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Constitutional Amendment: A Critical Analysis

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ABSTRACT

Constitution is an ever changing document. It should grow along as the nation transforms and should suit the ever growing needs and conditions of a on the rise and changing society. It happens under the brunt of new and dominant social and economic pressures, the government needs to bring some necessary changes. If the Constitution acts as a hindrance for accepting such desirable and necessary changes it will not under immense pressure sustain itself. A Constitution, as such, cannot have any claim to permanence, nor should it, because it has been adopted and has been working ever since, claim absolute sanctity. The authors will critically analyze the basic structure doctrine and like other safeguards in other countries to protect the essence of the Constitution. The Authors in this article will understand the problems from various perspectives keeping in mind the diverse nature of stake holders affected from an amendment. The Authors will ry to suggest and get on to cogent solution to encounter the problem affiliated with the amendment and its tedious process.

I. INTRODUCTION

"An unamendable Constitution is the worst tyranny of time or rather very tyranny of time"

-Mulford[3]

Constitution being the supreme law of the land is binding on the government and the people. It performs numerous functions in a modern welfare state. One of these functions could be to serve as a repository for a bunch of society's fundamental political values. Substantively, the Constitution can reflect these values by forbidding governmental interference with the freedom of religion, and in procedural ways, it provides that government can punish people for criminal actions only after trial at which defendant has been represented by his counsel. The three organs of a modern welfare democracy; legislature, executive and the judiciary, all stand on equal footing with respect to Constitutional responsibilities. Although, this position varies continuously as one organ asserts more authority over the other and claim to perform

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[3] Mulford, the nation p.155 quoted by Dr.Ashok Dhamija's 'Need to Amend a Constitution' 2007, p 12.

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better in performing Constitutional obligations. On the other hand, changes to a constitution may be motivated by selfish or partisan goals. Since a constitution sets the rules of the 'political game', those in power may be tempted to change the rules to extend their tenure in power, to secure their position, to marginalize the opposition or minorities, or to limit civil and political rights. Such changes may weaken, or even undermine, democracy.

Harold J. Laski has observed: "Law, like life, has its periods of change and its periods of conservation; it is not a closed system of eternal rules elevated above time and place. The respect it can win is measured by the justice it embodies, and its power to embody ideals of justice depends upon its conscious effort to respond in an equal way to the widest demands it encounters.[4] A Constitution to be considered living and growing, must be adaptable, must be flexible and must be adaptable. An arrangement for amendment of the Constitution is made with a view to conquering the troubles, which maybe experienced in future in the working of the Constitution. No age has an imposing model of intelligence nor has it a privilege to put shackles on future ages to form the government as per their needs. In the event that no arrangements were the general population would have no other way than to an extra like revolution to change the Constitution, like other written Constitutions; the Indian Constitution also contains provisions for amendment under article 368. It empowers the Indian Parliament to exercise its constituent power to amend the Constitution "by way of addition, alteration, variation or repeal any provision in accordance with the procedure prescribed under this article.[5] The process of Constitutional amendment can be put into motion only by introduction of a Bill for this particular purpose in either House of Parliament, passed by each House by a majority of the total membership of that House and by a majority of not less than two thirds of the members present arid voting, If the amendment proposed by the Parliament makes any change that has an impact on the States, the amendment then is required to be accepted by the Legislatures of not less; than one half of the States by resolution to that effect passed by those legislatures before it is to be presented to the executive head for his concurrence, After this has been carried out, the Bill is presented to the President, "who shall give his assent to the bill". The Constitution now shall stand amended. On a plain reading, Article 36% grants absolute power and is not subject to any restrictions or exceptions. Similarly, constitutions have to be responsive to social change and to changes over time in social mores and values, but they need to be protected against short-term changes or changes hastily approved without due reflection and consideration. The challenge, then, is to design an amendment process that allows a

[4] Krishan Keshav, *Constitutional Law.* Singhal Publications, 2016, p280.
[5] Provided under Article 368 of Constitution of India

constitution to be changed for the public good, when necessary, when supported by a sufficient consensus, and after careful deliberation, but that prevents it from being changed for self-interested, partisan, destructive or short-term motives

II. STATEMENT OF PROBLEM

"Tucked away in an obscure book by G.K. Chesterton is a small chapter entitled "the twelve men". In it Chesterton describes a jury trial through the eye of a laymen on the jury. The judge, the attorneys the Sheriff all see the trial as a daily occurrence; a routine, in which each plays his respective role, almost by role, almost by rote. Here are Chesterton's words: And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent) it is simply that they have gotten used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the lawful court of judgment; they only see their own workshop. But to the eyes of a layman with the sweet smell of the law fresh in his nostrils and the enthusiasm of the novelty, the law is a new experience and the facts are judged with no taint of routine. The layman, unlike the judge, does not see another case; and, unlike the sheriff, the Layman does not see just another prisoner in the dock. The layman see this plaintiff with a wrong crying to be redressed or this defendant who is wrongly and unjustly sued, or this prisoner with his story to tell. To the lay man each party stands as an individual with certain rights and duties."[6] The routine, frustrations and anxieties of our daily lives tend to obscure the meaning and beauty if the legal profession. ***Let us strive never to get "used to it".***

III. CONSTITUENT ASSEMBLY DEBATES

As per the Constituent Assembly Debates, the framers of the Constitution did *not* envisage any limitation on the amending power of the Parliament.[7] Pandit Jawaharlal Nehru told the Constituent Assembly that "as solid and permanent as the Constitution must be it must also permit National growth". He argued that "because the new Parliament would represent every adult in India, it is the right that the House elected so...should have an opportunity to make such changes as it wants to".[8] Needs that may arise as the nation progress[9] .Amendment is not only permissible s removal of difficulties experienced in the working of the Constitution but also needed for keeping up with the growth of Constitutionalism in step with changing society and to fill in the generation gap between

[6] The Art of a Lawyer, 80 (Chief Justice Dr. B Malik, 9th ed.,1999) contribution by Joseph Simeone (The profession of law)
[7] D.D. *Basu, Commentary on the Constitution of India,* 14-xisNexis, Haryana, 2013, 01260.
[8] CAD Vol.V1I 4323.
[9] M.P. lain, *Indian Constitutional Law*, LexisNexis, Vol. 11, 2010, p.2306-2307

the values, ideologies, ideas, demands and objections of the present day modern society and those held by the framers of the Constitution. An amendment can surpass changes required for the and even Amendment bring about changes keeping up with the new trends. 10 though the judiciary interprets the changes brought through, it may be too late for the- values to survive and save the original document in its sanctified state[10]. Amendment bring about changes keeping up with the new trends[11].

IV. AMENDMENT – CONCEPTUAL ANALYSIS

"All nature from the smallest thing to the biggest, from a grain of sand and sun, from Protista to man, is in a state of coming into being and going out of being, in a constant flux, in a ceaseless state of movement and change.[12] The Parliament derives its authority to amend the Constitution under Article 368. The term 'amendment' is derived from the Latin term *amendere'* which means to change or correct any fallacy. Black's Law Dictionary defines amendment as 'a formal revision or addition proposed or made to a statute, construction, pleading, order or other instrument, a change made by addition, deletion or correction specially an alteration of wording'[13]There are two methods of amendment, formal and informal. Informal amendment exists in the form of conventions and other methods while formal method is followed in countries having a written Constitution such as India and U.S.A., and provides the method of amendment in the Constitution itself through the interpretation of judiciary.[14] The framers of our Constitution have made the document in such manner which could change according to the changing times as well as the manner in which the nation is growing. It encompassed the socio, economic and political factors that prevail in our country and therefore provided the means to amend the Constitution. Our Constitution is partly rigid and partly flexible owing to the fact that it incorporates amendment process which has borrowed from South Africa. It has a mixture of both the rigidities and flexibilities of the major democracies in the world.

Different portions of the Constitution attract stringency according to the significance and impact of the provisions. Indian Constitution provides for amendment in three ways:

1. The provisions which are of significantly less important can be amended just like an normal legislation is passed in Parliament;

[10] *Supra* **note at 6, p.11259**
[11] *Kagz*i, The Constitution of India, EBC, 2001, p.931.
[12] Available at *https://www.marxists.orearchivehnancAvorks/1883/donlch01.htm* last accessed on 03.03-2020 at 12:46pm
[13] Garner, 'Black Law Dictionary', 8th Edition, p.89
[14] *Supra* note at 8, p.1725-1727.

2. The provisions that are important and of vital nature require special majority as per Art.365.

3. The provisions that have an impact nation vide or on majority of the states which ultimately have an effect on federal character of the country are required to be ratified by more than half of the State Legislatures as per Art.368.

(A) Power and procedure for amending the constitution

Article 368 Power of Parliament to amend the Constitution and procedure therefore:

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 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 changes in**:**

a) Article 54, Article 55, Article 73, Article 162 or Article 241, or;

b) Chapter IV of Part V, Chapter V of Part VI, or Chapter 1 of Part Xl, 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 Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures 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 provisions of Part 111) 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[15]

[15] *Minerva Milk v. Union of India,* (1980) 2 SCC 591,

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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 provisions of this Constitution under this article"[16]

The procedure of amendment has differentiated Indian Constitution from other written constitution as it not as rigid as them. Hence, it is characterized as partly rigid partly flexible. There are certain parts that can be changed in an easier manner but for some other parts, a certain process has to be complied with. Indian federation is different from other as the states do not play significant role in the bigger picture in this matter. In case of normal legislations, if both Lok Sabha and Rajya Sabha are in a deadlock, a joint session is held. But in case of constitutional amendment, it cannot pass till both houses agree, and there is no provision for clearing the deadlock in this case. There are three ways in which Constitution can be amended. Constitutional provision provides two ways in which it can be amended:

1. An amendment of the Constitution may be initiated only by the introduction of a Bill for the purpose in either house of Parliament and when a bill is passed in each house.

   i. By a majority of total membership of that house.

   ii. By a majority of not less than two-thirds 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 there upon the Constitution shall stand amended in accordance with the term of the Bill.

There are certain provisions which require simple majority for amendments. There are certain provisions that can be amended by the ordinary law making process and most of the provisions can be amended by this procedure.[17] Certain articles of the Constitution make uncertain stipulation for the time being by the Parliament by executing the process required for passing ordinary legislation. States now have to play active role before Parliament acts. For example, Art. 3 which provides for state re-organization may be a point of contention for the Parliament and the Union Legislature may make certain amendments in the Ist and IVth schedules for passing the law. But before the Parliament does this, it is necessary to take into consideration the views of the States that will be effected by passing this law.

(B) Article 368 and its history of amendment

1. The Constitution (Twenty-fourth Amendment) Act, 1971, for the very first time amended

[16] Article 368 of Indian Constitution, available at https://indiankanoon.org/doc/594125/, last accessed on 17-03-2020) at 12:32pm
[17] Supra note at 8, p.1730.1731

Art. 368 in order to defeat the consequences of the decision arrived in *Golak Nath case*[18]. The Judicial interpretation of amendment in Indian Constitution and other judicial pronouncements have been discussed in detail in Chapter IV.[19]

(A) Till 1967, the apex Court had through past decisions maintained that no portion of our Constitution that cannot be altered and that Parliament may by following the requisites of Art. 368 amend any provision of the Constitution, including the Part III and even Art. 368.[20]

(B) But, in *Golak Nath's case,* the majority overruled the previous decisions, and took the view that though there is no express exception from the ambit of Art. 368, the Fundamental Rights included in Part III of the Constitution cannot, by their very nature, be subject to the process of amendment provided for Art. 368 and that if any of such Rights is to be amended, a new Constituent Assembly must be convened for making a new Constitution or radically changing it.[21]

It was, further, held by the majority that:

a. The word 'amend' means modification of the existing provisions and not any radical change.

b. Since a Constitution Amendment Act is a 'law' made under Art. 248, it must be subject to Art. 13(2) and would, therefore, be void if it seeks to amend a fundamental right.

(C) The majority decision in Golak Nath's case was superseded by the Constitution (24th Amendment) Act, 1971, by inserting el. (4) in Art. 13, and cl. (1) in Art. 368 as a result of which an amendment of the Constitution, passed in accordance with Art. 368, will not be 'law' within the meaning of Art. 13 and the validity of a Constitution Amendment Act shall not be open to question on the ground that it takes away or affects a fundamental right. This Amendment made it clear that Art. 368 deals with the 'constituent' power of Parliament while Art. 13 dealt with its 'legislative' power and that, in exercise of its 'constituent' power under Art. 368, Parliament could make any changes in the Constitution by way of repeal of any of its provisions, including Art. 368 itself and not merely making mere modifications as it had been held in Golak Nath's case. It was clearly provided in Clause (3) of Art. 368 that Art. 13 would not apply to any Constitution Amendment Act. This proposition was made doubly sure by engrafting cl. (4) in Art. 13 by the same Amending Act.[22]

[18] *Golak Nath v. State of Punjab,* AIR 1967 SC 1643
[19] *Supra* note at 6, p,11238.
[20] *Shankari Prasad v. Union of India,* AIR 1951 SC 458
[21] *Supra* note at 6, p.11238.
[22] *Ibid.*

But even such elaborate amendments proved ineffective to deter the Supreme Court from invalidating a Constitution Amendment Act on a substantive ground, as happened in the Keshavananda and Raj Narain cases. In Kesavananda v. State of Kerala[23] a majority of 7:6 in a Full Bench of 13, invalidated the second part of Art 31 C, inserted by the Constitution (25th Amendment) Act, 1971, on the ground that it sought to take away the principle of judicial review which was one of the 'basic features' of the Constitution, even though they held (overruling Golak Nath[24]) that Fundamental Rights did not constitute one of such basic features as to fetter the amending power conferred by Art. 368.[25] In Indira v. Raj Narain[26] a majority of the Constitution Bench annulled clause 4 of Article 329 as inserted by the 39th Amendment Act, 1975, 011 the ground that it altered certain 'basic features' of the Constitution e.g.; "free and fair elections" (para 213); or rule of law (paras 343,628) or abolishing of judicial determination of an election dispute, without affording any alternative forum (para 213, 679).[27]

2. Hence, by the 42nd Amendment Act, clause (4) - (5) were inserted, to make it clear that on no ground (not even on the ground of procedural non-compliance with the requirements of Art. 368) shall any Court be competent to invalidate any Constitution Amendment Act. But in the *Minerva Mills case,* the Constitution Bench of the Supreme Court has invalidated clause (4)- (5) of Art. 368 on the ground that these provisions, introduced by the 42nd Amendment Act, 1976, sought to exclude judicial review, which was one of the basic features of the Indian Constitution, as held in Kesavananda." So long as this decision stands, all Constitution Amendment Acts shall be open to review by the Supreme Court to see whether it affected any of the basic features of the Constitution (substantively) or the procedural safeguards included in the other clauses of Art. 368.[28]

3. It is to be noted that the Janata Government's endeavor to recast the provisions **of** Art. 368 and to introduce referendum for effecting changes in certain 'basic features' of the Constitution by means of the 45th Amendment Bill failed since the Janata Government could not secure two third majority in the Rajya Sabha, owing to the united opposition of the Congress (0) and (I) Parties .[29]

(C) Effects of amendments

Article 368 as mentioned above has been amended in 1971 for the first time and in order to ascertain the effects various amendment has on this Constitutional provision, two positions: Art. 368 as in 1949

[23] *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461 (paras 759, 850, 1174,1282,1395,1840, 1916, 2079).
[24] Golak Nath v. State of Punjab, AIR 1975 SC 1643
[25] Supra note at 6, p.11238.
[26] *Indira Nehru Gandhi v. Raj Narain.* AIR 1975 SC 2299 (2396-71)
[27] *Supra* note at 6, p.11238.
[28] *Ibid.*
[29] *Ibid.*

and as it stands after 1976 has been mentioned in the following page:[30]

i. **PRESIDENT'S ASSENT**: In 1949, it was optional for the executive head to give assent to a bill for amendment of the Constitution. But by the forty second amendment, it was made obligatory for the President to give his assent to a bill passed under article 368. (Clause 2 was amended by the 24th Amendment act, 1971), the president's power to veto other regard to other bills is still existent, but it is guided by council of minster's advice under article 74(1) which was amended by the 42nd Amendment Act, 1976.

ii. **MEANING OF 'AMENDMENT'**: Prior to any amendments, what was meant by 'amendment' was not explained. In 1971 by the 20 amendment, the legislature declared its intention that it could by exercising its power of 'amendment by way of addition, variation or repeal of any the provision of this Constitution.

iii. **INTERPRETATION OF 'BILL'** : In Golak Nath case, the majority relied on the word 'bill' and it was held that a Constitutional amendment act, though passed in exercise of the power conferred by article 368, it meant 'law' subject to article 13(2). The 24th amendment repelled this theory by inserting clause (4) in article 13 and clause (3) in article 368

iv. **LIMITATIONS**: Our Constitutional scheme no provides any expressly laid down limitations which curtail any amendment power, it was held in *Kesavananda Bharti case and Raj Narain case* that it was subject to the procedural conditions imposed by article 368 and to implied limitations that the power to amend could not alter the basic features of the Constitution or to make a new Constitution altogether.

The 42nd amendment act repelled the above mentioned judicial limitation and made it clear that there is no limitation on the power conferred by article 368 and a new clause, clause(4) was inserted to nullify the *Golak Nath case's* effect making amendment immune from judicial review on both grounds, substantive and procedure.

In *Minerva Mills case*, the above proposition too was nullified by deleting the clauses 4 and 5 from article 368 and thereby reaffirming the doctrine laid down in Fundamental rights case. At present, Article 368 remains operative without clause (4) - (5) [31]

[30] *Ibid.*
[31] *Ibid.*

(D) Comparative perspective of amendment process

1. United State of America

The United States of America has held a trailblazer reputation with regard to providing an amendment clause in its Constitution. The American Constitution though being rigid has imbibed events such as The Great Depression, Industrial Revolution, and time after Civil War including various Civil Rights movements and above all, being at war overseas.

With the passage of more than 200 years since the declaration of Independence, it is the remarkable adaptability of the Constitution that has enabled it to survive above mentioned events. Amendments can be made as per the provisions laid down in Article V, mentioned as under:

'Me Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate". American Constitution thus adopts Constitutional amendments which are proposed in the following two ways:

1. By a two-third vote of both Houses of the Congress, or ;

2. By a Convention called together on application of the Legislatures of two-third of the states. The amendment after being proposed in either of the above two ways is then supposed to be ratified in following two ways:

1. By the Legislatures of, or

2. By Conventions of the States, - accordingly as one of the other method of ratification is proposed by Congress.

Furthermore, ratification is carried out in the either of the above two mentioned ways and after ratification, such proposal becomes a part of the Constitution. In all, there are two ways to propose an amendment and two ways to ratify such proposal. Thus there are four possible approaches for amendment of the United States Constitution.

a) Congress and the Ratification process

The option of choosing the modes of approval lies entirely on the lone prudence of the Congress.[32] Regarding time period required for ratification of the amendment, it has to stipulated while passing the amendment. Hence, if no provision regarding time is prescribed, the States shall have indefinite time for either accepting or rejecting the proposed amendment. [33] For example, the Congress had placed time limit of seven years for 18th, 20th, 21st and 22nd amendment. In 1924, no time limit was prescribed with regard to labor reforms that prohibited persons less than 18 years and up to 1939 only two states had ratified it. However, a state if rejects an amendment it may at a later stage may ratify it, although the vice versa of this proposition is not allowed. Further, Congress cannot compel a State Legislature to ratify an amendment other than placing prescribed time limit within which the amendment is open for ratification.[34] If there exists a deadlock between both the Houses, the mode of Conference is present to solve the deadlock.

b) Public opinion and amendment in U.S. constitution

The process of ratification reflects the rigid American Constitution and proves why U.S. is known as a true federation. The Constitution is not easily amended and in over 200 years, ten thousand amendments have been brought forward in but only 33 have been adopted by the Congress and as of now only 27 Constitutional amendments have been ratified.[35]

To establish and maintain the sanctity of the amendments brought forward, the Framers required ratification by State Legislatures or specially elected conventions in each State. This ties to establish that any Constitutional change coincides with the State public opinion. So far, only the Twenty-First Amendment which repealed prohibition has been ratified by convention in the state.[36] Thus, it is seen that in USA for the purpose of amendment, power is vested in a special body or an ad hoc is convened and not in the Legislature. The Supreme Court in *Hollingsworth v. Virginia*[37] has held that and amendment of the federal Constitution is not a law-making act and the assent of the executive head is not a condition. In order to validate that it has now become a part of the Constitution, when three-fourths of the States have ratified the amendment proposal, it makes the Archivist bound to publish the amendment certifying which states have

[32] *U.S.* V. *Sparague,* (1931)282 US 176.
[33] The 22nd amendment took around four years to receive ratification in 36 states.
[34] *Dilon v. Closs,* (1921) 256 US 510.
[35] Massey, *American Constitutional Law- Powers and Liberties,* 2nd Edition, p.52.
[36] *Supra* note at 6, p.11242-11244.
[37] *Hoilingsworth v. Virginia,* (1798) 3 Dall 378.

ratified it. In *Hawkes v. Smith*[38] the US Supreme Court negated the contention of ratification of amendment by the People, thus referendum could not be adopted as a means for amendment of the U.S. constitution.[39]

In *Lasser v. Garnett,* wherein it was contended that ratification process under Article V includes the ratification by the process of referendum to the people which is a part of Legislative process was rejected.[40] Article V may contemplate proposal of amendment through a convention, till now no two-thirds of the state have united in a call for such a Convention. It is an alternative procedure and not following it cannot be challenged that ratification through convention has not been followed because it is only an affirmative mode and the discretion to choose between the modes of proposal lay with the Congress.[41]

2. Australia

Section 128 of the Commonwealth of Australia Constitution Act, 1900, provides, -

This Constitution shall not be altered except in the following manner:

"The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives."[42] In any case, "if either of the chambers passes any such proposed law by an Absolute greater part, and the other House rejects or neglects to pass it with any correction to which the first-made reference to House won't concur, and if following an interim of three months the first-specified House in the equivalent or the following session again passes the proposed law by an outright majority with or with no alteration which has been made or consented to by the other House, and such other House rejects or neglects to pass it or passes it with any revision to which the principal made reference to House won't concur, the Governor-General may present the proposed law as last proposed by the main made reference to House, and either with or with no changes along these lines consented to by the two Houses, to the balloters in each State met all requirements to vote in favor of the race of the House of Representatives."[43] "When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representative becomes uniform throughout the Commonwealth, only one-

[38] *Hawkes v. Smith,* 253 U.S. (1920) 401
[39] *Supra* note at 3, p.38
[40] *Lasser v. Garnett,* (1922) 258 US 130.
[41] *Supra* note at 6, p.11241.
[42] *Id.,* at p.11245
[43] *Ibid.*

half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails. And if in **a** majority of the States a majority of the electors voting, approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.[44] No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representative, or increasing, diminishing, or otherwise altering the limits of the State or in any manner affecting the provision of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law."[45]

(a) By reason of S. 8 of the Statute of Westminister, 1931, the Commonwealth Parliament has no influence to revise Sections 1-8 of the Constitution Act, which set up the Federation under the Crown of the United Kingdom.[46]

(b) Different areas of the Constitution Act approve the Commonwealth Parliament to correct certain arrangements of the Constitution Act identifying with issues of detail, in the customary procedure of enactment.

(c) Other provision of the Constitution can be changed only in the manner provided by s.128, which requires that the proposed amendment-

(i) both the chambers must consent to the change proposed and the other way is that just a single house yet by in two interims of three months pass the proposition by special majority, and

(ii) At that point endorsed by a dominant part of the voters casting a ballot both in a larger part of the States and in the Commonwealth. Be that as it may, no modification decreasing the relative or least portrayal of, or modifying the regional furthest reaches of, a State, or influencing the arrangements of the .Constitution with respect to any State, can wind up law except if endorsed by a greater part of the voters of that State. From that point the Bill will be exhibited to the Governor-General for his consent.[47]

The trouble of the procedure of amendment will be clear from the way that of 24 amendments so far submitted to the general population; just 4 amendments have been endorsed. The unbending nature of the procedure of amendment in Australia in this manner comprises in the arrangements for referendum. The Australian Constitution, similar to the Swiss, can't be revised without an

[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*
[47] *Id.,* at p.11246

immediate vote of the general population.[48] When a Constitution provides a method for amending the Constitution, that method alone is 'legal', so that it cannot be amended in any other manner. If the people seek to legally exercise the amending power by virtue of their political sovereignty, they can do so only after getting the provision of the Constitution itself amended in accordance with prescribed procedure, to give the people the power to do it by a direct vote, e.g., by means of a Referendum as existing in some Constitutions. It has been held that the amendment of one provision of the Constitution by a valid Constitutional amendment cannot impliedly repeal another provision of the Constitution on the ground of inconsistency or repugnancy nor revive a previous invalid amendment which was void ab initio. [49] Thus, this was the Australian Constitution method of amendment.[50]

3. Switzerland

The Constitution of Swiss Federation (Switzerland) was adopted by Federal Parliament and adopted by Public Referendum and enforcement decree of Federal Parliament was enforced on 1-1-2000. Title VI of the Constitution of Switzerland deals with 'Revision of the Federal Constitution and Transitional Provisions'. Chapter I of Title VI deals with Revision.[51]

"Article 192 (General Principle) of Chapter I says,

1. Where the Federal Constitution and implementing legislation do not provide

Otherwise, the revision follows the legislative process

2. Where the Federal Constitution and implementing legislation do not provide otherwise, the revision follows the legislative process."

"**Article 193 (Total Revision) provides**:

1. A total revision of the Federal Constitution may be proposed by the People or by either of the two Councils or be decreed by the Federal Assembly

2. If the initiative emanates from the People or if the Chambers disagree, the People decide on the execution of the total revision

3. If the People approve a total revision, both Chambers will be newly elected

4. The mandatory provisions of international law may not be violated."

[48] Livingstone, *Federalism and Constitution Change,* Praeger, 1956, p. 118, 127, 135
[49] Akar v. AG, (1969) 3 All ER 384 (PC).
[50] *Supra* note at 6, p.11246.
[51] *Id.,* at p.11247

"Article 194 (Partial Revision) provides:

1. A partial revision of the Federal Constitution may be requested by the People, or be decreed by the Federal Parliament

2. The partial revision has to preserve the principle of unity of the subject matter, and may not violate the mandatory provision of international public law

3. The popular initiative for partial revision has, moreover, to preserve the principle of unity of form."[52]

"Article 195 (Entry into Force) says:

The Constitution revised in total or in part enters into force by the time it is accepted by the People and the Cantons."

Chapter 2: 'Initiative and Referendum'.

"Article 138 Popular Initiative for Total Revision of the Federal Constitution provides:

(1) 100,000 citizens entitled to vote may within 18 months of the official publication of their initiative demand a total revision of the Constitution

(2) This proposal has to be submitted to the people by referendum."

"Article 139[53](Popular Initiative for Partial Revision of the Federal Constitution) provides:

(1) 100000 citizens entitled to vote may within 18 months of the official publication of their formulated initiative demand a partial revision of the Constitution

(2) A popular initiative for the partial revision of the Constitution may take the form of a general proposal or of a specific draft of the provisions proposed

(3) If the initiative violates the principle of unity of form, the principle of unity of subject matter, or mandatory rules of international law, the Federal Parliament declares it invalid in whole or in part

(4) If the Federal Assembly is in agreement with an initiative in the form of a general proposal, it drafts the partial revision on the basis of the initiative and submits it to the vote of the People and the Cantons. If the Federal Assembly rejects the initiative, it submits it to a vote of the People; the People decide whether the initiative is adopted. If they vote in favour, the Federal Assembly drafts the corresponding bill.

[52] *Ibid.*
[53] As adopted by the popular vote on 27th Sept 2009, in force since 27th Sept 2009.

(5) The initiative in the form of a specific draft is submitted to the vote of the people and the Cantons. The Federal Parliament recommends the initiative for adoption or rejection. It may contrast the initiative with a counterproposal".

Article 140 (Mandatory Referendum) provides:

I. The following must be put to the vote of the People and the Cantons:

a) amendments to the Federal Constitution;

b) accession to organizations for collective security or to supranational communities;

c) emergency federal acts that are not based on a provision of the Constitution and whose term of validity extends one year; such federal acts must be put to the vote within one year of being passed by the Federal Assembly

People are voting on the following:

(a) Popular initiatives for total revision of Federal Constitution

(b) Popular initiatives for partial revision of the Federal Constitution in the form of general suggestions which were rejected by Federal Parliament

(c) the question if a total revision of the Constitution is to be carried out with disagreement of both chambers".[54]

"According to Article 141 (Optional Referendum):

1) "The following arc submitted to the vote of the people at the request of 50,000 citizens entitled to vote or of eight Cantons:

a) Federal statutes declared urgent with a validity of exceeding one year

b) International treaties which are of unlimited duration and may not be terminated;

c) Provide for the entry into an international organization;

d) Involve a multilateral unification of law".

e) Abolished treaty ratification is therefore governed by Article 141.[55]

"Article 142 (Required Majorities) says:

(1) Proposals submitted to vote of the People are accepted if the majority of those voting approves of them.

[54] *id*., itp.11248
[55] *Supra* note at 6,01241-

(2) Proposals submitted to the vote of the People and the Cantons arc accepted if the majority of those voting and the majority of the Cantons approve of them.

(3) The result of the popular vote in the Canton counts as the vote of that Canton.

(4) The Cantons of Obwald, Nidwald, Basle-City, Basle-land, Appenzell Outer Rhodes and Appenzell Inner Rhodes have each half of a Cantonal vote".

From the above provision, it is clear that the Constitution of Switzerland introduces the instrument of Constitutional Referendum and the Constitutional Initiative in the process of Constitutional Amendment. Again, Constitutional amendment may be total or partial. The federal Legislature may initiate either type by ordinary process of Legislative action, when the federal Constitution or implementing legislation does not provide otherwise.[56]

4. West Germany

Article 79 of the West German Constitution of 1949 says:

(1) "This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement or the phasing out of an occupation regime or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat

(3) Amendments to this Basic Law affecting the division of the Federation into Lander, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible".[57]

The mode of amendment laid down is thus the ordinary legislative process, with the prescribed special majority. Changes in the territories of the States require the express consent of the Bundesrat [(Art. 29(7)].

Certain provisions of the Constitution have been made unamendable:

(i) The basic rights guaranteed by **Art. 1.**

(ii) The federal and democratic form of the State declared by **Art. 20.**

[56] *Id.,* at p.11249
[57] *Ibid.*

(iii) The federal system and the participation of the States legislation.[58]

In the constitution framed in 1949, the power for formation of the legal document, was given for making the Constitution and the authority to make any change, i.e. constituent power was not vested with the Federal Legislature. This constituent power has been vested with the free and united German people because of the scope of re¬unification of the motherlands as encompassed by the framers of the Bonn Convention of 1949.

(E) Indian constitution vis-a-vis other constitutions

The Indian Amendment Process when compared to other Constitution is distinctive in the following ways:

- ✓ **MODES:** It provides for three ways to amend the Constitution which is a unique combination of British flexibility since its unwritten and American rigidity which happens to be the oldest written Constitution. Hence, Indian Constitution is partly flexible and partly rigid.
- ✓ **POWER TO AMEND:** Indian Constitution vests the amending power with the Parliament unlike the American Constitution which has an ad hoc or a special body for this purpose.
- ✓ **ROLE OF STATE LEGISLATURE:** In Swiss Constitution, the state legislatures (cantons) play an active role in amendment process which is not the case in Indian Constitution, other than ratification by more than one half of the states.
- ✓ **REFERENDUM:** Indian Constitution does not have the provision for referendum just like U.S.A., while Australia and Swiss Constitution and the Commonwealth of Australia Act, 1900 provides for it.
- ✓ **RATIFICATION:** Indian Constitution provides a broad approach with regard to ratification, which is not so in corresponding Constitutions of U.S.A., Australia, Swiss Constitution and Canada Act, 1982.
- ✓ **ROLE OF EXECUTIVE**: President's assent has been given a liberal and formal approach vis-a-vis., Australia, and Weimer Constitution and former Soviet Constitution.
- ✓ **TIME LIMIT**: Time limit is not a point of contention in Indian Constitution whereas it is prescribed often in U.S. for ratification.
- ✓ **EXTENT OF AMENDMENT**: Indian Constitution does not provide for any provisions which prevent amendment of fundamental rights whereas the Weimar Constitution and

[58] *Supra* note at 6, p.11245

U.S.A. Although the Doctrine of Basic Structure propounded through judicial interpretation.

V. JUDICIAL INTERPRETATION OF AMENDMENT OF CONSTITUTION

India had been a colony for over 200 years and it had gone through various phases. India has one of the largest fertile lands in the world with one of the largest population involved in agriculture sector. Various land revenue schemes had been implemented with the Zamindari being the most prominent one. It had various drawbacks and was one of the main factor in extortion and harassment in agriculture society. As soon as India gained Independence, Zamindari abolition was made a priority keeping in mind the history and the future socialistic approach that the framers of the Constitution wanted to comply with for India. For doing so, the Parliament went to implement various land settlement and land acquisition schemes throughout the country in order to get rid of the menace of Zamindari for once and all. For a large sector it was a relief but like most legislation, there was a lot of hue and cry as the scheme that was being implemented by the Union and various State Legislatures attracted various petitions being filed on the ground of infringement of Fundamental Rights. In 1951, it was the first time the question arose with regard to the amending process under Art. 368. It was *Kameshwar Prasad Singh v. State of Bihar*[59] which dealt with Bihar Land Reforms Act and was declared unconstitutional to be violative of the Fundamental Right to Property as it then was under article 19(1)(f) by reading in between the Fundamental Rights and Directive Principles of State Policy. To counter this decision by Patna High Court, the Parliament went on to bring forth the First Amendment Act of 1951 which brought Articles 31A and 31B. These are the articles which finally give substance to the genesis of the basic structure doctrine. Art. 31 A provided that any acquisition of property and compensation required to be paid by the State for such acquisition would not be called into question in the court under Art. 14, 19 and 21. Art. 31B created the Ninth Schedule which protected laws made by Parliament and inserted in Ninth Schedule from being challenged in the court on the basis of fundamental rights. Basically, it saved requisitioning of property by the state from judicial purview.[60]

The First Amendment Act, 1951 as mentioned above was regarding curtailment of the right to property which was guaranteed by Article 31. This was challenged in the case of *Shankar Prasad Singh vs. Union of India*[61] which is the first case dealing with the amendment provision of the Constitution. After the commencement of the Constitution, Sates like Bihar, Uttar

[59] AIR 1951 para 91.
[60] *Supra* note at 8, p.1733.
[61] *Shankari Prasad Singh v. Union of India,* AIR 1951 SC 458.

Pradesh, and Madhya Pradesh enacted agrarian land reform legislations which deprived zamindars of a significant portion of their land holdings. Various affected person then filed writ petitions in their respective High Courts. It was alleged by them that their Fundamental Right has been infringed. The Patna High Court invalidated the Bihar Land Reforms Act, 1950. After this the Constituent Assembly then functioning as a provisional Parliament passed the Constitution First Amendment Act in 1951. It inserted Articles 31A and 31B insulting land reform legislation from judicial scrutiny. Article 31B which created the ninth schedule, saved laws placed in it from being challenged before the Supreme Court on ground of violation of Fundamental Rights.[62] The validity of the First Amendment Act was challenged on the ground that it purportedly takes away or abridges rights conferred by Part III which fell within the prohibition of Article 13(2) and hence was void. The Supreme Court negated the above mentioned contention and emphasized that the power to amend the Constitution including the Part III is contained in article 368 and the word 'law' under article 13 clause 2 does not include constitutional law and includes only ordinary *law*. The court insisted on applying the Harmonious Construction to avoid the conflict between Article 13(2) and Article 368 as these are far and wide phrased and are in conflict with each other.[63] This would only include only ordinary law made under the exercise of 1egislative power and does not include Constitutional amendment which is made in exercise of constituent power. Therefore, a Constitutional amendment will be valid even if it abridges or takes away any of the Fundamental Rights.[64] Till 1964, for nearly 13 years, the contention regarding amendment provision remained silent and came up in the following of *Sajjan Singh*[65]

The Constitution (Seventeenth Amendment) Act, 1964 placed forty four statues in the Ninth Schedule by amending Article 31 A. It was challenged on the ground that it affected the power of High Courts under article 226. Furthermore, it was contented that the 17th amendment should have been ratified by the states after having being passed by the Parliament. Such process is laid down under Article 368 and was not followed, hence was claimed to be held as invalid. The main issue was whether the 17th Amendment Act, 1964 was invalid? [66] The Supreme Court bench of five judges rejected the argument by a majority of 3:2. The petitioners had contended that the land reform legislation of the impugned act falls within the power of State Legislatures under entry 18 of state list of schedule VII and the Parliament cannot do so. Furthermore, Article 245 and 246 lays down that parliament had no power to make any law in respect of law with respect to a state. The majority ruled that the pith and substance of the act was to save

[62] *Supra* note at 4, p.284.
[63] *Supra* note at 8, p.1734
[64] *Ibid.*
[65] *Sajjan Singh v. State of Rajasthan,* AIR 1965 SC 845
[66] *Ibid.*

certain land reform legislations from the purview of the Fundamental Right violation. Since the aim sought to be achieved was to help various state legislatures to enforce in strict compliance the agrarian reforms it rejected the petitioner's contention. It further observed that affect on article 226 happens to be only incidental and direct and was therefore an indirect effect of the 17th amendment Act.[67] The majority held that it in no way affected Article 226. The court also reiterated its decision in Shankari Prasad which dealt with the relation between article 13 and article 368. It also rejected the claim of fundamental rights to be eternal and inviolable and affirmed the Parliament's power to amend each and every provision of Indian Constitution. But the point that needs to be observed in this case happens to be of the dissenting judges, namely, Justice Hidayatullah and Justice Mudholkar. The majority may have drawn the distinction between article 13 and article 368 but Mudholkar JJ said that every Constitution has certain essential or fundamental parts that are unamendable and this approach should be followed by the Indian Parliament. He was although hesitant on expressing his views on the matter that should the word 'law' in article 13(2) exclude Constitutional amendment. Justice Hidayatullah said that Part III carries certain assurances and are not to be toyed by a special majority. The argument of Hidayatullah J. was taken as a basis of non- amendability of fundamental rights in Golak Nath case while Keshavnanda case was based on Mudholkar J's view of basic features.

In *IC Golak Nath v. State of Punjab* **[68]** The above mentioned dissenting opinions had given a basis for challenging the validity of 1st, 4th and 17th Amendment Act. An eleven judge bench and delivered the judgment by 6:5. The petitioners in this case were the next of kin of Henry Golak Nath who filed the petition on the ground that the land held by them was being wrongly assessed by the Financial Commissioner and hence, was violative as it infringed their Fundamental Rights under article 19(f) and (g) and under article 14. It was requested that certain directions be issued declaring these three amendment acts being violative of fundamental rights as mentioned above.

The Supreme Court by a majority of 6:5 overruled Shankari Prasad and Sajjan Singh cases and held that Parliament's power to amend is limited and it cannot take away or abridge the Fundamental Rights under Part III. It was based on the following reasoning:

i. The power to amend under Article 368 contains only procedure and the substantive power is not found under this article. The power to amend is a residuary power

[67] *Ibid.*
[68] *IC Golak Nath v. State of Punjab,* AIR 1967 SC 1643: 1967(2) SCR 762

contained under article 248 as it is not expressly provided under any article or any entries in any list.

ii. The word 'law' now included Constitutional law as well unlike previous decisions. Therefore, and Constitutional amendment made in violation of Part III would be held violative as per article 13(2).

iii. The term 'amend' visualizes only minute modifications in the already existing provisions but not any vital or major alterations.

iv. In order to amend Part III. I.e. Fundamental Rights, a new Constituent Assembly has to be convened by the Parliament.

While declaring Fundamental Rights to be an inviolable part of the Constitution, the majority laid down that there is no difference between legislative and constituent process and the process under Article 368 and not a constituent process. The Doctrine of Prospective Overruling was to extent a political move to save the Apex court from a complete backlash from the Parliament which at that time had taken form of an authoritarian government. It declared laws which were prior to this judgment shall not be challenged and only those amendments that are made are to be considered for judicial scrutiny when they attempt to encroach upon any of the Fundamental Rights. Furthermore, if the decision was to applied retrospectively it would to chaos and panic in the entire country as the amendments concerned dealt with agrarian reforms. After effect of the judgment was that minister of parliament Mr. Nath Pai, introduced a private member bill[69] in the Lok Sabha so as to negate the decision of *Golak Nath*. It although did not get much support but since the Congress party won the 1971 general elections, **24th** and 25th Constitutional Bills were passed. Following changes were made in article 13 and 368:

i. A new clause (4) was added to article 13 which provided that law under this article shall not affect any amendment made under Article 368.

ii. New marginal heading was substituted in place of old which read, "Procedure for amendment of this Constitution" to "Power of Parliament to amend the Constitution and Procedure thereof."

iii. Sub clause (1) was added to Article 368 which declared it Parliament while exercising its constituent power ,any amend by way of addition, variation or repeal any of the provision or Indian Constitution as per the procedure" laid down in the Article 368 itself,

iv. President's assent was made obligatory.

v. Clause (3) to article 368 was added to provide immunity front article 13.

[69]Introduced on 07.04.1967

The Constitutional validity of 24th and 25th Amendment Act was challenged in the case of *Kesavananda Nadi v. State of Kerala*[70] through a writ petition filed by Swami Kesavananda Bharti who was chief of a mutt in Kerala. For Sixty days, arguments from both the sides were heard and the decision was arrived by a bench of 13 judges with a majority of 7:6 on 24th April 1973. It was observed that the power to amend is itself contained in article 368. Further, held that the provisions that deal with procedure of amendment is one of the most vital provisions of our Constitution. The views as expressed in the cases of *Shanhari Prasad* and *Sajjan Singh* with relation to the amending power were held to right while *Golak Nath's* views stood overruled. The court now accepted the view that there is a difference between ordinary law and Constitutional law. It meant that Fundamental Rights and other parts of the Constitution can be abridged by the power contained in Article 368. The above mentioned point did not give unlimited amending powers to the Parliament as it still has to comply with the test of Doctrine of Basic Structure; any part of amendment that destroys any basic features shall stand as *ultra vires.*

Some of the basic features as laid down in this case arc as follows:

i. Supremacy of the Constitution;

ii. Republican and Democratic form of government;

iii. Secular character of the Constitution;

iv. Separation of Powers; and

v. Federal Character of the Constitution.

This list of features in not exhaustive and it shall vary from case to case. The courts from time to time as per the ease, shall interpret in order to safeguard the Constitution from any self-destruction by means of amendment of its basic features.

In the another instance *Raj Narain vs. Indira Gandhi*[71] the section 4 of the 39th Constitutional Amendment Act, 1975, Firstly, saved the Prime Minister's and other Union Officials from the purview of ordinary legislative process and Secondly, it tried to nullify the Allahabad High Court's judgment that had held Indira Gandhi's election to Lok Sabha as void and Thirdly, it excluded Supreme Court's exercise of the power of judicial review to hear any appeal. The Apex court validated the contention and declared section 4 as unconstitutional. The first portion of cl. (4) was held to violate of three vital features of the Constitution. It was struck down on the three tenets of democracy, separation of powers and natural justice. Article 329 clause (b)

[70] *Kesavananda Bharti v. State of Kerala* AIR 1973 SC 1461
[71] **1972 SCR (3) 841**

lays down that an election dispute will be solved by a judicial process that will be presented through a petition to an authority as the Legislature may provide as per the law. This amendment tries to vitiate the essential feature of a democracy, i.e. Free and Fair Elections which is an essential basic feature of the Constitution by diluting the above mentioned article by the insertion of Article 329A. The second feature that was in danger of being destroyed was Separation of Powers since there was no logical reasoning for creation of a privileged rule for the election of Prime Minister. The Election had made the amendment process a purely political tool rather than it being subject to Constitutional experts and clear interpretation by the Judiciary. It was violating the principle of natural justice, "audi alteram partem", which means `hear the other side'. Since there was no place for the petitioner who was challenging the election of Prime Minister, it was held that it rather seems to be use of despotic power in which the election dispute petition will lie with the body as the legislature may be law will provide. This would damage the basic structure of the Constitution. Rule of law was also held to be a basic feature of the Constitution as it was being violated as the law that shall provide for hearing the dispute matter shall be saved from any challenge whatsoever. Lastly, the principle of basic features applies only to the Constitutional Amendment and not to ordinary legislation because both belong to different fields and Constitutional law happens to be a Higher Law while ordinary legislation is confined to its enacted piece of legislation. The court laid emphasis on the fact that the framers of the Constitution wanted a controlled and not an uncontrolled Constitution as it has been seen lately to become. Thus, the decision arrived at by the Supreme Court was necessary to curb the Parliament's unbridled powers that i had given t itself by amending Article 329 and had cornered the third and the most important pillar of the democracy, i.e. the Judiciary.

The Parliament had enacted an act which deal with acquiring and management of sick mills, namely, Sick Textile Undertaking (Nationalization) Act, 1974. This was challenged along with an order made under Section 18-A of Industrial (Development and Regulation) Act, 1951 in Minerva Mills v. Union of India.[72] Furthermore, newly inserted clauses (4) and (5) under article 368 by section 55 of the 42nd Amendment Act, 1976 were also challenged and the case mainly dealt with these issues. These newly inserted clauses if continued to be in operation would make the 39th amendment immune from being challenged in court on account of it being placed in IX Schedule. The 42nd amendment has also made certain amendments to the Preamble and inserted words to make 'sovereign democratic republic' into 'sovereign socialist secular democratic republic' in order to enhance the Constitutional promise of unity and integrity of the country. The real object of these clauses being

[72] *Minerva Mills v. Union of India,* **AIR 1980 SC 1789**

inserted was to nullify the decision given by Supreme Court in *Kesavananda Bharti case.*[73] Clause 4 of article 368 aimed to take away the power of courts to call in question any Constitutional amendment. Clause 5 aimed at giving immense power to Parliament for exercising constituent power without any checks. It granted unbridled powers to Parliament to the extent of repealing any provisions of the Constitution.

The court held that the power to destroy does not co-relate with the power to amend. The power to amend is only a limited power and the parliament cannot by using this power enlarge this very power. The Parliament therefore cannot go beyond limits and destroy basic essential features of the Constitution. The majority decision put emphasis on the fact that fundamental rights have a unique place in modern democracies and they are an inherent part of the modem day societies. It further held that Part III and Part IV are the bedrock of Indian Constitution. These both parts have to be construed harmoniously. Moreover the relationship between Part III and Part IV have been established by the court in the manner that Directive principles should be achieved in a manner that does not override Fundamental Rights. They both are essential and significant feature of Indian Constitution and anything that destroys or disturbs the balance between these two will from that very moment be violate of the basic structure of Constitution. Supreme Court has held these following features to be a part of basic structure of Indian Constitution:

a) Limited power of Parliament to amend the Constitution;

b) Harmony and balance between Fundamental Rights and Directive Principles;

c) Fundamental Rights (Article 14 and 19 with relation to exercise of Article 31C); and

d) Power of Judicial Review (with respect to clause 4 under article 368).

The court declared clauses (4) and (5) invalid in this case and Article 368 operates without them.

In Waman Rao [74] case, the Supreme Court was dealing with validity of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 which had imposed ceiling on the agricultural holdings in Maharashtra. The act being placed in the ninth scheduled questioned the Constitutional validity of Articles 31 A, 31 B and 31 C on rounds of altering the basic structure of the Constitution. Article 31 C's position would be as it stood before the 42nd Amendment.[75]

The Supreme Court again pointed out that Parliament cannot amend the Constitution so that it destroys the basic features of the Constitution but the court supported the First and fourth Constitutional amendments since these were brought by amendment to fulfil state's directive

[73] *Kesavananda Bharti v. State of Kerala,* **AIR 1973 SC 1461**
[74] *Waman Rao v. Union ofIndia*, AIR 1981, 2 SCC 362, 1981 2 SCR 1
[75] Inserted in the year 1976

principle under Article 39 clauses (b) and (c). It was laid down that these did not destroy or damage the basic structure of the Constitution as these amendments were aimed towards removing economic and social inequalities in the agrarian society. The first and fourth amendment has given more strength to the basic structure rather than causing any damage to -

- ✓ **Article 31A:** The fourth amendment had amended the first amendment and the clause (1) of article 31A in total annihilates articles 14, 19 and 31 when they are in its scope. The court has supported the enactment of this article by saying that had it not been enacted, many Constitutional duties and schemes would not have been implemented timely and hence, it has strengthened the Constitution. Every case in which protection of Part III is taken away will not always result in damage of the basic structure.
- ✓ **Article 31B:** It was declared that every law placed in the ninth schedule until 24th April, 1973 shall receive complete immunity as given by Article 31B. Also, any addition or variation made to laws placed in IX schedule after the *Kesavananda* judgment shall receive no blanked immunity as there lays no justification for such act. Every law placed after mentioned date shall be held valid only of does not cause any damage to the basic features of our Constitution.
- ✓ **Article 31C:** This article as it stood prior to the 42nd amendment shall be deemed valid to that extent as it was upheld in the *Fundamental Rights case.*

In *Raghunath Rao v. Union of India*[76], the Apex Court arrived at a decision declaring that provision of amendment under article 368 cannot amend the basic structure of the Constitution. Furthermore, all three organs of the government, the legislature, the executive and the judiciary assert their powers and authority through the supreme law of the land, i.e. the Constitution.

The courts have been entrusted with the founding fathers of our nation to uphold supremacy of the Constitution. An amendment may be made to make the already existing document more ideal, valuable and significant and should not be made to damage the identity which forms the essential basic structure of the Constitution.

Courts have to look into two important points while deciding the validity of Constitutional amendments:

1. Has the procedure as laid under article 368 been followed; and
2. Has the amendment destroyed or abrogated any essential features of the Constitution.

[76] *Roghunath Roo v. Union of Indio,* **AIR 1993 SC 1267, 1287: 1933 (1) JT 374.**

VI. BASIC FEATURES & AMENDMENT OF CONSTITUTION

The *Kesavnanda Case* judgment dated *24th April 1973*, has been taken out from the date which any items added or previous items in the schedule IX shall be tested on the grounds of basic structure. Any amendment that has been inserted since date mentioned and any new item that is placed in the IXth schedule is prone to be tested on the ground whether it destroys the basic structure of the constitution or not. If it does, then such amendment shall be *ultra vires*. Basic Structure Doctrine is a judicial innovation made by Indian Supreme Court in order to preserve certain basic principles on which law of the land breathes upon. The origin of the basic structure doctrine can be attributed to the German Basic Law which provides for certain unamendable articles. Only additions that amplify the present positive stance can be added to these protected articles, amendment is permissible, else not. It was the former head of law department of the South Asia Institute of the University of Heidelberg, Germany, Professor Dietrich Conrad. He conveyed a lecture in February 1965 on *"Implied Limitations of the Amending Power" at* B.H.U.[77] a paper on the delivered lecture was sent to Professor T.S. Rama Rao of Madras for his comments. This paper was presented at the bar by M.K. Nambiar, who read before the Supreme Court of India in the Golak Nath case[78] On 24th April, 1973, a Supreme Court special 13 judge's bench ruled with a majority of 7-6 that Article 368 cannot alter the basic structure of the Constitution. The Parliament in order to amend the Constitution cannot go the extent of destroying it. In of the *Fundamental Rights case*[79], it was clearly laid down that the while exercising its constituent power under Article 368, the Parliament can amend **any provisions so far it does not destroys the basic structure or the basic elements of the Constitution**[80]**.**

Basic Features evolved by the Court: -

The Apex Court in different cases has laid down what the basic features in the Constitution:

- *Kesavananda Bharti v. State of Kerala,* AIR I 973 SC 1461
    a) Supremacy of the Constitution
    b) The objectives specified in the Preamble to the Constitution
    c) Article 32
    d) The Sovereign, Democratic, Republican Structure
    e) Unity and Integrity of the nation

[77] Benares Hindu University
[78] *Golak Nath v. State of Punjab,* AIR 1967 sc 1643.
[79] *Keshavananda Bharti v. State of Kerala,* 1973 SC 1491 paras. 751, 757, 759(3)
[80] Hypothesis proved; Should some provisions of a constitution be unamendable?

f) Harmony between Part III and Part IV, i.e. between Fundamental Rights and Directive Principles.

- *Indira v. Raj Narain,* AIR 1975 SC 2299
    a) Rule of Law
    b) Separation of Powers
    c) Judicial Review
    d) The principle of Equity
    e) Parliamentary form of Government
    f) The principle of Free and Fair Elections
- *Minerva Mills v. Union of India,* AIR 1980 SC 1789
    a) Federalism
    b) Secularism
    c) Freedom and Dignity of Individual
    d) Restrictions on amending power conferred by Article 368.
- *Bhim v. Union of India,* AIR 1981 SC 234
    a) The concept of Social and Economic Justice to build a Welfare State
- *Supreme Court Advocate on Records Association v. Union of India,* AIR 2016
    a) Primacy to Judiciary in appointment to Constitutional Courts

(A) Test of Basic Structure of Doctrine

Focus of Supreme Court is on the actual impairment caused by the law rather than the literal validity of the law. In *M Nagaraj v. Union of India*[81], the Court held that the word 'amend' postulates that the old Constitution continues to exist without losing its individuality even though it adapts according to the changes and the power to amend is laid down in Constitution and hence any limitation if imposed should exist in the main document itself. In that case, the Court upheld the validity of Constitution (77th Amendment) Act, 1995 inserting Article 16(4A) which provided for reservation for SC/ST in promotion and Constitution (81m Amendment) Act, 2000, inserting Article 16(413) that provided for carrying forward the vacant reserved posts Constitution (82nd Amendment) Act, 2000 inserted a proviso to Art, 335 enabling relaxation of qualifying marks for promotion in any examination or lowering the

[81] *M Nagaraj v. Union of India,* AIR 2007 SC 71

standards of evaluation for reservation in matters of promotion to tiny class or classes of services or posts in connection with the affairs of the Union or State and the Constitution (85th Amendment) Act, 2001 amended Article 16(4A) retrospectively from 17.6.1995 enabling reservation in matter of promotion with consequential seniority. The court upheld all the amendments since all of them have been carved out from Art. 16 which is valid and they do not contravene the basic structure. The Court applied *'width '* and *`identity'* tests to uphold the validity of the amendment and to find that these amendments do not offend basic features of the Constitution.[82]

The manner of amendment is not the decisive factor, but the effect arising from it would be the deciding factor which is known as *'right test'*. The Court has to examine the terms of the statute,

- The nature of the right involved, etc. to determine whether in cited and substance the statute violates the basic features. For so doing, it has to first find whether the Ninth Schedule law is violative of Part III.

- If it is found to be violative, a further examination is to be undertaken as to whether the violation is destructive of basic structure.

Hence, first the infringement of fundamental rights is to be determined and after that the effect is analyzed and if shown that in effect and substance, it destroys the basic essential feature or features, then the law will be invalidated.[83] The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights. The greater the invasion into essential freedoms, greater the need for justification and determination by Court whether the invasion is necessary, and if so, to what extent. The degree of invasion is for the Court to decide. In respect of inclusion of laws in the Ninth Schedule, the *principle of compatibility will* **come in.** One has to see the effect of the impugned law on the one hand and the exclusion of Part III in its entirety at the will of Parliament. Compatibility is one of the species of judicial review which is promised on compatibility with regard to right regarded as fundamental. The power to grant immunity at will on fictional basis without full judicial review will nullify the entire basic structure doctrine. The basic structure doctrine is promised on the basis that invasion of certain freedom needs to be justified. It is the invasion of such rights that attracts the basic structure. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered with in cases like terrorism, it does not follow that the same test can be applied for all the offences. Thus, the application of a standard is an important exercise required to be undertaken by the Court in applying the basic structure doctrine and that has to be done by the courts and not by the authority under Art. 368. The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of

[82] *Supra* note at 6, p.11373.
[83] *Id.,* **p.11374.**

laws that exclude Part III including power of judicial review under Article 32 is incompatible with the basic structure. The development made in the field of Constitutional interpretation and expansion of judicial review shall have to be kept in view while deciding the application of basic structure.[84] In recent time, the Apex Court in the *NJAC case*[85] has emphasized that even if certain alternation or damage of the basic structure or essential features of the Constitution is done, it would be sufficient to render such Constitutional amendment ultra-wires to the Constitution. The court has held that in order to test the veracity of the amendment made or any part altered, the tests such as *'width of power test'* or *'direct impact and effect test'* should be used.

(B) Can the Basic Features be amended?

1. CONSTIUTING A NEW CONSTITUENT ASSEMBLY

When the Supreme Court in Golak Nath case limited the Parliament's amending power, the question arose as to how to amend the fundamental rights. The majority suggested that it could do so by exercising its residuary power vested in it under Entry 97 List 1, Schedule VII. Parliament may call such a constituted Constituent Assembly for enacting a new document altogether or far-reaching changes.[86]

2. REVOLUTION

The query and the workable solution proposed in *Golak Nath case* was carried forward in the *Fundamental Right's case* since the previous solution was not satisfying for the Parliament as it would require Constitutional amendment requiring majority which was not possible at that time due to emergence of various regional parties and other political issues. In this latter case, the majority had in finality provided immunity to basic features from amendment under Art.368.

The majority in this case came to conclusion that:

a) Power to amend under Article 368 cannot be derived from the residuary power of Parliament.

b) Constituting the Constituent Assembly is not possible since power to amend is a limited power under Article 368. Hence, even if Article 368 was amendable its limited scope cannot be widened to the extent of setting up another Constituent Assembly.[87]

This situation proposed no workable solution and closed every statutory door for amending the basic features of the Constitution. Justice Khanna (in para. 1444) [88]recommended that it deemed fit for the people to decide how to frame a fresh Constitution.

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[84] *Ibid.*
[85] *Supreme Court Advocate-on-Record Association v. Union of India,* **AIR (2016) 5 SCC 1.**
[86] *Golak Math v. State of Punjab,* AIR 1967 SC 1643 paras. 55; 163,
[87] *Keshavananda Bharti v. State of Kerala,* AIR 1973 SC 1461.

'…it is not necessary that a Constitution must contain a provision for its abrogation and replacement by and entirely new and different Constitution and if they decide to have an entirely new Constitution, they would not need the authority of the existing Constitution for this purpose' (para. 1444)

From the italicized words, Justice Khanna made an attempt to suggest a revolution to frame a new Constitution as the people could not make use of the existing provision of the Constitution prevalent at that time for that purpose. Whether citizens will agree or acquiesce in such change is a political question and not a legal one. It is not a court's function to suggest a revolution and its function is limited to interpretation of the prevailing Indian Constitution. If there is not a provision limiting the use of total revision as a mode for amending the Constitution, the proper interpretation of a written Constitution would suggest for amending the Constitution, the proper interpretation of a written Constitution would suggest that amending power includes total revision. According to D.D.Basu, the view that no basic feature can be amended is not a good position from a juristic point of view as from the Framers of the Constitution's point of view since they would have not dreamt of it being immutable. Living Constitution survives when it adapts to changing circumstances prevailing in the country and hence when it is said that certain parts are unamendable seems unacceptable. [89]

Important to note, that these provisions are often the result of past traumas. Constitutional drafters in countries emerging from conflict or dictatorship may desire to create a constitutional order that will prevent previous oppressive structures or practices from ever returning. Unamendable provisions might also emerge from a process of transition in order to guarantee fragile bargains reached at that time. For example, some parties to the constitutional negotiation may demand that a constitutional commitment to decentralization be balanced by an 'unamendable' commitment to the indivisible territorial unity of the state.[90]

VII. CONCLUSION & SUGGESTIONS

With the passage of time everything evolves due to changing circumstances, so does the Constitution. It is the highest law of the land and governs everyone in a country. The existence of a nation is dependent upon its capability to adapt according to changing times. Indian Constitution since the Constitution came into force in 1950 has been adapting for over 100 times. It shows that although a written legislation it is less rigid when compared to the oldest written constitution of the *world.* Indian Constitution is partly rigid and partly flexible. This nature has been assumed keeping in the mind the history of the country where more than 565 small and disorganized states existed at the time of gaining Independence. India is union of indestructible

[88] *Ibid.*
[89] *Supra* note at 6, p. 11367-11368
[90] *Supra* note 86, Hypothesis proved.

union with destructible states as opposed to United States where *the* Stares are also indestructible just like the union. To cater for the needs of one of the largest populations in the world, the framers of the constitution who well ahead of their time provided for the provision of amendment so that past mistakes were not repeated. This amendment provision was provided so as to imbibe changes that are taking place globally in order to keep the nation on the same pace *as* other developed countries. The goal is to ensure a welfare society that even though having a diverse Diasporas function to achieve the wellbeing and self-sufficiency. In spite of having ample amount of disparities such religious, linguistic, casteism and regionalism has still survived only because of the vision of the framers or founding fathers of a *young* and independent India. This very vision was being blurred by parliament going to the extent of saving the election of Prime Minister by being a judge in its own cause. A totalitarian regime was on the rise in the 1970's when the Indira Gandhi government did everything possible in order to remain in power. Regional issues and the plight of the people had been sidelined in order to maintain a permanent and uninterrupted office. It even went on the extent of superseding a judge to the position of chief justice of India even though he was not fulfilling the manner in which the position was filled up till that time. When the government in power had tried to hijack the noble office of judiciary, it was not only necessary for that time alone, but for the coming generations on whom the ill effects of such acts would have made an adverse impact. Therefore, if judiciary did cross a line, it did so in order to preserve the best.

If a little harm is done in order to achieve a greater well, it is of less harm than being silent spectator to a totalitarian government canvassing a dystopian future. Various critic of the Judicial overreach and many constitutional experts have doubted the legitimacy of the Basic Structure Doctrine and questioned it on the basis of its constitutionality. Indian Judiciary on the outside may have crossed its line but it has done so in order to preserves those elements on which our country has been built. The vision of founding fathers is clear from the Preamble itself which lays down dreams and aspirations of not only the founding fathers or framers but also of the people of the country. A lot of people have questioned this very argument on the basis that constituent assembly was not only formed by any election. It may be so but the work carried on by them has lived on till this day and will continue to do so if the people in power do not assume a totalitarian figure. India's neighbor, Bangladesh had in 1989 adopted this doctrine citing the Fundamental Right's case. What had been in taking place in India was the assertion of excessive power by the legislature which then saw repercussions in the form of mass student movements and acts of rebellion across the country. By this time, the basic structure had been formed and unsuccessful attempts at scrapping it had been made. What started as a means to alter provisions in order to facilitate land reforms had become a handy tool in the hands of legislators for asserting their will against any opposing force through the

means of an amendment. It is quite correct that this altering power has been assigned to the people's representative and is not to be exercised by the judiciary, any overreach by the parliament that pervade the essential and vital portions of the constitution has to be stopped. The reason for such restriction is that these unrestricted or unbridled powers will cause damage to significant parts of the constitution. Power has a lucrative pull and at the cause damage to significant parts of the constitution. Power has a lucrative pull and at the same time negative impact and the absolute power if assumed may have a propensity to cause absolutism. It is said by the critics that basic structure has no basis as there exists no such provision for it. Furthermore, it is also questioned that how can any amendment be said not to be on the same note as the vision of founding fathers. To answer these vague assertions, the doctrine is not solely a judicial innovation. It is based on Germany's basic law which made certain parts inviolable. This has been done in order to not recast in India the holocaust as the dictatorship there had caused. Preservation of esteem values as enshrined in our constitution in the form of preamble, fundamental rights and directive principles is necessary in order to enrich the coming generations with more benefits rather than liabilities.

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