

## DOCTRINE OF BASIC STRUCTURE: CONSEQUENCE OF TUSSE BETWEEN PARLIAMENT AND JUDICIARY

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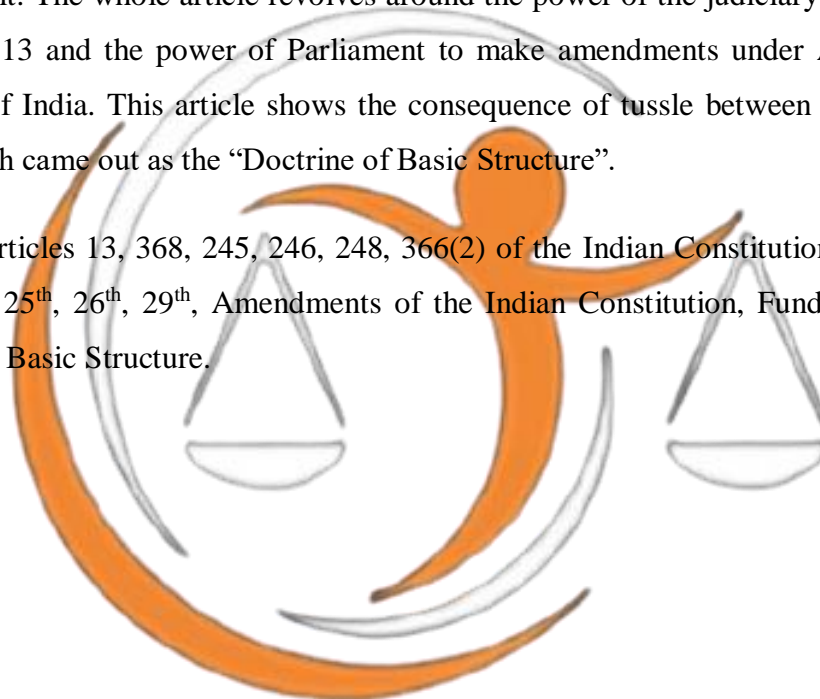
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### ABSTRACT

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The Constitution of India has some basic rights under Part III which are called Fundamental Rights. These rights play a crucial role to live a life with dignity. Now, the question raised in front of the court was that *whether fundamental rights can be amended*. The solution came as the ‘Doctrine of Basic Structure’. This article deals with the various cases which led to the emergence of it. The whole article revolves around the power of the judiciary to review laws under Article 13 and the power of Parliament to make amendments under Art. 368 of the Constitution of India. This article shows the consequence of tussle between parliament and judiciary which came out as the “Doctrine of Basic Structure”.

**Keywords:** Articles 13, 368, 245, 246, 248, 366(2) of the Indian Constitution, 9<sup>th</sup> Schedule, 1<sup>st</sup>, 17<sup>th</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 29<sup>th</sup>, Amendments of the Indian Constitution, Fundamental rights, Basic Feature, Basic Structure.



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## INTRODUCTION

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Whenever we talk about the Doctrine of Basic Structure, what flashes firstly in our mind is Article 13 and Article 368. Article 13 gives authority of judicial review to the Supreme Court (SC) and High Court (HC). Accordingly, SC and HC can review any law passed by the parliament and state legislature respectively that “Whether the law is violative of fundamental rights or not” but Article 13 does not talk about constitutional amendments. If any law violates fundamental rights then the court can declare it unconstitutional. Article 368 grants authority although it does not talk about the extent of that power. Therefore, it gives rise to several questions:

- i. Whether fundamental rights can be violated by constitutional amendment?
- ii. If any constitutional amendment violates fundamental rights then whether it is reviewable by the court under Article 13 or not.
- iii. Whether a constitutional amendment is a law as Article 13 only talks about the law?

The above questions lead to a tussle between Judiciary and Parliament.

In 1951, many laws were passed inter alia, the Mysore land Reform Act and Bihar Land Acquisition Act. These acts gave power to the government to acquire the property of any person for the public benefit and in return, the government used to give some monetary value to the respective property owner. However, the amount of monetary value was not fixed and also it was not mentioned in the act. The government was also not bound to give the same. At that time *Right to property* was one of the fundamental rights and therefore such laws were violating the fundamental rights of people. People’s contentions were that

- i. There is no specific power mentioned in the Constitution that allows the government to acquire property and
- ii. *Right to Property* is a fundamental right therefore, any law violating fundamental rights is unconstitutional as per Article 13.

For dealing with the above issues, the parliament amended the Constitution in 1951, which was the first amendment of the constitution. This amendment added inter alia, Article 31A, and 31B. Article 31A allows the government to acquire land of any person for the benefit of the public, without giving any reason. Article 31B added the 9<sup>th</sup> Schedule to the Constitution which mandated that the court cannot review any law included in it.

After this amendment, all laws which are violative of the *Right to Property* were added in the 9<sup>th</sup> Schedule so that SC and HC court cannot review it.

The first amendment of the Constitution was put to test in **Shankari Prasad Deo v/s UOI** for allegations of going against the Fundamental rights. In this case, the question raised before the court was “*what is the extent of the amending power of the parliament*”. The court used two terminologies, ‘legislative power’ and ‘constituent power’, and said that parliament uses its legislative power while making laws whereas it uses its constituent power while amending the constitution. Article 13 only talks about the judicial review of law and not about the constitution amendment, thus, the court held that constitutional amendments are not judicially reviewable.

After it, many states were passing laws to abolish *Zamindari System*. These laws were added by the Constitution (17<sup>th</sup> amendment) Act, 1964, so that these could be barred from judicial review. In the case of **Sajjan Singh v/s State of Rajasthan**, it was put to question again with the same question raised, that is, “*what is the extent of the amending power of the parliament when it comes to fundamental rights and judicial review*”. The court held that parliament makes amendments by exercising its constituent power so, constituent amendments are not laws and thus, it is not reviewable by a court.

Here, the crucial part of the judgement which was in the ratio 3:2 was the dissenting opinion given by Justice Mudholkar and Justice Hidayatullah. According to Justice Hidayatullah, if the parliament is making laws then its capacity will not change even when they are amending the constitution and therefore, a constitutional amendment is also law and hence judicially reviewable. Justice Mudholkar’s opinion was based on a Pakistani Supreme Court case **Mr. Fazlul v/s Haque** in which the then Chief Justice Cornelius of Pakistani SC, held that the Pakistani Constitution has some basic features which cannot be amended by the Pakistani Parliament. Influenced by this judgement Justice Mudholkar used it in his dissent and opined that the Preamble of the Constitution of India has some basic features which cannot be amended by the parliament using its constituent power.

The above judgements had increased the power of the Parliament as parliament had passed numerous legislations in the name of Article 368 since the 1950s. Punjab Security and Land Tenures Act, 1953 and Mysore Land Reform Act, 1962 were also added to the 9<sup>th</sup> Schedule by the 17<sup>th</sup> Constitutional Amendment. In **I.C. Golaknath** Once again 17<sup>th</sup> amendment was

put to test. In this case, 11 judge bench was constituted to decide “*whether the power of parliament to amend the Constitution is subject to any limitation*”. The court observed that Article 245 allows legislators to make laws for the Union and State respectively. Also, Articles 246 and 248 gives power to the Parliament to make laws. Therefore, these are the law-making power of the Parliament. Besides this Article 368 provides an only procedure to make changes to it (at that time). The word “power” was nowhere mentioned in the Art. 368. The court held that it does not grant authority to the parliamentarians to make changes to the Constitution and it is Article 245 which gives the Parliament to make laws, anything made under Article 245 is the law and hence, judicially reviewable.

Therefore, it overruled the earlier discussed two cases. In its judgement the court also included two things that.

- Parliamentarians possess no authority, from today, to make amendments to any of the Fundamental Rights.
- It also explained the meaning of the word ‘amend’ and said that, amend does not mean addition, variation, or repeal rather it means improvements and alteration.

So, it can be said that the judgement of the I.C. Golaknath case was a blow on the face of the Parliament by the SC.

In 1970, Prime Minister Indira Gandhi introduced a bill to abolish Privy Purse but the bill was not passed due to one vote. Then she asked the then President, V.V. Giri to pass an order under Article 366(22) to unrecognize all the rulers. Article 366(22) defines ruler and gives power to the president to recognize and unrecognize anyone as a ruler. The presidential order was passed and accordingly, there was no more ruler in the country and so the issue of Privy Purse was solved.

This presidential order was challenged in **Madhav Scindia v/s UOI**<sup>2</sup> and the presidential order was cancelled by the SC. It is also called the Privy Purse case.

After the above judgement, Indira Gandhi Dissolved the Parliament and again came into power with more majority which resulted in the Constitutional 24<sup>th</sup> amendment. Inter alia, the 24<sup>th</sup> amendment added the word ‘power’ to Article 368 which reads as “*power to the parliament to amend the constitution and procedure thereof*”. It also added clause I, which

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<sup>2</sup> Madhav Rao Sindhia v/s Union of India, AIR 1971 SC 530.

defines the word 'amend' as variation addition or repeal, and clause 3, which says that article 13 will be not there for changes made under Art. 368. In Art. 13 clauses 4 was also added, according to which Article 13 will not be applicable on any amendment made under Art. 368.

Thus, the 24<sup>th</sup> constitutional amendment overruled all three points of the judgement of the I.C. Golaknath case. Article 31C was also added through the 24<sup>th</sup> constitutional Amendment. According to Article 31C if parliament has to violate fundamental rights to uphold the Directive Principle of State Policy then it will not be declared a nullity as it went against the fundamentals.

There were also numerous amendments were made after the 24<sup>th</sup> amendments like 25<sup>th</sup>, 26<sup>th</sup>, and 29<sup>th</sup> amendments. 25<sup>th</sup> constitutional amendment permitted the government to acquire the property of any person for the benefit of the public, on the payment of the compensation but the amount of compensation was not fixed. This curtailed the Right to Property. 26<sup>th</sup> amendment nullified Privy Purse Judgement that the judgement of **Madhav Scindia v/s UOI**. 29<sup>th</sup> amendment added Kerala Land Reforms Act, 1963 an amendment to the Kerala Land Reforms Act, 1963 to the 9<sup>th</sup> Schedule. So, these two acts were also beyond the ambit of judicial review.

By invoking it in 1969, the government tried to acquire the property of Keshvanand Bharti who was the owner and manager of Edneer Mutt. Therefore, he challenged this in 1970 in the SC, saying that this is a violation of his Right to Property. In this case, **Keshvanand Bharti v/s State of Kerala**<sup>3</sup>, The court said 24<sup>th</sup> amendment was not liable to be set aside and said that parliamentarians can amend any part under Art. 368 but it does not have the authority to go against the Basic Structure. Also, any constitutional amendment can be challenged on this ground.

### OPINION OF MAJORITY JUDGES

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According to **Justice Sikri**, there are certain problems with the amending authority of the parliamentarians. The parliament has the authority to amend but it is not able to abrogate fundamental rights or change the basic features. Though Justice Sikri has not mentioned the essentials of it he mentioned fundamental features which include "supremacy of the constitution, the republican and democratic form of government, and separation of powers, the secular and federal character of the constitution".

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<sup>3</sup>Keshavanand Bharati v/s State of Kerala, AIR 1973 SC 1461.

**J. Shelat** and **J. Grover** gave joint judgement. According to them, in the light of the Preamble, one can say we have an indirect problem to do the amendments. They also said the basic features are not vague and it includes “the supremacy of the constitution, republican and democratic form of government and sovereignty of the constitution, the secular and federal character of the constitution, demarcation of power among the legislature, the executive and the judiciary, the dignity of the individual, the unity and integrity of the nation”.

**J. Hegde** and **J. Mukherjea** also gave joint judgement. They said the authority of parliament to make changes doesn't grant it permission to destroy or weaken the basic element of the constitution, but they did not mention what basic elements constitute and said that it will be decided by the court from time to time. Justice Hegde also mentioned the 9<sup>th</sup> Schedule of the Constitution and said that laws under the 9<sup>th</sup> schedule are also judicial reviewable and their validity will be determined based on the circumstances of the cases. He also added that all laws under the 9<sup>th</sup> Schedule are valid unless and until these are declared unconstitutional by specifically challenging these laws.

According to **Justice Jaganmohan Reddy**, basic models of the constitution include “sovereign, democratic, republic; justice, social, economic, and political; liberty of thought, expression, belief, faith, and worship; Equality of status and opportunity.”

**Justice Khanna** has propounded the term “the basic structure”. He was inspired by a Pakistani case **Mr. Fazlul v/s Haque**, which I have mentioned earlier, and by the theory of Dieter Conrad, a German Jurist, which is called “theory of implied limitations” mentioned in his book “Limitation of Amendment Procedure and the Constituent Power”. According to the “theory of implied limitation,” amendment authority is subject to certain restrictions and it cannot change F. Rs, which is in favor of its power. Justice Khanna said that basic features are those features that will keep basic structure unharmed.

## OPINION OF MINORITY JUDGES

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**Justice AN Ray**, **Justice Palekar**, **Justice Matthew**, **Justice Dwivedi** gave similar judgement. They said that Article 368 indeed gives the authority. The parliament can change while using the in-built power, not by the legislative power, so, a constitutional amendment is not law and thus, will not come under the purview of Article 13, and therefore, the constitutional amendment is not judicially reviewable. They said that there are no express or

implied restrictions on the amending power of parliament and also said that there is no distinction between essential and other not important models, so, no hindrance can be raised as to the power of amendment.

**Justice Beg** added his extra opinion to the above and according to him, the word 'amendment' in Article 368 includes varying repealing or abrogating and said that parliamentarians can amend any part they want. Justice Beg also gave his separate test which is called 'effect test or the test of consequences' according to which if the effect of any amendment is positive then it is irrelevant that whether it is inconsistent with the constitution or not.

**Justice Y.V. Chandrachud** also added his point to all the above minority opinions and said that the Preamble is also part of the constitution and therefore, it also comes under the ambit of its authority of doing tasks like these.

Thus, the court did not define what exactly basic structure includes and said that it depends on the prevailing conditions of the case. Some of the features of Basic Structure are Equality, Democracy, Federalism, Sovereignty, Free and Fair Election, Judicial Review, Republican Government.

## CONCLUSION

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In the light of the above case laws and discussion, it can be concluded that no one can alter the Basic Structure so that, one may not defy the very essence of the Constitution. On the one hand, the Constitution gives power to the Parliament to make laws and amendments, on the other hand, it also provides certain reasonable restrictions so that it cannot work arbitrarily. Judiciary can interpret laws and while doing the same, the judiciary can declare the law liable to be set aside in case it goes against the constitution and if it alters the Basic Structure. Thus, the constitution is supreme and all are bound to work within the ambit of the constitution. Judiciary has the power to interfere from time to time to when any law or amendment will be inconsistent with the constitution or will defy the basic structure and can declare it void. Thus, the judgement of the Keshvananda Bharti case worked as a savior of the very essence of the Constitution.

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