“H.H. Keshvanand Bharti

v.

The State of Kerala and Others,

AIR 1973 SC 1461

(The Fundamental Rights’ Case)”

Submitted by:

Manisha Chaturvedi

Associates,

VB Law Associates

LIST OF ABBREVIATIONS

Art.	Article
Sec.	Section
&	And
AIR	All India Reporter
SC	Supreme Court
J.	Justice

FACTS OF THE CASE:

His Holiness Kesavananda Bharati v. The State of Kerala and Others AIR 1973 SC 1461, popularly known as ***Fundamental Right's Case,*** is a landmark decision of the Supreme Court of India. Kesavanand Bharati, a mutt chief of Kerala, challenged the validity of Kerala Land Reforms Act, 1963. **During the pendency of the case, this Act was placed in the Ninth Schedule by 29th Amendment Act. He challenged the validity of the 29th Amendment and he was permitted to challenge the validity of the 24th and 25th Amendment also.** The validity of the Constitution (24th Amendment) Act,1971 was challenged in this case, the Petitioners **had challenged the validity of the Kerela Law Reforms Act,1963.** But **during the pendency of the petition the Kerela Act was amended in 1971 and was placed in the 9th schedule by the 29th Amendment Act. On an Application by the petitioner, they were permitted to challenge the validity of 24th,25th and 29th Amendment to the Constitution also.**

In this case the Court by majority **overruled the Golak Nath's case which denied the Parliament the power to amend fundamental Rights of the citizens.** The majority held that Art. 368 even before the 24th amendment contained the power as well as the procedure of amendment. The **24th amendment merely made explicit what was implicit in the un- amended Art.368-A.** The 24th Amendment doesn't enlarge the amending power of the Parliament. The 24th Amendment is declaratory in nature. It only declares the true legal position as it was before the amendment and hence it is valid. The Court held that **under Art. 368, Parliament is not empowered to amend the basic structure or framework of the Constitution.** It held that the **first part of the twenty-fifth Amendment Act is valid,** but held that the **second part**, namely, "no such law, containing the declaration that it is for giving effect so such policy shall be called in question in any Court on the ground that it doesn't give effect to such policy" **is invalid**.

Basic Structure and Judicial Review also found their way in this landmark case in the Constitutional History of India.

THE CASE AT A GLANCE

What bring forth this historical case?

- **Twenty Fourth Amendment:-**

The following changes were brought by 24th Amendment:-
1. **Article 368 was amended and the marginal note was changed from "Procedure for amendment of the Constitution" to "Power of Parliament to amend the Constitution and the procedure therefore."** This amendment was brought to **clarify that Article 368 provided not only the procedure for amendment but also the power of the Parliament to amend the Constitution**.
2. **Article 368(3) was added** to the Indian Constitution, which stated that **Article 13 shall not be applicable on Constitutional Amendment.**
3. **Article 368(1) was added**, which stated that **the Parliament may amend by way of addition, variation or repeal any provision of this Constitution.**
4. The provision was made that the **President shall be bound to give its assent to the Constitutional Amendment.**
5. **Article 13(4) of the Indian Constitution was added** to the Indian Constitution, which made it clear that **Article 13 will not be applicable to Constitutional amendments.**

- **Twenty Fifth Amendment:-**

Twenty Fifth brought the following changes:-
1**. Article 19(1) (f) was delinked from Article 31 (2).**
2. **Article 31C was added to the Constitution.**
3. The **word 'amount' was substituted for the word 'compensation' in Article 31(2).**
4. A new provision **Article 31C was added**.

- **Twenty Ninth Amendment:-**

By the twenty ninth amendment, **several acts including Kerala land Reforms Act were put in the Ninth Schedule to protect them from judicial review.**

Issues before the Constitutional Bench of 13 judges:

1. Whether the twenty-fourth amendment was unconstitutional or not?
2. Whether Article 13(2) is applicable on Constitutional amendment as well, i.e. whether the term law in Article 13 includes Constitutional amendment or not ?
3. Whether Fundamental Rights can be amended or not?
4. Whether Article 368 as it originally was conferred power on the Parliament to amend the Constitution?
5. Whether twenty fifth amendment was constitutional or not?
6. Whether substitution of the term 'amount' with the term 'compensation' in Article 31 was correct or not?
7. Whether Article 31C was valid or not?
8. Whether Directive principles will now be given preference over the Fundamental Rights or not?
9. Whether twenty ninth amendment was constitutional or not?

Judgment:

The 13 judges' bench after listening to the argument for sixty long days, passed its judgment which goes around six hundred pages. The Court unanimously decided:

- That the **24th amendment was valid.**
- On the question **whether the Fundamental Rights can at all be amended**, **the bench was divided into 7:6.** The **minority was of the view that the Parliament has all power to amend the Constitution** including the basic structure. The **majority decided that the Parliament can amend any provision of the Constitution but the basic structure should not be destroyed, damaged or abrogated.** The **majority overruled judgment in Golaknath case** as in the opinion of the bench, **apart from fundamental rights**, there are **several other features and provisions in the Constitution,** which are more important and which **should not be allowed to be violated**. Golaknath made the Fundamental rights non-amendable and this was quite harsh and will put an end to the flexibility of the Constitution. Thus the fundamental rights were allowed to be amended provided it does not abrogate the basic structure of the Constitution and it **was held that all fundamental rights are not included in the basic structure, specially right to property is not as such.**
- The court affirmed that **the power of the Parliament to amend the Constitution is not unlimited and the judicial review can be applied on it.** It was **held that the twenty fourth amendment made that explicit what was implicit in Article 368 earlier.**
- The court also partly **upheld the twenty fifth amendment** of the Indian Constitution.
- The **court upheld the substitution of the term "amount" for the term "compensation" but the courts also held that the amount must not be arbitrary.** The non- applicability of Article 19(1) (f) to Article 31(2) was held to be constitutionally valid

- **The first part of Article 31 C was held valid** so that the government can make legislations to give effect to the socio-economic reforms. The **latter part of Article 31 C was held to be unconstitutional as it made the laws challenge proof.**

INTERPRETATION OF VARIOUS PROVISIONS OF THE INDIAN CONSTITUTION

The court interpreted the following provisions of the Constitution and consequently the following ratio decidendi came into existence in the Constitutional History of India:

1) Doctrine of Basic Structure

The "Basic Structure" doctrine is the judge-made doctrine whereby **certain features of the Constitution of India are beyond the limit of the powers of amendment of the Parliament of India.** This doctrine of basic structure was laid down in this case. This basic structure was kept immune from Article 368 of the Constitution. The idea to evolve this doctrine was to curb out the ill-effects caused by the misinterpretation of Article 368. The SC interpreted Art.368 in the light of Art.13, Art.31-C ,24th amendment, etc. and thereby this doctrine was evolved. With Art.368 in hand, there were chances of Parliament to dis-utilize its authority which was granted to them absolutely to amend laws as it is said that **power corrupts and absolute power corrupts absolutely.** To safeguard the fundamental features of the Constitution and its essence, a need was felt to safe them by keeping them in an air tight compartment and that is why they came up with an idea of **"Basic Structure"**.

Chief Justice Sikri indicated that Basic Structure consists of the following features:

1. The supremacy of Constitution;
2. The republic and democratic forms of government;
3. The secular character of Constitution;
4. Maintenance of separation of power;
5. The federal character of the Constitution.

But he also held that **these features are not exhaustive and includes other features also which the court may from time to time lay down.**

Justices Shelat and Grover added another three features as basic structure:

1. The mandate to build a welfare state contained in the Directive Principles of State Policy;
2. Maintenance of the unity and integrity of India;
3. The sovereignty of the country.

EVOLUTION OF THE DOCTRINE OF BASIC STRUCTURE

Six Judges, namely, Sikri, C.J., and Shelat, Grover, Hegde, Reddy and Mukherjea, JJ., (hereafter referred to as the six Judges led by the Chief Justice) fully accepted the submission of the petitioners, and

held that **the Fundamental Rights, being part of the essential elements or basic features of the Constitution could not be abrogated or emasculated by the exercise of the power of amendment under Article 368. They conceded, however, that reasonable abridgment of the rights, as distinct from their abrogation or emasculation will be permissible under that Article 368.** Six other Judges, namely, Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ., held that there were no limitations or restrictions of a substantive nature on the exercise of the power of amendment under Article 368. Three of them, namely, Ray, Beg and Dwivedi, JJ., **conceded the possibility of one limitation**, however, namely, that the **entire Constitution cannot be repealed at one stroke leaving behind a Constitution void. Palekar, J., dismissed the argument based on the possibility of such total repeal**. The Union Judiciary and the High Courts have the **power to interpret and thereby affect the scope of the Constitutional Provisions concerning the power and franchise of States and that is why, in view of this power of judicial legislation, the provisions relating to the Supreme Court and the High Courts have also been entrenched**. The provisions relating to the lower judiciary have not been entrenched not because they are less important or basic, but because, under the scheme of the Constitution, the Courts below the High Court have no jurisdiction to interpret the Constitution.

Though with different views but all the seven of them believe that there must be some limitations on the power under Article 368 to amend the Constitution. **The real anxiety of Khanna, J., was that if not struck down, the second part of Article 31-C will "provide the cover for making laws with a regional or local bias", and will thereby "imperil the oneness of the nation", and sow the "dangerous seeds of national disintegration".**

The Chief Justice Sikri interpreted Article 368 as if no restrictions were implied on the amending power "a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution un-amendable or extremely rigid".

Shelat and Grover, JJ., **interpreted** that the **provisions of Parts III and IV of the Constitution** and **those relating to the rights and safeguards of minorities and the federal principles must, in their essence, be taken outside the scope of the amending power if they were to be preserved.**

Hegde and Mukherjea, JJ., **interpreted that Art.368 can "destroy the sovereignty of this country", to "substitute the democratic form of government by monarchical or authoritarian form of government", to "break up the unity of this country", to "destroy the secular character" of our State and so forth.**

And, Reddy, J., **interpreted that Parliament might effect a metamorphosis of power of making itself the supreme sovereign**. Surely, if the amending power is given its unrestricted scope, it will be "possible" for a two-third majority of Parliament legitimately to bring about such consequences that cannot and need not be denied.

The **real problem of construction,** therefore, is **whether this mere possibility,** apart from any question of likelihood, of undesirable but legitimate use of the power of amendment, **justifies a curbing construction for the power.**

The basic problem of the science of government which arose was that, on the one hand, without **granting power, the purposes or objectives of government cannot be achieved; i.e. government cannot function.** When a police constable is given the warrant to arrest, he may let the criminal go, or he may arrest the wrong person. When a board is given the power to issue licenses, it may refuse licenses in cases where they ought to have been granted and issue them in improper cases ; when a Judge is

empowered to adjudicate, he may adjudicate properly, or erroneously or whimsically ; when a legislature is given the power to make laws, it may make improper laws which will inconvenience and harass the people rather than serve them ; and, **finally, when a Constituent Assembly assumes the power to make a Constitution, it may make a wretched Constitution rather than a good, popular and useful one. Yet, none of these powers can be denied.** We can, of course, in most cases, **provide checks and correctives and balances; and that we do.** The constable is supervised and controlled by his superiors, and by the Courts; the licensing authority is checked and controlled, generally, by an Appellate Authority, then by the Minister, the legislature and, to a certain extent, also by the judiciary; the **Judge is overlooked, generally, by superior or appellate judicial authority, and also, in certain respects, by the legislature; and the legislature itself is checked by the electorate and, marginally, by the judiciary.**

Through this doctrine, the Court came to a conclusion that any part of the Constitution may be amended by following the procedure prescribed in Article 368. But no part may be so amended as to "alter the basic structure" of the Constitution. In other **words the basic structure is '*Unammendable*.' or in a context in which, any constitutional amendment that violates the 'basic structure' of the Constitution would be invalid.**

(2) ARTICLE 368 & CONSTITUTIONAL AMENDMENT) VIS-À-VIS A 'LAW' UNDER ARTICLE 13(2)

The Court considered the question that whether the word 'law' in clause (2) of Article 13 also includes a 'constitutional amendment' which had arisen in ***Shankari Prasad v. UOI***[1]**,** for the first time and later the decision in that case was overruled by the Supreme Court itself. As a result, a fiasco was noticeable; **thereby the Court felt an urge to uphold the validity of 24th Amendment.**

In **Shankari Prasad case,** the court held that the word 'law' in clause (2) didn't include law made by the parliament under Article 368. It was being interpreted that **the word 'law' in Article 13 must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constitutional powers** and, therefore, Art.13(2) didn't affect amendments made under Art. 368. **This interpretation was followed by the majority in Sajjan Singh's case**[2]**, but was overruled in Golakh Nath case**[3]**,** and it was held that the word 'law' in Art.13(2) included every branch of law ,statutory, constitutional, etc., and hence, if an amendment to the Constitution took away or abridged Fundamental Right of citizens, the amendment would be declared void.

The effect of this over-ruling was that the Constitution (24th Amendment) Act, 1971 was enacted. By this amendment, a new clause (4) was added to Article 13 which makes it clear that constitutional Amendment passed under Art.368 shall not be considered as 'law' within the meaning of Art.13 and therefore cannot be challenged as infringing the provisions of Part III of the Constitution.

[1] AIR 1951 SC458
[2] AIR 1965 SC 845
[3] AIR 1967 SC 1643

The validity of this amendment was considered by the Court in this case and the same was upheld by overruling the Golak Nath case.

The above mentioned cases as precedence paved way for the Courts to further interpret the scope of Art.368 and it was interpreted that there are inherent or implied limitations on the amending power of the Parliament **and Art.368 does not confer power to amend the Constitution so as to damage or destroy the essential elements or basic features of the Constitution**. Khanna J., held that though there is no implied limitation on the amending power, **but the power to amend does not include the power to abrogate the Constitution**. The word "amendment", according to him, postulated that **the old constitution must survive without loss of indemnity** and it must be retained through in the amended form and, therefore, the power doesn't include the power to destroy or abrogate the basic structure or framework of the Constitution. The remaining 6 judges (A.N.Ray, Chandrachud, Mathew, Beg, Dwivedi and Palekar, JJ.) held that there are no limitations, express or implied on the amending power. Thus, to sum up the entire discourse upon it, the court by majority of 7 to 6 **interpreted and held accordingly that the Parliament has wide powers of amending the Constitution and it extend to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the 'basic feature' or 'framework' of the Constitution.** There are implied limitations on the power of amendment under Art.368. **Within these limits Parliament can amend every Articles of the Constitution. Whether there are implied limitations on the amending power or not would depend upon the interpretation of the word 'amendment'**.

Delivering the leading majority judgment Sikri,C.J., **interpreted the word 'amendment'** as "in the constitution the word, 'amendment' or 'amend' has been used in various places to mean different things. In some articles, the word 'amendment' in the context, has a wide meaning and another context it has a 'narrow meaning'. In view of the great variation of the phrases used all through the Constitution it follows that **the word "amendment" must derive its color from Art.368 and the rest of the provisions of the Constitution.**

The **expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution** within the **broad contours of the Preamble** and the Constitution to carry out the objectives in the Preamble and the Directive Principle applied to Fundamental Rights, it would mean that while fundamental rights, cannot be abrogated reasonable abridgments of Fundamental Rights can be effected in the public interest. **The CJ was of the view that if this meaning be given, it would enable Parliament to adjust Fundamental Rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen."**

On behalf of the Union and the States, it was urged that the conception of basic elements and fundamental features are illusive conceptions and therefore it would be very unsatisfactory test for the Parliament to comprehend and follow. The Chief Justice said, that the concept of amendment within the contours of the preamble and Constitution cannot be said to be a vague and unsatisfactory idea which Parliamentarian and the public would not be able to understand. He said that the argument that because something cannot be cut or dried or nicely weighted or measured and therefore doesn't exist is Fallacious. There are many concepts of law which are not capable of exact definition, but it doesn't mean that it doesn't exist. It was also argued that every provision of the constitution is essential; otherwise it would

not have been put in the Constitution. The CJ further observed "But this doesn't place every provision of the Constitution in the same position. **The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same.**

(3) PREAMBLE

The Preamble is the key to open the mind of the makers. In ***Berubari's case,*** the SC held that the Preamble was not a part of the Constitution and therefore it could never be regarded as a source of any substantive powers. But in Keshvananda Bharti's case, the SC rejected the above view and **held that preamble was a part of the Constitution. The Attorney-General in this case argued that by virtue of the amending power in Art.368 even the preamble can be amended.** To this, the **petitioners contended that the amending power in Art.368 is limited. The Court interpreted that the amending power cannot be used so as to damage or destroy the basic features mentioned in the preamble.** Reading the Preamble, the Fundamental importance of the freedom of the individual, its inalienability and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Art.368 of provisions like Articles 52 ,53 and various other provisions, **an irresistible conclusion emerges that it was not the intention to use the word "amendment" in the widest sense. It was the common understanding that the Fundamental Rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare State. In view of the above reasons, a necessary implication arises on the power of Parliament that the expression "amendment of this constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the Attorney-General.**

Though in any ordinary statute not much importance is attached to the preamble, all importance has to be attached to the preamble in the Constitutional Statute. Sikri C.J., observed," no authority has been referred before us to establish the propositions that what is true about the power is equally true about the prohibitions and limitations. Even from the Preamble limitations have been derived in some cases. It seems to me that the **preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble." In fact, the Preamble was relied on in imposing implied limitations on the amending power of the Parliament under Art.368** of the Constitution. It was held in this case that the **"basic elements" in the Preamble cannot be amended under Art.368.**

(4) JUDICIAL REVIEW

Judicial Review is the power of courts to pronounce upon the constitutionality of legislative acts to enforce or refuse to enforce if it is unconstitutional and hence declare it void.

Khanna J. in this case interpreted the concepts regarding Judicial Review that it has become an integral part of our Constitutional System and a **power has been vested in the constitutional courts to decide about the constitutional validity of the provisions of the statutes . If any such provisions**

are found violative of any of the articles of the Constitution which is the touchstones for the validity of all laws the Supreme Court and the High Court are empowered to strike down the said provisions. It was held that the Judicial Review is the **'basic feature'** of the Constitution of India and therefore it cannot be damaged or destroyed by amending the Constitution under Art.368.

(5) ART.31-C- CERTAIN DIRECTIVE PRINCIPLES AND ART.14 AND 19 OF THE INDIAN CONSTITUTION

This Article was added by the Constitution 25th Amendment Act,1971. The new Article **empowers Parliament as well as State Legislature to enact laws towards securing the directive principles specified in Art.39 (b) and (c) of the Constitution. Such laws cannot be challenged on the ground that they infringe Art.14 and 19 of the Constitution.**

The object of this amendment was stated in its preamble- to get over the difficulties placed in the way of giving effect to the directive principles of State Policy. It was further provided that any law that contained a declaration that it was put on the statute book for giving effect to such policy could not be called into question in any court on the ground that the new law didn't give effect to such policy. **The declaration clause of Art. 31-C thus barred the judicial review of such laws completely.**

In this case, **the majority struck down the declaration clause of Art.31-C as unconstitutional on the ground that it was destructive of the basic feature of the Constitution, that is, the judicial review.** The first part was held to be valid. It was **interpreted and held that any law enacted by Parliament for giving effect to the Directive principles contained in clause (b) and (c) of Art. 39 cannot be declared void on the ground that it violates or abridges any of the rights conferred by Art. 14, 19 or 31. The effect of declaring the second para as void is that the Court will have jurisdiction to examine whether there is a direct and reasonable nexus between the laws passed to implement the directive principles contained in Art. 31 (b) and (c).**

It was further interpreted that **Fundamental Rights and Directive Principles aimed at a same goal** of bringing about a social revolution and establishment of a Welfare State and **they can be interpreted and applied together.**

CONCLUSION

To conclude, the interpretation in this case involved the major portions of the Constitution specially Art.368 and a very important **doctrine of Basic Structure was evolved as a result.**