nepal and Pakistan.

Parliament cannot increase the amending power by amendment of Art. 368 to neither confer on itself unlimited power of amendment and destroy and damage the fundamentals of the Constitution, nor can it use Art. 31-B, to achieve the same purpose in *I. R. Coelho by LRs V. State of Tamil Nadu & Ors.*<sup>30</sup>

The basic structure theory forms a very vital and useful part of our Constitutional jurisprudence. The story of the evolution of this doctrine is an interesting part of the Constitutional development in India. The genesis of the doctrine could be located in the court's review power and the basic structure theory was one of the arguments advanced by petitioner's counsel,<sup>31</sup> Mr. Mani in *Golak Nath V. State of Punjab.*<sup>32</sup> In this case, while challenging the power of parliament to amend the Constitution, it was argued that,

“What Article 368 confers is a power of amendment which means that in the exercise of that power of parliament, parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument for its better effectuation.”

Therefore, ‘the basic structure doctrine’ and its validity and limitations through the amending power of Constitution have run an era of controversy in time to time. These controversies have also challenged in Supreme Court and High courts over the year. So, they are divided into three Era such as: Pre *Kesavananda Bharati Case*, From *Kesavananda Bharati* to *I.R. Coelho Case* and Post *I.R. Coelho*.

### ***Pre Keshavananda Bharati Case:***

---

<sup>28</sup> ADISH C. AGGARWALA, *Constitution of India* 652-53 (4<sup>th</sup> ed. Amish Publication 2014).

<sup>29</sup> A.I.R. 2007 S.C. 71 (India).

<sup>30</sup> A.I.R. 2007 S.C. 861 (India).

<sup>31</sup> SURESH MANE, *Indian Constitutional Law: Dynamics and Challenges* 329 (2<sup>nd</sup> ed. Rai & Co. 2012).

<sup>32</sup> A.I.R. 1967 S.C. 1643 (India).

The question whether fundamental rights can be amended under Art. 368 came for consideration of the Supreme Court in *Shankari Prasad v. Union of India*.<sup>33</sup> In that case, the validity of the Constitution (1<sup>st</sup> Amendment) Act, 1951, which inserted *inter alia*, Art. 31-A and 31-B of the Constitution was challenged. The Amendment was challenged on the ground that it purported to take away or abridge the rights conferred by Part-III which fell within the prohibition of Art. 13 (2) and hence was void. It was argued that “State” in Art. 12 included Parliament and the “Law” in Art. 13 (2), therefore, must include constitution amendment. The Supreme Court, however, rejected the above argument and held that the power to amend The Constitution including the fundamental rights is contained in Art. 368 and the word ‘law’ in Art. 13 (8) includes only an ordinary law made in exercise of the Legislative power and does not include constitutional amendment which is made in exercise of constituent power. Therefore, a constitutional amendment will be valid even if it abridges or takes any of the fundamental rights.

In *Sajjan Singh v. State of Rajasthan*,<sup>34</sup> the validity of the Constitution (17<sup>th</sup> Amendment) Act, 1964, was challenged. The Supreme Court approved the majority judgment given in *Shankari Prasad*’s case and held that the words “amendment of the Constitution” means amendment of all the provisions of the Constitution.

Gajendragadkar, C J. said that if the Constitution-makers intended to exclude the fundamental rights from the scope of the amending power, they would have made a clear provision in that behalf.

In *Golak Nath v. State of Punjab*,<sup>35</sup> the validity of the Constitution (17<sup>th</sup> Amendment) Act, 1964, which inserted certain State Acts in Ninth Schedule was again challenged. The Supreme Court by a majority of 6 to 5 prospectively overruled its earlier decision in *Shankari Prasad*’s and *Sajjan Singh* cases and held that Parliament had no way or abridge the fundamental rights. Subba Rao, C J., supported his judgment on the following reasoning’s:

- (I) The Chief Justice rejected the argument that power to amend the Constitution was sovereign power and the said power was supreme to the legislative power and that

---

<sup>33</sup> A.I.R. 1951 S.C. 455 (India).

<sup>34</sup> A.I.R. 1965 S.C. 845 (India).

<sup>35</sup> A.I.R. 1971 S.C. 1643 (India).

it did not permit any implied limitations and that amendments made in exercise of that power involve political questions and that therefore, they were outside of judicial review.

- (II) The power of Parliament to amend the Constitution is derived Art. 245 read with Entry-97 of List-I of the Constitution and not from Art. 368. Article 368 lays down merely the procedure for amendment of the Constitution. Amendment is a Legislative process.
- (III) An amendment is a 'law' within the meaning of Art. 13 (2) and therefore, if it, violates any of the fundamental rights it may be declared void. The word 'law' in Art. 13 (2) includes every kind of law, statutory as well as constitutional law and hence a constitutional amendment which contravened Art. 13 (2) will be declared void.

The Chief Justice said that the fundamental rights are assigned transcendental place under our Constitution and, therefore, they kept beyond the reach of Parliament. The Chief Justice applied the doctrine of Prospective Overruling and held that, this decision will have only prospective operation and, therefore, the 1<sup>st</sup>, 4<sup>th</sup> and 17<sup>th</sup> Amendment will continue to be valid. It means that all cases decided before the Golak Nath's case shall remain valid.

The minority, however, held that the word 'law' in Art. 13 (2) referred to only ordinary law and not a constitutional amendment and hence, Shankari Prasad's and Sajjan Singh cases were rightly decided. According to them, Art. 368 deal with not only the procedure of amending the Constitution but also contains the power to amend the Constitution.<sup>36</sup>

***Amending the Ninth Schedule by Twenty-Ninth amendment:***

The Constitution (29<sup>th</sup> Amendment) Act, 1972 amended the Ninth Schedule to insert therein two Kerala Amendment Acts in furtherance of land reforms after Entry-64, namely, Entry-65 Kerala Land Reforms Amendment Act, 1969<sup>37</sup> and Entry 66 Kerala Land Reforms Amendment Act, 1971.<sup>38</sup> The validity of 24<sup>th</sup> 25<sup>th</sup> and 29<sup>th</sup> amendments were challenged in Kesavananda Bharathi's

---

<sup>36</sup> PANDEY, supra note 24 at 730.

<sup>37</sup> Kerala Land Reforms Act, 1969, NO. 35, Acts of Kerala State Legislature, 1969 (India).

<sup>38</sup> Kerala Land Reforms Act, 1971, NO. 35, Acts of Kerala State Legislature, 1971 (India).

case.<sup>39</sup> The main question involved was the extent of amending power of the Parliament under Art. 368 of the Constitution. This case popularly known as the ‘fundamental Right’ case. In this case the petitioners had challenged the validity of the Kerala Land Reforms Act, 1963. But during the pendency of the petition, the Kerala Act was amended in 1971 and same was placed in the Ninth-Schedule by the 29<sup>th</sup> Amendment to the Constitution.

This case dealt with some of the most seminal questions is raised in annals of Indian Constitutional Law. They are:

- (I) Whether the Parliament can abrogate fundamental rights enshrined in Part –III by exercising amending powers under Art.368?
- (II) Whether exercise of amending power for abrogation of Fundamental Rights under Part-III would lead to chaotic consequences?
- (III) Whether granting immunity to Part-III of the Constitution from the amending power would make the Constitution more ideal?
- (IV) Whether abrogation of Fundamental Right would result in violation or denial of principle of basic dignity?
- (V) Whether power to abrogation of Fundamental Rights has to be exercised subject to basic structure of the Constitution?
- (VI) Whether there is distinction between the core/essence and the periphery Fundamental Rights and whether the former is immune from the sphere of the amending process?
- (VII) Whether amendment under Art. 368 is law under Art. 13?
- (VIII) Whether the unamended Art. 368 contained both the power and procedure to amend and the magnitude of the said power was unrestricted so as to qualitatively transform Art. 368 itself?
- (IX) What is the width and the scope of amending power under Art. 368 post the 24<sup>th</sup> Amendment and whether the same is to be exercised subject to basic structure of the Constitution?
- (X) Whether there is distinction between constituent and amending powers?

---

<sup>39</sup> A.I.R. 1973 S.C. 1461 (India).

- (XI) Whether amending bodies and Parliament have authority under existing constitutional framework to hold a referendum or to convoke the special constituent assembly to adapt a brand new Constitution by replacing the present one?
- (XII) Whether amending bodies can amend Art.368 so as to create a parallel amending authority? Or can it delegate amending powers on State Legislatures by amending Art.368?
- (XIII) Whether the functions of amending body and Constitutional assembly are qualitatively different and whether the same is reflected in Art.368?
- (XIV) Whether the amending power is subjected to judicial review or is it co-equal with later? How the concept of Basic Structure is evolved and what are the features of the basic structure of the Constitution?
- (XV) Whether there is analytical distinction between basic structure and parameters of judicial review?
- (XVI) Whether court laid down any evaluative criteria to elevate a constitutional principle/ provision as a feature of basic structure of the Constitution?
- (XVII) Whether said power is subjected to any other implied limitation?
- (XVIII) Is it appropriate to describe the relationship between people and amending bodies by invoking the principle of social contract?
- (XIX) Whether Art.31-A and 31-B are mutually exclusive?

In Keshavananda Bharati case, these questions are raised and to examine and evaluate the amendment power of the Parliament relating to Art. 31-B read with Ninth- Schedule under Constitution of India. But Supreme Court in said case did not decide and clear following issues.<sup>40</sup>

They are:

- (I) It did not lay down any evaluative criteria to identify what features would constitute as basic structure of the Constitution?
- (II) It did not precisely articulate the distinction between amending power and constituent power?

---

<sup>40</sup> SANJAY. S JAIN & SATHYA NARAYAN, *Basic Structure Constitutionalism: Revisiting Kesavanada Bharathi* 6 (1<sup>st</sup> ed. Eastern Book Company 2011).

- (III) It did not say anything on the critical question, whether basic structure review is applicable beyond the exercise of amending powers?
- (IV) There is nothing in judgment indicating, whether the High Court can also invoke basic structure review?
- (V) Last but not the least, there is no indication in the judgment, whether it is to be applicable prospectively or retrospectively?

The following summary of the view of the majority of the Special Bench was issued, after the judgments (Kesavananda Bharati case) had been delivered. The view by the majority in these Writ petitions is as follows:

- Golak Nath case is overruled;
- Art. 368 does not enable Parliament the basic structure or framework of the Constitution;
- The Constitution (Twenty-fourth Amendment) Act, 1971, is valid;
- Section 2(b) of the Constitution (twenty-fifth Amendment) Act, 1971, is valid;

The first part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, is valid. The second part, namely, 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” is invalid;

- The Constitution (Twenty –ninth Amendment) Act, 1971, is valid.

The majority decided to adopt the position that amending power of Parliament is distinct from legislative power and has a wide reach to cover every provision of the Constitution; however, it qualified the above proposition by lying down that the basic structure of the Constitution was unamendable. While formulating the notion of the basic structure, however, it was clarified that what features would become the part of the basic structure would be an open question and its answer would be contingent upon the particular circumstances of the actual cases. On the other hand, the minority, by and large approved the views of minority in Golak Nath’s case. Of course, it also

categorically held that the amending body does not have the authority to effect complete abrogation of the Constitutions in one stroke.<sup>41</sup>

***From Kesavananda Bharati to I.R. Coelho Case:***

The validity of prior amendments was questioned in *Kesavananda Bharati V. State of Kerala*,<sup>42</sup> wherein a writ petition was filed initially to challenge the validity of the Kerala Land Reforms Act of 1963, as amended in 1969. But as the Act was amended in 1971 during the pendency of the petition and was placed in the Ninth Schedule by the Twenty-ninth Amendment the petitioner was permitted to challenge the validity of the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendment to the Constitution also. The petition was heard by a Bench of thirteen Judges of the Supreme Court. It was urged by the petitioner that if the power of amendment is to be construed as empowering Parliament to exercise the full constituent power of the people and authorizing it to destroy or abrogate the essential features, basic elements and fundamental provisions of the Constitution, such a construction must be held unconstitutional. This is so because:

- (i) having only such constituent power as is conferred on it by the Constitution which is given by the people unto themselves, Parliament cannot enlarge its own power so as to abrogate the limitation in the terms on which the power to amend was conferred;
- (ii) being a functionary created under the Constitution, Parliament cannot arrogate to itself the power of amendment so as to alter or destroy any of the essential features of the Constitution;
- (iii) purporting to empower itself to take away or abridge all or any of the fundamental rights, Parliament does not become competent to destroy the basic human rights and the fundamental freedoms which were reserved by the people for themselves when they gave to themselves the Constitution;
- (iv) initially having no power to alter or destroy any of the essential features of the Constitution, and inherent limitations on the amending power, Parliament has no power to alter or destroy all or any one of the fundamental rights, or, in other words,

---

<sup>41</sup> Id. at 7.

<sup>42</sup> (1973) 4 S.C.C. 225; A.I.R. 1973 S.C. 1461 (India).



parliament cannot abrogate the limits of its constituent power by repealing those limitations and thereby purporting to do what is forbidden by those limitations.

In this case,<sup>43</sup> all the Judges were of the view that the Twenty-fourth Amendment is valid, and that by virtue of Art. 368, as amended by the Twenty-fourth Amendment, parliament has power to amend any or all the provisions of the Constitution including those relating to the fundamental rights. However, seven of the Judges (Sikri, C.J., Shelat, Hegde, Grover, Jaganmohan Reddy, Khanna and Mukherjea, JJ.), held that the power of amendment under Art. 368 is subject to certain implied and inherent limitations, and that in the exercise of amending power, parliament cannot change the basic structure or framework of the Constitution. Six of them excluding Khanna, J.) thought that the fundamental rights enshrined in Part –III relate the basic structure or frame work of the Constitution and, therefore, are not amendable. Six Judges (Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ.) were by and large, not prepared to accept any limitation on the plenary power of parliament to amend the Constitution. Khanna, J., however, held that the right to property did not form part of the basic structure or framework of the Constitution and tilted the balance in forming the majority with Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ. in its conclusion.<sup>44</sup>

Shelat and Grover, JJ. Pointed out that the argument that there were no implied limitations because there were no express limitations was a contradiction in terms because implied limitations could only arise where there were no express limitations.<sup>45</sup> So also Hegde and Mukherjea, JJ. said that it was a general feature of all statutes, including the Constitution, that a grant of power was qualified by the implications of the context or by considerations arising out of the general scheme of the statute, and in this respect there was no distinction between other power and the amending power under the Constitution.<sup>46</sup>

According to these judges the implied or inherent limitations on the power to amend under the un-amended Art. 368 would still hold true even after the amendment of Art. 368, and the Twenty-fourth Amendment was valid by virtue of the exercise of the power to amend along with its implied

---

<sup>43</sup> (1973) 4 S.C.C. 225 (India).

<sup>44</sup> SHUKLA, *supra note 26 at 10002-03.*

<sup>45</sup> (1973) 4 S.C.C. 225 (India). at 453 (para 579).

<sup>46</sup> Id. at 482 ( paras 655,657).

or inherent limitations which could not be eliminated within the present constitutional structure or framework. For *Jaganmohan Reddy, J.* it was not necessary to consider the question of existence or non-existence of implied or inherent limitations. He explained that the word ‘amendment’ read with other provisions indicated that it was used in the sense of empowering a change in contradiction to destruction which a repeal or abrogation would imply, and Art. 368 empowers only a change in the Constitution. He agreed with the Chief Justice that the amplitude of the power of amendment in Art. 368 could not be enlarged by amending the amending power, through for different reason.<sup>47</sup>

The “summary” signed by nine out of thirteen judges in *Kesavananda Bharati* the majority in that case overruled *Golak Nath* and held that Art. 368 did not enable Parliament to alter the basic structure or framework of the Constitution.<sup>48</sup> The majority also invalidated the second part of Art. 31-C introduced by the 25<sup>th</sup> Amendment which excluded the jurisdiction of the courts to inquire whether a law protected under that article gave effect to the policy of securing the directive principles mentioned in that article, viz., the directives in Art. 39(b) and (c).<sup>49</sup>

If the his historical background, the Preamble, the entire scheme of the Constitution and the relevant provisions thereof including Art.368 are kept in mind then there can be no difficulty, in determining what are basic elements of the basic structure of the Constitution. These words apply with greater force to the doctrine of the basic structure, because, the federal and democratic structure of the Constitution, the separation of powers, the secular character of our State are very much more definite than either negligence or natural justice.<sup>50</sup>

The theory of implied limitation, through not accepted in the *Golak Nath* case was held by the majority as having substantial force and was shelved to be dealt with later when the situation arose, when the Parliament sought to destroy the structure of the Constitution embodied in provision other than Part-III of the Constitution.<sup>51</sup> This argument was later on taken up by *Nani Palkhivala*

---

<sup>47</sup> Id. at 628,633 (paras 1141, 1150).

<sup>48</sup> Id. at 1007. For a very power critique of *Golak Nath* particularly of the question of distinction between see P.K. TRIPATHI: some Insights into Fundamental Rights, 1 ff (1972).

<sup>49</sup> SHUKLA, *supra note 26 at* 10006-03.

<sup>50</sup> H.M. SEERVAI, *Constitutional Law of India* 1568 (2<sup>nd</sup> ed. Vol. II).

<sup>51</sup> (1967) 2 S.C.R. 762.

in Kesavananda Bharati case and was successfully converted to the doctrine of basic structure, as it stands today, through a number of additional features have been added by the Supreme Court under this umbrella, over the years.

***Parliament's amending power through Art. 31-B read with Ninth Schedule:***

Article 31-B read with the Ninth-Schedule of the Constitution tends to confer uncontrolled power on the legislature by excluding judicial review in the exercise of its amending power; whereas the doctrine of basic structure of the Constitution empowers the courts to control that uncontrolled power through judicial review, including the amending power exercised by the legislature in pursuance of article 31-B read with Ninth-Schedule of the Constitution. This is imperative for maintaining the basic premise of constitutional supremacy. It is true that by the superimposed basic structure doctrine, “efficacy of Article 31-B” stands reduced, “but that is inevitable in view of the progress the laws have made post Kesavananda Bharati’s case”. Since the constitutional validity of the First amendment of the Constitution introducing article 31-B has already been upheld, for retaining its legitimacy, subject of course to the overriding provision of basic structure doctrine, it requires re-reading or redefining.<sup>52</sup>

The ambit of article 31-B, the nine constitutional bench in I.R. Coelho case,<sup>53</sup> has approached the whole issue de novo in the light of first principles of constitutionalism as evolved by the court in Kesavananda Bharati and expounded thereafter in its subsequent decisions. The following principles may be abstracted:

- (a) The amending power of Parliament under Article 368 after the decision of Kesavananda Bharati, is no more unlimited.
- (b) Despite the ‘wide language’ of article 31-B the amending power under article 368 remains limited, albeit prospectively.
- (c) Legitimacy of article 31-B read with the Ninth Schedule of the Constitution is preserved by redefining, the scope of judicial review under basic structure doctrine.

---

<sup>52</sup> VIRENDRA KUMAR, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Government*, 49 Journal of the ILI. 375-376 (2007).

<sup>53</sup> A.I.R. 2007 S.C. 861 (India).

- (d) The issue of determining whether the Ninth-Schedule laws are immune of fundamental rights in the exercise of power under article 368 in pursuance of article 31-B cannot be left to the discretion of Parliament.

Thus, the whole logic of this interpretative exercise may be abstracted as follows:

- Parliament under article 31-B has the power to confer ‘fictional immunity’ on the laws passed by it.
- Such immunity could be conferred by including those laws into the Ninth Schedule of the Constitution.
- Inclusion of those laws into Ninth-Schedule, however, could be done only by amending the Constitution.
- The Constitution could be amended by the exercise of amending power under article 368 of the Constitution.
- The exercise of limited amending power under article 368, therefore, cannot confer unlimited power even in pursuance of article 31-B read with the Ninth-Schedule of the Constitution.<sup>54</sup>

***Fundamental Rights under basic structure doctrine as a touchstone to test amending power:***

Prior to the nine-judge constitutional bench of the Supreme Court unanimously in I.R. Coelho case, there was a lot of lingering over the applicable criteria of the basic structure principle that prompted a distinguished commentator of Indian constitutional law to say that the principle enunciated by the doctrine is right. However, it’s wrong application would not make the right principle wrong.<sup>55</sup> The apex court in I.R. Coelho case, has expounded the nature of fundamental rights contained in Part-III our Constitution as the very basis of the Basic structure principle in following points:<sup>56</sup>

---

<sup>54</sup> VIRENDRA, supra note 51 at 49.

<sup>55</sup> SEERVAI, supra note 49 at 1511.

<sup>56</sup> I. R. Coelho at 873, para 56 (India.) On general principles for determining whether a particular feature of the Constitution (including fundamental right) is part of the basic structure or not, the issue is to be examined in each individual case by finding out the place of that particular feature in the scheme of the Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country’s governance.

- (a) “Part-III of the Constitution does not confer fundamental rights. It (merely) confirms their existence and gives protection”.<sup>57</sup>
- (b) The fundamental rights in Part-III have been described as ‘transcendental’ ‘inalienable’ and ‘primordial’.<sup>58</sup>
- (c) The purpose of Part-III of the Constitution is to withdraw fundamental rights “from the area of political controversy to place them beyond the reach of majority and officials and to establish them as legal principles to be applied by the courts”.<sup>59</sup>
- (d) “Every foundational value is put in Part-III as fundamental rights as it has intrinsic value”. If it has no ‘intrinsic value’ as is the case in relation to right to property, the same could be excluded from Part-III. ( Perhaps, it is on the strength of this logic, Khanna J. in Indira Gandhi clarified that the fundamental right to property is not a basic feature of the basic structure doctrine,<sup>60</sup>
- (e) “A right becomes a fundamental right because it has a foundational value.”<sup>61</sup>
- (f) “Fundamental rights in Part-III are limitations on the power of the State,” so that the citizens could enjoy those rights in “the fullest measure.”<sup>62</sup>
- (g) “A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right, just as partial deprivation in every area.”<sup>63</sup>
- (h) Fundamental rights need to be protected not only because they are ‘superior’ or ‘higher’ rights, but for the reason that their protection in the best way to promote “a just and tolerant society.”<sup>64</sup>
- (i) For the protection of fundamental rights, the remedial right under article 32 of the Constitution has itself been made the fundamental rights. On account of its critical importance in the constitutional scheme, this remedial, or the sentinel on the *qui vive*.<sup>65</sup>

---

<sup>57</sup> Id. at 875 para 62 (India).

<sup>58</sup> Id. at 872 para 50 (India).

<sup>59</sup> Id. at 875 para 62 (India).

<sup>60</sup> Id. at 881 para 91 (India).

<sup>61</sup> Id. at 875 para 62 (India).

<sup>62</sup> Id. at 876 para 63 (India).

<sup>63</sup> Id. at 872 para 50 (India).

<sup>64</sup> Id. at 871 para 46 (India).

<sup>65</sup> Id. at 871 para 39 (India).

In the light of this exposition, the nine-judge bench states unequivocally: “If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be so accepted that Part-III of the Constitution has a role to play in the application of the said doctrine.”<sup>66</sup>

***Post I.R. Coelho Case:***

In *Madras Bar Association V. Union of India*,<sup>67</sup> the constitutional validity of the National Tax Tribunal Act, 2005, (NTT Act) was challenged along with the constitutional validity of the Forty-Second Amendment, 1976, on the ground that it violates the basic structure of the Constitution by impinging the power of judicial review of high courts. An alternate point that was made was that the National Tax Tribunal was an extra-judicial body and cannot substitute the jurisdiction of courts by discharging judicial functions. Khehar J. writing for the majority, concluded that the Parliament had the power to enact a legislation and to vest adjudicatory functions, early vested in the high courts, with an alternative tribunal.

Exercise of this power would not *per se* violate the basic structure of the Constitution. The basic structure of the Constitution would stand violated if while enacting such legislation the Parliament does not ensure that the newly constituted court or tribunal conforms to the standards and salient characteristics of the court sought to be substituted. This would also be violative of Constitutional conventions pertaining to Constitutions styled on the Westminster model. On these parameters, certain essential provisions of the NTT Act were struck down as being unconstitutional and since these provisions were critical to the Act, consequently, the NTT Act itself was declared unconstitutional.<sup>68</sup>

R.F. Nariman J. in a separate but concurring judgment in the NTT case, quoted paragraphs from *L. Chandra Kumar V. Union of India*,<sup>69</sup> which restored the supervisory jurisdiction of high courts so that a reference to article 323 B would not be necessary as the legislative competence to make a law relating to tribunal would in any case be traceable to Entries-77 to 79, and 95 of list-I entry

---

<sup>66</sup> Id. at 884 para 101 (India).

<sup>67</sup> (2014) 10 S.C.C. 1 (India).

<sup>68</sup> Id. at 226.

<sup>69</sup> (1997) 3 S.C.C. 261 (India).

65 of list-II a and 46 of list- III of the 7<sup>th</sup> schedule to the Constitution of India. It was held that the power of judicial review over legislative action vested in the high court's under Art. 226 and in Supreme Court under Art. 32 of the Constitution, is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of high courts and the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded.

Nariman J. also pointed out that *R. Gandhi V. Union of India*,<sup>70</sup> where it was held that the decision of the high court, that the creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them, the powers and jurisdiction exercised by the high court in regard to company law matters, are not unconstitutional, differs from the NTT case because the prior case deals with one specialized tribunal replacing another specialized tribunal at the original stage. When it talk about taking away the jurisdiction of high courts by deleting the provisions for appeals, revisions or references and that these functions traditionally performed by courts can be transferred to tribunals, the court was only dealing with situation of high court being supplanted at the original and first appellate stage where questions of fact are to be considered, not substantial questions of law. Thus, we see that the basic structure doctrine has been applied while striking down an ordinary legislation.<sup>71</sup>

In *State of West Bengal V. Committee for Protection of Democratic Rights*, a Constitution Bench of the Supreme Court held that the power of judicial review conferred to the Supreme Court and high court is an integral part of the basic structure of the Constitution and no Act of Parliament can exclude or curtail this power of the constitutional courts.

In the landmark judgment of Supreme Court *Advocates on Record Association v. Union of India*, it was observed by Khehar J. that for examining the constitutional validity of an ordinary legislative enactment, all the constitutional provisions, on the basis of which the concerned 'basic features' arise, are available and even the breach of a single provision is sufficient to render the legislation as unconstitutional. In cases of a cumulative effect of a number of articles of the Constitution is

---

<sup>70</sup> (2010) 11 S.C.C. 1 (India).

<sup>71</sup> SETU GUPTA, *Vicissitudes and limitations of the Doctrine of Basic Structure*, Winter Issue ILI Law Review. 110, 119 (2016).

stated to have been violated, all such articles may be started, if necessary. Khehar J. in no uncertain terms, held that, if a challenge is raised to an ordinary legislative enactment based on the doctrine of ‘basic structure’, the same cannot be treated to suffer from a legal infirmity. It was also held that if a challenge to an ordinary legislation is made as a result of cumulative effect of a number of articles of the Constitution, it would not always be necessary to list out each Article when such cumulative effect has already been determined to be constituting, one of the basic features of the Constitution. Therefore, to reiterate, it was said that an ordinary legislation can be challenged on the ground of being violative of basic structure doctrine. Madan B. Lokur J. on the other hand abided by what was held by the majority in *State of Karnataka v. Union of India*<sup>72</sup> Saying that, “only a constitutional amendment can be challenged on the ground of violation of the doctrine of basic structure, not an ordinary legislation.”

## **CONCLUSION**

In India, for quite some time, it was debated, whether the court should have the power to review constitutional amendments. Theoretically, there cannot be any doubt that, Parliament being the representative of the people, must be in a position to have the Constitution changed to suit the needs of the community. Between the court and Parliament the latter must be the final determiner of what the Constitution must contain.<sup>73</sup>

Parliament in its constituent power brought so many amendments to the Constitution in respect of the subject matter of right to property as well as agrarian reform. During 1950—72, the question of amend ability of fundamental Rights came up before Supreme Court in three different cases, namely, *Shankari Prasad case*, *Sajjain Singh case* and *Golak Nath case*. Until *Golak Nath Case*, the law was as follows:

- (I) Constitution Amendment Acts are not ordinary law and are passed by Parliament in exercise of constituent powers.

---

<sup>72</sup> (2010) 3 S.C.C. 571 (India).

<sup>73</sup> (2016) 5 S.C.C. 1 (India).



- (II) There is no limitation imposed upon the amending power of Parliament.
- (III) Fundamental Rights guaranteed under Part-III of the Constitution are subject to Parliament's power to Amendment.

But in Kesavananda Bharati case, the Supreme Court reversed its own previous decision that the word 'law' in Art. 13 (2) included amendments to the Constitution and the article operated as a limitation upon the power to amend the Constitution in Art.368 is erroneous and is overruled. Further, Court in this case gave a threat to the power of the Parliament by introducing the doctrine of basic structure theory. According to this theory, the Parliament under Art. 368 is not enabled to alter the basic structure or frame work of the Constitution. As a result, Parliament through 42<sup>nd</sup> Amendment committed another mistake by inserting Clauses (4) and (5) in Art.368 of the Constitution. Under these clauses Parliament declares its unlimited power and made clear Constitution Amendment Act would not be subject to Judicial review on any ground.

In Minerva Mills case, Supreme Court declaring clauses (4) and (5) of Art. 368 as unconstitutional, judiciary rectified the mistake committed by Parliament in 42<sup>nd</sup> Amendment. Further, Court held that, indeed, a limited amending power is also one of the basic features of the Constitution; therefore, the limitation on that power cannot be destroyed. The concept of basic structure was further developed by the Supreme Court in Waman Rao case, Bhim Singhji case, S.P. Gupta case, Samapth Kumar case Kihota Hollahan's and L. Chanrakumar's case etc. Lastly, I. R. Coelho's case, the Supreme Court has rightly concluded that the Parliament's power of amendment is subject to judicial review of courts. The court emphasized on the doctrine of Basic structure theory propounded by it, in the famous Kesavananda Bharati's judgment while adjudging the validity of amendments. It is how, the increases and decreases of the power of Parliament have been questioned and controversial in many cases over the years and finally this was resolved in I.R. Coelho's case.

After independence, Indian Constitution has been amended one hundred one times. Some of them were challenged in the apex court through various cases; from Sankari Prasad to I.R. Coelhi case. Sometimes Parliament enacted some controversial laws and amended the Constitution giving itself constituent powers, on the ground that Parliament being the representative of people had to fulfill the needs of the community. When the amendments were challenged in the Supreme Court, the

latter considered the validity and limitations of the said amendments on the touchstone of the power of judiciary review and the parameter of basic structure doctrine. The court has tried to strike a balance between the amending powers of the Parliament and the power of the Judiciary to keep it within limits, in the cases beginning from Golak Nath through Keshavanda to I.R. Coelhi. This balance between the two has made the constitution vibrant and saved it from being defaced and defiled.

