# THE CRUCIAL ROLE OF AMENDING A FEDERAL CONSTITUTION

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**ABSTRACT**

The Word 'Constitution' is Commonly used at least in two senses in any ordinary discussion of political affairs. Firstly in broader sense it is used to describe the whole system of the government of a country, the collection of rules which establish and regulate or govern the system. These rules are partly legal in the sense that courts of law will recognize and apply them, and partly non-legal or extra-legal taking the form of usages, understanding, customs or conventions which courts do not recognize as law but which are not less effective in regulating the govt. than the rules of law strictly so called. Secondly in narrower sense, it is used to describe not the whole collection of rules, legal and non-legal but rather a selection of them which has usually been embodied in one document. The selection is almost invariably a selection of legal rules only. The constitution, then for most of the countries in the world, is a selection of the legal rules which govern the government of that country and which have been embodied in a document.[1]

The moment the idea of constitution is conceived at that very moment the idea of its amendment has acquired the sanctity of its own. The amendment of the constitution is as important as the constitution itself. Right from the beginning even from the days of formation of the constitution there have been hot debate upon the extent of the power to be provided for the amendment and the procedure which is to be followed for amendment. Some scholars treat constitution as a sacrosanct document having sanctity of its own while others are of the view that there is no logic in forcing and compelling the present generation to follow and be governed by the logic and the reason of the past generation. So the scholars of the former categories subscribe to the view that the power of the amending the constitution should be very limited while the

[1] K.C.Wheare, Modern Constitution.

scholars of the later categories are of the view that the power of the amendment must be of plenary nature.

## IMPORTANCE OF AMENDMENT IN A FEDERAL CONSTITUTION

In a federal constitution the powers of government are divided between a government for the whole country and government for part of the country in such a way that each government is legally independent within its own sphere. Neither is subordinate to other, both are co-ordinate. Federal constitution may enumerate the power of one and provide residuary powers to other government or it may enumerate the power of both and provide residuary power to anyone, in any case the essence of federalism is the distribution of powers in such a way as both governments are independent and co-ordinate.

As in a federal structure the power and sphere of the federal government and constituent units are so divided that both are independent and co-ordinate, the original text of the constitution acquires its own sanctity and any change in it must be a very cautious and deliberate attempt so as not to disturb the balance of power. For this purpose, a federal constitution provides itself method of its amendment. It involves a complete and often complex procedure so as to ensure the sanctity of both the constitution and the federal set up provided by it. However, it is pointed out by K.C. WHEARE, that the ease or the frequency with which a constitution is amended of depends not only on the legal provisions which prescribes the method of change but also on the predominant political and social groups in the community and the extent to which they are satisfied with or acquiesce in the organization and the distribution of powers which the constitution prescribe. If the constitution suits them, they will not alter it much, even if the alteration requires no more than an ordinary Act of parliament and vice versa. Thus these obstacles are part but not the whole of the circumstances which will determine whether a constitution is going to be easily and frequently change or not.[2]

In case a federal constitution a tug–of–war appears to be there because on the one hand it is established fact that the framers of the federal constitution after considering all socio, economic, political and other circumstances and after having a good deal of discussion in constituent

[2] Supra, 1.

assembly bring into existence the federal constitution the most essential feature of which is such division of power between the center and state as the both of them are independent and co-ordinate. It takes much to establish such balance. On the other hand, it goes without saying that a constitution is an organic document. Constitution of nation is outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. A constitution is an experiment as all life is an experiment. If the experiment fails, there must be provision for making another. Jefferson said that a constitution is not an end in itself, rather a means of ordering the life of a nation. The generation of yesterday might not know the need of today and if yesterday is not to paralyze today, it seems best to permit each generation to take care of itself.

Thus, if the federal constitution is to express the hope and aspiration of the people of the nation, it must also provide for its amendment to maintain continuity with changing needs and ideals of the society.

## POSITION IN INDIA AT THE TIME OF INDEPENDENCE

In the initial years of the independence and working of the constitution, the position was very uncertain and confusing. That phase was also very critical with respect to the social, economical, institutional development of the country. The framers of the constitution had a vision in their mind. The vision of prosperous and developed India. For attaining this vision they had produced an excellent constitution and this is the sole basis of the arguments of the scholars of former category, while at the same time no one can deny requirement of new solution for the problem faced by a country which got its independence a few years back after the several hundred years of its subordination during which period both the economic and the human resources were exploited to that extent that it became weak and exhausted politically, economically, socially as well as intellectually.

At this juncture the role of judiciary which is provided with the responsibility of interpreting and protecting the constitution became much more important especially when it is entrusted not only with the responsibility of interpretation and adjudication but also of protecting the constitution and safeguarding the rights of majority of poor and illiterate people . The judiciary at this stage was to decide by the way of interpretation of the constitution the pace of social and economic

development of the country. The whole of this exercise has been broadly covered under the head of judicial review. In the present paper attempt has been made to analyse the exercise the power of judicial review by the Indian judiciary with respect to the amendment of the constitution and as to how the power exercised by the Indian judiciary is different from the exercise of such power by the American Supreme Court.

## FORMAL AMENDMENT PROCEEDINGS IN AMERICA AND INDIA[3]

In India the formal amending power is provided to the parliament by Article 368 of the constitution. Article 368 is expressed in following words:

**Article368. Power Of Parliament to Amend The Constitution And Procedure Therefor:**

**(1)** Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

**(2)** An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-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 thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in –

**(a)** 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 I of Part XI, or

**(c)** any of the Lists in the Seventh Schedule, or

[3] The comparison of these provisions makes it clear that the procedure for amendment adopted in America is more federal than the procedure adopted in India.

**(d)** the representation of States in Parliament, or

**(e)** the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions 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 III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground.

**(5)** For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

**In American Constitution Article 5** provides the formal method of amending the constitution. Article 5 is expressed in following words:

**Article 5**

"The 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.

## EXERCISE OF JUDICIAL REVIEW BY INDIAN JUDICIARY

### A) Constitution (First Amendment) Act, 1951 and the case of Shankari Prasad Singh

In Shankari Prasad Singh v. Union of India, the first case of amend ability of the constitution the validity of the constitution (First Amendment) Act, 1951, curtailing the right to property guaranteed by Art. 31 was challenged. The argument against the validity of the First Amendment was that Art. 13 prohibit enactment of a law infringing or abrogating the fundamental rights, the word 'law' in Art. 13 would include any law.Here was thus posed a conflict between Art, 13 and 368.

Adopting the literal interpretation court upheld the validity of First Amendment. The court rejected the contention and limited the scope of article 13 by ruling that the word 'Law' in article 13 would not include within its compass a constitution amending law passed under article 368. The court stated on this point: "we are of the opinion that in the context of the Article 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the constitutions made in the exercise of constituent power with the result that Article 13(2) does not affect amendments made under Article 368".

The Court insisted that the fundamental rights are not excluded or immunized from the process of constitutional amendments under Art. 368. These could not be invaded by legislative organs by means of laws and rules made in exercise of legislative power, but they could certainly be curtailed abridges or nullified by alteration in the constitution itself in exercise of constituents powers. There is a clear demarcation between ordinary laws, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power.

### B) Constitution (Seventeenth Amendment) Act, 1964 and the case of Sajjan Singh

For the next 13 years following Shankari Prasad the question of amending ability of fundamental rights remained dormant.

The same question was raised again in 1964 in Sajjan Singh v.Rajasthan, when the validity of the constitution (Seventeenth Amendment) Act, 1964, was called in question. This amendment again

adversely affected the right of property. By this amendment a number of statues affecting property rights were scheduled in ninth schedule and were thus immunized from court review.

The majority ruled that the 'pith and substances' of the amendment was only to amend the fundamental rights so as to help the state legislatures in effectuating the policy of the agrarian reform. If it affected Article 226 in an insignificant manner, that was only incidental; it was an indirect effect of the seventeenth amendment and it did not amount to an amendment of Art. 226. The impugned Act did not change Article 226 in any way. The conclusion of Shankari Pd. was reiterated by majority. The majority refused to accept the argument that Fundamental Rights were "eternal, inviolate, and beyond the reach of Art. 368."

However, the minority consisting of HIDAYATULLAH and MUDHOLKAR, JJ., in separate judgments expressed some reservations on the question whether Art. 13 would not control art. 368. HIDAYATULLAH, J. observed "I would require stronger reasons than those givens in Shankari Prasad's case to make accept the view that fundamental rights were not really fundamental but were intended to be within the powers of amendments in common with the other parts of the constitution and without concurrence of states, because the constitution gives so many assurance in part III that it would be difficult to think that they were play things of a special majority."

***c) Constitution (Seventeenth Amendment) Act and the case of GOLAK NATH***

Again the constitutional validity of the constitution (Seventeenth Amendment) Act was challenged in a very vigorous and determined manner. Eleven judges participated in the decision and they divided 6 to 5.

The majority now held overruling the earlier cases of Shankari Prasad and Sajjan Singh that the fundamental rights were non-amendable through the constitutional amending procedure set out in Art. 368, while the minority upheld the line of reasoning adopted by the Court in two earlier cases.

Overruling the position adopted by the court in Shankari Prasad and Sajjan Singh, it was now ruled that the term 'law' in a comprehensive sense would include constitutional law as well. The court formulated its position as follows "An amendment in the constitution is a law within the inclusive definition of the law under Article 13(2) of the constitution and, as the entire scheme of the

constitution postulates the inviolability of part III therefore article 368 shall not be so constructed as to destroy the structure of our constitution".

At this stage, the five Judges took recourse to doctrine of 'prospective overruling' because of two reasons. **First**, the power of parliament to amend the fundamental rights, and the first and the seventeenth Amendments specifically had been upheld previously by the Supreme Court in Shankari Pd. and Sajjan Singh. **Secondly**, during 1950 to 1967, a large body of legislation had been enacted bringing about an agrarian revolution in India. This isolation was based on the premise that parliament had authority o amend Fundamental Rights. Therefore the present decision was not to invalidate the amendments made so far to the fundamental rights. But in future the parliament has no power to take away or abridge any of the fundamental rights.

To make fundamental rights unamendable the majority refused to accept the thesis that there is any distinction between 'legislative' and 'constituent' processes. It went even further and asserted that the amending process in Article 368 is merely LEGISLATIVE and not CONSTITUENT in nature. This was the crux of the whole argument. If a Constitution Amendment Act could be regarded as just an ordinary law then it could plausibly be caught by Article 13. To bolster this position, the majority went to the extent to saying that Art. 368 did not confer any amending power but merely laid down the procedure there for. The majority located the amending power in Article 248 which only grants the legislative power with a view to annihilate the distinction between the 'legislative' and 'constituent' power. The majority found countenance to its argument from one anomalous feature of Art, 368. Viz. that the procedure laid down therein is very similar to ordinary legislative process.

The following four main propositions can be drawn from the majority opinion in Golak Nath case:-

1. The substantive power to amend is not to be found in Art. 368 this article only contain the procedure to amend the Constitution.

2. A law made under Art. 368 would be subject to Art 13(2) like any other law.

3. The word 'amend' envisaged only minor modifications in the existing provisions but not any major alterations therein;

4. To amend the fundamental rights, a constituent Assembly ought to be convened by the parliament.

The majority in Golak Nath case emanated from the premise that fundamental rights are fundamental and need to be protected. The majority was afraid of a possible erosion of the Fundamental Rights if the process of amendments of these rights continued unabated and was not halted. The minority set up the major premise that these rights are transcendental and must not, therefore, be allowed to be whittled down by parliament. It is true that far reaching amendments had been made to some of these rights and at times in a hurry and not after a cool and mature considerations, and so majority genuinely apprehend that those rights might be completely eroded in future. Nevertheless, what the court laid down in Golak Nath was unprecedented, and its logic could not stand a close scrutiny.

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

In the 1971 general elections the congress party was returned with a huge majority in lok sabha and party was placed in the position of undoing the effect of Golak Nath. Accordingly in 1971, parliament enacted the constitution Twenty-Fourth Amendment Act introducing certain modifications in Arts. 13 and 368 to get over the Golak Nath ruling and to assert the power of parliament, denied to it in Golak Nath, to amend the fundamental rights. Thus an attempt was now made to undo the effect of Golak Nath.

Following changes were sought to be made in Arts. 13 and 368:

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

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

c. The marginal note to Article 368 was changed from “Procedure for amendment of Constitution” to “Power of parliament to amend the constitution and procedure therefore”.

d. A clause was added to Art. 368 saying that "Notwithstanding anything in this constitution, parliament may in exercise of its constituent power amend by way of addition, variation or repeal any procedure of this constitution in accordance with the procedure laid down in this article."

e. A view had been expressed in Golak Nath that there was no difference between an ordinary law made under legislative process and constitutional amendment made under constitution powers. To prove this point it had been pointed out that the presidential power to assent, or not to assent, was similar in both cases- an ordinary law as well as a law passed under Art. 368.

   To meet this argument it was now clarified that once a constitutional amendment bill is passed by both houses of parliament by the requisite majority in accordance with the procedure laid down in Art. 368, the president would have no option but to give his assent to it.

**E) Constitution (Twenty-Forth and Twenty-Five Amendment) Act and the case of Kesavananda Bharati**

The constitutional validity of both the amendments, via, XXIV and XXV, was challenged in Supreme Court in Kesavananda Bharati v. State of Kerala. The matter was heard by a bench consisting of all 13 Judges of the Court. The major propositions held by court in this case can be summarized as follow:

a. The court now held the power to amend the constitution is to be found in Article 368 itself. It was emphasized that the "provisions related to the amendment of the constitution are some of the most important features of the modern constitution."

b. The Court recognized that there is a distinction between an ordinary Law and a constitutional law.

c. But the court did not concede an unlimited amending power to Parliament under Art. 368. The amending power was not subjected to one very significant qualification. Viz. that the

amending power cannot be exercised in such a manner as to destroy or emasculate the basic or fundamental features of the constitution. A constitutional amendment which offends the basic structure of the constitution is ultra virus.

d. The court meant that while Parliament can amend any constitutional provision by virtue of Art. 368, such a power is not absolute and unlimited and the courts can still go in to question that weather or not the amendment destroys the basic or fundamental features of the constitution. If an amendment does so, it will be constitutional invalid.

Kesavananda ruling can be regarded to be an improvement over the formulation in Golak Nath in at least two significant respects:

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

(ii) Golak Nath made all Fundamental Rights as non-amendable. This was too rigid a formulation. Kesavananda introduces some flexibility in this respect. Not all Fundamental rights en bloc are now to now regarded as non-amendable but only such of them as may be characterized as constituting the "basic" features of the Constitution.

In Keshvananda Bharti Case the first part of Art. 31C was upheld chiefly on the basis that it identified a limited class of legislation and exempted it from the operations of Articles 14, 19 and 31. Hence no delegation of amending powers was required. But the second part of Art. 31C was held to be invalid. The purport of this ruling was that while a law enacted to implement Arts. 39(b) and 39(c) may not be challenged under Arts. 14, 19 and 31, nevertheless, the courts shall have the power to go in to the question whether the impugned law does in fact achieve the objective inherent in Articles 39(b) and 39(c) or not.

### *F) Constitution (thirty ninth amendment) Act And the case of Indira Nehru Gandhi v. Raj Narain*

Indira Nehru Gandhi v. Raj Narain gave an opportunity to the Supreme Court to examine and apply Kesavananda Bharati. In that case appellant filed an appeal against the decision of Allahabad High Court invalidating her election on the ground of corrupt practices. Pending the appeal parliament enacted the thirty ninth amendments to overcome the effect of the high court judgment by withdrawing the jurisdictions of all courts over election disputes involving the Prime Minster. Following Kesavananda Bharati it was argued that the amendment affected free and fair election and judicial review, these being parts of the basic structure of the constitution; and therefore was unconstitutional. It was further argued that parliament in the exercise of constituent power was not was not competent to exercise power to validate an election declared void by a High Court.

This challenge was unanimously upheld by the Supreme Court. Khanna, and Mathew, JJ. held that democracy was an essential feature forming part of the basic structure of the constitution. The exclusion of judicial review in election disputes in this manner damage the basic structure.

In this case one more issue of application of doctrine of basic structure to the ordinary legislation was raised. According to Ray, ordinary legislation was not subject to the doctrine of basic features. Mathew, J. agreed with the chief justice in keeping ordinary legislation out of the purview of the doctrine of the basic features. However Beg, J. asserted that doctrine of ordinary features controlled ordinary legislation too.

This aspect of case defies logic because a basic feature of the constitution must be part of the Constitution which cannot be taken away even by an amendment of the constitution. How can logically any part of the constitution be disregarded by the legislature and be immune from challenge. The difference of approach between the opinions expressed in this case is found in the application of the doctrine of basic structure to test the validity of both constitutional as well as ordinary law making. The majority view appears to be that it was not available to test the validity of the impugned provisions of the Representation of the People Act as there was no ambiguity to be resolved about the ordinary law making powers of the parliament. On the other hand it was applied to interpret the ambit of the constituent power as there was uncertainty about its scope.

### *G) Constitution (Forty Second Amendment) Act 1976 and the case of Minevera Mills Ltd. V. Union of India*

The scope and the extent of the application of the doctrine of basic structure again came up for examination in Minevera Mills Ltd. V. Union of India.

In this case the petitioners challenged the validity of section 4 and 55 of the Constitution (Forty Second Amendment) Act 1976 on the ground of the violation of the basic structure of the constitution as laid down in Kesavananda Bharati. These section amended the respective Articles 31-C and 368. In Article 31-C laws implementing any directive Principles were exempted from challenge on the ground of violation of Article 14, 19 and 21; and Article 368 clauses (4) and (5) validated all invalidated and existing amendments and remove all limitations on future amendments. While the court unanimously invalidated the amendment of Art. 368, it invalidated the amendment of the Article 31-C by 4:1. Applying the basic structure doctrine with respect to article 368 it held that:

> "Since the constitution had conferred the limited amending power on the Parliament, the parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our constitution and therefore, limitations on that power cannot be destroyed."

In respect to Article 31-C the court held that:

> "Harmony and balance between fundamental rights and directive principles is an essential feature of basic structure of the Constitution … Anything that destroys the balance between the two parts will ispo facto destroy an essential element of the basic structure of our constitution." As the amended article 31-C gave primacy to all Directive Principles over the core Fundamental Rights, it violated the harmony between two and accordingly destroy the basic structure of the Constitution."

### *H) Article 31-A, 31-B, Ninth Schedule And Waman Rao v. Union of India*

In Waman Rao v. Union of India, Supreme Court re-examined an upheld the validity of the original and the amended Article 31-A and of Article 31-B and the Ninth Schedule with respect to the basic structure doctrine. About the First Amendment introducing these Articles and the schedules in the Constitution the Court also said instead of weakening the Amendments strengths the basic

structure because it "made the constitutional idea of equal justice a living truth." The court also said the same thing about the unamended Article 31-C as it stood before the constitution (Forty Second Amendment) Act, 1976.

The court declared that all acts and regulations included in the ninth schedule up till the land-mark case of Kesavananda April 24, 1973 will receive full protection of Art. 31B. Since IXth schedule is a part of constitution, no addition or alteration can be made therein without complying with the restrictive provision governing amendments to the constitution. Therefore, the Acts and regulations included in the IXth schedule after the Kesavananda will not receive the protection of Article 31B for the plain reason that in the face of the Kesavananda judgment, there is no justification for making additions to the IX schedule with the view to conferring a blanket protection on the laws included therein. "The various Constitutional amendments, by which additions were made to the IXth schedule on or after April24, 1973 will be held valid only if they do not damage or destroy the basic structure of the constitution."

In **I.R. Cohelo v. State of T.N.**, a nine Judge bench led by Sabharwal C.J. unanimously reaffirmed the law laid down in Waman Rao. Following two points can clearly be deduced from the reading of abovementioned two supreme court ruling:

1. Generally a ordinary law can be challenged on two ground:
    a. Lack of legislative competence
    b. Violations of Fundamental Rights
2. Earlier, the legislation placed in IXth scheduled could be challenged only on the basis of lack of Legislative competence and not on the violation of Fundamental rights.
3. But now after the Waman Rao and I.R. Cohelo the law placed on the IXth Schedule could be challenged again on two grounds:
    a. Lack of legislative competence

b. If it violates Fundamental Rights if such violation also amounts to the destruction of basic structure

### *H) Constitution (Forty Second Amendment) Act and S.P. Sampath Kumar v. Union of India, P. Sambhamurthy v. State of A.P., L. Chandra Kumar v. Union of India*

The court in S.P. Sampath Kumar v. Union of India upheld the validity of Article-323A (inserted by firty second amendment) which provides for Administrative Tribunals free from the jurisdictions of all Courts except the Supreme Court on the ground that Parliament can make effective alternate institutional mechanism or arrangements for judicial review without violating the basic structure of the Constitution if such mechanisms and arrangements are no less effective than the High Courts.

Under part XIVA, the Administrative Tribunals Act, 1985 made in pursuance of Article 323 A lacks in certain respects in providing the effective alternative the court ordered necessary changes to be made in Act within a specified time in order to save it from unconstitutionally. This was another innovative way of reviewing the amendability. Referring to this case alone and not any other discussed above, in **P. Sambhamurthy v. State of A.P.**, the court speaking through chief justice Bhagwati unanimously invalidated clause (5) of Article 371-D. This article was introduced by Thirty-second Amendment of the Constitution with effect from 1st July 1974. The main part of the clause (5) provided that the final order of the Administrative Tribunal to be set up under clause (3) of that Article shall became effective upon its confirmation by the Government or on the expiry of three months. The provisio to clause (5) authorized the Government to modify or annul any order of the Tribunal. The court held that proviso was "violative of the rule of law which is clearly a basic and essential feature of the constitution". If the exercise of the power of judicial review, the court added "can be set at naught by the State Government by overriding the decision gave against it, it would sound the death-knell of the rule of law". Since the main part of the clause (5) was closely related with the proviso and did not have any rationale for its independent existence the entire clause was invalidated. In **L. Chandra Kumar v. Union of India**, the Supreme Court held that to the extent Articles 323-A and 323-B excluded the jurisdiction of the Supreme Court under Article 32 and of the high court under Article 226 they were unconstitutional. The court emphasized that judicial review was a basic feature of the Constitution which cannot be diluted by

transferring judicial power to the administrative tribunals and excluding the review of their determinations under Article 32 or 22

### *Analysis of Way Of Indian Judicial Review w.r.t. Amendment*

Within one year of its adoption, the constitution had to be amended so as to accommodate the land reforms. And from that time itself the citizen have approached the Supreme Court for getting the amendments to be declared void. Prima facie it can be said by a lay man that in the initial years, the approach of Supreme Court was not clear and it gave several confliction decision but with the passage of time Supreme Court has understood its responsibility in a developing country and evolving democracy and its decisions evolved a jurisprudence guiding any future amending of the constitution. But I do not personally agree with this point as I think that even in initial years Supreme Court was quite consistent in its spirit of protecting the majority of poor, illiterate and weak people of India. In Shankari Prasad and sajjan Singh case when it permitted the amendment of Fundamental Rights it did that so that the Rights of jamidars and big land owners could be encroached so as establish an egalitarian society and a socialistic state in which all persons are entitled to their bare minimum requirements. In this way Supreme Court was consistent in its basic philosoply.

To protect the sanctity and the identity of the constitution from the narrow and selfish interest the SC of India had to be proactive and much alive. In case of **Keshavananda Bharti v. State of Kerala**[4] it propounded the theory of basic structure which is influenced by German practice. The theory of basic structure is based on the concept of constitutional identity. According to this doctrine, the word amendment postulates that the old constitution survives without loss of its identity despite the changes and it continues even though it has been subjected to alteration. To destroy is to abrogate the basic structure of the constitution.

Kesavananda illustrates judicial creativity and the policy-making role of Supreme Court of a very high order. The majority Judges sought to protect and preserve the basic features of the constitution against the onslaught of transient majorities in the parliament. An unqualified amending power could not mean that a political party with two-third majority in the parliament, for a few years

[4] Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461.

could make changes in the constitution, even to the extent of establishing a totalitarian state, to suits its own political exigencies. It was a conscious 'policy' decision on the part of Supreme Court to read implied limitations on the amending powers in order to preserve basic, core, constitutional values against the onslaught of transient majorities in the parliament. In Kesavananda, several judges felt convinced that several ideas and values embedded in the Constitution should be preserved and not destroyed by any process of the Constitutional amendment. The constitution driving its strength and sanction from the national consensus, and enacted in the name of the "People of India" should not be amendable merely by 2/3 vote in parliament when the truth is that 2/3 of the Lok Sabha does not represent a very broad national consensus, as nearly only 40% of the registered voters cast their votes in general elections and these voters are divided among several political parties contesting the general election to the lok sabha. Besides it, Rajya Sabha has no popular mandate as, in effect, it consists of the nominees of the various political parties elected by the various State Legislatures.

After the re–affirmation and extension of the applicability of the doctrine of Basic Structure in the Minerva mills case[5], it is now evident that so long as the decision in Keshvananda Bharti case[6] is not overturned by another full (larger) bench of the SC (which may come only as an extraordinary event) any amendment of the constitution is liable to be interfered with by the court on the ground that it affects one or other of the basic feature of the constitution. One post Keshavananda Bharti development is that the court has declined to foreclose the list of the basic features as suggested by different judges in the keshvanand case. In Raj Narain case[7] it has been observed that the claim of any particular features of the constitution to be a "basic" feature would be determined by the court in each case that comes before it. In the result, it is impossible for those responsible for amending the constitution to guess what surprise lies in store for them before the SC. So far, quite a multitude of features have been acknowledged as basic by different judges, individually, in different cases, though there is no consensuses as regards each of them, in particular:

(1) Supremacy of the constitution[8]

[5] Minerva mills Ltd. V. Union Of India, AIR 1980 SC 1789.
[6] Supra, 15.
[7] Indira Nehru Gandhi V. Raj Narian, AIR 1975 SC 2299.
[8] Supra, 15.

(2) Rule of law[9]

(3) Principal of separation of Powers[10]

(4) The Principal behind the Fundamental Rights [11]

(5) The objectives specified in the preamble to the constitution[12]

(6) Judicial review – Writ Petition under Article 32-226/27[13]

(7) Federalism[14]

(8) Secularism[15]

(9) The sovereignty[16]

(10) Freedom & dignity of the individual[17]

(11) Unity & integrity of the Nation[18]

(12) The concept of social a economic justice to build a welfare state, Part (IV)[19]

(13) Parliamentary system of government[20]

(14) Limitation upon the amending power conferred by Art 368[21]

[9] Supra, 18.
[10] Supra, 15.
[11] I.R. Coelho vs. State Of Tamil Nadu, (2007) 2 SCC1.
[12] Supra, 15.
[13] L. Chandra Kumar v. Union Of India, AIR 1887 SC 1125.
[14] Supra, 15.
[15] Supra, 15.
[16] Supra, 18.
[17] Supra, 15.
[18] Supra, 15.
[19] Supra, 15.
[20] Supra, 15.
[21] Supra, 16.

(15) Independent & efficient Judicial System[22] Delhi Judicial Service Association v. State Of Gujarat, AIR 1991 SC 2176

(16) Power of Supreme Court under Article 32, 136, 141, 142[23]

In the later cases of Waman Rao v. Union of India and I.R. Coelho vs. State Of Tamil Nadu, (2007) 2 SCC1, Supreme Court again put on scrutiny the law made by several state legislatures and placed by the parliament in the ninth schedule so as to examine whether such laws are made and placed in the said schedule so as to confirm and promote the philosophy behind providing such schedule or whether they are placed in the said schedule so as merely to avoid the judicial review. Supreme Court has made it clear that the law placed by parliament under ninth schedule on or after the passing of Keshavananda Bharti case on case to case basis can be reviewed by the supreme Court and if it is found destructive of Basic Structure of the constitution it shall be declared unconstitutional by the court. Such a move by the Indian apex court is unprecedented in the world and set an example for others.

***Analysis of way of American Judicial Review w.r.t. Amendment***

Though the validity of an amendment is a judicial question, the determination of it in the U.S. has become unnecessary for the court has no further purpose in subjecting any amendment to its scrutiny. The method of proposal and ratification of an amendment, in each case, is such as to leave no room for hasty or ill considered action, and court can do no better. The mutual respect obtaining between the judiciary and the legislature is responsible for this sense of security. The immunity from scrutiny by courts as regards the scope of a constitutional amendment is special in the US and serves as a useful convention[24]. Statistics reveal that during 160 year, out of more than 300 and odd amendment proposed, 22 have secured ratification in the U.S. This also accounts for the disinclination to further hedge in the power of amendment by more and more restriction or limitation, such as may be forged by the SC.

[22] All India judges Association v. Union Of India, AIR 1992 SC 165.
[23] Delhi Judicial Service Association v. State Of Gujarat, AIR 1991 SC 2176.
[24] D. Munikanniah, Amendments To Constitutions.

The SC has generally regarded the amending process as almost entirely a concern of congress, subject to very little in the way of judicial supervision or control. One of the important example of it is when after the cold war, the states which had attempted to secede and which had not been readmitted to the full enjoyment of the privileges of states, were required by congress to ratify the 14th & 15th Amendments as a condition to their readmission, The SC refused to question this requirement in the case of White v. Hart[25].

However, until 1939, SC passed judgment on procedural problems pertaining to the adoption of amendments. In **National Prohibition cases**[26], it ruled that 2/3 vote in each house required to propose an amendment mean 2/3 of the members present & not a two third of entire membership. In **Leser v. Garnett**[27], the validity of 19th amendment was attacked on the ground that the ratifying resolutions in 2 states were adopted in violation of those states rules of legislative procedure. But the court regarded official notice of ratification from the state to U.S secretary of states a conclusive upon him and held that his certification was conclusive on the courts.

In **Coleman v. Miller**[28], however, the court refused to take the responsibility of deciding as to what was a reasonable period for ratification. That was an essentially political question, which congress would have to determine. Four members of the court went further to hold that the court's assertion in **Dillon v. Gloss**[29] that amendment must be ratified within a reasonable period was entirely unauthorized, and nothing more than an "admonition to the congress in the nature of an advisory opinion". Their view was that the entire process of amendment was political and not subject to judicial guidance, control or interference at any point". Even the majority decision, it should be noted, left open the possibility of only a bare minimum of judicial control over the amending process, and it is significant to note that the court has not dealt with an amending clause problem since **Coleman v. Miller**[30].

[25] White v. Hart, 80 U.S. (13 Wall.) 646, (1982)
[26] National Prohibition cases, 253 US 350 (1920).
[27] Leser v. Garnett, 258 US 130, (1922).
[28] Coleman v. Miller, 307 US 433 (1939).
[29] Dillon v. Gloss, 256 US 368, (1921).
[30] Supra, 41.

## CONCLUSION

**A**t the time of its independence (which the country attained from the colonial rules which make it weak in every field for centuries), the conditions were very poor and there was no light which was appearing the lead the countries towards the enlighted future. After the first general election there was a new legislature, executive and judiciary which had to fight against the century old social, economical and political problems of a country which had become weak due to centuries of colonial rule. At that point what was the most important was the establishment and continuance of these three organs of the government. But its not a matter of secret that even from the starting the legislature and executive started to succumbed to the regional, religious, castiest, linguistic, and communal etc. pressure. And in the influence of such pressure it has not only made relevant legislations for that purpose but also sought to make constitutional amendments. The role of judiciary became important when such legislation and especially constitutional amendments were challenged by citizens.

And after almost 62 years of successful working of the constitution it may be safely concluded though Supreme Court was not absolutely consistent from the very beginning, yet it interpreted the conclusion every time incorporating the aspirations of the large number of the poor and weak citizens. Supreme Court never strictly follow the rule of literal interpretation and it always interpreted the constitution keeping in mind the context in which the amendment was made as well as the context in which it was challenged. The Supreme Court evolved and innovated methods of judicial review to protect the basic structure of the constitution and at the same time to minimally interfere in the power of parliament to legislate and amend. Interpretation given by Supreme Court especially in context of amendment, set an example for the scholar who subscribe to the view that the constitution is a luxury document and it express the aspiration as well as the goals of the citizens and thus it cannot be absolutely left in the hand of members of parliament who does not truly and represent the 2/3 of total population.