



# The Journal of Multidisciplinary Research (TJMDR)

Content Available at [www.saap.org.in](http://www.saap.org.in)

ISSN: 2583-0317



## A CRITICAL ANALYSIS OF THE POLITICS OF CONSTITUTIONAL AMENDMENT

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Received: 12 June 2023 Revised: 04 July 2023 Accepted: 27 July 2023

### Abstract

This paper discusses the relationship between the judiciary and the legislature in India. It argues that the judiciary has the power of judicial review, which allows it to strike down laws that it deems to be unconstitutional. This power has been used by the judiciary to balance the power of the legislature and to ensure that the rights of citizens are protected. The paper begins by discussing the history of judicial review in India. It then examines the two landmark cases in which the Supreme Court of India has upheld its power of judicial review: *Kesavananda Bharati v. State of Kerala* and *Minerva Mills v. Union of India*. The paper then discusses the implications of judicial review for the relationship between the judiciary and the legislature. The paper argues that judicial review is a necessary check on the power of the legislature. It also argues that judicial review can help to protect the rights of citizens. However, the paper also acknowledges that judicial review can be used to interfere with the democratic process. The paper concludes by arguing that the judiciary and the legislature should work together to ensure that the power of judicial review is used in a responsible way and focuses on the point that the legislature should be transparent about its decision-making process and that it should be accountable to the people.

**Keywords:** Judicial review, Supremacy of the Judiciary, Basic Structure, Parliament, Legislature, Constitution, Safeguarding the constitution, Judicial Activism, Separation of Powers.

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DOI: <https://doi.org/10.37022/tjmdr.v3i2.463>

### Produced and Published by

South Asian Academic Publications

### Introduction

One of the first tasks of independent India was to frame a new Constitution, as the 15<sup>th</sup> of August 1947 was only the beginning of a struggle to establish a democracy. The Constitution was made by taking inspiration from the different constitutions of the world. And came into existence on 26<sup>th</sup> January 1950. The day has been marked in history for the birth of a new republic. The framers of the Constitution, while borrowing different provisions from different constitutions put emphasis on making the Constitution flexible and adaptable to the changing situation of the society and hence, article 368. Article 368 gives the parliament the power to amend the Constitution. The framer of the Constitution, with the view of a less rigid document, wanted to make a provision to change the Constitution with the growing democratic country. Moreover, it was given the importance that the provisions would not be too modifiable that they can violate the very document it is mentioned in. This paper through some of

the historic amendments and judgment critically analyses a broader question of whether finding a path between the extreme flexibility and extreme rigidity to change the constitution with the growing society opened a box of pandora for subversion of the very document by tilting towards the former way.

### Research Question

- Whether Article 368 made the Constitution more flexible or it pushed the Constitution towards more unreasonable changes?
- Whether major judicial pronouncements were bold enough to question the vexatious use of legislative power of the parliament?

### Chapter One

#### Criticism of the Revolutionary Judgments

The parliament was given the power to amend the constitution under article 368 and it has been used many times since. The first amendment took place in the very same year the Constitution was born. In June 1951 the parliament moved its first constitutional amendment act. The country was newly independent and facing a lot of socio-economic problems. There was a need for social and economic equality and that had been done by distributing the land proportionately, i.e., abolishing the zamindari system. The people started challenging any law brought by the parliament to quash the zamindari system. Thus, the parliament had to insert a new provision to help the

policymaking process less judicially questionable. The most important insertion was the 9<sup>th</sup> schedule<sup>1</sup>, through which the government introduced many Zamindari abolishing laws.

The major changes started occurring after a landmark judgment in 1967. In 1967 two brothers filed a petition in the Supreme Court under Article 32. In the petition, it was mentioned the Punjab government violated the fundamental rights of the petitioners and violated part III of the constitution. The court held that parliament cannot curtail any of the fundamental rights in the Constitution. The fundamental rights are kept beyond the reach of parliamentary legislation.<sup>2</sup> The judgment was passed by overruling Sajjan Singh's judgment, where it was held the Parliament can amend any part of the constitution including fundamental rights.<sup>3</sup> The Golak Nath judgment also overruled the Shankari Prasad Judgement<sup>4</sup>, which challenged the 1<sup>st</sup> constitutional amendment, held valid even if it violates fundamental rights. Although the Golaknath judgment was revolutionary it failed to recognize the rights and duties are not balanced, and the representatives are more interested in fulfilling their individual aspirations rather aspirations of the people. The eleven-judge bench applied the Doctrine of Prospective Overruling which means the judgment will only have a prospective effect and all the amendment before the case was held valid. The bench basically held three important points;

1. Amendment will come under Article 13<sup>5</sup>.
2. The power of the parliament is limited regarding the amendment of the constitution.
3. If the parliament through any law or amendment violates part III of the constitution, the same can be held void by the judiciary.

The parliament was not satisfied with the judgment as it was revolutionary and opened a door to a wormhole of amendments to take place afterward. In the year 1971, the then Prime Minister, who wanted the parliament to have unlimited law-making power, passed the 24<sup>th</sup> Constitutional amendment, with the intention to nullify the impact of the Golaknath judgment. 24<sup>th</sup> amendment changed the very power of the parliament to make amendments. It was added to clause 3 in article 368. It gave the parliament unlimited power to amend the constitution even the fundamental rights. Moreover, it made the provision for compulsory assent of the President. The Golaknath judgment was a seed of what going to come afterward. In the year 1973, the historic judgment was passed by the largest bench in Kesavananda

Bharti Case.<sup>6</sup> The thirteen-judge bench overruled all the above judgments, which gave birth to the Doctrine of Basic Structure. It sets the subjective standard and gives more power to the judiciary. The basic structure theory has become an axiom of our constitutional law and one cannot imagine any Bench of the Supreme Court annulling that theory. It is also true that for whatever reason and method the majority view was arrived at, the axiom of inalterability of the basic structure of the Constitution has had a salutary check and control on the amending power. The Kesavananda Judgement change the trajectory of India's democracy. However, many questioned its complexity and inexplicit definition of what comes under the basic structure. The critics suggest that the inviolability of the basic structure doctrine was a dubious view of the majority of the bench.<sup>7</sup> Justice Dwivedi gave a distinction between Constitution and Law and continued his verdict, Constitution signifies a politico-legal document whereas law signifies legislative enactment. However, his point regarding the amendments not being included under Article 13(2) is problematic as well as narrow in its nature. The majority view was mainly of basic structure, but the doctrine is deeply enshrined in the constitution itself. Brushing it off and bringing it to the surface is not one of the most important jobs of the judiciary. However, the period after the Kesavananda case helps the doctrine to evolve through various judicial pronouncements. The bizarre part of the case was the afterward scenario that, although many criticized the judgment on various grounds no review petition was filed. So, it won't be absolutely wrong to say the court wanted a win scenario for the parliament as well as the Supreme Court.

## **Chapter Two**

### **The Insurgency on the Constitution**

It was not long enough after the historic judgment the challenges seemed to increase for the then-ruling government, which eventually brought the emergency. In 1975 Raj Narayan filed a case against Indra Gandhi on the ground of corrupt electoral practices, which conclusively went to the Supreme Court. The SC stayed the Allahabad Court judgment on the condition that she would not participate in parliamentary proceedings.<sup>8</sup> The National Emergency was declared. Again, to nullify the Allahabad Court judgment 39<sup>th</sup> Amendment was passed. Before that, in the 38<sup>th</sup> Amendment, the very power to question the reason for an emergency was deleted through the insertion of Article 123(4). In the emergency, the only positive action was the ban on RSS activity. While the entire opposition was in jail the parliament passed its 39<sup>th</sup>

<sup>1</sup> Constitution of India, 9<sup>th</sup> schedule

<sup>2</sup> I. C. Golaknath & Ors. v State of Punjab, 1967 AIR 1643

<sup>3</sup> Sajjan Singh v. State of Rajasthan, 1965 AIR 845

<sup>4</sup> Shankari Prasad Singh Deo v. Union of India And State of Bihar, 1951 AIR 458

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

<sup>6</sup> Kesavananda Bharti v. State of Kerala and Anr, 1973

<sup>7</sup> T.R. Andhyarujina, The Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by Supreme Court and Parliament, Universal Law Publishing Co. 2014

<sup>8</sup> Indra Nehru Gandhi v. Shri Raj Narain & Anr, 7 November, 1975

amendment act. This act was passed and the election of the President, Vice-president, Prime Minister, and Speaker could not be questioned in a court of law. It also added that any order passed by the court setting aside an election of any of these four functionaries would be deemed void. Then comes another reprehensible amendment; the 41<sup>st</sup> amendment, which amended article 361 and gave lifelong immunity from criminal prosecution of the Prime Minister, Governors, and President after and during their tenure. That means if a person holds any of these offices even for one day they got the immunity for life and escape from any heinous crime. Sad enough the fraudulent use of constitutional power did not stop there. One can see the mirror image of the 1975 parliamentary proceedings in 2020 when the farm laws were passed. Such a procedural lapse is a subversion of democracy. The procedure for the passage of the bill or amendment had been violated then and can be seen happening now. The similarities between the two governments' little to no regard for the parliament and the constitution is uncanny. The deliberate destruction of legislative scrutiny is very much present. The obstinate stand of the government, and silencing the opposition, all of these a little too real to take place in the parliament while passing major laws or in this case; amendments. The legislature was on very questionable ground but the major subversion through amendment was yet to happen.

### **Chapter Three**

#### **The Questionable Mini Constitution**

The emergency went on till 1977 and many amendments were taken place, and some of them questioned the very basic structure and violated fundamental rights. The 42<sup>nd</sup> Constitutional Amendment was one of them. The 42<sup>nd</sup> amendment was controversial and it would be apocryphal to say it was a positive step. Many changes were brought with the suggestions made by Swaran Singh Committee<sup>9</sup>. In the said amendment the most controversial ones were:

- (i) Prior to this amendment, the High Courts had the power to adjudicate upon any act passed by the Union Legislature. But this amendment restricted the power of the High Court.
- (ii) This amendment added Articles 226A and 228A, which allowed High Court to adjudge only the acts passed by the state legislature.
- (iii) This amendment was not only problematic for High Court but also it was made compulsory in the Supreme Court to constitute a seven-judge bench to decide upon the validity of any law brought in by the union and needed a 2/3<sup>rd</sup> majority to be declared void.
- (iv) This amendment added the provision to suspend rights conferred under Article 19 for the entire duration of the emergency.

- (v) The enforceability of fundamental rights is suspended under Article 359 of the constitution. Moreover, President can suspend the right to remedy for the people whose fundamental rights are violated during or by the emergency laws.

The amendment not only questioned the scope of the doctrine of separation of powers but also encroached on the power of the judiciary by the legislature. When the opposition came into power the 42<sup>nd</sup> amendment was reversed by bringing 43<sup>rd</sup> and 44<sup>th</sup> amendment. The powers of the Supreme Court and High Courts were provided back to them and it was a step towards strengthening the judiciary. And judiciary proved the reasoning of its duty to put checks and balances on legislature through the *Minerva Mills Case*.<sup>10</sup> It was held that judicial review comes under the purview of Basic Structure and cannot be hampered by any legislative action of the parliament. And the court also put emphasis on the limited amending power of the parliament. The majority was of the opinion that the parliament was vested with a limited power to amend the constitution it cannot exercise that very power and turn that into an unlimited one. The 42<sup>nd</sup> Amendment has a bad reputation although it has some positive aspects to it. However, it won't draw a veil over all the unconstitutional clauses it contains. One pragmatic way that arises out of this scuffle between parliament and the judiciary is that all the laws and constitutional amendments are now subject to judicial review and laws that contravene the basic structure are likely to be struck down by the Judiciary. The two-landmark judgment; *Kesavananda Bharti* and *Minerva Mills*, and the common scenario in both of the cases were none of the judges had a chance to review each other's judgment. No matter by how many precedents the judiciary will try to maintain its supremacy over parliament, parliament always seems to be at the other side of the door to manipulate the constitution. Nevertheless, Supreme Court is the final interpreter of all laws and constitutional amendments.

#### **Conclusion**

While answering the question of whether major judicial pronouncements were bold enough to question the vexatious use of legislative power of the parliament, another question lies behind, whether it always comes down to supremacy of one or another; judiciary or legislature. The continuous tug of war for the throne of supremacy not just questions the constitution but questions the very basic structure that the judiciary keep hailing when it was brought. Consequently, the question of whether Article 368 made the Constitution more flexible or it pushed the Constitution towards more unreasonable changes, goes to its framers. Although it would be naive to

<sup>9</sup> Fifth Series Vol. LXV. No.2 Lok Sabha Secretariat, Lok Sabha Debates, October 26, 1976

<sup>10</sup> *Minerva Mills Ltd. & Ors v. Union of India & Ors* 1980 AIR 1789

question the framers while they want to make the constitution flexible and adaptable, but it is the legislature who failed to understand the ideology behind and somehow judiciary went hand in hand, and did not stand clear on its view. And wanted to “play safe”. Thus, it always comes to interpretations and it’s the duty of the judiciary to interpret the law at its best to safeguard the constitution which not only safeguards the citizens but gives a way of life, rather to find a win situation for the parliament and the judiciary itself.

Article 368 was added by the framers only to make the Constitution less rigid and more adaptable in a changing society. And the judiciary mainly the legislature has to remember in a democratic country like India, though it slowly losing its status as the largest democracy, the constitution is supreme. Supremacy of the constitution prevails. And parliament does not have unlimited amending power. The parliament can’t make an amendment that affects the basic structure, although the basic structure is not given a static definition. And the judiciary has the power to use its creative interpretation. Although it can be said that some of the amendment is a result of societal evolution but the amendments, which are the result of the political framework cannot be ignored. The Constitution is in being for more than half a century and more than a hundred amendments were done. This recurrence not only can be a menace to the political structure of a state but also to the very fundamental rights of the people. Looking at the momentum one can say there’s a lack of certainty on safeguard people’s rights. The frequent amendments are a prerequisite of the dominance of one party, and the ruling party’s capability to shape the framework of the constitution to its personal benefit, botch the laws, which eventually results in being harmful to the citizens and their fundamental rights.

### **Funding**

No Funding

### **Acknowledgment**

Not Declared

### **Conflict of interest**

Author declared that no conflict of interest

### **Informed Consent**

Taken

### **Ethical Statement**

Not Applicable

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