



Subject :
**Constitutional
Law - II**

Paper : 2.1

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SUBJECT TOPICS

**1.AMENDMENT OF THE CONSTITUTION
OF INDIA**

**2.EMERGENCY PROVISIONS IN THE
INDIAN CONSTITUTION**

3.DOCTRINE OF PLEASURE

CHAPTER ONE: AMENDMENT

INTRODUCTION

The word “Amendment” in normal sense means change in the presently established and existing setup or order concerned with a particular subject matter. Likewise “Amendment of the Constitution” of any Country basically denotes the change in the presently established and existing setup or order (like change in any Article or any clause of any Article) of that particular Constitution. With the change of times, the circumstances change and hence it is necessary that the constitution also changes with the requirement of times and circumstances so that it can adapt itself according to changed times and circumstances.

With this philosophy in mind the Constitution makers provided for a provision of amendment of the constitution of India so that the constitution can be changed with the changing times and circumstances. The question before the constitution makers was that what method or procedure is to be adopted for the purpose of amending the constitution of India. They took help from the Amending Procedures prevalent in the Constitutions of U.S.A., Australia and Switzerland. After going through the amendment procedure of these Constitutions they structured and created the Amending Procedure or method of Amendment of the Indian Constitution. In U.S.A. for amending the Constitution the approval of two-thirds of majority of both the houses of Congress (the Senate and House of Representatives) is required. Moreover the amendment then must be ratified by at least three-fourths of the total number of the State Legislatures of the U.S.A. In Switzerland no amendment of the constitution can be done without taking help of a referendum (which means the matter is referred to the citizens of the country who provides their opinion on that matter). The process is complicated too. In Australia the constitution can be amended only by an act passed by absolute majority in both houses and then the act is subjected to a referendum in each state. Then if in a majority of states, a majority of voters approve the amendment, it shall be presented to the Governor-General for his assent to amend the Constitution..

After viewing the difficulties and complex procedures prevalent in the above mentioned constitutions of foreign soil, the Indian Constitution makers then tried to eradicate these difficulties and complex procedures like referendum from the structure and procedure of the Indian Constitution. They then adopted a process of Amendment which is not similar for all the Articles of the Constitution and which in essence is neither too rigid nor too soft. This

means that all the Articles of the Constitution cannot be amended in the similar manner. The powers of Amendment of Constitution were mainly in the hands of the Parliament and only in case of Amendment of few Articles or specific matters the ratification of the State Legislatures was also required. All the other Articles (except the one which requires state legislature ratification) were to be amended only by the Parliament.

However for those articles also (the one which does not require state ratification) the procedure was not same and it was divided into two ways. The first way provides that the amendment shall be done by a majority of not less than 2/3rd of the members of each house present and voting and a majority of the total membership of each house. The other way provides that the amendment shall be effected by a simple majority of both the houses. Hence the Constitution framers adopted an amendment process which is neither too rigid nor too soft. It is soft for few articles (like the ones which require only simple majority of both houses or 2/3rd of members present and voting along with simple majority of each house) and it is rigid or hard for few articles (the ones which require the ratification of state legislatures also along with parliament).

PROCEDURE FOR THE AMENDMENT OF THE CONSTITUTION OF INDIA

Article 368 of the Constitution of India deals with the Amendment of the Constitution. The head note of Article 368 before the 24th Constitutional Amendment Act, 1971 only stated for the Procedure of the Amendment of the Constitution of India. By the 24th Constitutional Amendment Act, 1971 the head note of Article 368 was altered and now it reads as “Power of Parliament to amend the Constitution and procedure therefor”. Hence not only the procedure but also the power of parliament to amend the Constitution was being provided under Article 368 by 24th Constitutional Amendment Act, 1971. The 24th C.A.A (Constitutional Amendment Act), 1971 also mentioned that the term “amendment” of the constitution meant either addition, variation or repeal of any provision of the constitution which will be successfully effected following the procedure laid down in Article 368 of the Constitution. The term addition means adding any new Article to the Constitution or adding any new clause to any present Article of the Constitution. The term Variation means changing the text or the head note of any Article or any clause of any Article. The term repeal literally means removing any provision from the Constitution and it is done by ending the effect of any Article or any clause of any Article.

The biggest debate regarding Constitutional Amendments has been that whether Constitutional Amendment Acts brought using the Constituent Power of Parliament is Law or not under the Purview of Article 13. Another debate is concerned with evaluating the limitation on this Constituent Power of Parliament to Amend the Constitution of India.

Now the Procedure that is adopted for the Amendment of the Indian Constitution can be broadly classified under three types. All the provisions of the Constitution of India are not amended in the same manner.

THE FIRST PROCEDURE is adopted for Article 4(which deals with creation of new states or reconstitution of existing states), Article 169(creation or abolition of Upper Chambers i.e. Vidhan Parishads in the States) and Article 239-A (Creation of Centrally administered areas) and paras 7 and 21 of the 5th and 6th Schedules respectively. The procedure that is adopted for the above mentioned Articles and paras 7 and 21 of the 5th and 6th Schedule respectively is that any amendment with respect to these articles and paras can be effected by the ratification of a simple majority only of both the houses of Parliament, like that is required for passing an ordinary law. That means for amending the above mentioned articles and paras of the Constitution, the requirement is that atleast more than 50% of the total number M.P's of both the houses of Parliament respectively must vote in favour of such Amendment. The Amendment procedure of the above mentioned Articles and Paras are not mentioned in Article 368 as the amendment process of this Articles and Paras are outside the purview of Article 368. Hence the first procedure adopted for Amendment is outside the scope of the Article 368. The second and third procedure has in common the beginning stage. Both the procedure comes under the scope of Article 368 and in both the cases the Amendment procedure has to be initiated by the introduction of a Bill which can be introduced in either house of the Parliament.

Like the Parliament while making a Law using its ordinary legislative power first introduces a Bill for that purpose in either house of Parliament (except Money Bill which can be introduced only in Lok Sabha), in the same manner the Parliament while making any Constitutional Amendment using its Constituent Power under Article 368 first introduces a Bill (called the Constitutional Amendment Bill) for that purpose in either House of Parliament. After this common stage of introduction of Constitutional Amendment Bill in either house of Parliament, the way forward for the both the Procedures are different.

THE SECOND PROCEDURE is adopted for amending the following provisions of the constitution namely:-

- The election and manner of election of the President (Article 54 and 55).
- The extent of executive power of the Union (Article 73).
- The extent of executive power of a State (Article 162).
- Provisions dealing with the Supreme Court (Chap IV of Part V).
- Provisions dealing with the High Courts in the States (Chap V of Part VI).
- High Courts for Union Territories (Article 241).
- Distribution of legislative powers between the Union and the States (Chap I of Part XI).
- The representation of States in Parliament (4th Schedule).
- 7th Schedule to the Constitution (List I, II and III).
- Article 368 of the Constitution (which prescribes the power of parliament to amend the constitution and procedure thereof).

The second procedure moves forward after the introduction of Constitutional Amendment Bill in any one of the houses of Parliament concerned with the Amendment of those related provisions of the Constitution for which 2nd Procedure is adopted. The next step in the second procedure is that the constitutional amendment bill must be passed by a majority of the total membership of each house of Parliament as well as by a majority of not less than two-thirds of the members of that House present and voting. This means that the constitutional amendment after getting introduced in any house of parliament must be passed by both the houses of Parliament before going into the next stage and this passing process is different for second procedure as compared from the first procedure. The process states that the Amendment bill must be passed by majority of total MP's of each house and also by a majority of not less than two-thirds of the members of that house present and voting. This means that the constitutional Amendment Bill must be passed by atleast more than 50 % of the total number of MP's of each House of Parliament separately and also by a strength of atleast 2/3rd of the total number of members (MP's) of a particular house who are present on

that particular day of passing the constitutional Amendment Bill and who subsequently votes in the passing process of that bill.

For making the 2nd procedure very clear an example can be studied. For a Constitutional Amendment Bill adopting the 2nd Procedure it is first introduced in any one of the houses of Parliament. Say the Constitutional Amendment Bill is introduced in Lok Sabha. Now the bill has to be passed by both the Lok Sabha and Rajya Sabha. For passing it in Lok Sabha the first requirement is that atleast more than 50% of the total MP's of Lok Sabha must vote in its favour. The total number of MP's of Lok Sabha is atleast 550 and hence atleast 276 MP's (which is just over 50% of 550) must vote in favour of the Constitutional Amendment Bill. The second requirement is that the Bill has to be forwarded by atleast 2/3rd of the total number of members (MP's) of Lok Sabha who are present on that particular day of passing the Constitutional Amendment Bill and who subsequently votes in the passing process. Now say in that particular day total 450 MP's out of 550 are present in Lok Sabha. Hence atleast 2/3rd of 450 MP's (i.e. 300 MP's) must vote in favour of the said bill to make it pass from Lok Sabha. Now say the total number of members who are present in that particular day of passing the Constitutional Amendment Bill is 390. Hence atleast 2/3rd of 390 MP's (i.e. 260 MP's) must vote in favour of the said Bill to make it pass from Lok Sabha and only 260 votes in favour. But the First Requirement in passing it from Lok Sabha is that atleast 276 MP's [which is just over 50% of 550(which is the total strength of Lok Sabha)] must vote in favour of the Constitutional Amendment Bill. Here 260 are not touching the number of 276. Hence the Constitutional Amendment Bill cannot be passed from Lok Sabha in such situation.

Thus the 2nd requirement of forwarding the bill by atleast 2/3rd of members of a particular house present and voting must touch (i.e. must either be equal or more than) the Ist requirement of getting the bill forwarded by atleast more than 50% of total membership of that particular house. The same method that is followed in passing the bill from Lok Sabha is repeated while passing the Constitutional Amendment Bill from the Rajya Sabha and the only difference is in the required numbers because the total strength of Rajya Sabha is different from Lok Sabha. Another thing to take note of is that in the first requirement and in the second requirement only the basic minimum is prescribed (like for Ist requirement atleast 50% of total MP's of a house and for 2nd requirement atleast 2/3rd of members of a house present and voting) and there is no mention about the maximum number required and hence all the MP's of a particular house can vote for the Constitutional Amendment Bill at this passing stage of the bill from both the houses of Parliament.

After getting the said Constitutional Amendment Bill passed from both the Houses of Parliament the next step in the second procedure is getting the said Constitutional Amendment Bill ratified and passed by resolution by atleast not less than one-half of the State Legislatures in the Country. This means that after getting passed from both the houses of Parliament the said Constitutional Amendment Bill must be forwarded and passed by atleast 50% of the total State Legislatures in the Country and the method adopted for passing the bill in any Particular State Legislature is that it is passed by simple resolution. Now State Legislature may be Unicameral (one House Legislature) having only Vidhan Sabha and also may be Bicameral (two House Legislature) having both the Vidhan Sabha and Vidhan Parishad. If the State Legislature is Unicameral then the bill will be passed only from Vidhan Sabha as there is no Vidhan Parishad and if the State Legislature is Bicameral then the bill will be passed from both the Vidhan Sabha and Vidhan Parishad.

The method of passing the said Constitutional Amendment Bill from both the Vidhan Sabha and Vidhan Parishad is the same as only simple resolution is required for passing the bill . This means that for passing the bill from say Vidhan Sabha the requirement is that atleast more than 50% of the total number of members of that Vidhan Sabha must vote in favour of that Bill. The same process is followed for passing it through Vidhan Parishad if the State Legislature is Bicameral. By following this method the bill must be ratified and passed from atleast $\frac{1}{2}$ of the State Legislatures in Country.

After the Constitutional Amendment Bill is passed by both the Houses of Parliament and by atleast $\frac{1}{2}$ of the State Legislatures in Country, the bill comes to its final stage in the Second Procedure where it is presented before the President for his Assent. Before the 24th C.A.A, 1971 the President had an option of atleast withholding the Constitutional Amendment Bill presented for his/her approval and assent. But with the effect of 24th C.A.A, 1971 this option no longer remains and now when a Constitutional Amendment Bill (which is being passed by following any of the three procedures) is presented to the President for his/her approval then the President is bound to give his/her assent to that said Constitutional Amendment Bill and cannot under any circumstances withhold the Constitutional Amendment Bill. After the Constitutional Amendment Bill has got the assent of the President it becomes a Constitutional Amendment Act and the Constitution gets amended according to the terms and conditions mentioned in the said Constitutional Amendment Bill.

THE THIRD PROCEDURE that is adopted for constitutional amendments are being followed for those Articles and Provisions of the Constitution that has not adopted either the First or Second Procedure mentioned previously. That means those Articles and Provisions which do not follow the first or the second procedure follows the third Procedure.

In the first stage of the third Procedure the Constitutional Amendment Bill is introduced in either house of Parliament. The next step in the third procedure is that the constitutional amendment bill must be passed by a majority of the total membership of each house of Parliament as well as by a majority of not less than two-thirds of the members of that House present and voting. This means that the constitutional Amendment Bill must be passed by atleast more than 50 % of the total number of MP's of each House of Parliament separately and also by a strength of atleast $2/3^{\text{rd}}$ of the total number of members (MP's) of a particular house who are present on that particular day of passing the constitutional Amendment Bill and who subsequently votes in the passing process of that bill. The method mentioned can be understood from the example. Say the Constitutional Amendment Bill is introduced in Lok Sabha. For passing it in Lok Sabha the first requirement is that atleast more than 50% of the total MP's of Lok Sabha must vote in its favour. The total number of MP's of Lok Sabha is atleast 550 and hence atleast 276 MP's (which is just over 50% of 550) must vote in favour of the Constitutional Amendment Bill. The second requirement is that the Bill has to be forwarded by atleast $2/3^{\text{rd}}$ of the total number of members (MP's) of Lok Sabha who are present on that particular day of passing the Constitutional Amendment Bill and who subsequently votes in the passing process. Now say in that particular day total 450 MP's out of 550 are present in Lok Sabha. Hence atleast $2/3^{\text{rd}}$ of 450 MP's (i.e. 300 MP's) must vote in favour of the said bill to make it pass from Lok Sabha.

Now say the total number of members who are present in that particular day of passing the Constitutional Amendment Bill is 390. Hence atleast $2/3^{\text{rd}}$ of 390 MP's (i.e. 260 MP's) must vote in favour of the said Bill to make it pass from Lok Sabha and only 260 votes in favour. But the First Requirement in passing it from Lok Sabha is that atleast 276 MP's [which is just over 50% of 550(which is the total strength of Lok Sabha)] must vote in favour of the Constitutional Amendment Bill. Here 260 is not touching the number of 276. Hence the Constitutional Amendment Bill cannot be passed from Lok Sabha in such situation. Thus the 2nd requirement of forwarding the bill by atleast $2/3^{\text{rd}}$ of members of a particular house present and voting must touch (i.e. must either be equal or more than) the 1st requirement of

getting the bill forwarded by atleast more than 50% of total membership of that particular house.

The same method that is followed in passing the bill from Lok Sabha is repeated while passing the Constitutional Amendment Bill from the Rajya Sabha and the only difference is in the required numbers because the total strength of Rajya Sabha is different from Lok Sabha. After the Constitutional Amendment Bill is passed by both Houses of Parliament, it is presented before the President for his Assent which is the final stage in third Procedure. After the Constitutional Amendment Bill has got the assent of the President it becomes a Constitutional Amendment Act and the Constitution gets amended according to the terms and conditions mentioned in the said Constitutional Amendment Bill.

TUSSLE BETWEEN THE PARLIAMENT AND THE JUDICIARY REGARDING CONSTITUTIONAL AMENDMENTS AND THE DEVELOPMENT OF THE BASIC STRUCTURE IN INDIA

Constitution of India did not emerge from vacuum. It is continuous process of evolution, reformation and recreating the existing system of governance by eminent scholars, experts and judges etc. No Constitution can remain static. It must respond to new challenges and take account of unanticipated and unforeseen events which were not within the contemplation of the framers of the Constitution. Ours is the living Constitution which requires an amendment from time to time according to the societal changes. Parliament in its constituent power can amend by way of addition, alteration, variation or repeal any provisions of the Constitution. On its plain terms Article 368 is plenary and is not subject to any limitations or exceptions. The Constituent Assembly debates indicate that the founding fathers did not envisage any limitation on the amending power.

Bringing alteration to the Constitution provisions by the Parliament was very easy process before *Keshavananda Bharati's Case*, because there was no implied or express limitation on its amending power exercised under the Constitution. But in the *keshavanandha's case*, uncontrolled power of the Parliament has been controlled and curtailed by the Doctrine of Basic Structure. We did not have this doctrine at the commencement of the Constitution of India. This doctrine conceived in the case of *Sajjan singh* and took real birth in the case of

Keshavanandha Bharati's Case. It is the product of long struggle between the Judiciary and Parliament. Through this basic structure principle, the Supreme Court changed the course of Constitutional history by denying the assertion of supremacy of Parliament in matter of amending the Constitution at solely on the basis of requisite voting strength, quite unmindful of the basic or fundamental rights of citizens. Article 31-B and Ninth Schedule are the main root cause for developing this doctrine by the Judiciary in so many cases. The reason is, this Schedule made controlled Constitution into uncontrolled by excluding the judicial review which is also a form part of the basic Structure.

After independence, the Government of India started to implement agrarian reforms scheme, but unfortunately, this action of the government was attacked and challenged in many High Courts, because the initiation of agrarian reforms were directly violating the Fundamental Right such as Articles 14, 19 and 31, especially right to property which was a fundamental right in the original constitution. Bihar Land Reforms Act, 1950 was the first enactment on agrarian reform which was challenged in the Patna High Court in the case of *Kameshwar Singh v State of Bihar*. To nullify the judgment of High Court and to immunize this law from being struck down of being violative of Fundamental Rights, **Article 31-B and the Ninth Schedule were introduced in the Constitution by the Constitution First Amendment Act 1951**. The **1st Constitutional Amendment also added Article 31-A** to the Constitution of India which provided that if any law was introduced for certain specific purposes (the purposes was mentioned in the Article and included mainly acquisition of property and estate by the State), then that law could not be declared unconstitutional by utilizing Article 13 even if that law is inconsistent with or abridges or violates the Fundamental Rights provided by Articles 14 and 19. Hence because of the protection of Article 31-A, laws which were made for some specific purposes being mentioned in Article 31-A was unable to be declared void on the ground of being violative or contrary to the Fundamental rights of Articles 14 and 19.

Parliament added the **ninth schedule** to the constitution as a means of immunizing certain laws against judicial review. Under the provisions of **article 31**, which themselves were amended several times later, laws placed in the **ninth schedule** (pertaining to acquisition of private property and compensation payable for such acquisition) cannot be challenged in a court of law on the ground that they violated the fundamental rights of citizens. **The Ninth Schedule** was created with the primary objective of preventing the judiciary (which upheld

the citizens' right to property on several occasions) from derailing the Congress party led government's agenda for a social revolution.

The question whether Fundamental Rights can be amended under Article 368 came for consideration in the Supreme Court in *Shankari Prasad Deo v. Union of India* case. In this case validity of Constitution (First Amendment) Act, 1951 which inserted inter alia, Articles 31-A and 31-B of the Constitution were also challenged. The amendment was challenged on the ground that it abridges the rights conferred under Part III of the Constitution and hence was void. The Supreme Court however rejected the above argument and brought out the distinction between legislative power and constituent power and held that “law” in Article 13 did not include an amendment of the Constitution made in the exercise of constituent power and Fundamental Rights were not outside the scope of amending power. Later on several amendments were made to the constitution of India of which the 4th and 7th Amendments were related to the Part III of the Constitution.

The 17th Amendment which added 44 legislations to the 9th schedule and thus making them immune from judicial scrutiny and thus giving them protection from attack on the ground of violation of fundamental rights was challenged in *Sajjan Singh v. State of Rajasthan*. The same view was also expressed by the court in *Sajjan Singh* case in which actually the question was not whether fundamental rights can be amended by the parliament by a subsequent constitutional amendment but the question in hand was regarding irregularity in following the procedure prescribed for amending the constitution. In this case however two judges namely **Justice Mudholkar and Justice Hidayatullah** showed concerns over the judgement of the *Sankari Prasad* case and Justice Mudholkar went on to state that “It is also a matter for consideration whether making a change in a basic feature of the constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the constitution”. It is in this case and by these two judges (especially Justice Mudholkar) who sowed the seeds of the Basic Structure Doctrine which was later on firmly established in the *Keshavananda Bharati Case*.

In *I.C. Golak Nath V. State of Punjab* case, the constitutional validity of **1st, 4th and 17th Amendment Acts** which inserted certain **44 legislations in Ninth Schedule** was once again challenged. **Three writ petitions** were involved in the case. One was filed by the son, daughter and granddaughters of Golak Nath. In this petition, the inclusion of the Punjab Security of Land Tenures Act, 1953 in the 9th schedule was challenged on the ground that the 17th amendment by which it was so included as well as the First and the Fourth Amendments violating the fundamental rights were unconstitutional. In the other two petitions, the

inclusion of Mysore Land Reforms Act (10 of 1962 as amended by Act 14 of 1965) had been challenged on the same grounds.

The case was heard by an eleven-judge bench of the Supreme Court and the court in its decision by a **majority of 6:5 held that the fundamental rights were outside the realm of the amending process** if the amendment took away or abridges any of the fundamental rights. The major observations of the Court in this case are as follows:-

- a. **Chief Justice Subha Rao** put forth the curious position of **Article 368**, and stated that **Article 368 of the Constitution of India does not contain the power to amend the Constitution but merely it provides the procedure for amending the Constitution**. The power of amending the Constitution by the Parliament is included within the plenary legislative power of Parliament (ordinary law making power or the power to legislate). He further stated that it is quite clear from the provisions contained in the Constitution in **Articles 245, 246, 248** and in Entry 97 of List I of the 7th Schedule, that the residuary power of legislation is vested in parliament. This residuary power of legislation of the Parliament certainly takes in its fold the power to amend the Constitution. Articles 4, 169, and para 7 of the 5th Schedule and para 21 of the 6th Schedule have expressly conferred such amending power to the Parliament and it can be traced from the language of these Articles and Paras itself. Hence the apex court simply stated that Constitutional Amendments are being made using usual plenary legislative power of Parliament (which is contained in Articles 245, 246, 248 and Entry 97 of List I) and that no power of amending the Constitution (i.e. Constituent Power) is provided in Article 368 which infact speaks of the procedure to amend the constitution and not the power to amend. Thus, the apex court held that the amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood under **Article 13(2) and hence if violative of fundamental rights shall be struck down**.
- b. The majority judgement invoked the concept of **implied limitations on Parliament's power to amend the Constitution**. The court held that the Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to themselves, the people had reserved the fundamental freedoms for themselves. **Article 13**, according to the majority view, expressed this limitation on the powers of Parliament. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under

it. The judges stated that the fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament.

- c. The court observed that a **Constituent Assembly might be summoned** by Parliament for the purpose of amending the fundamental rights if necessary by enacting a law for that purpose in the exercise of its residuary power.
- d. The court although in this case asserted that fundamental rights are inviolable, it also admitted that applying this decision across the board to earlier constitutional amendments would lead to chaos, confusion and serious inequities. Therefore the court decided to employ the American doctrine of **“Prospective Overruling”**, which means that its decision would apply only to future and subsequent constitutional Amendments and it would not apply to any previous constitutional amendments including the ones which were challenged in this case and therefore the Court did not invalidate any of the constitutional Amendments disputed in the case. So the petitioners in Golak Nath case actually got no relief. This approach of the Supreme Court was criticized by various scholars and the most important lacuna of the doctrine is that the court applies a principle to a party before it, but gives the party no relief. All it does is that it provides for a solution for the future without granting relief to the present party. However for the first time going against its decision from the Sankari Prasad and Sajjan Singh Case the Court perhaps depicted an instance of judicial activism.

In order to nullify this Judgement the Parliament introduced the **24th Constitutional Amendment Act, 1971 which made significant changes in Article 368 and in Article 13**. Firstly it added clause (4) to article 13 which provides that nothing in article 13 shall apply to any amendment of the constitution made under Article 368. It simply means that the meaning of the word „law“ in terms of Article 13 will not extend to an amendment made under Article 368 and hence constitutional amendments made under article 368 are not law under the eye of Article 13 and hence even if the constitutional amendment violates the fundamental rights then also it cannot be declared to be void by the judiciary utilizing article 13. This position is reassured by adding clause (3) to Article 368 which provides that nothing in article 13 shall apply to an amendment made under this article. Secondly this amendment made a change in the marginal note of article 368 and after this amendment the marginal note now reads as **“Power of Parliament to amend the Constitution and procedure therefor”**. Before this

amendment the marginal note stated only “Procedure for amendment of the Constitution”. This change hence nullified the statement of Chief Justice Subha Rao in the Golak Nath decision who stated that Article 368 of the Constitution of India does not contain the power to amend the Constitution but merely it provides the procedure for amending the Constitution. Moreover in order to be very sure, clause (1) was added to Article 368 which stated that the Parliament may in the exercise of its **constituent Power** amend by way of addition, variation or repeal any provision of the Constitution (including the provisions of Part III) in accordance with the procedure laid down in that Article. Thus the 24th Amendment clearly recognizes the distinction between the ordinary law making power of Parliament of making a normal law and Constituent Power of Parliament of making Constitutional Amendments and this also differed from the view of the Golak Nath Judgement.

Then came the famous case of *Keshavananda Bharati v. State of Kerala*. His holiness Swami Keshavananda Bharati Sripadagalvaru was the head of the Edneer *maath* in Kerala. The Kerala land Reforms Act, 1963 had affected the property of his religious institution, leading him to challenge state land reform legislation in Kerala in 1970. The said legislation was amended twice in the year 1969 and 1971 in the form of the Kerala Land Reforms (Amendment) Act, 1969 and the Kerala Land Reforms (Amendment) Act, 1971. While the proceedings were under way, the Parliament passed the 29th Constitution Amendment Act, 1972 which inserted the above two land reform legislations namely the Kerala Land Reforms (Amendment) Act, 1969 and the Kerala Land Reforms (Amendment) Act, 1971 to the 9th Schedule and hence adversely affected the right to property of Swami Keshavananda. The 29th Constitution Amendment Act was passed after the Supreme Court has struck down the Kerala Land Reforms (Amendment) Act, 1969 in *Kunjukutty Sahib v. State of Kerala*. So to make the land reform laws immune from judicial scrutiny they were introduced in the 9th Schedule of the Constitution by the 29th Amendment.

Nani Palkhivala, the counsel for the petitioner Keshavananda Bharati ceased the opportunity and challenged the constitutional Validity of the 24th, 25th and 29th Constitutional Amendment Acts. The 25th Constitutional Amendment Act gave Articles 39(b) and (c) precedence over the articles 14, 19 and 31. It also took away the power of the Courts to decide whether a law was actually passed to further the policy laid down in those Articles or not. The most critical question which the court dealt with were regarding how much amending power was granted to the Parliament under Article 368 and whether that power was unconstrained, unrestricted or could the courts review the amendments? The petitioners in the

Keshavananda case contended that the challenged amendments nullify some of the most cardinal principles of our Constitution and the Parliament could not utilize the power granted to by the Constitution and could not draw authority from the Constitution to alter those very principles. On the other hand the government argued that there was no limit to the Parliament's amending power under Article 368. Hence it becomes relevant for the Supreme Court to examine the Parliament's amending power to ascertain the constitutional validity of the Amendments.

13 judges of the apex court sat on a bench for almost five months to consider questions referred above. The court issued as many as eleven separate opinions, with each judge expressing divergent views on every issue, implying that there is no clear indication of what the court actually held. For the 1st time in the Court's History, the judges gave a summary of their decision, with nine such judges giving the summary and four judges refusing to give it. The view of the Court on this case can be broadly summarized as follows:-

- a. All the judges were of the view that the 24th Amendment Act is valid and that parliament by virtue of Article 368 which was amended by the 24th Amendment Act has power to amend any or all the provisions of the Constitution.
- b. However seven of the thirteen judges namely (Sikri, C.J., Shelat, Hedge, Grover, Jaganmohan Reddy, H.R. Khanna and Mukherjea) held that although the Parliament has the power to amend any part of the Constitution, it could not use this power to alter or destroy the basic structure or framework of the Constitution. Hence by a majority of 7:6 the apex court held that that Article 368 did not enable the Parliament to alter the basic structure or framework of the Constitution and Parliament could not use its amending power under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.
- c. Six of these above referred seven judges apart from Justice Khanna thought that the Fundamental Rights provided in Part III of the Constitution relate to the basic structure and are therefore not amendable.
- d. Justice Khanna however differed from (Sikri, C.J., Shelat, Hedge, Grover, Jaganmohan Reddy, and Mukherjea) on the point that Fundamental Rights provided in Part III of the Constitution relate to the basic structure and are therefore not amendable. In his view the power to amend fundamental rights could not be denied by describing them as natural or human rights so long as the Basic Structure of the Constitution remained unaffected. It means that the parliament has got power to amend any part and provisions of the Constitution including the fundamental rights by

way of addition, alteration or repeal provided that such amendment does not disturb the basic structure or framework of the constitution. He stated that the right to property could not be said to pertain to the basic structure or framework of the Constitution.

- e. Six other judges remaining (J.J Ray, Palekar, Mathew, Beg, Dwivedi, and Chandrachud) were not prepared to accept any limitation on the power of parliament to amend the Constitution.
- f. The majority overruled the Golak Nath Judgement, which had asserted that Fundamental Rights could not be taken away or nullified by the Parliament.
- g. The 29th Amendment was held valid.
- h. The 25th Amendment was held valid but the part which barred the court's jurisdiction to decide whether a law was actually passed to further the policy laid down in Articles 39 (b) and (c) or not was struck down.

The basic structure doctrine may be called an „*invention*“ as it was inspired by an exceptional display of *art, courage and crafts* that the Supreme Court exhibited while evolving this doctrine which counts as one of the greatest contribution of Indian judiciary to theory of institutionalism. German Jurist Professor Dieter Conrad influenced by radical constitutional amendments in Germany during the Weimer regime is responsible for the genesis of the concept of the Basic Structure Doctrine. The "Basic Structure" doctrine is the judge-made doctrine whereby certain features of the Constitution of India are beyond the limits of the amending powers of the Parliament.

Though the Court held that the power of Parliament to amend the Constitution was impliedly limited by the doctrine of basic structure, it did not clearly define or explain what constituted the basic structure. Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

Sikri, C.J. explained that the concept of basic structure included:-

- supremacy of the Constitution
- republican and democratic form of government
- secular character of the Constitution
- separation of powers between the legislature, executive and the judiciary
- federal character of the Constitution

Shelat, J. and Grover, J. added two more basic features to this list:-

- the mandate to build a welfare state contained in the Directive Principles of State Policy
- unity and integrity of the nation

Hedge, J. and Mukherjea, J. identified a separate and shorter list of basic features:

- sovereignty of India
- democratic character of the polity
- unity of the country
- essential features of the individual freedoms secured to the citizens
- mandate to build a welfare state

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:-

- sovereign democratic republic
- parliamentary democracy
- three organs of the State

All constitutional Amendments enacted after the Keshavananda Bharati Judgement would have to pass the “basic-structure filter” created by the Supreme Court. The court empowered itself to judge the constitutionality of amendments and revoke any that compromised the essential features of the Constitution.

The basic structure doctrine was again tested and reaffirmed in the **Indira Gandhi Election case**. In 1975, a challenge to Prime Minister Indira Gandhi's election victory from Rae Bareilly was upheld by the Allahabad High Court on grounds of electoral malpractice. On appeal to the Supreme Court which had the vacation judge, Justice Krishna Iyer to adjudicate the matter, the Supreme Court granted a stay to the judgement that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided.

During the pendency of the appeal, the Parliament passed the **Thirty-ninth amendment** to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. The amendment was meant to nullify the judgement of the Allahabad High Court so as to protect Indira Gandhi's Election from being challenged in the Supreme

Court. Amendments were also made to the *Representation of Peoples Acts* of 1951 and 1974 and placed in the **Ninth Schedule** along with the *Election Laws Amendment Act, 1975* in order to save the Prime Minister from embarrassment if the apex court delivered an unfavorable verdict.

Raj Narain challenged the constitutional validity of the 39th Amendment itself which was the first time that a constitutional amendment was challenged not in respect of the right to property but with reference to an electoral law. The points of challenge was that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. Counsel also argued that Parliament was not competent to use its constituent power for validating an election that was declared void by the High Court. By a majority of 4:1 the apex court struck down the amendment, recognizing that it vitiated certain fundamental tenants forming part of the basic structure of the Constitution, including the free and fair elections and the rule of law. However, Indira Gandhi's election was not affected, since the court upheld the retrospective amendments to the electoral laws.

Soon after the declaration of National Emergency, the Congress party constituted a committee under the Chairmanship of Sardar Swaran Singh to study the question of amending the Constitution in the light of past experiences. Based on its recommendations, the government incorporated several changes to the Constitution including the **Preamble**, through the **Forty-second amendment**. This amendment was also brought to nullify the Keshavananda Bharati judgement. Sections 4 and 55 of the 42nd Amendment is significant in this respect. The said Amendment through section 4 gave the **Directive Principles of State Policy** precedence over the **Fundamental Rights** contained in **Article 14**, **Article 19** and **Article 21**. **Article 31C** was amended to prohibit any challenge to laws made under any of the **Directive Principles of State Policy** on the ground of it being violative of Fundamental rights of Articles 14, 19, and 31. **Section 55 of the 42nd Amendment** also lay down that amendments to the Constitution made in the past or those likely to be made in future could not be questioned in any court on any ground. It also removed all amendments to fundamental rights from the scope of judicial review and eradicated all limits on Parliament's power to amend the Constitution under **Article 368**.

Within less than two years of the restoration of Parliament's amending powers to near absolute terms, the **Forty-second amendment** was challenged before the Supreme Court by

the owners of *Minerva Mills* (Bangalore) a sick industrial firm which was nationalized by the government in 1974 in the case of *Minerva Mills v. Union of India*. Mr. N.A. Palkhivala, renowned constitutional lawyer and counsel for the petitioners, chose not to challenge the government's action merely in terms of an infringement of the fundamental right to property. Instead, he framed the challenge in terms of Parliament's power to amend the Constitution. Mr. Palkhivala argued that Section 55 of the amendment had placed unlimited amending power in the hands of Parliament. The attempt to immunize constitutional amendments against judicial review violated the doctrine of basic structure which had been recognized by the Supreme Court in the *Kesavananda Bharati* and *Indira Gandhi Election Cases*. He further contended that the amended **Article 31C** was constitutionally bad as it violated the Preamble of the Constitution and the fundamental rights of citizens. It also took away the power of judicial review.

Chief Justice Y.V. Chandrachud, delivering the majority judgement (4:1), upheld both contentions. The majority view upheld the power of judicial review of constitutional amendments. They maintained that clauses (4) and (5) of **Article 368** conferred unlimited power on Parliament to amend the Constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitution's basic structure. Hence the majority in this case upheld judicial review of constitutional amendment as a part of the basic structure of the Constitution. The majority also held the amendment to **Article 31C** as unconstitutional because by giving The Directive Principles of State Policy predominance over the Fundamental Rights (especially of Equality and Freedom), the said 42nd Constitutional Amendment Act has destroyed the **harmony and balance between fundamental rights and directive principles which is an essential or basic feature of the Constitution.**

After this case, Supreme Court in *Waman Rao v. Union of India* once again reiterated and applied the doctrine of basic features of the Constitution. In this case, implications of the basic structure doctrine for Article 31-B were reexamined by a five-judge bench of the Supreme Court. The constitutionality of Article 31-B, as well as of Articles 31-A and 31-C (as it was before the 25th Amendment) were questioned on the grounds that they violated the basic structure of the Constitution. The majority judgment, delivered by C.J. Chandrachud, rejected this contention, and held that inasmuch as the impugned Articles were aimed at fulfilling the mandate of social and economic justice through agrarian reform, they were in conformity with the Constitution's basic structure. Insofar as Article 31-B was concerned, the Court drew a line of demarcation at April 24th, 1973 i.e. the date of *Kesavananda Bharati's*

decision and held it should not be applied retrospectively to reopen the validity of any amendment to the Constitution which took place prior to 24-04-1973, that means all the amendments which added to the Ninth Schedule before that date were valid. All future amendments were held to be challengeable on the grounds that the Acts and Regulations which they inserted to the Ninth Schedule damaged the basic structure.

In I.R.Coelho v. State of Tamilnadu case, question was raised that, whether on and after 24th April, 1973 when Basic Structures Doctrine was propounded, it is permissible for the Parliament under Art.31-B to immunize legislations from Fundamental Rights by inserting them in the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court? A Nine Judge bench of the Supreme Court held unanimously that all amendments to the Constitution made on or after 24th April, 1973, by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic features of the Constitution. It means that even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the Fundamental Right or rights taken away or abrogated pertain to the basic structure of the Constitution.

Even today we can find the tussle going on between the Parliament and Judiciary. The 99th Constitutional Amendment Act brought changes in the manner the judges of the Supreme Court and High Courts are to be chosen from the existing collegium system. However this amendment was challenged in the Supreme Court and it was subsequently struck down by the Supreme Court by stating the amendment violated the independence of the judiciary which is one of the cardinal parts of the basic structure of the Constitution.

CHAPTER TWO: EMERGENCY

The Constitution of India is federal in nature having a unitary bias. On the one hand, it has all the characteristic features of a federation, while, on the other hand the Centre is more powerful than the States. When the Constitution of India was being drafted, India was passing through a period of stress and strain which included partition of the country, communal riots and the problem concerning the merger of princely states including Kashmir. Thus, the Constitution-makers thought to equip the Central Government with the necessary authority, so that, in the hour of emergency, when the security and stability of the country is threatened by internal and external threats. Therefore, some emergency provisions were made in Constitution to safeguard and protect the security, integrity and stability of the country and effective functioning of State Governments. Emergency is a unique feature of Indian Constitution that allows the center to assume wide powers so as to handle special situations. Emergency Provisions are contained in Part Eighteen of the Constitution of India.

The term emergency in normal sense denotes the presence of extraordinary circumstances of peril which require extraordinary solutions. The framers of the Indian Constitution visualised that perhaps in the future there may exist circumstances of peril regarding the security of the Country, or constitutional problems of executive and legislative nature or some economical problems and hence they provided for certain solutions which can be invoked if and when these kind of circumstances of peril exists as it is not normal practice. The Emergency Provisions in our Constitution has been borrowed from the Constitution of Germany. In the Indian Constitution there exist three kinds of Emergencies which are National Emergency (Article 352), State Emergency (Article 356) and Financial Emergency (Article 360).

NATIONAL EMERGENCY

Article 352 which deals with the National Emergency provide and discusses about the following things which are as follows:-

- Who has got the power to proclaim National Emergency
- What are the grounds of the Proclamation of National Emergency.
- What is the duration of the Proclamation of National Emergency.

- How the duration of the proclamation can be increased.
- When will the proclamation shall be revoked by the President
- Limitation if any on the number of Proclamation of National Emergency

The Power to Proclaim National Emergency lies with the President of India. When the President of India is satisfied that a grave or serious emergency is present whereby the security of India or any part of the territory of India is threatened then he may by proclamation invoke emergency in respect of the whole territory of India or in respect of such part of the territory where such threat is eminent. Article 352(1) thus means that the proclamation need not extend to the whole of India. It may be restricted to a part of the Indian Territory. The threat to the security of the territory of India or any part of the territory of India may occur because of the following reasons which are:-

- War
- External Aggression
- Armed Rebellion

In addition to it, when the president is satisfied that there is imminent danger of the occurrence or possibility of a war or external aggression or armed rebellion happening which can threaten the security of India or any part of its territory, then also the President may proclaim an Emergency in respect of the whole of India or in respect of any such concerned part of its territory. Hence the actual occurrence of the war or armed rebellion or external aggression is not necessary a pre-condition to proclaim emergency.

Hence grounds for the Proclamation of National Emergency are as follows:-

- Actual Occurrence of War.
- Actual Occurrence of External Aggression.
- Actual Occurrence of Armed Rebellion.
- Possibility of the occurrence of War.
- Possibility of the Occurrence of External Aggression
- Possibility of the Occurrence of Armed Rebellion.

The ground of “armed rebellion” was not there in the Constitution and instead of it the ground of “internal disturbance” was there. However by the 44th Constitutional Amendment Act, 1978 the ground of internal disturbance got replaced by the ground of armed rebellion. The main intention of this substitution of the ground of proclaiming national emergency is to limit the invocation of the national emergency only to more serious conditions and to exclude situations which are less serious in nature. This point is also seconded by the Supreme Court in the case of *Naga People’s Movement of Human Rights v. Union of India*, where the court stated that the expression “internal disturbance” has a wider connotation than „armed rebellion“ in the sense that “armed rebellion” is likely to pose a threat to the security of the country, or a part thereof, while “internal disturbance”, though serious in nature, would not pose a threat to the security of the country, or a part thereof.

The 44th Constitutional Amendment Act, 1978 also added a condition to the proclamation of National Emergency. The condition is that the President before Proclaiming a National Emergency on any of the above mentioned grounds must obtain a written approval of the Union Cabinet (i.e. the body consisting of the Cabinet rank Ministers appointed under Article 75 and the Prime Minister) that such Emergency may be proclaimed and that such written consent must be communicated to him. This means that the decision to issue such a proclamation has to be arrived at collectively by the Cabinet and not by the Prime Minister alone without consulting the Cabinet. It so happened in 1975 that the President proclaimed emergency on the advice of Prime Minister alone and the Council of Ministers was later presented with a *fait accompli* (*the general terms of the emergency*). It is to avoid any such situation in future that Article 352(3) which speaks of such written consent has been introduced in the Constitution by the 44th Constitutional Amendment Act, 1978.

The 38th Constitutional Amendment Act makes it quite clear that the president may if satisfied issue **proclamations of national emergency on different grounds**, even if a proclamation of national emergency on any particular ground has already been issued and is in operation. For example say a proclamation of National Emergency on the ground of War is in operation and still because of the 38th constitutional amendment a separate proclamation of National Emergency on the ground of say External Aggression can be yet be declared.

When the President of India after getting the written consent of the Union Cabinet proclaims national emergency then each and every such proclamation of National Emergency has to be laid (brought) before each house of Parliament. Before the expiry of one month from the date on which it was first brought in any house it has to get the approval by resolutions of both the houses of Parliament for getting continued. That means before the period of one month is over it has to get approved by resolution from each of the two houses of Parliament separately. If the Proclamation does not get the Approval of both the houses then it will cease to operate after the period of one month. There was a reduction of approval of proclamation by the Parliament by the 44th amendment. Earlier the period allowed for parliamentary approval of the proclamation was two months.

If the National Emergency is proclaimed at a time when the Lok Sabha is already dissolved or the dissolution of the Lok Sabha takes place during the above mentioned period of one month, and if a resolution approving such Proclamation of national emergency is passed by Rajya Sabha but not by Lok Sabha within such period of one month, then the Proclamation would be ineffective after the expiration of thirty days from the date on which the Lok Sabha first sits after its reconstitution, unless before the expiration of the said thirty days a resolution approving the proclamation is being passed by the Lok Sabha. This means that if the National Emergency is proclaimed when the Lok Sabha was already dissolved or when during the period of one month which is provided for approving the proclamation through resolution by both the houses separately, the Lok Sabha (which was there at the time of time of Proclamation) subsequently got dissolved and before getting dissolved it has not approved the proclamation (the Proclamation which already is being approved by Rajya Sabha) through any resolution, then the proclamation would be ineffective after the expiration of thirty days from the date on which the Lok Sabha first sits after its reconstitution, unless before the expiration of the said thirty days a resolution approving the proclamation is being passed by the Lok Sabha.

A proclamation approved by resolution by both the Houses of Parliament gets extended for operation for a period of six months from the date it gets approved by resolution from that house of parliament which approves it last. Between the period of the proclamation getting approved by the house which passes it last and the time it gets extended because of such approval (i.e. between the date, the proclamation gets approved by the house which approves it last and the period of six months from such approval), if both the Houses of Parliament further approves the continuance in force of such proclamation by resolutions separately then

it gets extended for a further period of six months. However if between the period of the proclamation getting approved by the house which passes it last and the time it gets extended because of such approval (i.e. between the date, the proclamation gets approved by the house which approves it last and the period of six months from such approval), the Lok Sabha gets dissolved without approving continuance in force of such proclamation by resolution but resolution approving continuance in force of such proclamation is passed by Rajya Sabha, then in such circumstances the Proclamation would be ineffective after the expiration of thirty days from the date on which the Lok Sabha first sits after its reconstitution, unless before the expiration of the said thirty days a resolution approving the continuance in force of such proclamation is being passed by the Lok Sabha.

The fact that the term reconstitution of Lok Sabha is permitted after it is getting dissolved at the time of National Emergency is in operation means that New Lok Sabha elections is possible to held during the time of national Emergency is in operation.

The **procedure for the passing of the resolution** in both the houses says that the requirement is majority of total membership of each house and by a majority of atleast $2/3^{\text{rd}}$ members of that House present and voting. This means that the resolution must be passed by atleast more than 50 % of the total number of MP's of each House of Parliament separately and also by a strength of atleast $2/3^{\text{rd}}$ of the total number of members (MP's) of a particular house who are present on that particular day of passing the resolution and who subsequently votes in the passing process of that resolution. The 2^{nd} requirement of passing the resolution by atleast $2/3^{\text{rd}}$ of members of a particular house present and voting must touch (i.e. must either be equal or more than) the Ist requirement of getting the bill forwarded by atleast more than 50% of total membership of that particular house.

If the Lok Sabha passes a **resolution disapproving either the proclamation of emergency in the first place or the continuance in force of such proclamation** then the president shall revoke such Proclamation of emergency immediately after such disapproval. The things which are required to be followed for such disapproval are:-

- i. There must be notice in writing signed by atleast $1/10^{\text{th}}$ members of total strength of Lok Sabha.
- ii. The notice must state their intention to move a resolution of disapproval of either the proclamation of emergency in the first place or the continuance in force of such proclamation.

- iii. The notice must be given to the speaker of Lok Sabha if it is in session, or
- iv. The notice must be given to the President if the Lok Sabha is not in session.
- v. A special sitting will be held within 14 days from the day the notice is received by either the President or the Speaker as the case may be for considering such resolution of disapproval.

After such consideration the disapproval resolution may be or may not be passed and if it is passed then the president shall revoke such Proclamation of emergency immediately after such disapproval.

There have been **three instances of the proclamation of National Emergency** and they are as follows:-

- For the first time, emergency was declared on 26 October 1962 after China attacked our borders in the North East. This National Emergency lasted till 10 January 1968, long after the hostilities ceased.
- For the second time, it was declared on 3 December 1971 in the wake of the second India Pakistan War and was lifted on 21 March 1977.
- While the second emergency, on the basis of external aggression, was in operation, third National Emergency (called internal emergency) was imposed on 25 June 1975. This emergency was declared on the ground of „internal disturbances“.9 Internal disturbances justified imposition of the emergency despite the fact that the government was already armed with the powers provided during the second National Emergency of 1971 which was still in operation..

EFFECTS OF NATIONAL EMERGENCY

The Effects of National Emergency are as follows:-

❖ LEGISLATIVE EFFECT

- According to Article 250 during the national emergency is in operation then the parliament shall be entitled to make laws for the whole or any part of the territory of India with relation to any of the matters provided in the state list. Restriction on the legislative competency of the Union Parliament for the state list matters is removed during the time of National Emergency.
- Any law made by the Parliament on any state list matter during which such emergency is in operation, will become inoperative after the expiration of a

period of six months from the day the emergency ceases to have the force of operation. However things those are done or omitted to be done before the expiration of such period of six months (i.e. before the law ceases to have effect) will stand valid.

- During the time of National Emergency the state legislature is not stopped from making a law on the subjects of state list. However if two laws are made by parliament (L1 which is law made by Parliament) and by the state legislature (L2 which is law made by State Legislature) separately on the same matter of the state list and if certain provisions of L1 is clashing with L2 then the clashing provisions of L1 will prevail over L2 as long as the law made by parliament (L1) on the concerned subject of the state list is in operation.

❖ **EXECUTIVE EFFECT**

- During the emergency is in operation, the executive authority of the Union extends to the giving of directions to any state as to the way in which the executive power of the state is to be functioned.
- During the emergency the parliament may also make laws conferring powers and imposing duties on Union and its officers concerned with matters outside the union list.
- The above mentioned point can be extended even to those states to which the proclamation of emergency does not apply, if the extension is necessary to deal with the threat to the security of India or any part of its territory thereof.

❖ **FINANCIAL EFFECT**

- While a proclamation of emergency is in operation, the president may by order alter the financial arrangements between the states and the Union as laid down in Articles 268 and 279. Every such order of the president, as soon as may be after it is made, has to be laid before the each house of parliament.

❖ **EFFECTS ON FUNDAMENTAL RIGHTS**

- If the emergency arises out of a declaration that the security of India or any territory thereof is threatened by war or external aggression, then because of Article 358 the hindrance created on the legislative and executive powers by the fundamental right to freedom of Article 19 (State shall not make any law violative of Part III which includes Article 19) is thereby removed and then even if the legislatures make laws and executive commits acts which are

violative of Article 19 , the validity of those laws and acts is not open to challenge during the proclamation of emergency.

- The effect on the operation of Article 19 is not automatic and a law which is intended to violate Article 19 must contain a recital to the effect that such law is in relation to the Proclamation of Emergency and an executive action taken only under such law and not otherwise is protected from attack under Article 19.
- Moreover the operation of such laws and executive actions outside the territory under the proclamation of emergency is not protected from Article 19 unless the Activities in such territory threaten the security of India or any part of it.
- As soon as the proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the Emergency shall become inoperative to the extent to which they conflict with the rights under Article 19. However things that are done or omitted to be done before such law and executive actions ceases to have effect will stand valid.
- During the operation of a proclamation of National Emergency enforcement through Courts of all or any of the fundamental rights except those in articles 20 and 21 may be suspended by the president. The 44th Constitutional Amendment has made it very clear that the suspension of the enforcement of the fundamental rights of Articles 20 and 21 is not permitted even during the proclamation of National Emergency. Before the 44th Constitutional Amendment the enforcement of all the fundamental rights including that of Articles 20 and 21 could be suspended during the operation of national emergency.
- Such suspension has the effect of validating the legislative and executive action against those fundamental rights whose enforcement has been suspended.
- The law intended to violate the fundamental right must make a specific recital to that effect and an executive action causing violation of such fundamental right must have its basis in such a law.

- The suspension of the fundamental rights specified in the order under article 359(1) shall remain valid during the period of emergency or for such short period which the president may specify in the order.
- The order suspending the enforcement of all or of those specified fundamental rights except article 20 and 21 may extend to the whole of India or any part of the territory thereof.
- Under Article 358 armed rebellion cannot be a ground of suspension of Article 19. Article 359 suspends only the remedy that is the enforcement of the fundamental rights except of article 20 and 21, but article 358 suspends the fundamental right of Article 19 itself.

There are some landmark cases to understand the effect of national emergency on fundamental rights. In the case *Makhan Singh v. State of Punjab* emergency was declared on an earlier occasion during Indo-China war. The persons who have been detained under the Defense of India rules had no right to move the court for the enforcement of Art 14, 21 and 22 of the Constitution of India and the right was suspended under Art 359 of the Constitution of India. The suspension was partial. The rights were suspended for legally detained person and not for the persons who have been detained illegally. It was for the first time during emergency imposed on 26th June, 1975 that Article 14, 19, 21 and 22 of the Constitution of India were suspended without any reference to any law. The Supreme Court said that a citizen would not be deprived to move the court for a writ of habeas corpus of the detention is mala fide.

In the case *Maharashtra State v. Prabhakar* liberty has not been deprived under the Defense of India act, or any rule made there under, then his right to move the court will not be suspended. In the case *Ram Manohor Lohia v. State of Bihar* the Supreme Court said that the right of a person to move a court is not suspended when he has been detained in violation of the mandatory provision of the Defense of India act. The order of the president did not form a bar to all applications for the release for the detention under the act. In the case *Arjun Singh v. State of Rajasthan*, the question arose whether Art. 16 of the Court said that Art. 16 of the Constitution of India remained operative even though Art. 14 of the Constitution of India were suspended. The court said that enforcement of Fundamental Rights was suspended which were specifically mentioned in the Presidents order.

In the case *ADM Jabalpur v. Shiv Kant Shukla*, right to move the court to enforce Art. 21 of the Constitution of India was suspended under Art. 359 of the Constitution of India during

internal emergency (1975-1977). In this case the Presidents order was the one issued during emergency declaring that the right of any person to move the court for any enforcement of the right given by Art. 14, 21 and 22 of the Constitution of India and all proceeding pending in any court for the enforcement of the rights shall remain suspended for the period during the period of emergency. Supreme Court said that” *in the view of the presidential order dated June 27th, 1975 no person has any locus standi to move any writ petition under article 226 before a high court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations*”.

Fundamental rights which the constitution guarantees to the citizen of India are called fundamental because they are the basic to the development of human personality. These rights are guaranteed to the citizen of India by the Constitution and no one can encroach upon them and infringe the right of a citizen. Our legal system also provides remedies to those citizens whose fundamental rights have been violated. But only when an emergency is declared in the country, these rights can be suspended by the Central Government. These rights of the citizens can be suspended only up to the law which is related to the emergency and is mentioned in the Presidents order. But even during the period of emergency there are two rights which cannot be suspended are right to life and personal liberty under Art 20 and 21 of the Constitution of India. These rights can be enforced during the period of emergency by moving the court under Art. 32 of the Constitution of India. So, it is the duty of the citizens of India to protect the country from any kind of war, external aggression, armed rebellion or internal disturbances. The citizens should take initiatives for the development of the country and protect the country from every harm.

STATE EMERGENCY

It is the duty of the Union Government to ensure that governance of a State is carried on in accordance with the provisions of the Constitution. Under Article 356, the President may issue a proclamation to impose emergency in a state if he is satisfied on receipt of a report from the Governor of the State, or otherwise, that a situation has arisen under which the Government of the State cannot be carried on smoothly. In such a situation, proclamation of

emergency by the President is called „proclamation on account of the failure (or breakdown) of constitutional machinery.“ In popular language it is called the President’s Rule.

Like National Emergency, such a proclamation must also be placed before both the Houses of Parliament for approval. In this case approval must be given within two months, otherwise the proclamation ceases to operate. If approved by the Parliament, the proclamation remains valid for six months at a time. It can be extended for another six months but not beyond one year. However, emergency in a State can be extended beyond one year if:-

- (a) A National Emergency is already in operation, or if
- (b) The Election Commission certifies that the election to the State Assembly cannot be held.

This type of emergency has been imposed in most of the States at one time or the other for a number of times. It was in 1951 that this type of emergency was imposed for the first time in the Punjab State. In 1957, the Kerala State was put under the President’s Rule. There have been many cases of misuse of „constitutional breakdown“. For example, in 1977 when Janata Party came into power at the Centre, the Congress Party was almost wiped out in North Indian States. On this excuse, Desai Government at the Centre dismissed nine State governments where Congress was still in power. This action of Morarji Desai’s Janata Government was strongly criticized by the Congress and others. But, when in 1980 (after Janata Government had lost power) Congress came back to power at the Centre under Mrs. Gandhi’s leadership and dismissed all the then Janata Party State Governments. In both cases there was no failure of Constitutional machinery, but actions were taken only on political grounds. In 1986, emergency was imposed in Jammu and Kashmir due to terrorism and insurgency. In all, there are more than hundred times that emergency has been imposed in various States for one reason or the other.

The effects of the imposition of the State Emergency under Article 356 are as follows:-

- The President can assume to himself all or any of the functions of the State Government or he may vest all or any of those functions with the Governor or any other executive authority.
- The President may dissolve the State Legislative Assembly or put it under suspension.
- He may authorise the Parliament to make laws on behalf of the State Legislature. The President can make any other incidental or consequential provision necessary to give effect to the object of proclamation.

The way President's Rule was imposed on various occasions has raised many questions. At times the situation really demanded it. But at other times, President's Rule was imposed purely on political grounds to topple the ministry formed by a party different from the one at the Centre, even if that particular party enjoyed majority in the Legislative Assembly. Suspending or dissolving assemblies and not giving a chance to the other political parties to form governments in states have been due to partisan consideration of the Union Government, for which Article 356 has been clearly misused. In view of the above facts, Article 356 has become very controversial. In spite of the safeguards provided by the 44th Amendment Act, this provision has been alleged to be misused by the Union Government. That is why, there is a demand either for its deletion or making provision in the Constitution to restrict the misuse of this Article. The Sarkaria Commission which was appointed to review the Centre-State relations also recommended that Article 356 should be used only as a last resort. The Commission also suggested that the State Legislative Assembly should not be dissolved unless the proclamation is approved by the Parliament. It further suggested that all possibilities of forming an alternative government should be fully explored before the Centre imposes emergency in a State on grounds of breakdown of Constitutional machinery. The Supreme Court held in the Bommai case that the Assembly may not be dissolved till the Proclamation is approved by the Parliament. On a few occasions such as when Gujral Government recommended use of Article 356 in Uttar Pradesh, the President returned the recommendation for reconsideration. The Union Government took the hint and dropped the proposal.

One of the important cases of the State Emergency is *State of Rajasthan v. India*. A constitutional controversy of great significance in Article 356 was raised in this case. When the general election for Lok Sabha were held in the country in 1977, after the lifting of the emergency of 1975, the Congress Party was badly routed in several states by the Janata Party which won a large number of seats in the Lok Sabha and thus, formed the government at the Centre. In these states, congress ministries were functioning at the time and they still had some more time to run out for completion of the full term. There have been many cases of misuse of „constitutional breakdown“. For example, in 1977 when Janata Party came into power at the centre, the Congress Party was almost wiped out in North Indian States. On this excuse, Desai Government at the Centre dismissed nine State governments where Congress was still in power. This action of Morarji Desai's Janata Government was strongly criticized by the Congress and others. The suit was designed to foretell the invocation of Article 356 in the several States. The Supreme Court however, dismissed the suit unanimously. The board

position adopted by the Court was that it could not interfere with the Centre's exercise of power under Article 356 merely on the ground that it embraced „political and executive policy and expediency unless some constitutional provision was being infringed.”

Another landmark case of Article 356 is **S.R. Bommai v India**. The Supreme Court gave a landmark decision in this case. The facts of the case are- in 1989, the Janata Dal Ministry headed by Shri SR Bommai was in office in Karnataka. A number of members defected from the party and there a question mark on the majority support in the house for Bommai's ministry. The Chief Minister proposed to the governor that the Assembly Session be called to test the strength of the ministry on the floor of the house. But the governor ignored this suggestion. He also did not explore the possibility of an alternative government but reported to President that as Shri Bommai had lost the majority support in the house and as no other party was in the position to form the government, action be taken Article 356(1). Accordingly, the president issued the proclamation in April 1989. Bommai challenged the validity of the proclamation before the Karnataka high court through writ petition on various grounds. The high court ruled that the proclamation issued under article 356(1) is not wholly outside the pole of judicial scrutiny. The Satisfaction of the president article 356(1) which is a condition present for issue of the proclamation ought to be real and genuine satisfaction based on relevant facts and circumstances. Bommai appealed to the Supreme Court against the high court decision. The Supreme Court was also called upon to decide the validity of similar proclamation under 356(1) in the states of Meghalaya and Nagaland and thus declared it unconstitutional. The Supreme Court held in the Bommai case that the Assembly may not be dissolved till the Proclamation is approved by the Parliament. On a few occasions such as when Gujral Government recommended use of Article 356 in Uttar Pradesh, the President returned the recommendation for reconsideration. The Union Government took the hint and dropped the proposal.

FINANCIAL EMERGENCY

The third type of Emergency is Financial Emergency provided under Article 360. It provides that if the President is satisfied that the financial stability or credit of India or any of its part is in danger, he may declare a state of Financial Emergency. Like the other two types of emergencies, it has also to be approved by the Parliament. It must be approved by both

Houses of Parliament within two months. Financial Emergency can operate as long as the situation demands and may be revoked by a subsequent proclamation. So far, fortunately, financial emergency has never been proclaimed.

The consequences of the Proclamation of Financial Emergency are as follows:-

- (a) The Union Government may give direction to any of the States regarding financial matters.
- (b) The President may ask the States to reduce the salaries and allowances of all or any class of persons in government service.
- (c) The President may ask the States to reserve all the money bills for the consideration of the Parliament after they have been passed by the State Legislature.
- (d) The President may also give directions for the reduction of salaries and allowances of the Central Government employees including the Judges of the Supreme Court and the High Courts.

CHAPTER THREE: DOCTRINE OF PLEASURE

In England the rule is that a civil servant of the Crown holds office during the pleasure of the Crown and his services can be terminated by the Crown at any time without assigning any reason and without giving any compensation except where it is otherwise provided by a statute. The Crown is not bound by the contract of employment between it and a civil servant and therefore in the case of dismissal, a civil servant is not entitled to damages for premature termination of his services. The doctrine of pleasure is based on the public policy. Its operation, however, can be modified by an act of Parliament. In India the doctrine of pleasure has been incorporated in Article 310 of the Constitution of India. Article 310 provides that except as expressly provided by the Constitution, every person, who is a member of defense service or of a civil service of the Union or of an All India Service or holds any post connected with defense or any civil post under the Union, holds office during the pleasure of the President and every person who is a member of a civil service of a State or holds any civil post under a state holds office during the pleasure of the Governor of the State. It was decided in the case of *Shyam v Union of India*, Pleasure under Article 310 is not required to be exercised by the president or the Governor personally. It may be exercised by the president or the Governor acting on the advice of the Council of Ministers. In another case of *Union of India v Tulsiram*, , it was decided that pleasure of the President or the Governor under Article 310 is not subject to any contract and cannot be fettered by contract, ordinary legislation or the rules made under Article 309.

EXCEPTIONS TO DOCTRINE OF PLEASURE

The Doctrine of pleasure is subject to other express provisions of the Constitution. Article 310(1) will not apply where the constitution expressly provides for secured tenure. Article 124 and Article 217 guarantee a secured tenure to the judges of the Supreme Court and the High Courts. Similarly, the Comptroller and Auditor-General of India (Article 148), Chairman and Members of Public Service Commission (Article 317) and the Chief Election Commissioner (Article 324) also have constitutionally secured tenure. Doctrine of pleasure does not apply to the holders of these offices. They can be removed from office only on the ground of „Proved misbehavior“ or „incapacity“ by observing the procedure contemplated by the constitution.

OTHER OFFICES SUBJECT TO DOCTRINE OF PLEASURE

The executive power of the Union and of a state has been vested in the President and the Governor of the State concerned respectively. The President has a fixed term and he does not hold office at pleasure. The Governor is the executive head of a state and has a term of five years. But he can be removed from his office earlier because he holds his office during the pleasure of the president. This doctrine of pleasure has no safeguards and in a number of cases the Governors have been dismissed by the president arbitrarily. There are no safeguards available to him. The ministers of the Union and of various States have real executive powers with respect to their ministers. But all the ministers hold office during the pleasure of the president or a Governor as the case may be. Factually, all ministers hold office during the pleasure of the Prime Minister or the Chief Minister which is exercised formally in the name of the President or Governor. The Council of Ministers of National Capital Territory of Delhi holds office during the pleasure of the President though it is accountable to the Legislative Council. The Attorney General of India and the Advocate General of each state also hold office during the pleasure of the President or the Governor as the case may be.

DOCTRINE OF PLEASURE UNDER ARTICLE 310 AND COMMON LAW

In Britain, the doctrine of pleasure is a common law doctrine. It can be modified by parliament by law. In India, it is a constitutional doctrine and cannot be changed by ordinary legislation (decided in the case of *Sampuran Singh v State of Punjab*). In Britain, a civil servant has no right to bring suit against the Crown for arrears of salary. In India, a civil servant will get his arrears of salary if his dismissal is found to be unlawful. The pleasure of the President/Governor is subject to other provisions of the Constitution. In our Republic where the rule of law prevails, even pleasure is canalized. Viewed from this perspective, security of tenure is a value itself.

Clause (2) of Article 310 again makes an exception to the doctrine of pleasure. The state can enter into service contracts with new entrants, other than those covered by Clause (1), having special qualifications and such agreements will not be subject to the doctrine of pleasure where such contracts make provision for compensation in case of premature termination of contract,, except the cases of misconduct on the part of the employee, the Government shall be bound to pay compensation. Payment of compensation under clause (2) of Article 310 is not implicit. It can be made only when the contract of service makes specific provision for such compensation. Being an enabling provision in the matter of payment of compensation

on the basis of a contractual obligation, it cannot be said that even when there is no stipulation in a contract of employment, the same is implicit, decided in the case of ***J.P. Bansal v State of Rajasthan***.

SAVE GUARDS TO CIVIL SERVANTS (ARTICLE 311)

Article 311 is a bulwark of civil servants. This is an important guarantee which severely restricts the doctrine of pleasure contained in Article 310 (1) of the Constitution. Article 311 envisages three major penalties which may be inflicted on a civil servant. They are dismissal, removal and reduction in rank. Dismissal and removal from service are grave penalties which end the services of an employee. Article 311 gives more protection to a civil servant against these penalties. Reduction in rank does not end the services of an employee and, has been treated differently. Article 311 (1) provides that no person who is a member of a civil service of a state or holds a civil post under the union or a state shall be dismissed or removed by an authority subordinate to that by which he was appointed.

REASONABLE OPPORTUNITY OF HEARING

A civil servant cannot be dismissed, removed or reduced in rank unless: (a) an inquiry is made in which (b) he is informed of the charges against him; and (c) given a reasonable opportunity of being heard in respect of those charges. Procedural defect in the inquiry proceedings does not set aside the order of dismissal etc. and reinstate the employee. In such cases, the enquiry proceedings shall continue from the stage where it stood before the alleged vulnerability surfaced. Decided in the case of (***Union of India v Y.S. Sandhu***) The protection given to a civil servant by Article 311 (is that he cannot be dismissed, removed or reduced in rank by way of punishment without: (a) an inquiry informing him of (b) the charges against him and without (c) giving a reasonable opportunity of being heard in respect of those charges. In cases where the basis on which the employee obtained the employment is false, no inquiry is required. In ***Superintendent of Post Offices v R. Valasina Babu***, the respondent secured Government Job by producing false certificate. On inquiry the Collector cancelled the certificate. After disciplinary proceedings he was dismissed from service. It was held that in case of this nature, it might not have been necessary to initiate any disciplinary proceedings against the respondent. He could be dismissed without an inquiry. Departmental proceedings are said to have been initiated only when a charge-sheet is issued (***Coal India Ltd. V Saroj Kumar Mishra***) Departmental proceedings and criminal proceedings are different. Unless the charge in criminal trial is of grave nature with complicated facts and

law, departmental inquiry can be held separately, decided in the case of ***NOIDA Entrepreneurs Association v NOIDA***.

REASONABLE OPPORTUNITY

Reasonable Opportunity is a facet of natural justice. Natural Justice has no fixed meaning. The basic object is to ensure fairness, impartiality and reasonableness. In the case of *Uma Nath Pandey v State of U.P.*, it was held by the Supreme Court that the very purpose of the following principles of natural justice is the prevention of miscarriage of justice. Broadly reasonable opportunity may include the following:-

- The employee against whom action for either of three punishments (removal, dismissal or reduction in rank) is proposed should be informed of the charges;
- The charges must be clear, precise and accurate;
- The delinquent employee should be informed of the evidence by which those charges are sought to be substantiated against him;
- Copies of relevant document must be supplied to the employee;
- If charges are framed on the basis of evidence of witnesses examined in the absence of delinquent employee, copies of statements of witnesses must be given to him;
- Personal hearing if demanded by the delinquent servant, must be given;
- The employee charged must be given an opportunity to cross-examine the witnesses produced against him;
- All the witness should be examined in the presence of delinquent and he should be given an opportunity to cross-examine them;
- The employee against whom an inquiry is being held has a right to argue his own case. It is a part of personal hearing;
- Inquiry officer should not be biased;
- Reasons must be given by an inquiry officer for his decision;
- Inquiry officer cannot be witnesses himself.

SERVICE TRIBUNALS

One of the recommendations of the Swaran Singh Committee was to have special tribunals for resolving the disputes of civil servants which had resulted in backlog of cases in High Courts. Article 323-A was inserted in the Constitution as a follow-up measures by the Constitution (forty-Second Amendment) Act, 1976. The purpose of service Tribunals is to deal exclusively with service matters and to provide to persons covered by them, speedy

relief in respect of their grievances. Article 323-A is not self-executor. Parliament „may“, by law provide for the adjudication of or trial by administrative tribunals of disputes and complaints with respect to recruitment and condition of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. By virtue of this authorization Parliament in 1985 has enacted The Administrative Tribunals Act providing for the establishment Central/State/Joint Administrative Tribunals. It is clear from the language of Article 323-A that Parliament alone has power to establish such tribunals. The object was to equate these tribunals with the High Court so that the burden of the later could be reduced.