



# Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820  
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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## The Scope of Article 368 under Article 13: A timeline

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*Received* 18 August 2021; *Accepted* 17 September 2021; *Published* 21 September 2021

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*One of the objectives of the Constitution was to modernize the recently decolonized country by the virtue of infrastructural development and agrarian reforms. Large acres of land for such purposes were reorganized through state land reform legislation which was contested by the estate owners for infringement of their rights. Schedule 9 was enacted to prevent certain laws which allowed the Government to proceed with its aims, from being challenged before the court of law. The status of Constitutional Amendments for the purpose of law under Article 13 varied with judicial developments, ultimately falling outside the purview of law as held in the landmark judgement of Kesavnanda Bharti. Over the years, the Parliament enacted numerous Constitutional Amendments to circumvent the judicial scrutiny, only to be annulled for violating the basic structure doctrine. This article seeks to analyze the judicial developments that ultimately led to the accordance of the higher status to Constitutional Amendments and limiting the amending powers of the Parliament.*

**Keywords:** *article 32, article 368, amendment, basic structure, judicial review.*

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### INTRODUCTION

India, at the time of independence, was in a state of shambles, in dire need of roads, bridges, factories, hospitals, infrastructure, and most importantly, agrarian reforms. For all purposes, the Government needed large acres of land which were primarily under the control of Princely Rulers and Zamindars. One of the goals after independence was to build and provide the

infrastructure that allowed the citizens of the nation to develop themselves, fulfilling the goals of the Constitution. The land was distributed unequally, the majority of which were concentrated in the hands of a minority. It was the need of the hour for the government to reorganize these large estates for one, realizing their promise of infrastructural development, and two, to fulfill the promises of ownership of land guaranteed to the freedom fighters of the nation. This reorganization was complemented by the Directive Principles of State Policy<sup>1</sup> which advocated for the equitable distribution of resources, including land.

### INITIAL TRANSFORMATIONS

Land being a subject of the State List<sup>2</sup> (*List 2, Schedule 7*), Bihar was the first state to introduce the Bihar Land Reforms Act<sup>3</sup> in 1950. This legislation tried to address the anomaly of the control of large landholdings under a group of individuals, by reorganizing it for development. Essentially, this legislation was violating the rights of the estate owners. This was challenged in *Kameshwar Singh v. the State of Bihar*<sup>4</sup>, and it was contended that the aforesaid legislation violated *Article 13(2)* which states ‘No law can be in contravention of a Fundamental Right.’<sup>5</sup> (It is to be noted that Right to Property was a Fundamental Right under *Article 19(1)(f)*, before 1978<sup>6</sup>.) The question before the court ‘Whether State can make such laws’ was answered in the negative, **annulling the legislation**. The then Constituent Assembly (as Parliament had not been established yet) passed the 1<sup>st</sup> Constitutional Amendment<sup>7</sup> enacting Schedule 9<sup>8</sup> thereby opening the floodgates for ending litigation between the government and the citizens.

Schedule 9 of the Indian Constitution deals with laws that cannot be challenged in a court of law. Any law under Schedule 9 was held to be outside the purview of judicial review. Laws in contravention with Fundamental Rights but upholding the Directive Principles of State Policy

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<sup>1</sup> Constitution of India, art 39(b)

<sup>2</sup> Constitution of India, Schedule 7

<sup>3</sup> Bihar Land Reforms Act 1950

<sup>4</sup> *Kameshwar Singh v State of Bihar* AIR 1952 SC 252

<sup>5</sup> Constitution of India, art 13

<sup>6</sup> Constitution of India, 44<sup>th</sup> Constitutional Amendment 1978

<sup>7</sup> Constitution of India, 1<sup>st</sup> Constitutional Amendment 1951

<sup>8</sup> Constitution of India, Schedule 9

could be enforced if placed under Schedule 9. This Amendment was applied retrospectively, reviving the Bihar Land Reforms Act<sup>9</sup> by placing it under Schedule 9. The Schedule was primarily enacted to resolve the conflict between Land Reforms and Right to Property. This Amendment also introduced *Article 31A* (Saving of laws providing acquisition of estates etc.<sup>10</sup>) and *Article 31B* (Validation of certain Acts & Regulations under Schedule 9<sup>11</sup>). This schedule allowed the government to proceed with land reforms without judicial interference. This marked the first instance of curtailing the decision of the courts.

This Constitutional Amendment was challenged in *Shankari Prasad v. Union of India*<sup>12</sup> wherein the 5-judge bench led by CJ Kania decided on the difference between ordinary legislation and a Constitutional Amendment and whether the latter is a law under Article 13. The court accepted the challenge on grounds of procedural violations only. Due to the absence of an upper house, the validity of the amendment was contested. However, this was resolved via the Constitution itself which authorized the Constituent Assembly to act as a provisional Parliament. The Court also held that the amendment could be passed as an ordinary bill process. The amendment was **held constitutional**, but **not 'law'** for the scope of Article 13.

### **AFTERMATH OF THE SHANKARI PRASAD JUDGEMENT**

Constitutional Amendments were held to be a superior law, but not law for the purpose of Article 13 thereby avoiding comparisons with ordinary legislation and any scrutiny under Article 13(2). The challenge on substantial grounds that Fundamental Rights are sacrosanct & could not be amended, was rejected by the court. In a very narrow and literal interpretation, the Court held that the Constituent Assembly would have added a provision solidifying the need for Fundamental Rights to be inviolable if such was the intent of the makers of the Constitution. Constitutional Amendments could not be declared void if they infringed the Fundamental Rights of the citizen and Fundamental Rights were allowed to be amended. All

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<sup>9</sup> Constitution (n 2)

<sup>10</sup> Constitution of India, art 31A

<sup>11</sup> Constitution of India, art 31B

<sup>12</sup> *Shankari Prasad v Union of India* AIR 1951 SC 458

laws with retrospective effect settled under Schedule 9 were outside the extent of judicial review and decisions of court will be void as against legislations placed under Schedule 9.

If Constitutional Amendments were held to be law for the purpose of Article 13(2), it would have thwarted the nation's objective of development by abolishing the Zamindari system and reorganizing land distribution. However, the *Shankari Prasad* judgement is not a judicially sound precedent, for it did not bestow Fundamental Rights the pedestal it deserves and confined its understanding. This decision was criticized by Nehru as "*somehow, we have found that the magnificent Constitution that we have framed was kidnapped and purloined by the lawyers.*"<sup>13</sup>

### 1964 AND ONWARDS

The Supreme Court contributed to a rich jurisprudence through bold decisions, post-1964. In India whenever the Government at the center was strong, the Supreme Court refrained from taking a strong stand and vice-versa. Article 31A was amended and several land legislations were placed under Schedule 9, for agrarian and infrastructural development. In *Sajjan Singh v. the State of Rajasthan*<sup>14</sup>, it was contended on procedural grounds that the special procedure of ratification was not undertaken while passing the laws and that land being a subject matter of the states, the Union had no power to legislate. The Court struck down the contentions stating the lack of change in the federal structure, to validate the need for the special procedure of ratification and the Parliament was not legislating but essentially providing protection to the land reform laws by placing them under Schedule 9. Confirming *Shankari Prasad*, Constitutional Amendments were not 'law' for the purpose of Article 13.

In a 3:2 verdict, the amendment under Article 368<sup>15</sup> was held to be absolute in nature, without any limitations, thereby allowing an absolute amendment to the entire Constitution. The majority led by CJ Gajendragadkar gave a problematic interpretation wherein if all the procedural rules were followed, the Parliament had unlimited powers of amendment.

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<sup>13</sup> Tripurdaman Singh, *Sixteen Stormy Days: The Story of the First Amendment to the Constitution* (Penguin Random House 2020)

<sup>14</sup> *Sajjan Singh v State of Rajasthan* AIR 1964 SC 845

<sup>15</sup> Constitution of India, art 368

The minority dissenting opinion came from J. Hidayatullah and J. Mudholkar, who held that Article 368 did not grant absolute powers to the Parliament and could not be used indiscriminately to usurp the Fundamental Rights of the citizens. The Parliament has limited and derivate power from the Constitution. It can be said that the Constituent Assembly had the true constituent powers (which the Parliament seeks to achieve) albeit they too were regulated via political restriction (desires of the citizens of independent India) and minority interest restriction. Whether making a change in the basic structure of the Constitution can be regarded merely as an amendment or would it imply rewriting a part of the Constitution and if it is so, would such amendment be within the scope of Article 368? If the amendment in question, changes the basic feature of the Constitution, then it would not qualify as an amendment for the purpose of Article 368. This view was inspired by the Supreme Court of Pakistan's judgement in *Fazlul Chowdhury v. Mohammed Abdul Haque*<sup>16</sup>.

#### **IC GOLAKNATH: A CASE OF PER INCURIAM**

The 17<sup>th</sup> Amendment along with the *Shankari Prasad* and *Sajjan Singh* judgments were challenged which included a lot of state legislation under Schedule 9, in *IC Golaknath v. the State of Punjab*<sup>17</sup>. Several questions were raised before the court and the following are the observations made by the court –

- i. Both *Sajjan Singh* and *Shankari Prasad* were overruled, and Constitutional Amendments were declared law for the purpose of Article 13. For the first time, prospective overruling was used which disallowed any new land acquisition under Schedule 9. This enabled the court to bring about a seamless transition by correcting its fallacies, without upsetting the impact of such fallacies in previous cases.
- ii. Article 368 talks about the procedure to amend but does not provide the power to amend the Constitution. The Courts had the power of Constitutional Amendment review under their derived power. The power was traced to Article 245, 246, and Item

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<sup>16</sup> *Fazlul Quader Chowdhury v Abdul Haque* [1963] 18 DLR SC 69

<sup>17</sup> *I C Golaknath v State of Punjab* AIR 1967 SC 1643

97 of List 1<sup>18</sup> under the Seventh Schedule which granted residuary powers to enact laws. This resulted in the subservience of the power of amendment to the other provisions of the Constitution, thereby making the power of amendment extremely rigid, contrary to the power granted under Article 368 and the intentions of the Constituent Assembly. Constitutional Amendments and legislations were conflated as same. It was held that there existed no distinction between legislative and constituent powers<sup>19</sup>.

- iii. Fundamental Rights have a transcendental effect and cannot be taken away or abridged by the actions of the Parliament. It is true that the Fundamental Rights are sacrosanct albeit a blanket ban on its modification or up-gradation can hinder development and modernization. The judges were looking to ascribe a substantive limitation to the power of Parliament, however, the view can be construed as a rigid interpretation

Following this judgement, the 24<sup>th</sup> and 25<sup>th</sup> Constitutional Amendment was enacted. The 24<sup>th</sup> Constitutional Amendment added 'constituent power' to Article 368 in an attempt to increase the power of the legislature to the tune of the constituent assembly<sup>20</sup>. The Parliament wanted to bring about swathing changes in their powers. However, their power is still derived from the Constitution itself and can never be equivalent to the actual constituent power possessed by the Constituent Assembly. The Assembly had powers to **create** a constitution whilst the Parliament is limited to **alterations, modifications, or repeals**. Further, amendments were made in Articles 13 and 368 to include a 'nothing clause' affecting changes in Articles 368 and 13 respectively.

The 25<sup>th</sup> Amendment was enacted to address the lacuna established in the *IC Golaknath* case, via Article 31C which allowed the legislature to pass laws that secured the Directive Principles of State Policy, even if in contravention with Fundamental Rights<sup>21</sup>.

## THE KESHAVNANDA BHARTI JUDGEMENT: ADDRESSING THE CONUNDRUM

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<sup>18</sup> Constitution of India, Schedule 7

<sup>19</sup> H M Seervai, *Constitutional Law of India* (3111, Universal Law Publishing Company Pvt Ltd 2014)

<sup>20</sup> Constitution of India, 24<sup>th</sup> Constitutional Amendment 1971

<sup>21</sup> Constitution of India, 25<sup>th</sup> Constitutional Amendment 1971

The largest bench to date comprising of 13 judges led by CJ Sikri in *Keshavnanda Bharti v. the State of Kerala*<sup>22</sup>, was constituted to review the judicial soundness of the *IC Golaknath judgement*. Four questions were put forth before the bench –

- i. Where the power to amend is provided in the Constitution?
- ii. Is there any conflict between Fundamental Rights and Directive Principles of State Policy?
- iii. Whether an amendment is 'law' for the purpose of Article 13?
- iv. To what extent can the Parliament amend the Constitution?

The first three questions were answered unanimously. The 24<sup>th</sup> and 25<sup>th</sup> were upheld, accorded higher powers to the Directive Principles of State Policy. Any conflict or creation of conflict between Fundamental Rights and Directive Principles of State Policy will be struck down by the judiciary. Both should be complementary to each other.

The bench was divided into groups of six, one in support of unlimited powers to amend the Constitution and the other in support of limited powers. The latter could not substantiate their opinions. J. Khanna held that the powers of the Parliament are to be limited and such substantive limitation should be based on the **basic structure doctrine**. Subsequently, Fundamental Rights could be amended and the Right to Property<sup>23</sup> was demoted to the status of a legal right via the 44<sup>th</sup> Constitutional Amendment. Therefore, in a 7:6 verdict, the Court ruled in favour of limited amending powers of the Parliament. As Nani Palkhivala had said, "*Article 368 should not be read as expressing the death-wish of the Constitution or as a provision for its legal suicide.*"

J. Khanna opined that the amendment should be such that the Old Constitution (Constitution prior to the amendment) survives without the loss of its identity despite the alterations and continues to be in operation. The Old Constitution cannot be done away with, instead, it is regained in its amended form. The State without means of some changes is without the means of conservation and risks the loss of the very ideals of the Constitution that it wished to

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<sup>22</sup> *Keshavnanda Bharti v State of Kerala* AIR 1973 SC 1461

<sup>23</sup> Constitution of India, art 300(A)

preserve<sup>24</sup>. The wordings of Article 368 are clear enough such that the Parliament cannot emasculate the basic structure of the Constitution. The constituents of the basic structure shall be determined by the judiciary on a case-to-case basis.

Substantive limitations cannot be traced to any Article in the Constitution, but it is rooted in the basic structure which is not explicitly mentioned in the Constitution. This grey area can only be interpreted by the judiciary. Had the basic structure been traced to the Constitution, the Parliament would have amended it too, to suit its agenda. The *IC Golaknath* judgement, as quoted by Professor Upendra Baxi, was based on the ‘argument of fear’, that “*if no brakes are applied, the engine of amending power would soon overrun the Constitution.*”<sup>25</sup> However, by making fundamental rights unamendable, it would expose the rest of the Constitution to legislative aggressions. Therefore, to check this power of the Parliament, the *Keshavnanda Bharti* decision addressed this lacuna.

## THE OMNIPOTENCE OF THE BASIC STRUCTURE DOCTRINE

After the Allahabad High Court decision barring Indira Gandhi from contesting elections, the 39<sup>th</sup> Constitutional Amendment was enacted that ceased the Right to Appeal and kept the election of Prime Minister, President, etc. outside the purview of judicial review<sup>26</sup>. This amendment was struck down in *Indira Gandhi v. Raj Narain*<sup>27</sup> (1975), utilizing the basic structure doctrine, as democracy and free & fair elections are a part of the basic tenets of the Constitution. Any amendment that violates the basic structure of the Constitution is unconstitutional<sup>28</sup>.

In *Minerva Mills v. Union of India*<sup>29</sup> (1980), the Supreme Court declared clauses 4 (provided immunity from judicial review) and 5 (provided unlimited amending power to the Parliament)

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<sup>24</sup> Burke, *Recollections on the Revolution of France and Other Writings* (Oxford University Press 1958)

<sup>25</sup> Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980)

<sup>26</sup> Constitution of India, 39<sup>th</sup> Constitutional Amendment 1975

<sup>27</sup> *Indira Gandhi v Raj Narain* AIR 1975 SC 865

<sup>28</sup> Aharon Barak, ‘Unconstitutional Constitutional Amendments’ [2011] 44 Israel Law Review 321

<sup>29</sup> *Minerva Mills v Union of India* AIR 1980 SC 1789

of Article 368 to be unconstitutional. It was held that the Parliament cannot use its limited power of amendment, to grant itself unlimited amending power.

Ambiguities with respect to opinions in the *Keshavnanda Bharti* judgment were clarified in *IR Coelho v. State of Tamil Nadu*<sup>30</sup> (1999) and furnished a comprehensive clarification. It was held that Schedule 9 is not a Pandora's box anymore as when laws are inserted into Schedule 9 of the Constitution, it must be done via a Constitutional Amendment. Albeit the judiciary cannot review laws under Schedule 9, it has the power to review the Constitutional Amendment that placed the legislation under Schedule 9. If such an amendment is found to be unconstitutional, the law will be treated as ordinary legislation for the purposes of Article 13, thereby falling under the purview of judicial intervention.

## CONCLUSION

The dust between powers of the Parliament with respect to Articles 13 and 368 has been settled. Constitutional Amendments are not laws for the purpose of Article 13. Fundamental Rights and the Directive Principles of State Policy should be harmoniously enforced, and a conflict must not be deliberately traced between the two. The former clearly is enforceable in the court of law, whilst the latter should be promoted by the Government as and when adequate resources are available. The amending powers of the Parliament are limited to the extent of the basic structure doctrine, thereby upholding the identity of the living text and the true intentions of the Constituent Assembly.

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<sup>30</sup> *IR Coelho v State of Tamil Nadu* [1999] 7 SCC 580