Abstract
The structure of a country’s government is divided into three institutional components: one Legislature to make laws; other Executive to implement and execute law; and third one Judiciary to interpret the laws and administer justice. All these organs are controlled by the Constitution. The Constitution underlines the idea that there are certain basic rights which are inherent in a human being and which no government should seek to take away either by legislation or by Executive action. The Judiciary is endowed with the function of protecting those rights and acting as the guardian thereof. If the Legislature passes any law or the Executive takes an action, so as to infringe any of the fundamental rights, then the courts may declare such a law or action as unconstitutional. Some of these rights are freedom of the person, freedom of speech, right to equality, freedom of conscience and religion etc. On the other hand, non-legal norms arise in the course of time as a result of practices followed over and over again such norms are known as conventions, usages, customs, practices of the Constitution. There may be nothing in the Constitution sanctioning them, nevertheless they exist. In the words of Jennings, “thus within the framework of the law there is a room for the development of the rules of practice, rules which may be followed as consistently as the rules of law which determines the procedure which the man concerned with the government follow.” Thus, to make out the need of the Amendment it will not be wrong to say that the institutions of the Govt. cannot function without a Constitution. The paper analyses the scope and extent of amending power of the parliament under article 368 of the Indian Constitution vis-à-vis the Doctrine of Judicial Review explored by the judiciary.

Key Words: Doctrine of Judicial Review, Basic Structure Theory, Article 368 and Fundamental Rights.

Introduction
Meaning of Amendment
The word Amendment is susceptible to different meanings. There is no single definition of this word which can fully explain its significance or purpose. Ordinarily it is understood as a minor change or deletion of few words or provisions from an enactment. According to English Reference Dictionary, the word Amendment is derived from the Latin word ‘Emendose’ which means a minor change or addition to a document and to change something slightly in order to correct an error to make an improvement. The word Amendment when used in connection with the Constitution it may refer to the addition of a provision or a new and independent subject complete in itself and wholly disconnected from other provisions or to some particular Articles.

This was the general meaning of Amendment. Now we will try to find out the meaning of Amendment with respect to Article 368 of the Indian Constitution. If we see the wordings of Article 368 then we find that in the substantive part of Article 368 the words “Amendment of this Constitution” are used, whereas the proviso to it is applicable only when the ‘Amendment’ seeks to make ‘change’ in the specified Article. Amendment literally means ‘removal of faults or errors, reformation.’ Whereas the word ‘change’ literally means the Act or fact of changing, substitutions or

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succession of one thing in place of another, substitution of other conditions, variety.

‘Amendment’ would emerge thus:

1. The word ‘Amendment’ does not bear the restricted dictionary meaning but is wider and includes change, substitution, modification, deletion, repeal, etc.
2. This wider scope of the word does not extend to each and every provision of the Constitution and
3. It does not extend to the extent of taking away or abridging the fundamental rights and as to whether or not it extends to the provisions dealing with the fundamental institutions established under the Constitution.

Vesting of the power of Constitutional Amendment

Articles 368 (Power of Parliament to Amend the Constitution and Procedure thereof)

1. Notwithstanding anything in this Constitution Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this Article.
2. An Amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-third of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon, the Constitution shall stand amended in accordance with the terms of the Bill:
   Provided that if such Amendment seeks to make any change in –
   a. Articles 54, Article 55, Article 73, Article 162 or Article 242 or
   b. Chapter IV of par V, Chapter V of Part VI or Chapter I of Part XI or
   c. Any of the lists in the Seventh Schedule or
   d. The representation of States in Parliament, or
   e. The provisions of this Article.

The Amendment shall also require to be ratified by the Legislatures of not less than one half of the states by resolution to that effect passed by those Legislature before the Bill making provision for such Amendment is presented to the President for assent.

3. Nothing in Article 13 shall apply to any Amendment made under this Article.
4. No Amendment of this Constitution (including the provision of Part II) made or purporting to have been made under this Article (whether before or after the commencement of section 55 of the Constitution (Forty Second Amendment, Act 1976) shall be called in question in any court on any ground.
5. For the removal of doubts it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provision of this Constitution under this Article.

Amendment Procedure

By bare reading of Article 368, Clause (2) it is remarkable to note that one of the outstanding feature of the Indian Constitution is that different procedures have been laid down for amending different provisions of the Constitution, though in all cases and Amendment has to be moved in Parliament. That is, for the purposes of Amendment the provisions of the Constitution fall under three categories. The procedure for each category is laid down in the Constitution.

Firstly, those that can be effected by a simple majority, required for the passing of an ordinary law. The amendments contemplated in Articles 4, 169 and 239-A fall within this class. They are specifically excluded from the preview of Article 368.

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4 Paras Diwan, Amending Power and Constitutional Amendment, 118 (1990)
5 Article 4 – Creation of new states or re-constitution of exiting states; Article 169(3) – creation or abolition of upper chambers in the States; Article 239– A Constitution of Centrally Administered Areas.
Secondly, those that can be effected by a special majority as laid down in Article 368(2). 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 two-third of the members of that House present and voting.

Thirdly, that those require, in addition to the special majority as described above, ratification by resolution passed by not less than one-half of the State Legislatures. This class comprises amendments which seek to make any change in the provisions referred to in the proviso to Article 368(2). Amendments in the following provisions require such ratification:

(i) The election and manner of election of the President;\(^6\)
(ii) The extent of Executive power of the Union;\(^7\)
(iii) The extent of Executive power of a state;\(^8\)
(iv) Provisions dealing with Supreme Court;\(^9\)
(v) Provisions dealing with the High Courts in the states;\(^10\)
(vi) High Courts for Union Territories;\(^11\)
(vii) Distribution of legislative powers between the Union and the state.\(^12\)
(viii) The representation of States in Parliament;\(^13\)
(ix) Seventh Schedule to the Constitution;\(^14\)
(x) Article 368 i.e. the power and procedure of amending of the Constitution.

Speaking about the uniqueness of the procedure for Amendment of the Constitution the following observation was made by Pandit Nehru, “while we want this Constitution as solid and permanent as we make it. There is no permanence. In the permanent you stop the nation’s growth of living, vital organs of the people in the changing conditions, when the world is in a period of transition. What we may do today may not be wholly applicable tomorrow.”\(^15\)

**Doctrine of Judicial Review**

In countries with written Constitution there prevails the doctrine of Judicial Review. It means that the Constitution is the supreme law of the land and any law inconsistent there with is void. The courts performs the role of expounding he provisions of the Constitution and exercise power of declaring any law or administrative action which may be inconsistent with the Constitution as unconstitutional and hence void.\(^16\) In exercising the power of judicial review, the courts discharge a function which may be regarded as crucial to the entire governmental procedure in the country. The bare text of the Constitution does not separate in itself the living law of the country. For that purpose, one has to read the fundamental text along with the gloss put there on by the courts. In this sense it can be stated that the study of constitutional law may be described in general terms as a study of the doctrine of judicial review in action.\(^17\) The Constitution of India being a written Constitution explicitly established the doctrine of judicial review in several Articles.\(^18\) The doctrine of judicial review is firmly rooted in India and has the explicit sanction of the Constitution. Article 13(2) even goes to the extent of saying that, “the state shall not make any law which takes away or abridges the rights conferred by this part (Part III containing fundamental rights) and any law made in contravention of this clause shall, to the extent of the contravention be void,” the courts in India are thus under a

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\(^6\) Articles 54 and 55
\(^7\) Article 73
\(^8\) Article 162
\(^9\) Articles 124 to 147
\(^10\) Articles 214 to 233
\(^11\) Article 241
\(^12\) Part XI, Articles 245 to 255
\(^13\) Fourth Schedule
\(^14\) List I, II, III Schedule VII
\(^17\) Dowling, *Cases and Materials on Constitutional Law*, 19 (1965)
\(^18\) Articles 13, 32, 131-36, 143, 226 and 246.
constitutional duty to interpret the Constitution and declare the law as unconstitutional if found to be contrary to any constitutional provisions. The courts at as sentinel on quivi so far as the Constitution is concerned.

**Scope of Amending Power of Parliament under Article 368**

Since the commencement of the Constitution, a constitutional battle has been fought with regard to scope of the amending power of the Parliament both in the courts as well as inside the Parliament. In its arguments Parliament asserts that it is a supreme law making authority and enjoys a status as of the British Parliament, on the other hand the Supreme Court argued that in its interpretation Parliament is the creature of the Constitution, exercising power under and not beyond the Constitution. Although the Constitution expressly confers amending power on the Parliament, but it is the Supreme Court which is to finally interprets the scope of such power and to spell out the limitations, if any, on such amending power. The question as to the scope of the amending power of the Parliament often arises in case of Amendment of certain inalienable provisions of the Constitution which has to be preserved by the Judiciary from encroachment by the Parliament.

The controversy arises mainly because of Article 13(2) which reads as follows:

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 question is how wide is the expression ‘law’ in Art. 13(2) Does it include a constitutional amendment? If it does, the amendability of fundamental rights in such a way as to eliminate or reduce them is denied to Parliament. Because even if Parliament amends Art. 13(2) or Art. 368 in order to arm itself with the power to amend Part III in any way it likes, that Amendment itself is liable to be struck down by the Supreme Court on the ground that the Amendment is ‘law’ within the meaning of Art. 13(2) and therefore ultra-vires of Parliament.

**Amendment of Fundamental Rights**

The whole controversy with regard to the chapter of Amendment mainly arises because of one question only i.e. whether Parliament in exercise of its amending power under Article 368 can take away or abridge the fundamental rights secured to its citizens by the Constitution itself? As we know, that these fundamental rights form the soul of the Constitution and finding out answer to this question is very much essential while dealing with the topic of Amendment and scope of Parliament in amending it. For this purpose, we should first find out nature of fundamental rights which is as follows:

**Nature of Fundamental Rights**

Jawaharlal Nehru while presenting to the Constituent Assembly the interim report on fundamental rights, expressed his idea regarding the nature of the fundamental rights, “A fundamental rights should be looked upon, not from the point of view of any particular difficulty of the moment but as something that you want to make permanent in the Constitution.”

The point to be considered is whether he meant by ‘permanent’ unamendable in the legalistic sense or something else. It seems that by ‘permanent’ we have meant ‘unamendable’ because he clarified his view later on in these words, “... that while we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions. There should be certain flexibility. If you make anything rigid and permanent, you stop a nation’s growth of a living vital organic people. Therefore, it has to be flexible. So also, when you pass this constitution, you will and I think it is proposed, law down a period of years. Whatever that period may be during which changes to that Constitution can be easily made without any difficult procedure.”

Speaking on Article 32 which guarantees the constitutional remedies for enforcing the fundamental rights Dr. Ambedkar described Article 32 as “the very soul of the Constitution and the very heart of it,” because that Article alone makes the rights effective by their speedy enforcement.

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19 C.A.D. Vol. III 454
20 C.A.D. Vol. VII 322-323
21 Ambedkar, C.A.D., Vol. VII 953
The First Phase of Judicial Approach

In this phase we will deal with the two judgements i.e. Shankari Parasad and Sajjan Singh case wherein the Supreme Court for the first time faced the question as to the scope of the amending power of the Parliament.

(A) Shankari Prasad v. Union of India

In this case the constitutional validity of the Constitution (First Amendment) Act, 1951 was challenged before the Supreme Court. The Constitution (First Amendment) was enacted to remove certain difficulties brought to the light of judicial pronouncements in regard to fundamental rights and the Directive Principles of the State Policy. The whole controversy about this Amendment arose from Article 31 i.e. right to property. Article 31 dealing with compulsory acquisition of property as originally framed provided that no property shall be acquired by the State except by law providing for compensation for such acquisition.

The validity of this Amendment was challenged in the Supreme Court. The question before the court was whether an Amendment of the Constitution made under Article 368 was included in the term law in Article 13. The court upholding the constitutionality of First Amendment observed that although ‘law’ must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law which is made in exercise of constituent power.

(B) Sajjan Singh v. State of Rajasthan

After Shankari Parshad for the next thirteen years the question of amendability of fundamental rights remained dormant In the instant case, the court was called upon to decide the following questions:

(1) Whether the Amendment of the Constitution in so far as it purported to take away or abridge the fundamental rights was within the prohibition of Article 13(2) and

(2) Whether Articles 31A and 31B (as amended by XVII Amendment) sought to make changes to Articles 32, 136 and 226 or in any of the list in the VII Schedule of the Constitution so that the conditions prescribed in the proviso to Article 368 had to be satisfied?

With regard to the second question the court rejected the argument on the ground that the Amendment Act did not make any alteration in Article 226 and any incidental effect on that Article was irrelevant during the course of oral arguments. As regard Article 13(2) three of the five judges including the Chief Justice observed that, “it is true that Article 13(2) refers to any law in general and literally construed the word ‘law’ may take in a law made in exercise of the constituent power conferred on Parliament but having regard to the fact that a specific unqualified and unambiguous power to amend the Constitution if conferred on Parliament, it would be unreasonable to hold that the word ‘law’ in Article 13(2) takes in Constitution Amendment Acts passed under Article 368.”

The Second Phase of Judicial Approach

(A) Golak Nath v. State of Punjab

In the Golak Nath case three writ petitions were involved. One was filed by the son, daughter and grand-daughter of Golak Nath challenged the Punjab Security of Land Tenure Act, 1953, on the ground that the said Act infringed the petitioner’s rights under clause (f) and (g) of Article 19 and Article 14 of the Constitution and therefore, should be declared unconstitutional. Since the Act was included in the Ninth Schedule to the Constitution by the Seventeenth Amendment Act. The Amendment Act itself was challenged as ultra-vires of Parliament. The court, comprising all the eleven judges of the Supreme Court, was sharply divided on the interpretation of Article 13(2) and Article 368. The majority of six judges overruled the decision in the Shankari Prasad and held that ‘law’ in Article 13(2) includes a constitutional Amendment because ‘amendment’ cannot be made.

22 AIR 1951 SC 458 decided by Kania, C. J., Patanjali Sastri, B. K. Mukherjee, S. R. Das and Chandrasekhar Aiyar, JJ.
23 Id., at 857
otherwise than by following the legislative procedure. The judgement proceeded on the following reasoning: (Chief Justice Subba Rao, Shah, Shalet and Vaidialingam JJ.)

(1) The power to amend the Constitution should be found in the plenary legislative power of Parliament is clear from Articles 245, 246 and 248 and entry 97 of List I of the Seventh Schedule, the residuary power of legislation is vested in Parliament. The residuary power of Parliament certainly takes in the power to amend the Constitution. Articles 4 and 169, and para 7 of the Fifth Schedule and para 21 of the Sixth Schedule have expressly conferred such power.

There is, therefore, no inherent inconsistency between the legislative power and the amending procedure. The Constitution incorporates an implied limitation that the fundamental rights are out of the reach of Parliament.

(2) The contention that the power to amend is a sovereign power, that the said power is superior to the legislative power, than it does not permit any implied limitation and that amendments made in exercise of that power involve political question which are outside the scope of judicial review cannot be accepted. There is nothing in the nature of the amending power which enables Parliament to override all the express or implied limitations on that power.

(3) As to the Constitution (1st Amendment) Act 1951, the Constitution (Fourth Amendment) Act, 1955, and the Constitution (17th Amendment) Act 1964, the majority held that these amendments abridged the scope of fundamental rights. But on the basis of earlier decisions of the Supreme Court they were valid. By applying the doctrine of prospective, overruling, the decision will have only prospective operation and therefore, the said amendments will continue to be valid. Thus at this stage the five judges took recourse to the doctrine of prospective overruling because of two reasons. First, the power of Parliament to amend the fundamental rights and the First and the Seventeenth Amendments specifically had been upheld previously by the Supreme Court in Shankari Parasad and Sajjan Singh. Secondly, during 1950 to 1967 a large body of legislation had been enacted bringing about an agrarian revolution in India. As the Constitution (Seventeenth Amendment) Act is held valid the validity of the Punjab Security of Land Tenures Act, 1962 as amended by Act XIV of 1965 cannot be questioned on the ground that they offend Articles 13, 14 or 31 of the Constitution.

Justice Hidayatullah’s conclusions were as follows:
(i) The fundamental rights are outside the amendatory procedure if the Amendment seeks to abridge or take away any of the rights;
(ii) Shankari Prasad’s case (1952) SCR 89 and Sajjan Sigh case (1965) 1 SCR 933 concluded the power of Amendment over Part III of the Constitution on an erroneous view of Article 13(2) and 368.
(iii) The First, Fourth and Seventeenth Amendments being part of the Constitution by acquiescence for a long time, cannot now be challenged and they contain authority for the Seventeenth Amendment.
(iv) Fundamental rights cannot be abridged or taken away by the exercise of amendatory procedure in Article 368, any further inroad into these rights from the date of the decision will be illegal and unconstitutional unless is complies with Part III in general and Article 13(2) in particular.
(v) For abridging or taking away fundamental rights, a constituent body will have to be convoked; and
(vi) The two impugned Acts are valid under the Constitution not because they are included in Schedule of the Constitution but because they are protected by Article 31-A and the President’s assent. The petitions were dismissed but without cost.

(Per Wanchoo, Bhargava and Mitter, JJ.)

The power to amend the Constitution is to be founded in Article 368 and the power to amend the Constitution can never reside in Article 245 and Article 248 read with item 97 of List I.

25 Id., at 1707
The power conferred under Article 368 is constituent power to change the fundamental law i.e. the Constitution and is distinct and different from the ordinary legislative power.

Thus Golak Nath raised an active controversy in the country. One school of thought applauded the majority decision as a vindication of the fundamental rights, while the other school criticised it as creating hindrance in the way of enactments of socio-economic legislation required to meet the needs of the society.

**Amendment of Article 368: Twenty-Fourth Amendment**

To neutralise the effect of Golak Nath, Nath Pai, M. P. introduced a private member’s Bill in the Lok Sabha on April 7, 1967, for amending Article 368, so as to make it explicit that any constitutional provision could be amended by following the procedure contained in Article 368.

Accordingly, in 1971, Parliament enacted the Constitution (Twenty-fourth) Amendment Act, introducing certain modifications in Articles 13 and 368 to get over the Golak Nath ruling and to assert the power of Parliament, denied to it in Golak Nath, to amend the fundamental rights. Thus, an attempt was now made to undo the effect of Golak Nath. The rationale underlying the various clauses enacted by the Twenty-Fourth Amendment was as follows:

(a) It was now clarified that Article 13 would not stand in the way of any constitutional Amendment made under Article 368. This was sought to be achieved by adding a clause to Article 13 declaring that Article 13 shall not apply to any constitutional Amendment made under Article 368.

(b) As a matter of abundant caution, a clause was added to Article 368 declaring that Article 13 shall not apply to any constitutional Amendment made under Article 368.

(c) The marginal note to Article 368 was changed from ‘procedure for Amendment of the constitution’ to ‘power of Parliament to amend the Constitution and procedure thereof.’

(d) A clause was added to Article 368 saying that notwithstanding anything contained in the Constitution, Parliament may in exercise of its constituent power amend by way of addition, alteration or repeal any provision of this Constitution in accordance with the procedure laid down in this Article.

The addition of the clause was designed to make an express grant of power to Parliament to amend any part of the Constitution including fundamental rights. It had been argued by Chief Justice Subba Rao in Golak Nath that since Article 368 did not expressly authorise the curtailment of fundamental rights, each curtailment must be out of reach of the amending procedure. The Amendment now excluded such an inference being drawn by expressly including the fundamental rights within the scope of the amending procedure.

Along with the Twenty-fourth Amendment was also enacted the Twenty-fifty Amendment of the Constitution. The salient features of which as discussed earlier were as follows:

(i) The word amount was substituted for the word compensation in Article 31(2). This was done to remove any contention that the government was bound to give adequate compensation for any properly acquired by it.

(ii) Article 19(1) was delinked from Article 31(2)

(iii) A new provision Article 31-C was added to the Constitution saying

(a) That Articles 14, 19 and 31 would not apply to a law enacted to effectuate the policy underlying Article 39(b) and (c) and

(b) That a declaration in the law that it was enacted to give effect to the policy under Article 39(b) and (c) would immunize the law from such a challenge the assent of President.

The effect of this clause was quite far reaching. Hitherto, Directive Principles had been treated as subservient to fundamental rights. Now this relationship was sought to be revered. Directive Principles contained in Article 39(b) and (c) were now sought to be given precedence over

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fundamental rights contained in Articles 14, 19 and 31. Twenty-fifth Amendment thus further diluted the right to property.

**The third and final phase of judicial approach**

The judicial controversy regarding the Amendment of fundamental rights, which started from the decision of Sankari Parsad and passing through the erroneous view of Sajjan Singh and Golak Nath finally reached its ultimate conclusion in the landmark judgement of Kesavananda Bharti case which is discussed as follows.

**(A) Kesavananda Bharti v. State of Kerala**

In this case the constitutional validity of (24th Amendment) Act 1971, the Constitution (25th Amendment) Act 1971 along with the Constitution (29th Amendment) Act 1972 were challenged before the Supreme Court through an Article 32 by Sawami Kesavananda Bharti, a Mutt Chief of Kerala. This case was popularly known as fundamental rights case. It was heard by a Bench of thirteen Judges of the Supreme Court. Out of thirteen Judges, eleven Judges delivered separate judgements. Its hearing took five long months. In the constitutional history of free India, the court gave the longest judgment running into five hundred and ninety five pages. The judgement in respect of each Amendment challenged is discussed below:

**The Twenty-fourth Amendment Act 1971 : Its constitutionality**

The court held that the power to amend the Constitution is to be found in Article 368 itself. It was emphasized that the provisions relating to the Amendment of the Constitution are some most important features of any modern Constitution.

Hedge and Mukherjee, JJ. Found it difficult to believe that the Constitution makers had left the important power to amend the Constitution hidden in Parliamentary residuary power on this point, therefore, the views expressed in Shankari Prasad and Sajjan Singh were endorsed and the view expressed in Golak Nath that the power to amend the Constitution was not to be found in Article 368 was overruled.

(b) Further the court recognised that there is a distinction between an ordinary law and a constitutional law.

Hedge and Mukherjee, JJ. Stated in this connection “an examination of the various provisions of our Constitution shows that it has made a distinction between the Constitution and the Law.” It was asserted that the Constitution makers did not use the expression law in Article 13 as including constitutional law. This would thus mean that Article 368 confer power to abridge a fundamental right or any other part of the Constitution. To this extent, therefore, Golak Nath was now overruled.

(c) But Kesavananda did not concede an unlimited amending power to Parliament under Article 368. The amending power was now subjected to one very significant qualification viz. that the amending power cannot be exercised in such a manner as to destroy or emasculate the basic of fundamental features of the Constitution. A constitutional Amendment which offends the basic structure of the Constitution is ultra-vires.

(d) Some of the features regarded by the court as fundamental and thus non-amendable are:

(i) Supremacy of the Constitution
(ii) Republican and democratic form of government
(iii) Secular character of the Constitution
(iv) Separation of powers between legislative, Executive and the judiciary
(v) Federal character of the Constitution

(e) This, therefore, means that while Parliament can amend any constitutional provision by virtue of Article 368, such a power is not absolute and unlimited and the courts can still go into the question


28 The 29th Amendment, 1972 inserted the Kerala Land Reforms (Amendment) Act 1969 and the Kerala Land Reforms (Amendment) Act, 1971 in the 9th Schedule to provide protection of Article 31-B to these Acts.

whether or not an Amendment destroys a fundamental or basic feature of the Constitution. If an Amendment does so it will be constitutionally invalid. The justification for this judicial view is that the expression ‘amend’ in Article 368 has a restrictive connotation and could not comprise a fundamental change in the Constitution. The words ‘Amendment of the Constitution’ in Article 368 could not have the effect of destroying or abrogating the basic structure of the Constitution. The 2/3rd majority in Parliament may not represent majority of the votes of the people in the country. This means that there are inherent or implied limitations on the power of Amendment under Article 368.

(f) What is a fundamental feature of the Constitution is a moot point. That list given above is not final or exhaustive of such features. It is for the courts to decide as and when a question arise whether a particular Amendment of the Constitution affects any ‘basic’ or ‘fundamental’ feature of the Constitution or not. The question of basic feature has to be considered in each case in the context of the concrete problem. Kesavananda ruling can be regarded to be an improvement over the formulation in Golak Nath in at least two significant respects:

(1) It has been stated earlier that there are several other parts of the Constitution which are as important if not more, as the fundamental rights, but Golak Nath formulation only confined itself to fundamental rights and did not cover these pacts. This gap has been filled by Kesavananda by holding that all basic features of the Constitution are non-amendable.

(2) Golak Nath made all fundamental rights as non-amendable. This was too rigid a formulation. Kesavananda introduces some flexibility in this respect. Not all fundamental rights enbloc are now regarded as non-amendable but only such of them as may be characterised as constituting the basic features of the Constitution.

According to Kesavananda, even a fundamental right can be amended or altered provided the basic structure of the Constitution is not damaged in any way. It is for the court to decide from case to case as to which fundamental right is to be treated as a basic feature. The right to property has not been treated as such as so the fundamental right to property has been abrogated. Kesavananda also answer to question left unanswered in Golak Nath, namely can Parliament under Article 368 rewrite the entire Constitution? This answer to the question is that Parliament can only do that which does not modify the basic feature of the constitution and not go beyond that. The immediate application of the Kesavananda principle as regards the amendability of the Constitution was made to assess the constitutional validity of the Twenty-Fourth and Twenty Fifth Amendments. The entire Twenty Fourth Amendment was held valid.

The Doctrine of Basic Structure of the Constitution

By seven of the thirteen Judges in the Kesavananda Bharti case, including chief Justice Sikri who signed the summary statement, declared that Parliament’s constituent power was subject to inherent limitation. Parliament could not use its amending power under Article 368 to damage, emasculate, destroy, abrogate, change or alter the basic structure or framework of the Constitution.

Thus, while the 7 out of the 13 Judges boldly declared that the basic structure or framework of the Constitution could not be altered by Parliament by amending the Constitution under Article 368, there was no consensus among these Judges as to the precise content of the basic structure or framework of the Constitution.

Each Judge laid our separately, where 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

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30 Id., at 1467
31 Raghunath Rao v. Union of India, AIR 1993 SC 1267
32 Ibid.
34 Kesavananda Bharti v. State of Kerala, AIR 1973 SC 1461 at 1535
- Secular character of the Constitution
- Separation of powers between the Legislature, Executive and the judiciary
- Federal character of the Constitution
  Shelate and Grover JJ., added two more basic features to this list.\textsuperscript{35}
- The mandate to build a welfare state contained in the Directive Principles of State Policy
- Unity and integrity of the nation
  Hegde, J. and Mukherjee, J. identified a separate and shorter list of basic features: \textsuperscript{36}
- Sovereignty of India
- Democratic character of the policy
- 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 element of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as: \textsuperscript{37}
- Sovereign democratic republic
- Parliamentary democracy
- Three organs of the state
  He said that the Constitution would not be itself without the fundamental freedom and the Directive Principles.

Only six Judges of the Bench (therefore a minority view) agreed that the fundamental rights of the citizens belonged to the basic structure and Parliament could not amend it.

Thus, from the above description, it can be enjoined that the basic structure remain a vague and undefined concept, at least as vague as most of the basic features illustrated by the seven Judges. This is the weakness of the doctrine. At the same time, in the folds of vagueness of basic structure lies limitless judicial power. The single decision has deflected the balance of power decisively in favour of the Judiciary at the cost of Parliament and cast a cloud of uncertainty over the amending power. Previously the Parliament had the last word in law-making and amending the Constitution. Now, the Supreme Court has the final say. As it is the Supreme Court to determine finality, as to what constituted the basic structure or what feature, and the essential features constituted the framework of the Constitution. It may be stated that by laying down the concept of basic structure, the Supreme Court has assumed to itself the constituent power.\textsuperscript{38}

Application of the Doctrine of Basic Structure

After having laying down the doctrine of basic structure in Kesavananda case, it becomes easy for the Supreme Court to judge the validity of every Amendment which tends to destroy that structure or which seems to affect those essential features of the Constitution which forms the basic framework of it. And, in applying the doctrine, the Supreme Court interpreted and explained this doctrine in much better and detailed way.

(A) Indira Nehru Gandhi case

The immediate case after Kesavananda ruling was \textit{Smt. Indira Nehru Gandhi v. Raj Narain},\textsuperscript{39} popularly known as election case, where the Supreme Court made a reference to Kesavananda Bharti and accepted the majority opinion on the doctrine of basic structure or framework of the Constitution. In this case, a challenge to Prime Minister Indira Gandhi’s election victory was upheld by the Allahabad High Court on the ground of electoral malpractices in 975. Parliament passed the Thirty Ninth Amendment to the Constitution i.e. Constitution (39th Amendment) Act, 1975, which removed the authority of the Supreme Court to adjudicate petition regarding election of the President, Vice-

\textsuperscript{35} Id., at 1603
\textsuperscript{36} Id., at 1628
\textsuperscript{37} Id., at 1753-54
\textsuperscript{38} P. P. Rau, Basic Features of the Constitution, (2000) 2 SCC (J) (Journal Section) at p. 15.
\textsuperscript{39} AIR 1975 SC 2299 decided by A. N. Ray, C. J., H. R. Khanna, K. K. Mathew, M. H. Beg and Y. V. Chandrachud, JJ.
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 as the object of the ongoing dispute.

Amendments were also made to the Representation of Peoples Act 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 of the apex court delivered an infavourable verdict. 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 power of judicial review. Counsel also argued that Parliament was not competent to use the 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 (clause 4 of Article 329 A) that part which sought to curb the power of the Judiciary to adjudicate in the current election dispute. One Judge, Beg J., upheld the amending in its entirety. Mrs. Gandhi’s election as 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.

Thus, the case came again, each Judge expressed views about what amounts to the basic-structure of the Constitution.

**Basic features of the Constitution according to the election case verdict**

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

**(B) The Minerva Mills and Waman Rao cases**

Within less than two years of the restoration of Parliament’s amending power to near absolute terms, the Forty-Second Amendment was challenged before the Supreme Court in *Minerva Mills Ltd. v. Union of India,* by the owner of Minerva Mills (Bangalore) a sick industrial firm which was nationalized by the government in 1974.

Chief Justice Y. V. Chandrachud, delivering the majority judgement (4:1) upheld both contentions. The majority view upheld that power of judicial review of constitutional amendments. They maintained that clause (4) and (5) of Article 368 conferred unlimited power on Parliament to amend the Constitution. They said that this deprived courts to ability to question and Amendment even if it damaged or destroyed the Constitution 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 role Judge of its power and actions under the Constitution. The

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40 AIR 1980 SC 1789 decided by Y. V. Chandrachud, C. J., P. N. Bhagwati, A. C. Gupta, N. L. Untwalia and P. S. Kailasam, JJ.

41 Such a position seems contrary to the philosophy of separation of power that characterize the structure of governance in India. The Constitution provides for a scheme of checks and balance between the three organs of government namely the Legislature, the Executive and the Judiciary against any potential abuse of power. For example, the Judge of Supreme Court and High Court in the state are appointed by the Executive i.e. the President acting on the advice of Prime Minister and the Chief Justice of 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 People or the Lower
majority held the Amendment Article 31 C unconstitutional as it destroyed the harmony and balance between fundamental rights and Directive Principles which is an essential or basic feature of the Constitution. In the instant case, the Supreme Court considered the constitutional validity of the Maharashtra Agricultural Lands (Ceiling on Holding) Act, 1961. The Act imposed ceiling on agricultural holdings in the state. As the Act had been placed in the 9th Schedule. The Constitutional validity of Article 31A, 31 B and the unamended Article 31C (as it existed before the 42nd amendment) was also challenged on the ground of damaging the basic structure of the Constitution. The proposition that Parliament cannot under Article 368, so amend the Constitution as to destroy its basic feature was again reiterated and applied by the Supreme Court in present case. Accordingly the court ruled that the First and the Fourth Amendment Acts introduced in 1951 and 1955 did not damage any basic or essential features of the Constitution or its basic structure and were thus valid and constitutional being within the constituent power of the Parliament. The court declared in Waman Rao that all Acts and regulations included in the Ninth Schedule until the landmark case of Kesavananda Bharti (April 24, 1973) will receive the full protection of Article 31B. Since the 9th Schedule is a part of the Constitution, no additions of alterations can be made therein without complying with the restrictive provisions governing amendments to the Constitution. Therefore, the Acts and Regulations included in the 9th Schedule after Kesavananda (i.e. on or after April 24, 1973) will not receive the protection of Article 31B for the plain reason that in the face of the Kesavananda judgement, there is no justification for making additions to the IX Schedule with a view to conferring a blanket protection on the laws included therein. The various constitutional amendments, by which additions were made to the IX Schedule on or after April 24, 1973 will be held valid only if they do not damage or destroy 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. However in Sanjeev Coke Mfg. Co. v. M/S Bharat Cooking Coal Ltd., while considering the validity of Coking Coal Miles (Nationalisation) Act 1972 under Article 31C as it stood before its Amendment by the Forty Second Amendment dissented from Minerva Mills case regarding the validity of Article 31C, Chinappa Reddy J., speaking for a Constitution Bench of the court said that Minerva Mills case was concerned with the law passed before the Amendment of Article 31C by the Forty Second Amendment and therefore, any decision on the validity of the Amendment of that Article was purely hypothetical and academic. But the Sanjeev ruling is more in the nature of an obiter dicta as the Act in question pertained to Articles 39(b) and (c) and could be held valid under the original Article 31C as held valid in Kesavananda. Similarly, without taking note of Sanjeev Coke case, but relying exclusively on Minerva Mills case, the Supreme Court in S. P. Sampath Kumar v. Union of India, upheld the validity of Article 323-A which provides for Administrative Tribunals free from the jurisdiction of all courts except the Supreme Court on the ground that Parliament can make effective alternative institutional mechanism or arrangements for judicial review without violating the basic structure of the Constitution if such arrangements or mechanisms are no less effective than High Court. In the same case, Bhagwati C. J. observed that judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is. Invoking the doctrine of basic structure, in P. Sambhamurthy v. State of A. P., the Supreme Court unanimously invalidated clause (5) of the Article 371-D. This Article was introduced by 32nd
Amendment of the Constitution with effect from 1st July, 1974. The main part of clause (5) provided that the final order of the Administrative Tribunal to be set up under clause (3) of that Article shall become effective upon its confirmation by the Government or on the expiry of three months. The proviso to clause (5) authorized the government to modify or annul any order of the Tribunal. The court held that the proviso was “violative of the rule of law which is clearly a basic and essential feature of the constitution.” If the exercise of the power of judicial review, the court order, “can be set at naught by the state government by overriding the decision given against it, it would sound the death knell of the rule of law.”

In L. Chandra Kumar v. Union of India, the Supreme Court held that to the extent Article 323-A and 323-B exclude the jurisdiction of the Supreme Court under Article 32 and the High Courts under Article 226 are unconstitutional. The court emphasized that judicial review is a basic feature of the Constitution which cannot be diluted by transferring judicial power to the Administrative tribunal and excluding the review of their determination under Article 32 or 226. In view of this decision Tribunals, the court has held that if a retired Judge of a High Court is appointed chairman of the Tribunal in consultation with the Chief Justice of the High Court or a sitting Judge is so appointed after nomination by the Chief Justice of High Court with the concurrence of the Chief Justice of India and the other judicial and non-judicial members are appointed without such consultation or nomination, the constitution of the Tribunal is valid. The court thus ruled that the power of judicial review which is in the High Court under Articles 226 and 227 and the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of the High Courts and the Supreme Court to test the constitutional validity of the legislation can never be ousted or excluded. Therefore, no constitutional Amendment can exclude the power of the High Courts and the Supreme Court to test the constitutional validity of the legislation. Hence, finally L. Chandra Kumar has settled that judicial review is a part of the basic structure of the Constitution.

(A) I. R. Coelho case

In 2008 the Supreme Court once again reiterated the basic structure doctrine in I. R. Coelho (dead) L. R’s. v. State of Tamil Nadu and others. In this case the fundamental question before the court was that whether on and after 24th April 1973 when basic structure doctrine was propounded, it is permissible for Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so what is its effect on the power of judicial review of the court. Basically the main question it as to the scope of challenge to Nine Schedule laws after (24th April 1973 which is raised from I to 284) immune from challenge. The nine Judges bench presided by Justice Y. K. Sabharwal, C. J., delivered a unanimous verdict on 11.1.2007 in the said case upholding the basic structure doctrine and the authority of the Judiciary to review any such law, which destroy or damage the basic structure as indicated in Article 21 read with Articles 14, 19 and the principles underlying thereunder, even if they have been put in 9th Schedule after 14th April, 1973 (the date of the judgement in Kesavananda Bharti case). The judgement upholds the right of judicial review and the supremacy of Judiciary in interpreting the laws which have been constantly under threat. The judgement reiterates and defines the exclusive right of the Judiciary to interpret laws, in an ongoing struggle of supremacy between legislative and Judiciary since 26th November, 1949 when the Constitution was dedicated to the people of India.

The Supreme Court held that “a law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not I former is the consequence of law, whether by Amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the court. The validity or

46 Id., at 667, para 4
47 AIR 1991 SC 1125 decided by A. M. Ahmadi, CJ. M. M. Punchhi, K. Ramaswamy, S. P. Bharucha, S. Sagar Ahmad, K. Venkatasawami and K. T. Thomas, JJ.
invalidity would be tested on the principles laid down in this judgement. The majority judgement in Kesavananda Bharti case read with Indira Gandhi case, requires the validity of each new constitutional Amendment to be judged on its own merits. The actual effect and impact of the law on rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge. All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Articles 14 and 19 and principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or right taken away or abrogated pertains to the basic structure justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall be a matter of constitutional adjudication by examining the nature and extent of infractions of a fundamental right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Articles 14 and 19 by application of the rights test and the essence of the right test taking the synoptic view of the Articles in Part III as held in Indira Gandhi’s case. Applying the above test to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule.

The Supreme Court held that if the validity of any Ninth Schedule has already been upheld by this court, it would not be open to challenge such law again on the principles declared by this judgement. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 with Article 14, Article 19 and the principles underlying there under. The Supreme Court further held that the action and transactions finalized as a result of the impugned Acts shall not be open to challenge, and directed that the petitions/appeals be placed for hearing before a three Judge Bench.

Conclusion

Mr. Nehru, the first Prime Minister of India speaking about the importance of Amendment said that:

“A Constitution which is unchanging and static, it does not matter how good it is, how perfect it is, is a Constitution that is past its use. It is in its old age already and gradually approaching its death. A Constitution to be living must be growing, must be adaptable, must be flexible, must be changeable. And if there is one thing which the history of political developments has pointed out, I say with great force it is this that the greatest strength of the British nation and the British people has laid in their flexible Constitution. They have known how to adopt themselves to change, to the biggest changes constitutionally. Sometimes they went through the process of fire and revolution. Even so, they tried to adopt their Constitution and went on with it.”

Speaking generally, the Constitution of a country seeks to establish its fundamental or apex organs of government and administration describing their structure, composition, powers and principal functions, define that inter-relationship of these organs with one another, and regulate their relationship with the people, more particularly, the political relationship.

The only conclusion that can be laid down is that the Parliament is supreme as far as the power of amending the Constitution is concerned. If we go by the bare wordings of Article 368 we come to know that this Article provides ample power to Parliament in amending the Constitution i.e. an Amendment to Constitution can be effected either by simple majority or special majority and in some

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49 Parlimentary Debates (of India) 1951, Vol. XII, Col. 9625-26
case of estranged provision it requires special majority plus ratification by state Legislatures. Thus as far as the scope of Parliament’s amending power is concerned Article 368 provides easy way to amend the Constitution. The only question with regard to the scope of Parliament’s amending power comes in controversy is the Amendment of Part III of the Constitution dealing with the chapter of fundamental rights which are said to be the soul of the Indian Constitution and guarantee of every Indian citizen’s liberty, freedom and dignity of life as we had discussed earlier in the present chapter. The Judiciary has played a commendable role in safeguarding these fundamental rights against the unlimited power of the Parliament in amending the Constitution. But in controlling the vast and unbridled powers of the Parliament the Judiciary had to pass through various stages of judicial interpretation ranging from Shankari Prasad to Kesavananda Bharti case. The doctrine of judicial review and its application to Article 368 is one if the pillar that holds our constitution in its original basic structure. Needless to say that its only the judiciary which has explored this doctrine in every possible way to ensure and prevent the Parliament from derogating the soul of Indian constitution in exercise of its vast power of amendment under Article 368.