

# The Basic Structure of the Indian Constitution

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## Introduction

The debate on the 'basic structure' of the Constitution, lying somnolent in the archives of India's constitutional history during the last decade of the 20<sup>th</sup> century, has reappeared in the public realm. While setting up the National Commission to Review the Working of the Constitution (the Commission), the National Democratic Alliance government (formed by a coalition of 24 national and regional level parties) stated that the basic structure of the Constitution would not be tampered with. Justice M.N. Venkatachalaiah, Chairman of the Commission, has emphasised on several occasions that an inquiry into the basic structure of the Constitution lay beyond the scope of the Commission's work.

Several political parties -- notably the Congress (I) and the two Communist parties which are in the opposition -- have made it clear that the review exercise was the government's ploy to seek legitimacy for its design to adopt radical constitutional reforms thus destroying the basic structure of the document.

Much of the public debate has been a victim of partial amnesia as even literate circles of urban India are unsure of the ramifications of this concept, which was hotly debated during the 1970s and 1980s. The following discussion is an attempt to chart the waters of that period rendered turbulent by the power struggle between the legislative and the judicial arms of the State.

According to the Constitution, Parliament and the state legislatures in India have the power to make laws within their respective jurisdictions. This power is not absolute in nature. The Constitution vests in the judiciary, the power to adjudicate upon the constitutional validity of all laws. If a law made by Parliament or the state legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such a law invalid or *ultra vires*. This check notwithstanding, the founding fathers wanted the Constitution to be an adaptable document rather than a rigid framework for governance. Hence Parliament was invested with the power to amend the Constitution. **Article 368** of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers, the apex court pronounced that Parliament could not distort, damage or alter the basic features of the Constitution under the pretext of amending it. The phrase 'basic structure' itself cannot be found in the Constitution. The Supreme Court recognised this concept for the first time in the historic *Kesavananda Bharati* case in 1973.<sup>1</sup> Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by Parliament.

## The pre-Kesavanada position

Parliament's authority to amend the Constitution, particularly the chapter on the fundamental rights of citizens, was challenged as early as in 1951. After independence, several laws were enacted in the states with the aim of reforming land ownership and tenancy structures. This was in keeping with the ruling Congress party's electoral promise of implementing the socialistic goals of the Constitution [contained in **Article 39 (b) and (c) of the Directive Principles of State Policy**] that required **equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few**. Property owners -- adversely affected by these laws -- petitioned the courts. The courts struck down the land reforms laws saying that they transgressed the fundamental right to property guaranteed by the Constitution. Piqued by the

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<sup>1</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; AIR 1973 SC 1461.

unfavourable judgements, Parliament placed these laws in the **Ninth Schedule** of<sup>2</sup> the Constitution through the **First and Fourth amendments** (1951 and 1952 respectively), thereby effectively removing them from the scope of judicial review.

[Parliament added the **Ninth Schedule** to the Constitution through the very first amendment in 1951 as a means of immunising certain laws against judicial review. Under the provisions of **Article 31**, which themselves were amended several times later, laws placed in the **Ninth Schedule** -- pertaining to acquisition of private property and compensation payable for such acquisition -- cannot be challenged in a court of law on the ground that they violated the fundamental rights of citizens. This protective umbrella covers more than 250 laws passed by state legislatures with the aim of regulating the size of land holdings and abolishing various tenancy systems. **The Ninth Schedule** was created with the primary objective of preventing the judiciary - which upheld the citizens' right to property on several occasions - from derailing the Congress party led government's agenda for a social revolution.<sup>3</sup>]

Property owners again challenged the constitutional amendments which placed land reforms laws in the **Ninth Schedule** before the Supreme Court, saying that they violated **Article 13 (2)** of the Constitution.

**Article 13 (2)** provides for the protection of the fundamental rights of the citizen.<sup>4</sup> Parliament and the state legislatures are clearly prohibited from making laws that may take away or abridge the fundamental rights guaranteed to the citizen. They argued that any amendment to the Constitution had the status of a law as understood by **Article 13 (2)**. In 1952 (*Sankari Prasad Singh Deo v. Union of India*<sup>5</sup>) and 1955 (*Sajjan Singh v. Rajasthan*<sup>6</sup>), the Supreme Court rejected both arguments and upheld the power of Parliament to amend any part of the Constitution including that which affects the fundamental rights of citizens. Significantly though, two dissenting judges in *Sajjan Singh v. Rajasthan* case raised doubts whether the fundamental rights of citizens could become a plaything of the majority party in Parliament.

### The *Golaknath* verdict

In 1967 an eleven-judge bench of the Supreme Court reversed its position. Delivering its 6:5 majority judgement in the *Golaknath v. State of Punjab* case<sup>7</sup>, **Chief Justice Subba Rao** put forth the curious position that **Article 368**, that contained provisions related to the amendment of the Constitution, merely laid down the amending procedure. **Article 368** did not confer upon Parliament the power to amend the Constitution. The amending power (constituent power) of Parliament arose from other provisions contained in the Constitution (**Articles 245, 246, 248**) which gave it the power to make laws (plenary legislative power). Thus, the apex court held that the amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in **Article 13 (2)**.

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<sup>2</sup> Originally, the Constitution guaranteed a citizen, **the fundamental right to acquire hold and dispose of property** under **Article 19f**. Under **Article 31 he could not be deprived of his property unless it was acquired by the State, under a law that determined the amount of compensation he ought to receive against such an acquisition. Property owned by an individual or a firm could be acquired by the State only for public purposes and upon payment of compensation determined by the law.** **Article 31** has been modified six times -- beginning with the **First amendment** in 1951 -- progressively curtailing this fundamental right. Finally in 1978, **Article 19f** was omitted and **Article 31** repealed by the **Forty-fourth amendment**. Instead **Article 300A** was introduced in **Part XII** making the **right to property** only a **legal right**. This provision implies that the executive arm of the government (civil servants and the police) could not interfere with the citizen's right to property. However, Parliament and state legislatures had the power to make laws affecting the citizens' right to property.]

<sup>3</sup> Later on, laws relating to the nationalisation of certain sick industrial undertakings, the regulation of monopolies and restrictive trade practices, transactions in foreign exchange, abolition of bonded labour, ceiling on urban land holdings, the supply and distribution of essential commodities and reservation benefits provided for Scheduled Castes and Tribes in Tamil Nadu were added to the **Ninth Schedule** through various constitutional amendments.

<sup>4</sup> **Article 13 (2)** states- "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." The term Part refers to **Part III** of the Constitution which lists the fundamental rights of the citizen.

<sup>5</sup> *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458

<sup>6</sup> *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

<sup>7</sup> *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.

The majority judgement invoked the concept of **implied limitations on Parliament's power to amend the Constitution**. This view held that the Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to themselves, the people had reserved the fundamental rights for themselves. **Article 13**, according to the majority view, expressed this limitation on the powers of Parliament. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under it. The judges stated that the fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament. They observed that a Constituent Assembly might be summoned by Parliament for the purpose of amending the fundamental rights if necessary.

**In other words, the apex court held that some features of the Constitution lay at its core and required much more than the usual procedures to change them.**

The phrase '**basic structure**' was introduced for the first time by M.K. Nambiar and other counsels while arguing for the petitioners in the *Golaknath* case, but it was only in 1973 that the concept surfaced in the text of the apex court's verdict.

### **Nationalisation of Banks and Abolition of Privy Purses**

Within a few weeks of the *Golaknath* verdict the Congress party suffered heavy losses in the parliamentary elections and lost power in several states. Though a private member's bill - tabled by Barrister Nath Pai - seeking to restore the supremacy of Parliament's power to amend the Constitution was introduced and debated both on the floor of the house and in the Select Committee, it could not be passed due to political compulsions of the time. But the opportunity to test parliamentary supremacy presented itself once again when Parliament introduced laws to provide greater access to bank credit for the agricultural sector and ensure equitable distribution of wealth and resources of production and by:

- a) nationalising banks and
- b) derecognising erstwhile princes in a bid to take away their Privy purses, which were promised in perpetuity - as a sop to accede to the Union - at the time of India's independence.

Parliament reasoned that it was implementing the **Directive Principles of State Policy** but the Supreme Court struck down both moves. By now, it was clear that the Supreme Court and Parliament were at loggerheads over the relative position of the **fundamental rights** vis-à-vis the **Directive Principles of State Policy**. At one level, the battle was about the supremacy of Parliament vis-à-vis the power of the courts to interpret and uphold the Constitution.

At another level the contention was over the sanctity of property as a fundamental right jealously guarded by an affluent class much smaller than that of the large impoverished masses for whose benefit the Congress government claimed to implement its socialist development programme.

Less than two weeks after the Supreme Court struck down the President's order derecognising the princes, in a quick move to secure the mandate of the people and to bolster her own stature Prime Minister Indira Gandhi dissolved the Lok Sabha and called a snap poll.

For the first time, the Constitution itself became the electoral issue in India. Eight of the ten manifestos in the 1971 elections called for changes in the Constitution in order to restore the supremacy of Parliament. A.K. Gopalan of the Communist Party of India (Marxist) went to the extent of saying that the Constitution be done away with lock stock and barrel and be replaced with one that enshrined the real sovereignty of the people<sup>8</sup>. The Congress party returned to power with a two-thirds majority. The electorate had endorsed the Congress party's socialist agenda, which among other things spoke of making basic changes to the Constitution in order to restore Parliament's supremacy.

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<sup>8</sup> Quoted in Granville Austin, *Working a Democratic Constitution, The Indian Experience*, Oxford University Press, New Delhi, 1999, p. 235.

Through a spate of amendments made between July 1971 and June 1972 Parliament sought to regain lost ground. It restored for itself the absolute power to amend any part of the Constitution including **Part III**, dealing with fundamental rights.<sup>9</sup> Even the President was made duty bound to give his assent to any amendment bill passed by both houses of Parliament. Several curbs on the **right property** were passed into law. The **right to equality before the law and equal protection of the laws (Article 14)** and the fundamental freedoms guaranteed under **Article 19**<sup>10</sup> were made subordinate to **Article 39 (b) & (c)** in the **Directive Principles of State Policy**.<sup>11</sup> Privy purses of erstwhile princes were abolished and an entire category of legislation dealing with land reforms was placed in the **Ninth Schedule** beyond the scope of judicial review.<sup>12</sup>

### Emergence of the Basic Structure Concept- the *Kesavananda* milestone

Inevitably, the constitutional validity of these amendments was challenged before a full bench of the Supreme Court (thirteen judges). Their verdict can be found in eleven separate judgements.<sup>13</sup> Nine judges signed a summary statement which records the most important conclusions reached by them in this case. Granville Austin notes that there are several discrepancies between the points contained in the summary signed by the judges and the opinions expressed by them in their separate judgements.<sup>14</sup> Nevertheless, the seminal concept of '**basic structure**' of the Constitution gained recognition in the majority verdict.

All judges upheld the validity of the **Twenty-fourth** amendment saying that Parliament had the power to amend any or all provisions of the Constitution. All signatories to the summary held that the *Golaknath* case had been decided wrongly and that **Article 368** contained both the power and the procedure for amending the Constitution.

However they were clear that an amendment to the Constitution was not the same as a law as understood by **Article 13 (2)**.

[It is necessary to point out the subtle difference that exists between two kinds of functions performed by the Indian Parliament:

- a) it can make laws for the country by exercising its legislative power<sup>15</sup> and
- b) it can amend the Constitution by exercising its constituent power.

**Constituent power is superior to ordinary legislative power.** Unlike the British Parliament which is a sovereign body (in the absence of a written constitution), the powers and functions of the Indian Parliament and State legislatures are subject to limitations laid down in the Constitution. The Constitution does not contain all the laws that govern the country. Parliament and the state legislatures make laws from time to time on various subjects, within their respective jurisdictions. The general framework for making these laws is provided by the Constitution. Parliament alone is given

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<sup>9</sup> *The Constitution (Twenty-fourth amendment) Act 1971.*

<sup>10</sup> **Freedom of speech and expression, the right to assemble peacefully, the right to form unions and associations, the right to move freely and reside in any part of India and the right to practise any profession or trade** are the six fundamental freedoms guaranteed under Article 19. The right to property was also guaranteed in this section until 1979 when it was omitted by the **Forty-fourth amendment** during the Janata party regime.

<sup>11</sup> *The Constitution (Twenty-fifth amendment) Act 1971.*

<sup>12</sup> *The Constitution (Twenty-sixth amendment) Act 1971 and The Constitution (Twenty-ninth amendment) Act 1972,* respectively.

<sup>13</sup> *His Holiness Kesavananda Bharati Sripadagalavaru v State of Kerala and Another 1973 (4) SCC 225ff.*

<sup>14</sup> See Austin, *Working a Democratic Constitution...*, p.265.

<sup>15</sup> By virtue of the powers conferred upon it in **Articles 245 and 246**, Parliament can make laws relating to any of the 97 subjects mentioned in the **Union List** and 47 subjects mentioned in the **Concurrent List**, contained in the **Seventh Schedule** of the Constitution. Upon the recommendation of the Rajya Sabha (Council of States or the Upper House in Parliament) Parliament can also make laws in the national interest, relating to any of the 66 subjects contained in the **State List**.

the power to make changes to this framework under **Article 368**<sup>16</sup>. Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament.

Another illustration is useful to demonstrate the difference between Parliament's constituent power and law making powers. According to **Article 21** of the Constitution, **no person in the country may be deprived of his life or personal liberty except according to procedure established by law**. The Constitution does not lay down the details of the procedure as that responsibility is vested with the legislatures and the executive. Parliament and the state legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The executive lays down the procedure of implementing these laws and the accused person is tried in a court of law. Changes to these laws may be incorporated by a simple majority vote in the concerned state legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert **Article 21** into the fundamental right to life by abolishing death penalty, the Constitution may have to be suitably amended by Parliament using its constituent power.

Most importantly seven of the thirteen judges in the *Kesavananda Bharati* case, including **Chief Justice Sikri** who signed the summary statement, declared **that Parliament's constituent power was subject to inherent limitations**. Parliament could not use its amending powers under **Article 368** to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.

### Basic Features of the Constitution according to the *Kesavananda* verdict

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

**Sikri, C.J.** explained that the concept of basic structure included:

- supremacy of the Constitution
- republican and democratic form of government
- secular character of the Constitution
- separation of powers between the legislature, executive and the judiciary
- federal character of the Constitution

**Shelat, J. and Grover, J.** added two more basic features to this list:

- the mandate to build a welfare state contained in the Directive Principles of State Policy
- unity and integrity of the nation

**Hegde, J. and Mukherjea, J.** identified a separate and shorter list of basic features:

- sovereignty of India
- democratic character of the polity
- unity of the country
- essential features of the individual freedoms secured to the citizens
- mandate to build a welfare state

**Jaganmohan Reddy, J.** stated that elements of the basic features were to be found in the **Preamble** of the Constitution and the provisions into which they translated such as:

- sovereign democratic republic

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<sup>16</sup> However certain constitutional amendments must be ratified by at least half of the State legislatures before they can come into force. Matters such as the election of the President of the republic, the executive and legislative powers of the Union and the States, the High Courts in the States and Union Territories, representation of States in Parliament and the Constitution amending provisions themselves, contained in **Article 368**, must be amended by following this procedure.



- parliamentary democracy
- three organs of the State

He said that the Constitution would not be itself without the fundamental freedoms and the directive principles.<sup>17</sup>

Only six judges on the bench (therefore a minority view) agreed that the fundamental rights of the citizen belonged to the basic structure and Parliament could not amend it.

### The minority view

The minority view delivered by **Justice A.N. Ray** (whose appointment to the position of Chief Justice over and above the heads of three senior judges, soon after the pronouncement of the *Kesavananda* verdict, was widely considered to be politically motivated), **Justice M.H. Beg**, **Justice K.K. Mathew** and **Justice S.N. Dwivedi** also agreed that *Golaknath* had been decided wrongly. They upheld the validity of all three amendments challenged before the court. **Ray, J.** held that all parts of the Constitution were essential and no distinction could be made between its essential and non-essential parts. All of them agreed that Parliament could make fundamental changes in the Constitution by exercising its power under **Article 368**.

In summary the majority verdict in *Kesavananda Bharati* recognised the power of Parliament to amend any or all provisions of the Constitution **provided such an act did not destroy its basic structure**. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position of *Sankari Prasad* (1952) by restoring the supremacy of Parliament's amending power, in effect **it strengthened the power of judicial review much more**.<sup>18</sup>

### Basic Structure concept reaffirmed- the Indira Gandhi Election case

In 1975, The Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution. A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the **Thirty-ninth amendment** to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.

Amendments were also made to the *Representation of Peoples Acts* of 1951 and 1974 and placed in the **Ninth Schedule** along with the *Election Laws Amendment Act, 1975* in order to save the Prime Minister from embarrassment if the apex court delivered an unfavourable verdict. The *mala fide* intention of the government was proved by the haste in which the **Thirty-ninth amendment** was passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day. The Rajya Sabha (Upper House or House of Elders) passed it the next day and the President gave his assent two days later. The amendment was ratified by the state legislatures in special Saturday sessions. It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment.

<sup>17</sup> *His Holiness Kesavananda Bharati Sripadagalavaru v State of Kerala and Another* 1973 (4) SCC pp. 637-38.

<sup>18</sup> The majority view declared certain parts of the **Twenty-fifth amendment** invalid especially those relating to **Article 31 (c)** and upheld the **Twenty-ninth amendment**- for a detailed account see Austin, *Working of a Democratic Constitution...*, pp. 265ff.

Counsel for Raj Narain who was the political opponent challenging Mrs. Gandhi's election argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. Counsel also argued that Parliament was not competent to use its constituent power for validating an election that was declared void by the High Court.

Four out of five judges on the bench upheld the **Thirty-ninth amendment**, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute.<sup>19</sup> One judge, **Beg, J.** upheld the amendment in its entirety. Mrs. Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect.

### **Basic Features of the Constitution according to the Election case verdict**

Again, each judge expressed views about what amounts to the basic structure of the Constitution:

According to **Justice H.R. Khanna**, **democracy is a basic feature of the Constitution and includes free and fair elections.**

**Justice K.K. Thomas** held that the **power of judicial review is an essential feature.**

**Justice Y.V. Chandrachud** listed four basic features which he considered unamendable:

- sovereign democratic republic status
- equality of status and opportunity of an individual
- secularism and freedom of conscience and religion
- 'government of laws and not of men' *i.e.* the rule of law

According to **Chief Justice A.N. Ray**, the constituent power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that **democracy was a basic feature but not free and fair elections.** **Ray, C.J.** held that ordinary legislation was not within the scope of basic features.

**Justice K.K. Mathew** agreed with **Ray, C.J.** that ordinary laws did not fall within the purview of basic structure. But he held that **democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary.**

**Justice M.H. Beg** disagreed with **Ray, C.J.** on the grounds that it would be unnecessary to have a Constitution if Parliament's constituent power were said to be above it.<sup>20</sup> Judicial powers were vested in the Supreme Court and the High Courts and Parliament could not perform them. He contended that **supremacy of the Constitution and separation of powers** were basic features as understood by the majority in the *Kesavananda Bharati* case. **Beg, J.** emphasised **that the doctrine of basic structure included within its scope ordinary legislation also.**

**Despite the disagreement between the judges on what constituted the basic structure of the Constitution, the idea that the Constitution had a core content which was sacrosanct was upheld by the majority view.**

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<sup>19</sup> The Supreme Court struck down Section 4 of the **Thirty-ninth amendment Act**, *i.e.* **Article 329A** of the Constitution as it existed in 1975.

<sup>20</sup> A comparison with the Westminster model would bring out the subtleties involved in this matter more clearly. The United Kingdom does not have a written Constitution like India or the USA. The British Parliament is a sovereign body and there is very little difference between constitutional law and ordinary law in that country. The Indian Parliament owes its existence to a written Constitution that was put together by another sovereign body, namely, the Constituent Assembly. Parliament's powers (including the power to amend) are not *sui juris* but essentially derived from this Constitution. Therefore it cannot be said to occupy a position superior to the Constitution.

## The Kesavananda Review Bench

Within three days of the decision on the Election case **Ray, C.J.** convened a thirteen judge bench to review the *Kesavananda* verdict on the pretext of hearing a number of petitions relating to land ceiling laws which had been languishing in high courts. The petitions contended that the application of land ceiling laws violated the basic structure of the Constitution. In effect the Review bench was to decide **whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution**. The decision in the Bank Nationalisation case was also up for review.

**Meanwhile Prime Minister Indira Gandhi, in a speech in Parliament, refused to accept the dogma of basic structure.**<sup>21</sup>

It must be remembered that no specific petition seeking a review of the *Kesavananda* verdict filed before the apex court- a fact noted with much chagrin by several members of the bench. N.N. Palkhivala appearing for on behalf of a coal mining company eloquently argued against the move to review the *Kesavananda* decision. Ultimately, **Ray, C.J.** dissolved the bench after two days of hearings. Many people have suspected the government's indirect involvement in this episode seeking to undo an unfavourable judicial precedent set by the *Kesavananda* decision. However no concerted efforts were made to pursue the case.

The declaration of a National Emergency in June 1975 and the consequent suspension of fundamental freedoms, including the right to move courts against preventive detention, diverted the attention of the country from this issue.

## Sardar Swaran Singh Committee and the Forty-second amendment

Soon after the declaration of National Emergency, the Congress party constituted a committee under the Chairmanship of Sardar Swaran Singh to study the question of amending the Constitution in the light of past experiences. Based on its recommendations, the government incorporated several changes to the Constitution including the **Preamble**, through the **Forty-second amendment** (passed in 1976 and came into effect on January 3, 1977). Among other things the amendment:

- a) gave the **Directive Principles of State Policy** precedence over the **Fundamental Rights** contained in **Article 14 (right to equality before the law and equal protection of the laws)**, **Article 19** (various freedoms like **freedom of speech and expression, right to assemble peacefully, right to form associations and unions, right to move about and reside freely in any part of the country and the right to pursue any trade or profession**) and **Article 21 (right to life and personal liberty)**. **Article 31C** was amended to prohibit any challenge to laws made under any of the **Directive Principles of State Policy**;<sup>22</sup>
- b) laid down that amendments to the Constitution made in the past or those likely to be made in future could not be questioned in any court on any ground;
- c) removed all amendments to fundamental rights from the scope of judicial review and
- d) removed all limits on Parliament's power to amend the Constitution under **Article 368**.

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<sup>21</sup> Speech in Parliament- October 27, 1976: see *Indira Gandhi: Selected Speeches and Writings*, vol. 3, p.288.

<sup>22</sup> **Article 31C** stated that laws passed to implement the **Directive Principles of State Policy** could not be challenged in courts on the ground that they violated any fundamental right. Prior to the **Forty-second amendment** this clause was applicable only to **Article 39 (b) & (c)** of the **Directive Principles** which dealt with equitable distribution of wealth and resources of production.



## Basic structure doctrine reaffirmed- the *Minerva Mills* and *Waman Rao* cases

Within less than two years of the restoration of Parliament's amending powers to near absolute terms, the **Forty-second amendment** was challenged before the Supreme Court by the owners of *Minerva Mills* (Bangalore) a sick industrial firm which was nationalised by the government in 1974.<sup>23</sup>

Mr. N.A. Palkhivala, renowned constitutional lawyer and counsel for the petitioners, chose not to challenge the government's action merely in terms of an infringement of the fundamental right to property. Instead, he framed the challenge in terms of Parliament's power to amend the Constitution.

Mr. Palkhivala argued that Section 55 of the amendment<sup>24</sup> had placed unlimited amending power in the hands of Parliament. The attempt to immunise constitutional amendments against judicial review violated the doctrine of basic structure which had been recognised by the Supreme Court in the *Kesavananda Bharati* and Indira Gandhi Election Cases. He further contended that the amended **Article 31C** was constitutionally bad as it violated the Preamble of the Constitution and the fundamental rights of citizens. It also took away the power of judicial review.

**Chief Justice Y.V. Chandrachud**, delivering the majority judgement (4:1), upheld both contentions. The majority view upheld the power of judicial review of constitutional amendments. They maintained that clauses (4) and (5) of **Article 368** conferred unlimited power on Parliament to amend the Constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitution's basic structure.

**The judges, who concurred with Chandrachud, C.J. ruled that a limited amending power itself is a basic feature of the Constitution.**

**Bhagwati, J.** the dissenting judge also agreed with this view stating that no authority howsoever lofty, could claim to be the sole judge of its power and actions under the Constitution.<sup>25</sup>

The majority held the amendment to **Article 31C** unconstitutional as it destroyed the **harmony and balance between fundamental rights and directive principles which is an essential or basic feature of the Constitution.**<sup>26</sup> The amendment to **Article 31C** remains a dead letter as it has not been repealed or deleted by Parliament. Nevertheless cases under it are decided as it existed prior to the **Forty-second amendment**.

In another case relating to a similar dispute involving agricultural property the apex court, held that all constitutional amendments made after the date of the *Kesavananda Bharati* judgement were open to judicial review.<sup>27</sup> All laws placed in the **Ninth Schedule** after the date of the *Kesavananda Bharati* judgement were also open to review in the courts. They can be challenged on the ground that they are beyond Parliament's constituent power or that they have damaged the basic structure of the Constitution. In essence, the Supreme Court struck a balance between its authority to interpret the Constitution and Parliament's power to amend it.

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<sup>23</sup> *Minerva Mills Ltd. v Union of India* (1980) 3 SCC 625.

<sup>24</sup> The Constitution (Forty-second amendment) Act 1976 [corresponding to Article 368 (4) & (5)]

<sup>25</sup> Such a position seems contrary to the philosophy of separation of powers that characterise the structure of governance in India. The Constitution provides for a scheme of checks and balances between the three organs of government namely, the legislature, the executive and the judiciary, against any potential abuse of power. For example, the judges of the Supreme Court and the High Courts in the States are appointed by the executive i.e. the President acting on the advice of the Prime Minister and the Chief Justice of the Supreme Court. But they may be removed from office only if they are impeached by Parliament. This measure helps the judiciary to function without any fear of the executive. Similarly, the executive is responsible to Parliament in its day to day functioning. While the President appoints the leader of the majority party or a person who he believes commands a majority in the Lok Sabha (House of the People or the Lower House) a government is duty bound to lay down power if the House adopts a motion expressing no confidence in the government.

<sup>26</sup> **Bhagwati, J.** upheld its validity and concurred that the government's takeover of the sick mill was valid.

<sup>27</sup> *Waman Rao v Union of India* 1981 2 SCC 362. The Supreme Court decided this case along with that of *Minerva Mills*. **Bhagwati, J.** who was in the minority again incorporated his opinions on both cases in a single judgment.

## Summary

It may be said that the final word on the issue of the basic structure of the Constitution has not been pronounced by the Supreme Court- a scenario that is unlikely to change in the near future. While the idea that there is such a thing as a basic structure to the Constitution is well established its contents cannot be completely determined with any measure of finality until a judgement of the Supreme Court spells it out. Nevertheless **the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. are some of the essential features of the Constitution that have appeared time and again in the apex court's pronouncements.** One certainty that emerged out of this tussle between Parliament and the judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the Supreme Court. In essence Parliament's power to amend the Constitution is not absolute and the Supreme Court is the final arbiter over and interpreter of all constitutional amendments.