E-tutorial

Title: Basic Structure of Constitution

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Dear learners this e-tutorial pertains to one of the most important topic and part of your syllabus that is Theory of Basic Structure of Constitution. After going through this e-tutorial we shall come to know about Scope of amending power of the Parliament including evolution of basic structure of constitution, contents of basic structure.

Introduction:

The constitution of India is considered to be the ‘General Will’ of the people of India. It is a document of immense importance. It is not only is the basic law of the land but the living organic by which the other laws are to be created as per the requirement of the nation. The life of a nation is dynamic, living, and organic its political, social and economic conditions are always subject to change. Therefore, a Constitution drafted in one era and in a particular circumstance may be found to be inadequate in another era in a different context. It becomes necessary therefore to have machinery or some process by which the constitution may be adopted from time to time as per the contemporary needs of the nation. Such changes may be brought by different ways including formal method of amendment contained in Article 368 of the constitution. Article 368 of the constitution does not prescribe any express limitation upon the parliament’s amending power. Since the commencement of the constitution, a constitutional battle has been fought, in this regard, both in the courts as well as, inside the parliament. It appears that parliament has been asserting its supremacy as enjoyed by the British parliament, but the Supreme Court has been interpreting parliament as a creature of the constitution, exercising powers under and not beyond the constitution. The constitution, though expressly confers amending powers on the parliament, but it is the Supreme Court which is to finally interpret the scope of such power and to spell out the limitations, if any, on such amending power. This battle between the parliament and judiciary gave birth to one of the important doctrine —— a limitation on parliaments amending power which is known as the doctrine of Basic Structure. This doctrine was evolved in the famous case of Kashvananda Bharti vs. State of Kerala A.I.R 1973 SC popularly known as the Fundamental Rights case in which the court observed that article 368 of the Indian constitution did not enable parliament to alter the ‘Basic Structure or Framework’ The basic structure doctrine is a judicial creation whereby certain features of the constitution of India are beyond the limits of amending powers of parliament of the constitution. From then till very recently, this doctrine continues to be the limitation upon the parliament’s power to amend the constitution, in spite of the fact that Article
368 is really silent as to the width of amending power. There has been a long journey almost two decades in carving an implied limitation in the form of doctrine of basic structure on the on amendment powers of the parliament under article 368.

**Evolution of Basic Structure Theory:**

Parliament’s power to amend the fundamental rights was challenged in year 1951. After independence several laws regarding Land Agrarian reforms were passed in several states with the aim of reforming land ownership and tenancy. Land owners which were adversely affected by such laws challenged the same and the courts declared these laws as unconstitutional. Parliament by reacting to the decisions of the courts placed these laws in the ninth schedule of constitution and thus making them immune from judicial review through first and fourth constitutional amendment.

The question whether fundamental rights can be amended under article 368 came for consideration in the Supreme Court in **Sankari Prasad Deo vs. Union of India (1952) S.C.R** in this case the validity of the Constitution (first Amendment) Act, 1951, which curtailed the right to property guaranteed by Article 31 was challenged. The argument against the validity of the First Amendment was that Article 13 prohibits enactment of a law infringing or abrogating the Fundamental Rights, that the word ‘law’ in Article 13 would include any law, even a law amending the Constitution and, therefore, the validity of such a law could be judged and scrutinised with reference to the Fundamental Rights which it could not infringe. Adopting the literal interpretation of the Constitution, the Supreme Court upheld the validity of the 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 a constitutional amendment passed under Article 368. The Court observed “we are of the opinion that in the context of article 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendment made in the exercise of constituent power under article 368 of the constitution.

The Court insisted that there is a clear demarcation between ordinary law, which is made in exercise of legislative powers, and constitutional law, which is made in exercise of constituent power. The Court thus held that Parliament could by following the ‘procedure’ laid down in
Art.368 amend any provision of constitution including fundamental rights, in absence of any clear and express limitation to the contrary the plenary power of parliament cannot be restricted.

The same question was raised again in 1964 in the case of **Sajjan Singh v. State of Rajasthan AIR 1965 SC 845**, wherein the validity of the constitution (Seventeenth Amendment) Act, 1964, was called in question. The impugned amendment again adversely affected the right to property.

The Supreme Court again rejected the argument by a majority of 3 to 2. The majority ruled that the ‘pith and substance’ of the Amendment was only to amend the Fundamental Right so as to help the State Legislatures in effectuating the policy of the agrarian reform. If it affected Art.226 in an insignificant manner, that was only incidental; it was an indirect effect of the Seventeenth Amendment. The court held that the constituent power conferred by article 368 on the parliament included even the power to take away fundamental rights under part III of the constitution.

Again in **Golak Nath vs. State of Punjab AIR 1967 SC, 1643** the question whether any of the Fundamental Rights could be abridged or taken away by Parliament in exercise of its power under article 368 was raised again in this case. Again, the constitutional validity of the Constitution 1st Amendment Act, 1951, 4th Amendment Act, 1955, 17th Amendment Act, 1964 was challenged in a very vigorous and determined manner. Eleven Judges participated in the decision and they divided 6:5.

The majority now held (overruling the earlier decisions in cases of **Shankari Prasad & Sajjan Singh Case**) that the Fundamental Rights were non-amendable through the constitutional amending procedure set out in article 368 while the minority upheld the line of reasoning adopted by the Court in the two earlier cases. The majority now took the position that the Fundamental Rights occupy a “transcendental” position in the constitution, so that no authority functioning under the Constitution, including Parliament exercising the amending power under Art.368 would be competent to amend the Fundamental Rights. It was also observed that article 368 merely laid down the procedure and it did not confer on parliament the power to amend the constitution. Chief Justice **Subha Roa** referred to the marginal heading of article 368. The power to amend the constitutional was to be found in the residuary legislative power of parliament contained in Art.248, because such a power was not expressly conferred by any article or any legislative entry in the Constitution. Accordingly, amendment to the Constitutional would
be a ‘law’ for purposes of article 13. The court held that the amending and legislative powers of the parliament were essentially same and therefore any amendment of constitution must be deemed law and falls under the purview of article 13(2) of constitution.

To neutralise the effect of Golak Nath decision, a bill was introduced in the Lok Sabha on April 7, 1967 to restore the parliament power to amend the fundamental rights. The object of the bill was to restore the original position of the parliament to make it explicit that parliament can amendment any provision of the constitution following the procedure contained in Article 368. Accordingly, in 1971, parliament passed the Constitution (24th Amendment) Act to neutralize the effect of **Golak Nath** and set the stage for **Keshavananda Bharati** case in the Indian constitutional history. By way of the Constitution (24th Amendment) Act, Parliament introduced certain modifications in Article 13 and Article 368 to assert the parliament's amending power and get over the Golak Nath case. 25th Amendment which inserted a new article 31C Subsequently by the Constitution (29th Amendment) Act, the Kerala Land Reforms (Amendment) Act, 1969 and 1971 were included in the Ninth Schedule of the Constitution in order to making them immune from attack on the ground of violation of fundamental rights. These amendments made by the parliament subsequent to the Golak Nath’s case were challenged in **Keshavananda Bharati vs. State of Kerala AIR 1973** which is popularly known as **Fundamental Rights case**. The petitioner in the instant case challenged the validity of **Kerala Land Reforms Act , 1963** passed by the state government as unconstitutional. He contended that the impugned Act violated his fundamental rights guaranteed under articles 14, 19(f), 25, 26 and 31. While the case was pending in the supreme court the parliament passed the above amendments viz, constitutional 24th amendment , 1971, constitutional 25th Amendment Act, 1971, 29th Amendment Act 1972. In order to sustain his claim before the court, the petitioner amended the petition and challenged the validity of 24th, 25th, and 29th Amendments. The case was heard by bench of 13 judges of supreme court. 11 judges delivered separate judgments.

The questions involved were:

- Whether the parliament possess unlimited power of amendment under article 368.
- Whether basic features of the constitution can be amended.
- What is the content of basic features in other words what constitutes basic features of constitution.
Majority of seven judges upheld the validity of constitutional 24th, 25th, and 29th Amendments overruled its earlier decision in Golak Naths case. The court laid down that the power of amendment under article 368 is unlimited. Parliament can amend any part of the constitution including the preamble but the amending power should not affect the basic features of the constitution. In other words parliament by exercising its amending power can not destroy the basic features of the constitution. However the courts did not define the basic structure with mathematical precision neither provided any guidelines so as to identify it. However the courts recognize certain elements as the basic features of the constitution which cannot be amended. Majority of the judges observed that there are certain basic features of the constitution which can be altered in by exercising the powers under article 368, constitutional amendment which seeks to alter or destroy the basic structure of the constitution of the constitution is ultra vires. The word amend under article 368 would mean changes other than altering the very basic structure of the constitution. The court in fact did not define the basic structure of the constitution in absolute and clear terms. Sikri, C.J., explained by giving certain examples of basic structure and observed,

**Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299** popularly known as Election Case. In this case the appellant Mrs. Indira Nehru Gandhi the then prime Minister filed an appeal before the supreme court from the judgments of Allahabad High court, wherein the election of the appellant to the loksabha was invalidated on the ground of malpractice and corrupt practice Under the **Representation of Peoples Act, 1951**. During the pendency of appeal the parliament passed the Constitution 39th Amendment Act, 1975 which inserted article 329A in the constitution to nullify the effect of Allahabad high court’s judgment and also withdraw the jurisdiction of all the courts including supreme court over the disputes related to elections involving speaker and prime minister, including the present appeal which was sub-Judice before the Supreme Court. Cl(4) of newly inserted article 329A, which directly concerned the pending appeal stated that no law made prior to the commencement of 39th Amendment in so far as it relates to election petitions apply or would be deemed to have applied to election of the prime minister to either house of parliament, it further provided that such election would not deemed to be void or ever to have become void and that notwithstanding any decision of any court before 39th Amendment, declaring such amendment to be void, such election would continue to be valid.
The council for Raj Narain argued that the amendment was against the basic structure of the constitution as it affected the conduct of free and fair election and the power of the judicial review. It was also argued that the parliament was not competent to use its constituent power for validating the election that was declared unconstitutional by the Allahabad High court. Four out of five judges upheld the validity of 39th Amendment but only after striking down the part which sought to curb the power of judiciary to adjudicate in the dispute sub-judice before the court. The supreme court unanimously struck down cl(4) of article 329-A.

The Constitution 42\textsuperscript{nd} Amendment interalia inserted following two changes:

\begin{itemize}
  \item[a)] cl(4) & (5) in article 368 inserted through 42\textsuperscript{nd} amendment to the effect that an amendment of constitution under article 368 shall not be called in question in any court on any ground and that there shall be no limitation whatever on the constituent power of the parliament.
  \item[b)] It amended article 31C to provide primacy to all directive principles over the Fundamental Rights. These clauses came to be challenged in the case of Minerva Mills V. Union of India AIR 1980 SC 1789 the Supreme Court struck down these provisions and held them unconstitutional as they destroyed the essential features of constitution. The court unanimously held that judicial review is the basic feature of the constitution which cannot be destroyed also the changes to article were struck down and restored article 31-C to the original state in which it was inserted by 25\textsuperscript{th} amendment in 1971. Chandrachudu C.J; speaking for the majority observed,
\end{itemize}

Fundamental rights occupy a unique place in the lives of civilized society and have been variously been described in the judgments of the supreme court as transcendental, inalienable etc. for us they constitute the arc of constitution. To destroy guarantees given by part III in order to achieve the goals in part IV is plainly to subvert the constitution by destroying the basic structure. The Indian constitution is founded on the bedrock of balance between part III and part IV of the constitution. This harmony and balance between part III and part IV is an essential feature of basic structure of the constitution.

The court clearly observed that,

Since the constitution has conferred a limited amending power on the parliament. Parliament by exercising that limited amending power cannot enlarge the very that limited power into absolute power. Indeed a limited amending power is one of the basic features of the constitution and
therefore the limitation on that power cannot be destroyed by transforming limited power into unlimited one.

**Contents of Basic Structure of Constitution**

Analysis of case laws reveals that the courts have not in fact defined the term or the expression basic structure but time and again has provided basic elements which constitute basic structure. In other words we can say that the contents of the basic structure has been provided or what is included in the basic structure of constitution has been recognized by the judiciary in various cases till date. Thus supreme court is yet to define clearly as to what basic structure means. Right from Keshvananda Bharti case till date various elements have been recognized as the basic structure of the constitution which includes;

- Supremacy of the constitution
- Republican Form of Government
- Secular character of the constitution
- Maintenance of separation of powers
- Federal character of the constitution as per Chief Justice Sikri----- justice Shelat and Grover added mandate to build welfare state as provided in the directive principles of state policy and unity and integrity of Nation…. Hegde ,Mukherjea,JJ; recognized and identified Sovereignty of India, Democracy, Unity of Nation, Essential Individual Freedoms, Mandate to build welfare state. Jaganmohan Reddy J; OBSERVED THAT the elements of basic structure were to be found in the preamble. **Keshvananda Bharti v. State of Kerela AIR 1973**

- Limited power of parliament to amend the constitution
- Harmony and balance between fundamental rights and directive principles
- Power of judicial review were observed and identified to be the basic structure elements in the case of------- **Minerwa Mills v. Union of India AIR 1980**

Doctrine of equality under article 14 came to be recognized as basic element of constitution in the case of **M. Nagrajv. Union of India AIR 2007**. In **Indra Sawhney v. Union of India AIR 1992 SC**. Unamendability of basic structure in itself constitutes basic structure of constitution

**Conclusion:**
The judiciary firmly accepts and strongly recognizes the theory of basic structure. However the courts have not closed the contents of basic structure or list of the elements of basic structure of constitution. The fact cannot be disputed that doctrine of basic structure has served the country very well. One certainty that emerged out of the tussle between parliament & judiciary is that all laws and constitutional amendments are subject to judicial review and laws that tend to destroy the basic structure are declared as unconstitutional and thus ultra vires. Parliament’s amending power is not absolute and the supreme court is final interpreter of the constitution. In essence basic structure theory is a limitation on Parliament’s amending power. There is no hard and fast rule for basic feature of the Constitution. Different judge keep different views regarding the theory of basis structure but at one point they have similar view that parliament has no power to destroy the 'basic structure' or framework of the constitution. If the historical background, the preamble, the entire scheme of the constitution and the relevant provisions thereof including article 368 are kept in mind then there can be no difficulty in determining the basic structure theory.