CHAPTER 4

4. AMBIT OF THE INDIAN PARLIAMENT AS AN AMENDING BODY

The question concerning the power of Parliament to accomplish constitutional changes and the range of that power, has naturally engaged the minds of politicians, jurists, judges and lawyers. As Justice Dwivedi observed presciently in Kesavanand:\(^1\) ‘the Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people.’\(^2\) Indeed even the raising of the question concerning the range of the amending power wielded by the Parliament and State Legislatures under Article 368 has very substantially affected the course not merely of the constitutional but also the political history of contemporary India. The need for power to change the Constitution cannot be gainsaid. It was recognised by the Constitution makers when they provided Article 368. This chapter thus charts out the praxis and province of the Parliament in the sphere of amendment. Till now the Parliament was seen just as a legislative body capable of making and enacting laws but with the enactment of Article 368 a new feather was added to the cap of the Parliament. In addition to its legislative powers it now became a wielder and donee of amending power as well.

4.1. The Standing of the Indian Parliament: Locus of Sovereignty in India

The starting point for this subject would undoubtedly be United Kingdom. The doctrine of parliamentary sovereignty as understood in the British Constitutional tradition was articulated in authoritative form at the end of the 19th century by A.V. Dicey although there were earlier formulations of it to similar effect\(^3\). The doctrine of parliamentary sovereignty grew out of the particular historical experience of the United Kingdom. The British constitution evolved organically over centuries interlocking institutions the operations of which was governed by a network of statutes, judicial decisions, constitutional conventions

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\(^1\) Kesavanand Bharti v. State of Kerala(1973)4 S.C.C. 225 at 825(hereafter referred to as Kesavanand
\(^2\) Kesavanand at 947
practices and assumptions. By the nineteenth century it was widely admired for its relative protection of civil liberties and the economic prosperity with which it was associated.

The man instrumental in bringing this doctrine to the limelight A.V. Dicey upheld

"The principle of parliamentary sovereignty means neither more nor less than this namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever, and further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."

From this definition, three fundamental principles can be derived; the first is that Parliament can make or unmake any law. An example of this principle in practice; The Septennial Act 1715 was passed to extend the life of Parliament from three to seven years out of fear of the effects of an election. His Majesty's Declaration of Abdication Act 1936 demonstrates Parliament's ability to alter the line of succession to the throne and the Parliament Acts 1911 and 1949 demonstrate Parliament legislating over its own procedures. The War Damage Act 1965 overruled a House of Lords decision in Burmah Oil Company v Lord Advocate [1965] and is a demonstration of Parliament's ability to make or unmake any law as it was able to legislate with retrospective effect.

The second principle of Dicey's theory is that Parliament cannot be bound by its predecessors or bind its successors. This affirms Thomas Paine's theory that, 'every age and generation must be free to act for itself, in all cases as the ages and generations which preceded it'. Vauxhall Estates Ltd v Liverpool Corporation (1932) concerned conflict between The Housing Act 1925 and the Acquisition of Land Act 1919 where it was held that the provisions of the later act would apply; this is known as 'implied repeal' and demonstrates Parliament's inability to bind its successors. Ellen Streets Estates Ltd. v Minister for Health (1934) also held that the later Act must apply and it was stated that the intention of Parliament to repeal the legislation must be given effect 'just because it is the will of the legislature'.

The third basic principle of Dicey's theory is that no-one can question Parliament's laws, as Blackstone stated, 'true it is, that what the Parliament doth, no authority on earth can

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4 Supra note 1
5 Thomas Paine, Rights of Man, 1987,p.204
Wauchope challenged an Act of Parliament on the grounds that he was not given notice of its introduction as a bill into Parliament. His challenge was rejected on the basis that the courts are 'precluded from investigating whether the proper internal procedures have in fact been complied with'. This is known as the Enrolled act rule.

It is worth noting that not even the courts can question the validity of an Act of Parliament or declare it void. Illustrating the role of the judiciary in upholding the principle of parliamentary sovereignty, Lord Campbell in Wauchope v. Edinburgh and Dalkeith Railway Company, a decision of the House of Lords on a Scottish appeal in 1842 pronounced:

“...all that a court of justice can do is to look at the Parliamentary roll: if from that it should appear that a bill has passed both houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, what was done to it previously being introduced, or what passed in Parliament during the various stages of its progress through both houses of Parliament.”

In Manuel v A-G (1982) where then constitutionality of a UK statute (the Canada Act 1982) was challenged, Sir Robert Megarry V-C observed that he had:

“ Heard nothing in this case to make me doubt the simple rule that the duty of the court is to obey and apply every Act of Parliament, and that the court cannot hold any such Act to be ultra vires. Of course there may be questions about what the act means and of course there is power to hold statutory instruments and other subordinate legislation ultra vires. But once an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity.”

From the above passage it is amply clear that anything short of an act of parliament is not entitled to same obedience.

A new development took place in the British institutional landscape in 2009. The role of the House of Lords as the UK’s highest court ended by virtue of the Constitutional Reform

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6 In a case titled Pickin vs British Railways (1974) it was reaffirmed by the court that-"the idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution.”
7 Edinburgh & Dalkeith Railway Co v Wauchope (1842) 8 Cl & F 710
8 John Alder, Constitutional and Administrative Law, Palgrave Macmillan 2007,p.201
9 Sessional Papers Printed by Order of the House of Lords: Minutes of Proceedings ... Public Bills ... Reports from Committees ... Miscellaneous, Volume 5,Great Britain House of Lords, 1977.p.5
Act 2005. The Act for the first time expressly recognizes the principle of independence of judiciary by ordaining for a Supreme Court. Law Lords who were members of the House of Lords and could legally take part in voting in the house will retain their membership however they are no more eligible to vote in the House. Judges appointed after October 2009 shall be directly appointed to the Supreme Court and has nothing to do with House of Lords anymore.

However the jurisdiction of the Supreme Court remains the same as it was when it used to work as a committee of the House of Lords. Its separation from the House of Lords is merely an assurance of its being independent from legislature. The Supreme Court shall continue to work as the final court of appeal in the UK in terms of Civil and Criminal Cases. It shall continue to hear cases of public and constitutional importance however it cannot quash any law made by the parliament except to interpret it and give meaning to it. The parliament continues to be sovereign and as stated above that no person or body—including courts of law—may question the validity of the parliamentary enactments.

Although it is still strongly believed that the sovereignty of Parliament is the central principle of the British constitution, many theorists argue that British and every other legal system is based on more than one fundamental principle and it is hard to grade them. For instance Barber\textsuperscript{10} claims that “the English legal system possesses multiple unranked sources of legal power” and “that neither Kelsen's Grundnorm nor Hart's rule of recognition can be accepted as universal truths of legal systems”. One of the other crucial principles of the British constitution is the rule of law .\textsuperscript{11} This principle consists of ‘two sovereignties’\textsuperscript{12}. The first one is the sovereignty of Parliament and the second is the sovereignty of the courts. However, the former refers to ‘law making’, and the latter to ‘interpreting and applying the law’. Therefore, both courts and Parliament must coexist and it makes the principle of parliamentary sovereignty much more complicated. The quotation below illustrates it perfectly:

“the sovereignty of Parliament can be said to be based upon decisions of the courts in applying Acts of Parliament”\textsuperscript{13}

\textsuperscript{10} Nicholas Barber, Sovereignty re-examined: the courts, Parliament and statutes, Oxford Journal of Legal Studies 20, no. 1, 2000, pp. 137
\textsuperscript{13} Ibid. at 29
Another vital issue which also has to be considered is the present-day perception of the parliamentary sovereignty. In other words they divided the understanding of the parliamentary sovereignty into theoretical (form) and practical (substance). Bogdanor\textsuperscript{14} distinguished the form and the substance of parliamentary sovereignty. Nonetheless, it is essential to mention here about another famous British constitutional lawyer – Sir Ivor Jennings and his thoughts. He agreed with Dicey that the Parliament can enact legislation dealing with any subject\textsuperscript{15} and that the legislation of the Parliament is superior to the jurisdiction of the courts\textsuperscript{16}. However, Jennings claimed this as well that the supremacy of the Parliament exists only in theory, because it “is a legal fiction and legal fiction can assume anything”. To prove this he supported it with a famous example which read as follows: “if Parliament enacted that all men should be women, they would be women so far as the law is concerned”.\textsuperscript{17} This case shows that there is a disagreement between academics about the existence of the doctrine of parliamentary sovereignty in practice.

Nevertheless in recent years British Parliament has witnessed an erosion in parliamentary sovereignty. The sovereignty of Parliament has already been diluted by the devolution of power to bodies like the Scottish Parliament and the Welsh Assembly but, increasingly parliamentary sovereignty is at risk: externally because of the United Kingdom’s membership in the European Union, making British legislation subordinate to European legislation. An important illustration of the attrition of parliamentary sovereignty by European courts may be seen in the Factortame case and internally because of manipulations by the government of the day through the guillotining of Bills, which subverts confidence in the laws so passed – e.g. in 2004, the Lord Chief Justice, Lord Woolf – commenting on the Government’s inclusion of a comprehensive ‘ouster clause’ in the Asylum and Immigration (Treatment of Claimants, etc.) Bill, to exclude the judicial review of decisions on applications for asylum – suggested that if the clause were to become law, the courts would simply refuse to apply it. The sovereignty of the British Parliament is undoubtedly under threat. The United Kingdom Parliamentary Sovereignty Bill attempts to re-establish parliamentary sovereignty by shifting legislative emphasis back to domestic laws, requiring laws to expressly state an intention to deviate from the Act. Theoretically, the United Kingdom Parliamentary

\textsuperscript{16} Ibid. at 254
\textsuperscript{17} Ibid at 170
Sovereignty Bill, if it passes into legislation, will redress the concern of the erosion of parliamentary sovereignty.

In conclusion, much has changed since A V Dicey spelt out his doctrine. His doctrine was an accurate depiction of the situation at the time of writing. Parliamentary sovereignty is intended to prevent krytarchy – that is to say rule by judges. The doctrine of parliamentary sovereignty has evolved much. Parliamentary sovereignty has been limited especially by the advent of the European Union as a law-making organisation.

One question that becomes pertinent here is that if the Indian Parliament was created in the image of the British parliament then is the Indian parliament as powerful and absolute as the sovereign Parliament of Dicey? Before answering this question, we might note that the British parliament is not a constitutionally contrived organ; it is the result of historical evolution and to that extent a comparison of the concept of Indian parliament, which is the creation of a Constitution, is bound to raise illusions. Since it is the culmination of the constituent will of the people it is not as sovereign as the British parliament as it is bound the Constitution and the implied limitations which are inherent in the Parliament. The basic structure or otherwise called as the eternity clauses or constitutional reserves by some are one such limitation to the sovereignty of the Parliament.

The institutions for legislation in the Indian constitution are primarily the Parliament and the State legislatures. Concomitantly in the field of delegated and subordinate legislation there are hundreds of law making authorities under diverse statutes whose law known as rules or regulations or bye-laws. These authorities, statutory and administrative are additional legislative institutions which operate in numerous areas and in particular under fiscal, taxing revenue, labour, company, corporation and licensing laws. With this kind of escalation, the laws are becoming unmanageable and complex. Formal statutes are pouring in torrents and subordinate legislation in floods throughout the country. Legislative power has become insurmountable and massive. The examples of the exercise of such vast legislative powers are not only confined to acts and statutes of Parliament and State Legislatures but express themselves also in the forms of resolutions of these legislative institutions and rules, regulations, bye-laws, schemes and orders of subordinate law-making bodies.

Article 79 of the Constitution provides: “There shall be a Parliament for the Union which shall consist of the President and the two Houses to be known respectively as the
council of States and the House of People. “. Parliament may make laws for the whole or any part of India. The legislature of the State may make laws for the whole or any part of the State. Article 245 states that extra territorial operation is not a ground for the invalidity of any law made by Parliament.

Parliament in India is not a sovereign body – uninhibited and with infinite powers in the same sense as the British Parliament. It functions within the bounds of a grundnorm called the Constitution. Its legislative authority is circumscribed by in by limitations in a two-fold manner: first by the distribution of powers between the Union and the States and by the incorporation of a code of justiciable fundamental rights in the Constitution. The provision of judicial review is another deterrent that makes sure that all laws passed by the Parliament must be in conformity with the provisions of the Constitution and liable to be tested for constitutionality by an independent judiciary. This is reflected in the Minerva Mills case where the Supreme Court declared Cl. (4) & (5) of Article 368 to be invalid on the ground that these clauses, which removed all limitations upon the power of Parliament to amend the Constitution and precluded judicial review of a Constitution Amendment act, on any ground sought to destroy an ‘essential feature’ or ‘basic structure’ of the Constitution. All these limitations tend to qualify the nature and extent of the authority and jurisdiction of Parliament.

Nevertheless, the Parliament occupies a pivotal position in the present day Indian polity and constitutional limitations on its sovereign authority are themselves to be understood. With important qualifications such powers as Parliament possess under the Constitution are immense and it fulfils the role which a sovereign legislature does in any other independent country. The abundance of its powers at once becomes evident on an analysis of the extent of jurisdiction of Parliament under the scheme of distribution of powers, the constituent powers it possesses, its role in emergencies and its relationship vis-à-vis the judiciary, Executive the state Legislatures and other authorities under the Constitution.

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19 Vide S. 55 of the Constitution (Forty-second Amendment) Act, 1976, Parliament inserted Cl. (4) and Cl. (5) in article 368 so as to provide that no amendment of the Constitution made under the said article “shall be called in question in any court on any ground” [Cl.(4)] and that “There shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal, the provisions of this Constitution under this article’s Cl.(5).
4.2. Legislative Competence of the Indian Parliament

This part examines the constitutional significance of the Doctrine of Legislative supremacy of the Parliament. The patterns of division of Legislative power between the Union and the States are peculiar to India. It does not follow the American pattern and is also materially different from the pattern of many other constitutions of the commonwealth countries. Threefold division of the Legislative power distributed in the Union list, Concurrent list and the State list is its significant feature. The Canadian constitutional pattern of distribution and division of legislative power has largely influenced the Indian constitution. The state list with specific items for state legislation, the Union list with specific items for Union legislation, the residuary powers of legislation in the Union Parliament and the absence of the grant of ancillary powers are the four points of similarity between the Indian constitution and the Canadian constitution on the subject of legislative power. On the other hand three specific features of the legislative power in the Indian constitution are:

1. Parliament’s power to legislate with respect to a matter in the state list under article 249
2. Parliament’s power to legislate during a proclamation of emergency in respect of any matter in the state list.
3. The other cases of parliamentary legislative invasion by consent and adoption mentioned above illustrate the Indian constitutional tendency towards centralism and mark the major departure from the Canadian constitution on the nature and division of legislative power.

Generally speaking division of legislative power in federalism follows three basic principles of (1) relations of “ordination” (2) Relations of “co-ordination” in areas of conflict (3) and Relations of Cooperation.

At this juncture of the discussion it would be appropriate to ponder on the construction of legislative grant and the proper interpretation of the legislative power.

The Parliament has the exclusive power to make laws with respect to any matters enumerated in the Union list of the 7th schedule of the Constitution. The Concurrent list (list3) in the same schedule enumerates matters with respect to which both parliament and State Legislatures have concurrent powers to make laws. Thirdly, the State Legislatures have exclusive power to make laws with respect to any of the matters enumerated in the State list (list 2) of the 7th schedule of the Indian Constitution. In the case of any part of the territory of
India which is not included in a State Parliament is given the power to make laws for that territory with respect to any matters as enumerated in the State List (Art 246).

From this analysis one instance can be taken into account where the special power expressly assumed by Parliament under the Constitution to legislate and set up additional courts is provided within the scheme of Legislative power. The present Constitution has a unified system of laws and a unified system of courts to administer these laws and no distinction in India is made from that point of view between the Federal laws and the State laws. Yet this article 247 contains the germ for a departure. It permits additional courts for better administration of Union Laws. It is “courts “in the regular sense of the word and administrative or other tribunals or commissions that this power implies. Such courts however can only be “additional” courts and not courts in substitutions of the existing courts. The State list clearly provides that administration of justice ,constitution and organisation of all courts (except the Supreme Court and the High Courts ) the officers and the servants of the High Courts , procedure in Rent and Revenue courts and fees taken in all courts (except the Supreme Court) are within the legislative power of the State Legislatures. Besides jurisdiction and power of all courts (except the Supreme Court) with respect to any of the matters in List 2 are also brought within the ambit of the legislative power of the State Legislatures (Item 65, List 2).

Finally the Concurrent List gives power to both Parliament and the State Legislature to make laws with regard to “jurisdiction and powers of all the courts (except the Supreme Court) with respect to any matters in the List.” and fees in respect of any matters in the Concurrent List but not including fees taken in any Court. (Item 46, 47, List 3).

Another terrain where the enlargement of the legislative powers is felt is Parliament’s exclusive power to make any law with respect to any matter not enumerated in the Concurrent list or the State List as in article 248 (1). This is the residuary power of legislation in Parliament. Whatever does not belong to the State list or the Concurrent list belongs to the Parliament’s law-making power. This is an enlargement of the Union List. Unlike the American and the other likes of constitutions, the union in India is not one of enumerated powers only. It has certainly enumerated powers mentioned in the Union List but besides this it also has residuary powers. In a sense this is a tautological constitutional provision for item 97 of the Union List I of the 7th schedule of the constitution under article 246 had already
given parliament the power to make law in respect of any” other matter not enumerated in List 2 or List 3”.

Parliamentary legislative invasion becomes more perceptible when the Parliament begins to legislate with respect to matters in the State List on the ground of “national Interest” A precondition of this governmental invasion in the territory of the State list is a declaration by a resolution of the Council of States by not less than two-third members present and voting that “it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution. “ Parliament’s power to make such laws only remains in force while the resolution remains in force which is limited to a period not exceeding one year with an option to extend it for a further period of one year. A law made by Parliament on this basis ceases to have effect on the expiration of a period of six months after the resolution spends its force except as regards things done or omission to be done before the expiration of the said period (Art. 249).

This parliamentary aggrandizement continues further when there is inconsistency between laws made by Parliament not only under Article 249 but also under the proclamation of emergency under Article 250 where laws are made by the State legislatures. In case of such repugnancy, the law made by parliament shall prevail and not the law of the State. Parliament’s overriding legislative supremacy is therefore recognised in cases of (1) national interest and (2) Emergency. In such an event Parliament becomes the supreme law making body with supreme legislative competence overriding the State legislatures and the State laws. (Art. 251)

The fifth exception in favour of Parliament is its power to legislate for two or more States by consent and adoption of such legislation by other States. If it appears to the legislatures of two or more states to be desirable that any of the matters with respect to which Parliament has no power to make laws for the states except as provided in articles 249 and 250, should be regulated in such States Parliament by law and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act to regulate that matter accordingly. An act so passed shall apply to such states and to other states by which it is adopted afterwards by resolution passed in that behalf

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by the House. Any act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not as respects in the State to which it applies be amended or repealed by an Act of the Legislatures of that State.(Art 252 of the constitution). It is further provided that where a law made by the State legislatures with regard to one of the matters in the Concurrent list contains any provision repugnant to the provision of an earlier Parliamentary law or an existing law with regard to that matter then in that event the law so made by the state legislature, if it has been reserved for the consideration of the President and has received the President’s assent shall prevail in that State. But then it is provided that nothing in this clause shall prevent Parliament from enacting at any time any law with regard to the same matter including a law adding to or amending, varying or repealing the law so made by the State legislatures (Art 254).

This legislative nexus in the Indian constitution therefore reveals a pattern of its own. In the first place the president of India as much as parliament with two houses is an integral part of the Legislative institutions (Art 79).

In the second place the constitution of the States is written in the Constitution of India. The result is that the States have no independent powers to amend their constitutions and there is no scope for experiment with the States’ Constitution by the States in India as there is in Canada. Any change in any part of the Constitution of a particular State even though the Centre and other States may not be interested therein is an affair for the whole of India. Even a decision to abolish the legislative council of a State requires an Act of Parliament (Art 169). Thirdly the three legislative lists in the 7th schedule of the constitution and the division of legislative power between the union and the states are a characteristic compromise between unitary and federal forms of legislation. The residuary and the emergency powers of legislation in parliament and the provisions for invasion of State legislative power indicate a constitutional verdict for the Union against the states.

The entries in the three Legislative lists are prolix, and detailed, a fact which often raises many controversies on the “pith and substance” of those items raising new conflicts in the exercise of legislative powers. In India the States affect the lives of the ordinary people and citizen just as much if not more than the Union. In the division of the legislative power therefore the states are in a subordinate position and yet they are more vitally concerned with the life an expression of its citizen.
There are various other attributes that confer it legislative supremacy which are as follows:

1. The plenarity of the legislative power of Parliament is also not affected by the rule making power of the government and the administration. The delegated authority is exercisable only within the confines of the limits laid down in the statute and is always liable to withdrawn, the limits of the delegated authority and the procedure of its exercise are all fixed by Parliament which is not prepared to abdicate. This power of Parliament to delegate legislative authority under a statute is taken as an incident of its sovereignty.\textsuperscript{24}

2. Parliament is not a delegate of any other sovereign body. It is not even a delegate of the electorate. It exercises its own sovereign powers on behalf of and for the people who found it fit to endow it with legislative power under the Constitution adopted by them.

3. Parliament is not bound by the authority of its predecessors. It is free to repeal any law made by any previous Parliament including a law specified in the Schedule Nine of the Constitution (other than a State law so included.) There is no permanent unamendable statute put beyond its reach.

4. Parliament has full jurisdiction to regulate its internal matters. The Houses of Parliament can punish any one of their contempt. Their determinations are not subject to a review in any court. They can rescind their resolution.

However, there are numerous limitations and restraints on the powers of the Parliament. In Kesavanand Bharati, Palkhivala vehemently argued that there were inherent and implied limitations on Parliament’s amending power. In his work, Constitution Defaced and Defiled, Palkhivala had put this argument thus: Parliament’s Power to amend the Constitution “do not comprise the power to alter or destroy any of the essential features, basic elements or fundamental principles of the Constitution.” He asserted that this conclusion is reached either by ascribing the term “amendment” a restricted meaning or by invoking the doctrine of inherent and implied limitation.\textsuperscript{25}

Further the powers of the Indian parliament in legislative and other fields have been expressly limited by various provisions of the Constitution. The Constitution provides for a


\textsuperscript{25} N.A. Palkhiwala, Constitution Defaced and Defiled ,1974, pp.113-16
federal polity and the legislative powers of parliament as per the provisions of Article 246 are limited to the subjects enumerated in List I (Union List) and List III (Concurrent List) in the Seventh Schedule of the Constitution. It cannot cede, to foreign country any territory of India except by way of the Constitution.\(^{26}\) It cannot determine the election disputes relating to the election of the President or Vice-President of India according to Article 71. Similarly Parliament does not possess complete control over Union Finances and rights and privileges of constitutional authorities and functionaries viz; the judges of the Supreme Court and High Courts, the Comptroller and Auditor general of India.\(^{27}\)

Another significant area of specific limitations concerns Fundamental Rights in part III of the Constitution. All democratic Constitutions contain a Bill of Rights and these are treated as inviolable and inalienable and are protected against any legislative encroachment. The Basic Law of the Federal Republic of Germany accepts these even from constitutional amendments.\(^{28}\) The Japanese Constitution declares them to be eternal and inviolate rights conferred upon the people of this and future generations.\(^{29}\) Correspondingly the Indian parliament too cannot make a law in contravention of these rights, except to the extent permitted in article 31(C) for giving effect to Directive Principles specified in clauses (b) and (c) of Article 39 of the Constitution.

This brief overview answers the basic premise that the Constitution of India provides for a limited and controlled Parliament and this has been evidenced by the numerous judicial decisions also.

In The Delhi Land Act 1912, Chief Justice Kania said: Parliament is not a sovereign body, uncontrolled with unlimited powers.\(^{30}\) Chief Justice Gajendragadkar too held “there can be no doubt that the sovereignty which can be claimed by the Parliament in England cannot be claimed by any legislature in Indian the literal absolute sense.”\(^{31}\)

### 4.3. Parliament as the Donee of Amending Power

Reverting back to the core question of what is the locus of sovereignty in India, we may say that the Constitution confers the constituent power of the nation and the sovereignty

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\(^{26}\) In re: Berubari Union Exchange of Enclaves (1960) 3 S.C.R. 250.

\(^{27}\) Constitution of India, articles 112(3), 113(1), 125(2), 221(2) and 148(3)

\(^{28}\) Basic Law for the Federal Republic of Germany (1949) Oceana Pub. (1975), Article I to III

\(^{29}\) Constitution of Japan (1947), VII Oceana Pub. (1973), Article 11

\(^{30}\) In re: The Delhi Land Act 1912, (1951) S.C.R. 747 at 765

\(^{31}\) In re: Under Article 143 of the Constitution (1965) 1 S.C.R. 413 at 446
on the Parliament of India. The protagonists of Parliamentary sovereignty claim that the constituent power conferred by Article 368 enables the Parliament to walk into the shoes of the Constituent Assembly which itself was the repository of the sovereign power of the people.

Article 368 no doubt bestows constituent amending power on the Parliament but this is a derivative power and not independent and immanent. As to matters enumerated in the proviso to article 368, the States have the final and definitive power of ratification.

It is also professed that in the hierarchy of the constituent organs; the Parliament holds the pre-eminent position and subject to the procedure laid down in Article 368 it can claim a sovereign status.

No discussion on sovereignty in the Indian context would be complete without the reference to the people of India who represent the pith and substance of the constituent power of the nation. True that they have not, by any apparent or express words, reserved to themselves the power to amend or alter the Constitution but that certainly does not derogate them from their sovereignty. As the Constitution is an enactment, the people are also the fountainhead of legal sovereignty.

Besides the power to legislate for vast domains, the Constitution vests in the Parliament the Constituent power or the Power to amend the Constitution. The amplitude of this power is far-reaching as the parliament can amend in any way i.e. by addition, variation or repeal of any provision of the Constitution. Also, no extraordinary terms and conditions (e.g. ratification by a convention or at a referendum) fetter the exercise of this power. There was an attempt to introduce referendum for effecting changes in certain ‘basic features’ of the Constitution, by means of the Constitution (Forty-Fifth Amendment) Bill, 1978 but it failed since the Government of the day could not secure the required two-thirds majority in the Rajya Sabha.

4.4. Constituent Power is Superior to Ordinary Legislative Power

It is necessary to point out the subtle difference that exists between two kinds of functions performed by the Indian Parliament:
a) It can make laws for the country by exercising its legislative power and

b) It can amend the Constitution by exercising its constituent power.

Unlike the British Parliament which is a sovereign body (in the absence of a written constitution), the powers and functions of the Indian Parliament and State legislatures are subject to limitations laid down in the Constitution. The Constitution does not contain all the laws that govern the country. Parliament and the state legislatures make laws from time to time on various subjects, within their respective jurisdictions. The general framework for making these laws is provided by the Constitution. Parliament alone is given the power to make changes to this framework under Article 368. Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament.

Another illustration is useful to demonstrate the difference between Parliament's constituent power and law making powers. According to Article 21 of the Constitution, no person in the country maybe deprived of his life or personal liberty except according to procedure established by law. The Constitution does not lay down the details of the procedure as that responsibility is vested with the legislatures and the executive. Parliament and the state legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The executive lays down the procedure of implementing these laws and the accused person is tried in a court of law. Changes to these laws may be incorporated by a simple majority vote in the concerned state legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert Article 21 into the fundamental right to life by abolishing death penalty, the Constitution may have to be suitably amended by Parliament using its constituent power.

In the preceding paragraphs one can see the recurrence of the word “constituent power” and in order to get a better understanding of the ambit and scope of the Parliament as an amending body one should become familiar with this term.

4.5. Conceptual Analysis of the Term “Constituent Power” and the Nature of Amending Power

Lately, Constituent power has begun to appear in the work of many Anglo-American Constitutional scholars. In constitutional parlance, it means the constitution making power, the very source of juridical norms. The Classical theory of constituent power draws a distinction between a will that is superior to the Constitution (constituent power) and the

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positive constitutional forms created by the constituent subject that determines how public power is to be exercised and how ordinary laws are to be shaped. The most famous formulation of the theory came from Emmanuel Sieyes\textsuperscript{34} and Carl Schmitt\textsuperscript{35}. Both of them have treated this power as the repository of an extraordinary faculty of constitution making which also has the capacity of not being absorbed by the adoption of the Constitution. In other words it possesses the power and capability of taking precedence over the established constitutional forms.

The first most elaborate distinction between Constituted and Constituent power surfaced in a prominent political pamphlet titled what is the Third Estate? published in 1789\textsuperscript{36}. In this Sieyes’s identified the nation as the possessee of the constituent power and having the faculty to adopt a constitution for France. Sieyes described the nation as “a body of associates living under common laws and represented by the same legislative assembly”. Further he wrote “The nation is prior to everything, it is the source of everything. It wills is always legal indeed it is the law itself.” With the enunciation of this argument, he suggested that the nation was the subject of the Constituent power and its exercise was transcendental and independent of any constitutional form or specified procedure. Constituent power in that sense signified a legal beginning, an ability to stand outside established juridical order, assess its desirability and replace or transform it in important ways. It must be noted that for Sieye’s, Constituent power is not an arbitrary power but is always limited by the imperatives of natural law. For him the will of the nation is symbolised by the Constituent power and is legitimate so long as it is in accord with the “common security, the common liberty and finally the common welfare.” Only if an assembly representative of the pouvoir constituent respects such standards can it “justify in the name of reason and fair play its claim to deliberate and vote for the whole nation without any exception whatsoever?”

With this assertion he laid the foundation of what came to be known as the Constituted powers ---the legal and political institutions created through the exercise of constituent power. As a consequence of this, the bodies that emerged came to be known as The Legislature, Executive and Judiciary respectively and the powers vested in them are always limited by the Constitutional forms that grant their existence and thereby are denied in acts of Constitution making. For example, an ordinary legislature must adopt statutes in the prescribed manner and if granted the power to amend trey Constitution, it can do so.

\textsuperscript{34} Emmanuel Joseph Sieyes, What is the Third Estate? Pall Mall Press, London, 1963
\textsuperscript{35} Carl Schmitt, Constitutional Theory, trans. by Jeffrey Seltzer, Duke University Press, Durham, 2008
\textsuperscript{36} Ibid 2
according to the specific procedures and limits contained in the Constitution. In this respect the ordinary power of Constitutional reform is a constituted not a Constituted Power.

The Constituent power in its fuller sense connotes power to establish, adopt and enact and give a new constitution. By its very nature, the reins of the Constituent power are wielded by the political- legal sovereign in the society and polity which also commands the allegiance of the bulk of the people. The notion of “constituent power “as used in the Indian decisions, involves a central ambiguity. The term is used to connote the power of amendment of the Constitution (what the French call pouvoir constituent) and the power to make, remake and unmake the Constitution. The two powers are distinct though related.

Historically speaking, even in countries like that of Asia, Africa and United States of America the freedom fighters have claimed this power to frame the Constitution. It would first be advisable to look at the American Constitution which had been established by a Convention constituted exclusively for that purpose. Hence the American Constitution was deemed to have the sanction of the sovereign, the people who wielded the constituent power. Now, after the Constitution has been made, through Article V, they could either amend the Constitution, or as a means of radical change, even institute another Constitutional Convention. Thus, the conventional meaning of constituent power within American constitutionalism is the power of the people to change the Constitution through amendment or a constitutional convention. A plain reading of this show that amending power is considered to be a sub-set within constituent power of the sovereign according to the American Constitution. However there is a hierarchy between these two sorts of changes. The normal amendment usually requires the Congressional Method while the major changes require a ‘Convention’ method. When Parliament amends the Constitution, it does so in exercise of its constituent power as distinguished from its ordinary legislative power.

Contrary to this, The British Constitutional system shows a deviation from the rest. Here no distinction is made between Constituent power and legislative power due to some entrenched historical reasons.Dicey and other learned scholars have dealt with the constitutional law as a part of the common law that is founded on the deep rooted conventions and Parliamentary statutes, Bills in the form of Magna Carta. Because of this the

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37 Amendments to the U.S. Constitution may be proposed in one of two ways: Either two thirds of both houses of Congress must approve a proposed amendment and submit it to the states (the ‘congressional method’), or two-thirds of the states may petition Congress to call a constitutional convention which would then submit a proposed amendment to the states (the ‘convention method’).

38 Stephen M Griffin, Constituent Power and Constitutional Change in American Constitutionalism, Tulane University School of Law, Public Law and Legal Theory Working Paper Series, Working Paper No. 06-12A.
British Constitution was never put down in writing. A first of its kind attempt was made towards this end by Robert Cromwell to synthesize a written Constitution who established Commonwealth to achieve this end. The British Parliament did hold the constituent power in respect of territories flung offshore and British colonies spread out in various continents before the transfer of power in 1947.

The constitutional developments in India bears testimony to the fact that prior to the passage of the path breaking Indian Independence act, 1947 all the Constitutional acts including the Government of India Act, 1935, were enacted by the Imperialist British Parliament in pursuance of its despotic constituent power. The Constitutional statutes enacted required no special procedure and or any special legislative majorities in British Parliament. Before the commencement of the Parliament, The Indian Parliament was constituted by the authority of the British Crown or was patterned by the successive constitutional reform laws passed by the British Parliament. It was the British Parliament that vested the Indian Parliament with legislative powers which were derived from the statutory grants made under such enactments of the British Parliament which exercised supreme constituent authority. Despite the fact that ours was a non-sovereign legislature but it was in no way subordinate in nature. Even the Judicial Committee of the Privy Council, in a series of cases that dealt with colonies of India, Canada and Australia, maintained that the Legislatures of those countries were not subsidiary entities but were very much autonomous in matters within their competence and jurisdiction. Each such legislature was a chip in the block of the British Legislature. Though derived from a statutory grant, yet so long its powers existed they neither could be withdrawn nor could the Imperial Parliament make any laws in relation to the subjects that came under its purview. Its legislative competence could only be inhibited by the statutes under which it was constituted, for instance The Indian Councils Act 1861, the various reform acts and by the massive Constitution of India Act 1935. All these documents were enacted by British Parliament which alone had the amending power and under no situation the people of India or their representatives were given the power to amend the Constitution.

Besides these the Colonial Laws Validity Act 1865 and the Merchant shipping Act, 1894 too impacted the Indian Legislature. The Indian Legislature under the Indian Legislative Councils Act 1861, said Lord Selborne, “has powers expressly limited by the Act of Imperial Parliament which created it: and it can, of course, do nothing beyond the limit which circumscribe these powers. But when acting within these limits, it is not in any sense an agent
of the Imperial Parliament, but has always been intended to have plenary powers of legislation as large and of the same nature, as those of Parliament itself.” 39

With the dissolution of the Imperial Parliament, the Constitution of liberated India declared the Parliament to be Sovereign. Elected on the basis of universal adult suffrage, it is endowed both with legislative and constituent powers. The history of the framing of our Constitution provides a striking example of the true nature of the plenary law making power of framing a Constitution. The Constituent assembly acted in two capacities: as the Constituent assembly it claimed and exercised plenary law making power of framing and shaping the constitution. Under the Indian Independence act the transfer of power by the British Parliament was made to the Constituent Assembly of India, which germinated under the Cabinet mission Plan of 1946. On transfer of constituent power to it, the Assembly became the sovereign with unchallengeable rights to give the people the Constitution. In doing so, it exercised full constituent power to frame the constitution and enacted it in about three years. As the dominion legislature under S. 18, G.I. Act, 35 it exercised restricted legislative powers under the Act, particularly under ss.99 and 100, G.I. Act 35, read with three legislative lists. The Governor General had part in the law making process (s.20 and s.32) and he also possessed the power to pass ordinances under s.42,43 and 44 and section 72 of Schedule 72. But he had no part in the plenary law making power of framing the constitution.

The framers of the Constitution were familiar with meaning of “legislative powers”. Indeed they have described the power of making laws as a ‘legislative power’. The heading of Part XI is “Distribution of Legislative Powers; the title for Article 123 is ‘Legislative power of the President’ and the marginal note of Article 213 is ‘Legislative Power of the Governor’. The legislative acts passed by it are under a power conferring clause called Article 245 which enables them to enact such legislation which derives its validity from a transcendental legal source called the Constitution. A law enacted by it may be absolute or conditional. It may be prospective or retrospective; and if enacted by Parliament and so declared, extraterritorial. It has unobstructed legislative powers for “ the whole or any part of the territory of India”, limited only by the precondition of non-encroachment of the legislative powers of the State legislatures in accordance with the prescribed application of the federal principle of distribution of powers that comes under Articles 246- 248 of the

39 Hodge v. Queen (1883)9 A.C. : Powell v. Apollo Candle Co., (1885) 10 AC 282
Constitution. Parliament may by an organic law admit a new state into the Union, reorganise the existing states by altering their boundaries or amending the names by amending the First schedule, prescribe the manner of election of the President, the elections to the two Houses of Parliament and State Legislatures; confer ancillary powers on the Supreme Court; appoint authorities to carry out the purposes of Inter-state trade and commerce and made laws with respect to inter-State movement, travel and navigation. Besides legislating on the subjects enumerated in the Union List, the Parliament has full plenary powers to enact laws on all subjects and matters not given to the State Legislatures.  

It may be observed that the framers did not subsume Article 368 under the heading ‘legislative power’ or in Part XI or in Part V dealing with the legislative procedure. This makes it obvious that they were making distinction between ‘legislative powers’ and ‘constituent powers’. Bose, J. discussing the concept of legislative power said:

“We have to try and discover from the Constitution itself what the concept of legislative power looked like in the eyes of the Constituent Assembly which conferred it. When that body created an Indian Parliament for the first time and endowed it with life, what did they think they were doing? What concept of legislative power they had in mind/....First and foremost they had the British model in view where Parliament is supreme in the sense that it can do what it pleases and no court of law can sit in judgement over its Acts. That model it rejected by introducing a federation and dividing the ambit of legislative authority. It rejected by drawing a distinction between the exercise of constituent powers and ordinary legislative activity.”

Constituent power can also be used to classify Constitutions. On this basis there are rigid or controlled constitutions and flexible or uncontrolled constitutions. As has been seen constitutions may be uncontrolled like the British Constitution and can be controlled and rigid like the Constitution of the United States of America. Then there may be a hybrid class of Constitutions which may be partly flexible and partly controlled. In a stereotyped controlled Constitution of USA the procedure for making laws and for amending the Constitution are distinct. This distinction between constituent power and amending power evolves from the law making procedure and constitution amending procedure.

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42 In re: Delhi Law Act
On the other hand a flexible constitution is one where the power to amend to
constitution is exercisable by the same procedure as is prescribed for making laws. It also
held that the distinction between “ legislative” and “ constituent power “ is analytic and
formal but in substance this difference fades away, because any law passed under the
constitution, if repugnant to the provisions of the constitution , repeals those provisions pro
tanto.\footnote{McCauley v. R.(1920) A.C. 691 (P.C.)}

The Indian Constitution however combines the elements of the both previously
mentioned Constitutions. In the words of Ray J., in a rigid Constitution like ours” ….law
making power is the genus of which legislative power and the constituent power are the
species. The differentia being found in the different procedure prescribed for the exercise of
constituent power as distinguished from the procedure prescribed for making ordinary
laws.”\footnote{Kesavanand case ('73) A.SC.} When any part of the Constitution is amended by following the legislative procedure ,the amendment is the result of the exercise of legislative power ; when it is amended through the procedure prescribed by the exclusive Article 368 , the amendment is an outcome of the constituent power . Thus the amending power conferred by Article 368 is a constituent power and not a legislative or law making power.

A very important aspect comes to the fore that when it is said that the framing of the
constitution involves the exercise of “constituent power” the expression “constituent power
“merely describes the power to enact a particular kind of law” namely the Constitution is not
meant to distinguish constituent power from legislative power in a rigid Constitution, for that
distinction emerges after the rigid constitution has been framed. Thus the constituent power
acts in two capacities. Firstly the sovereign constituent power to frame a constitution like the
Indian one unfettered by external restrictions, is plenary law making power and not a
legislative power. That is the power to frame a Constitution is a Primary power.

Secondly the power to amend a rigid constitution is a derivative power –derived from
the Constitution and subject to at least to the limitations imposed by the prescribed procedure.
Therefore the laws made under the Constitution as also the amendment of such a Constitution
can be ultra vires if they contravene the limitations imposed on the amending power of the
Constitution as the Constitution is the very touchstone of the validity of the exercise of the
powers conferred by it.
The expression “Constituent power” means the “ability to frame or alter a (political) constitution “as constituent assembly. But the Election case added a new complexion to the expression where it was spelt out as a “power conferred by the Constitution to alter or amend it, or to describe the power of framing the Constitution itself.”

So it’s amply clear that the constituent power involved in amending the Constitution cannot be paralleled to the constituent power involved in framing it. It can also be submitted that it would be an untenable and extreme proposition to consider the amending power as “outside” the Constitution or as a super power. The power to amend the Constitution is not a legislative power even though it is exercised by the Parliament. It is neither a Constituent power in the complete sense. Rather, it can be equated as a chip in the block of the Constituent power. It imbibes the attributes of the Constituent power but the amendatory power as such cannot be dubbed as a constituent power in the absolute sense. The very nature of the amendatory power can be explained in the subsequent manner:

a. It effects the desired changes in the constitution.
b. Its exercise cannot and decimate or damage the basic framework of the Constitution nor can it impair the essential features of the constitution in any way.
c. It is the powers by which the objectives and ideals of the Constitution can be realised as it endow the Parliament with special authority to effect changes to meet the demands of time.
d. By its use the identity of the Constitution cannot be disfigured, defaced defiled or jeopardized. Whenever the Constitution is amended by its exercise, the amended constitution must remain “this Constitution” and must not be replaced by a new one.
e. This power guarantees against socio-political upheavals and guards against unforeseen revolutionary break in the continuity of Constitutional system.
f. The amendatory power is not exactly a replica of the constituent power but still it shares its traits to a certain extent. This semblance can be witnessed in Article 368 (1). The provision describes the power functionally and then prescribes the procedural condition for its exercise. Its exercise cause change in the Constitution and it shall stand amended in accordance with its terms. This article does not describe it as a sovereign, all-encompassing comprehensive power whereby the Constitution can be disestablished, defaced or defiled. The implied limitations inherent in it confine it to addition, variation or repeal of any provision and change in the Constitution. It can in no way endanger the existence of the Constitution by making sweeping changes.
The concept of Constituent power was introduced by the Twenty Fourth Amendment in article 368 to assert a generic difference between Constituent power and legislative power. The constituent power of the Indian Parliament is not co-extensive with the constituent power of the nation. It does not substitute the original pouvoir constituent with anything new. In other words it does not bring out the direct and specific will of the Constitution as the people of India are not associated with the amending process. The broad contours of the Constituent power vested and wielded by the Indian parliament are as follows:

Thus what comes across as an amending power of the Parliament is actually a subset of the constituent power of the Parliament. It is in the nature of a amending power that is intra-constitutional and legally cognized. It is neither unlimited nor unbridled rather it is deeply enmeshed in the Constitutional matrix nor its limits are determined by its basic structure and essential features. Then it is subject to the judicial review of the Court which exercises concurrent constituent- amending power. Here Prof. Baxi advices that:

“It is perhaps an essential part of the very order that there must be a continuing dialogue on this issue, resulting in wise accommodation from time to time between the two principal and coordinate organs of the Government: Parliament and the Court. This is a much better solution which would build a spirit of cooperation and Constitutional harmony between the two organs Vis; Parliament and Court.”

To sum up, Article 368 permits Parliament to apply not only the physician’s needle but also the surgeon’s saw. It may amputate any part of the Constitution if and when it becomes necessary so to do for the good health and survival of the other parts of the Constitution. It has wide amplitude when it comes to peaceful constitutional transition but it cannot liquidate the Constitution from which it draws its strength and validity.

4.6. Mutations Undergone by Parliament’s Constituent Power over the Years

The concept of constituent power has been well delineated chronologically below. The gossamer concept has evolved over a period of time where the character of the Parliament has been taken into consideration which has undergone mutations time and again in various judicial decisions.

4.6.1. The Shankari Prasad Case (1951)

The concept of the constituent power of the Parliament was recognised in Shankari Prasad case where Justice Patanjali Shastri differentiated between ‘Constituent Power ‘from Legislative law. He said that ordinary law is made in pursuance of the legislative power and the Constitutional Law is made in exercise of the Constituent power. It is article 368 that sanctions the Parliament to amend the Constitution without any exception whatsoever to such an extent that even the Fundamental rights can be nullified by making alterations in the Constitution in exercise of this sovereign constituent power. The verdict passed in this case has equated article 368 with Constituent power having unlimited sweep for constitutional change.

4.6.2. The Sajjan Singh Case (1965)

Sajjan Singh case has two facets: one relating to the entrenchment of the fundamental rights and the other concerning the concept of basic structure of the Constitution. The majority judgement viewed this aspect in the context of socio-economic progress and development of the country and it was in view of that it was thought to be not judicious to assume that fundamental rights were intended to be finally and immutably settled and determined once for all and beyond the reach of any amendment. However the dissenting judges Justice Hidayatullah and Justice Mudholkar came forward with opinions that blazed a new trail.

Justice Hidayatullah remarked, “There is hardly any measure of reform which cannot be introduced reasonably: Father of the Constitution gives so many assurances in Part III that it would be difficult to think that they were the playthings of special majorities. So for him the fundamental rights were the grandiose ideals to which all men should pay due respect and deference.

This case was in the nature of a mixed constitutional bag where the amending power of the Parliament was discussed in an indirect way. In this case Chief Justice Gajendragadkar supporting the majority held that the power in question that is the amending power of the Parliament conferred on it by Article 368 can be exercised over all the provisions of the Constitution. The amending power of the Parliament is not only unambiguous but specific and therefore the power can be exercised both prospectively and retrospectively.

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47 Ibid. at 862
Justice Mudholkar gives his judgement a doctrinal bent by saying that the amending power of the Parliament was a legislative act and further added that article 368 nowhere does refer that when Parliament makes an amendment to the Constitution, it assumes the garb of a ‘Constituent body’. He also voiced that while the Constitution as originally framed can only be interpreted by a Court of law and its validity cannot be challenged, an amendment to be treated as part of the Constitution, must be shown to have ‘in fact and law’ become a part of the Constitution, the question thus being open to judicial review.

It was Justice Mudholkar to whom the authorship of the Doctrine of basic structure can be attributed and it was his formulations that were subsequently utilised in the later cases of the Supreme Court. Formulating the Concept of Basic structures he said:

“We have to bear in mind the fact that ours is a written Constitution. The Constituent Assembly, which was the repository of sovereignty, could have created a sovereign Parliament on the British model. But instead it created a written Constitution, created three organs of state……erected a federal structure….recognised certain rights as fundamental and provided for their enforcement….and further requires the members of the Union Judiciary and of the Higher Judiciary in the states to uphold the constitution. Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it be not said that these are the indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution.”

It is also a matter of consideration whether making a change in the basic structure of the Constitution can be regarded merely an amendment, or would it be in effect, rewriting a part of the Constitution and if the latter, would it be within the purview of article 368. Thus this verdict upheld the decision delivered in the Shankari Prasad case making the Parliament the sole repository of Constituent power.

4.6.3. The Golaknath Case (1967)

Subba Rao was the architect of the majority judgement in the celebrated Golaknath case that circumscribed Parliament's power to amend the fundamental rights enshrined in the Constitution. Subsequently the apex court did not uphold every part of this judgement, but

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48 Ibid at 863
49 Ibid at 864
Nariman argues pertinently that if there were no Golaknath there would have been no Kesavanand Bharati (1973).\(^{50}\)

In this case, Court refused to give Parliament carte blanche power to pass whatever it deemed appropriate. It was argued by the Court that Parliament could not curtail any of the Fundamental Rights in the Constitution. Although it backtracked on the forcefulness of this decision some six years later, the Court continued to proclaim that in principle no institutional body could alter the democratic essence of the Constitution.

Fundamental rights were the only point and the decision was based on the ground that amending power being a legislative power fell within the power of article 13(2). Both majority and minority judges paid very little attention to the concept of basic structure. The majority verdict just says: the Parliament will have no power to amend the Constitution so as to take away, or abridge the fundamental rights. On this question the view expressed by Justice Wanchoo, is equally brief which said that the constituent power like that contained in article 368 can only be subject to express limitations and not to any implied limitations so far as substance of the amendments are concerned, and in the absence of any thing in article 368 making any provision unamendable, the power reaches every provision of the Constitution, provided the procedure indicated in this article is followed.\(^{51}\)

Unlike the other judges, Justice Hidayatullah observed that the “Parliament today is not a constituent body which must bear true allegiance to the Constitution as by law established. To change the fundamental part of individual’s liberty is a usurpation of the constituent functions because they have been placed outside the scope of the constituted Parliament”.\(^{52}\)

On an overall assessment, Golak Nath was in the nature of a decision that discussed whether an amendment was “law” within the meaning of article of 13(2). In fact, Golak Nath showed some kind of judicial desperation to guard the Bill of Rights from abuse of the amending process and injected into constitutional jurisdiction a kind of judicial quixotic.\(^{53}\)

In this case the amending power undergoes a mutation from being a Constituent Power it goes on to become a legislative power. From being an uncontrolled power it gets

\(^{50}\) Fali S. Nariman, Before Memory Fades: An Autobiography, Hay House India, 2009


\(^{52}\) Ibid at 1700

\(^{53}\) M.C.J.Kagzi, Was the Indian Constitution Intended to be Overhauled Periodically, in Rajeev Dhavan and Alice Jacob (Eds.), Indian constitution: Trends and Issues, Vol.33, 1978, p. 48
subjected to various riders. The widely held opinion was that the article 368 personified not the power but the procedure of amendment. In other words it was a derivatory power that was to be found in Article 245,246 and 248 of the Constitution. By this means the amending power becomes a legislative one and the Parliament no longer had the power to ride roughshod over the express or implied limitations on that power.

However those who identified the amendatory power as ‘Constituent Power’, considered Article 368 as a complete code in itself. But as regards the reach of the amending power was concerned it was left open for discussion. Justice Bachavwat resonated that the Fundamental Rights are within the ambit of the amending power. Another view was put forward by Justice Wanchoo according to which the sweep of the amending power was considered to be so vast that it would completely abrogate the present Constitution and substitute it with a new Constitutional landscape.

4.6.4. The Kesavanand Case (1973) and the Rider of Doctrine of Basic Structure

The concept of basic structure is a concept with variable connotation. The fundamentality of constitutions or the basic structure serves a purpose. It is designed to provide protection against whimsical amendments of essential parts of a system of government and against potential infringement of rights of minorities and individuals as a result of chance majorities.\(^54\)

In this case the Supreme Court propounded the famous ‘basic structure and framework of Indian Constitution’ or ‘doctrine of basic structure’ thereby halting the legislature’s ever extending arm.” According to this doctrine, the Court was in charge of “prevent[ing] the erosion of those enduring values that constitute the essence of constitutionalism .\(^55\) With the intention to preserve the original ideals of the Constitution, the Supreme Court pronounced that the Parliament could not distort, disfigure and mutilate the basic features of the Constitution which are sacrosanct to the ideals of the Indian society. This move effectively puts a brake on the powers of the Parliament to deface the Constitution under the pretext of amending it.


\(^{55}\) S.P. Sathe, Judicial Activism In India: Transgressing Borders And Enforcing Limits, Oxford University Press, New Delhi,2002,P .99
If Chief Justice Marshall of American Supreme Court laid down the basic principle of judicial review of legislation in Marbury v. Madison\(^{56}\) our Supreme Court went further, on what Cardozo would call, “the felt necessities of the time.” For the first time a court held that a constitutional amendment duly passed by the legislature was invalid as damaging or destroying its basic structure. This was a gigantic innovative judicial leap unknown to any legal system.\(^{57}\) The Apex Court has adopted balancing technique in holding that the provisions of the Constitution, particularly the provisions relating to the fundamental rights, should not be construed in a pedantic manner, but should be construed in a manner that would enable the citizens to enjoy the rights in the fullest measure.\(^{58}\)

Sikri CJ. And Shelat J. advanced similar arguments for the protection of the fundamental rights in Kesavanand as they did in the Golak Nath case to which they were party. However earlier the hands of the Parliament were cuffed by Part III of the Constitution but now they were tied more strongly through the basic structure doctrine. In this connection, Justice Subba Rao made very rational remarks:

“In Kesavanand Bharti’s Case, the judgement is drawn on a larger canvass. In one sense it went beyond the Golak Nath judgement. As the Golak Nath judgement was overruled, all the previous amendments , which were to be valid by the Golak Nath judgement are open to be reviewed , though they can be sustained on the ground that they do not affect the basic structure of the Constitution or on the ground that they are in public interest……..Under the Golaknath judgement , an amendment can be supported on the basis of the Laws of social control in terms of Part III, under the present judgement on the ground that it does not affect the basic structure of the Constitution.”\(^{59}\)

The 24\(^{th}\) amendment of the Constitution was enacted in 1971 restoring the constituent power to Parliament for amending the Constitution including the Fundamental rights without any hindrance or limitation per se.\(^{60}\) This amendment was however questioned in the Kesavanand Bharti case but the Court overruled Golak Nath by a majority of seven to six and upheld the validity and constitutionality of the amendment in this case but with a caveat ,

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\(^{56}\) 1803) 5 U.S. (1Cranch) 137  
\(^{57}\) Anil Divan, Judicial Activism and Democracy, The Hindu, Chennai edition dated April 2, 2007, p.12  
\(^{58}\) Patna v. State of Bihar AIR 1988 S C 1136  
\(^{59}\) The Two Judgments:” Golaknath and Kesavanand Bharti”, S. Malik (Ed.) Fundamental Rights Case: The Critics Speak, 79(1975)  
namely that the Parliament, in exercise of its amending power, cannot affect the basic structure of the constitution. The basic structure doctrine\(^{61}\) as enunciated by the judiciary tries to stem such amendments, which would alter the fundamental structure of the Indian constitution. The quest by the Indian judiciary for a principle of constancy in the constitution resulted in the emergence of the basic structure doctrine, and one may find its spiritual inspiration in the efforts of natural law jurists who empathize with Antigone\(^{62}\) when she proclaims that the King’s order or laws will not override the unwritten and unchanging laws of the Gods. Antigone faced the king’s wrath when she defied his order and buried her slain brother. Similarly, the Indian judiciary had to face the challenge of the executive, which was constantly interfering with judicial machination and was undermining to a large extent, the rights of the people in general. The Indian judiciary has consistently taken a high domain in defining the spirit of amendment, it has opined that “the concept of amendment within the contours of the Preamble and the Constitution cannot be said to be a vague and unsatisfactory idea which parliamentarians and the public would not be able to understand.”\(^{63}\)

The majority judges in this case comprised of Sikri C.J., Shelat, Grover, Hegde, Mukherjee, Reddy, and Khanna JJ. The minority was composed of Ray J., Palekar, Mathew JJ., Beg J., Dwivedi J. and Chandrachud J. A synopsis of the judgement can be encapsulated as follows:

1. Mr. Palkhivala, the counsel for the petitioner in Kesavanand Bharti contended that by virtue of Article 368, Parliament cannot so amend the Constitution so as to take away or abridge the essential features of the Constitution. Six majority judges (except Khanna J.) used various expressions like ‘essential features’, ‘basic features’, ‘fundamental elements’ to explain the meaning of the Doctrine of basic structure.
2. That Parliament cannot so amend so as to damage or destroy the core of the fundamental rights in Part III of the Constitution.

\(^{61}\) The ‘basic structure doctrine’ is a judicial innovation whereby certain features of the Constitution of India are beyond the limit of the powers of amendment of the Parliament of India. The doctrine which was first expressed in Kesavanand Bharati v. The State of Kerala (AIR 1973 SC 1461) and reflects judicial concern at the perceived threat to the liberal constitutional order. The Basic Structure doctrine applies only to the constitutionality of amendments and not to ordinary Acts of Parliament, which must conform to the entirety of the constitution and not just its basic structure.

\(^{62}\) Antigone is a Greek tragedy where Antigone’s brothers fight over throne and when both get killed the new king allows one brother to be buried but other’s body is not allowed to be buried, Antigone buries the body of her brother in spite of King’s specific order claiming that there is a higher law which authorizes her to do so.

\(^{63}\) Kesavanand at p.315
3. That the right to property is a human right and is necessary for the enjoyment of every other right thus it cannot be taken away by an amendment of the Constitution.

4. That the Parliament is a creature of the Constitution and cannot supersede or supplant its creator namely the Constitution.

5. That the amending power in Article 368 is limited by the principles of Natural law and an amendment in violation of these principles will be void.

6. Palkhivala then enlisted 12 essential features in his pleadings:
   a. The Supremacy of the Constitution
   b. The Sovereignty of India
   c. The Integrity of the country
   d. The Democratic way of life
   e. The Republican form of Government
   f. The guarantee of basic human rights elaborated in Part III of the Constitution
   g. A Secular state
   h. A free and independent Judiciary
   i. The dual structure of the Union and the State
   j. The balance between the Legislature, the Executive and the Judiciary
   k. A Parliamentary form of Government
   l. Article 368 can be amended but cannot be amended to empower Parliament to alter or destroy any of the basic features of the Constitution.

   It was these twelve basic features of the Constitution that the majority in Kesavanand Bharti considered sacrosanct and impenetrable and together they wrought the Doctrine of Basic Structure. Sikri C.J. held that every provision of the Constitution including Part III can be amended provided the basic structure of the Constitution remained intact.

   In regard to the scope of amending power, Khanna J. opined:

   “In my opinion, the minimum required is that which relates to the basic structure or framework of the Constitution. If the basic structure is retained, the old Constitution would be considered to continue even though other provisions have undergone change, on the contrary if the basic structure is changed, mere retention of the articles of the existing Constitution continues to survive,” 64 The major thrust of this case is the concept of basic structure and limitations on the amending power but it also sheds ample light on the nature of Constituent power as well. Firstly it was unanimously accepted that the amending power in article 368

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64 (1973) 4 SCC 225 at 768
was a constituent power, but the court did not equate it with the constituent power of the nation. Even those judges who did not recognise the theory of implied limitations caused by Basic structure did not wish to empower the amendatory constituent power with the power to repeal or abrogate the Constitution. Thus the summary of the judgement as signed by 9 judges clearly stipulated that article 368 does not enable the Parliament to alter the basic structure or framework of constitution.65

Secondly the judgement was strongly torn apart between hard core majority and hard core minority. Representing the hard core majority Chief Justice Sikri regards the amending power was to be found in the interstices of the Constitution and in the Preamble and subject to the limitations of the Fundamental Rights and the immutable Basic Structure of the Constitution. Justices Shelat and Grover held that the amending power is neither narrow nor unlimited. Rather it was wide enough to allow amendment to each and every article of the Constitution but limited to the extent that it cannot erode the Basic elements of the Constitution... Justice Reddy reverberates, the same opinion and also mentions that the amplitude of the power cannot be enlarged by the amending power under article 368.

Though Justice Khanna was a neutral judge in the case yet he expressed that the amending powers a plenary power to amend the Constitution, only subject to the basic structure or framework of the Constitution. Article 368 can in no way be construed so as to embody the death wish of the Constitution or to provide sanction for its lawful hara-kiri.66

As opposed to the majority, the judges in minority like Justice Ray regarded the constituent power in article 368 as sui generis and sovereign. Justice Beg in a similar vein held that the sovereign amending power can erode the Constitution completely step by step so as to replace it by another.67 Justice Mathew regarded the power as plenary extending to all parts of the Constitution thus increasing its canvas of amenability. Thus the minority judges said that the amending power is broad enough to reach every provision of the Constitution.

As per Conrad, the Indian judiciary has consistently taken a balanced view of amenability of Indian Constitution, while in the formative years they gave total amending power to Indian Parliament (Sajjan Singh and Shankari Prasad cases) in the later stages the judiciary completely changed its position in Golaknath and finally brought out the famous ‘basic structure theory’ in the Kesavanand case, with this judgment and later cases like

65 Kesavanand at 1462
66 Ibid at 1860
67 Ibid at 1979-1980
Election case, Minerva Mills, Waman Rao, Indian courts have demonstrated that the judiciary is also evolving with the evolving nation. In the first years of independence the judiciary allowed the legislature to make laws which may be necessary for implementation of greater social good but with changing times and progress the courts decided to implement the inherent limitations of the amending provisions of the Constitution.

Soli Sorabjee had assisted Nani Palkhivala in arguing the Kesavanand Bharati case in which Palkhivala persuaded the Supreme Court to accept the basic structure doctrine. What outraged Palkhivala was the tinkering with the Constitution by the politicians, its frequent amendment as if it were a Municipal Licensing Act or the Drugs Act, the failure to preserve the integrity of our Constitution against many hasty and ill-considered changes, the fruits of passion and ignorance. His firm belief was that Parliament's amending power is not absolute, the amending power is subject to inherent and implied limitations which do not permit Parliament to destroy any of the essential features of the Constitution and thereby damage the basic structure of the Constitution.

Soli Sorabjee held “To my mind, Kesavanand Bharati was Palkhivala's greatest contribution to our constitutional jurisprudence. The judgment has been a salutary check on Parliament's tendency to ride roughshod over fundamental rights and its insatiable appetite to encroach upon fundamental rights.”

Thus the Kesavanand Case is a landmark judgement in the annals of Constitutional jurisprudence which made a thorough judicial review of the Constituent power of the Indian Parliament.

4.6.5. The Indira Gandhi Case (1975)

The question of the width of the Parliament power of amendment of the Constitution came into consideration in the Indira Gandhi v. Raj Narain case. This case considered the validity of the Thirty-Ninth amendment where the five judges delivered separate judgements which throw considerable light on the notion of Constituent Power of the nation. Chief Justice Ray and Justice Beg upheld the unqualified power of the Parliament to amend any provision of the Constitution.

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68 Soli Sorabjee, First Palkhivala memorial lecture on Palkhivala and the constitution of India in February 2003 in Chennai
69 Indira Nehru Gandhi v. Raj Narain (1975) Supp. SCC 1
In this case the vires of the 39th amendment was called into question which attempted to insert Article 329A in the Constitution. This Amendment sought to decide the election petition in favour of Mrs. Indira Gandhi by legislative action before her appeal could be heard by the Supreme Court. In a way it wanted to oust the jurisdiction of the jurisdictions of the Courts so far as the election of the Prime Minister or the Speaker of the House was concerned.

Articulating the notion of Constituent Power, Chief Justice Ray regarded the constituent power as a Sovereign power. Further this power being *sui generis* in character is different from the legislative power by virtue of its sovereign character. Elaborating further he also attributes the constituent power with the power of creating organs and distributing powers and so itself it becomes independent of the fetters imposed by the doctrine of separation of powers.\(^70\)

But in relation to the validation of the election under clause (4) of article 329A, Chief Justice Ray said:

“The nature of the constituent power is legislative. The constituent power cannot exercise judicial power. Exercise of judicial power or a purely executive power is not the power of amendment to change the Constitution. The Constitution may be amended to change constitutional provisions but the constituent power cannot enact that a person is declared to be elected.”\(^71\) Thus, he rightly said that Clause (4) had done three things:

a) First it had wiped out not merely the judgement but also the election petition and law relating to it
b) It had deprived the defeated candidate of his right to challenge the validity of the election.
c) Thirdly there was no judgement to deal with and no right or dispute to adjudicate upon as the election had passed a declaratory legislative judgement and not a law.

Thus, clause (4) was held unconstitutional as it was violative of the basic structure of the Constitution which considers free and fair elections which is an essential feature of democracy.

\(^70\) Ibid at 42  
\(^71\) Ibid at 36
Another adjudicator Justice Mathew regarded the constituent power as the power to frame a Constitution and that the power of amendment is conferred on the amending body by this constituent instrument. ‘Quoting himself in Kesavanand on the subject of the distinction between the original sovereign – the people and the possessor of the amending power under the Constitution, he goes on to say that:

“If it is made clear that the sovereign is not a ‘mortal God’ and can express himself or itself only in the manner and form prescribed by law and can be sovereign only when he or it acts in a certain way also prescribed by law, then perhaps the use of the expression will have no harmful consequence.”

Speaking on the expanse of Article 368 he said, it could not have intended to create “an oriental despot”. He adds that: the Constituent power is all embracing comprising within its ambit judicial, executive and legislative powers. But if the constituent power is a power to frame or amend a Constitution, it can be exercised only by making laws of a particular kind. The possession of power is different from its exercise. The constituent amending body would not be entitled to exercise legislative or judicial power without passing a constitutional law. Until then its judicial power can in no possible way become tangible.

His observation regarding the case was “A despotic decision without ascertaining the facts of a case and applying the law to them, though dressed in the garb of law, is like a bill of attainder. It is a legislative judgement.”

The constituent amending power, like the legislative power cannot be employed to produce a bill of attainder or a legislative judgement. To support this argument he quotes Blackstone’s view and strikes down clause (4) of article 329A on the ground that he could not regard the resolution of the election dispute by the amending body as law; it was either a judicial sentence or a legislative judgement like a Bill of Attainder.

Moreover if at all the constituent amending body stoops to exercise the judicial power that power has to be exercised on the principles of natural justice of *audi alteram partem.*

Another eminent judge, Justice Beg puts forward the premise of ‘Supremacy of the Constitution’. He says that in India it is the Constitution and not the constituent power that is

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72 Kesavanand at 123
74 Liyange v.Queen (1967) 1 A.C. 259,291
supreme; the constitutionality of the Constitution cannot be called into question before the
Supreme Court, but the exercise and the validity of the exercise of the constituent power can
be put to the anvil of the constitutional provisions by the Supreme Court.

Justice Beg brings out another aspect of the constituent power of the Parliament by
juxtaposing the amending power with the Constitution. As between the sovereignty of the
amending article and the sovereignty of the Constitution, there should be little doubt that the
lawyers should and would prefer the sovereignty and supremacy of the whole Constitution
rather than any part of it: it appears more reasonable and respectable to swear allegiance to
the whole Constitution, rather than to article 368 or to the amending powers contained in
it.\textsuperscript{75}

He regards the amending power as the manifestation of constituent power which can
be judicially cognized. This constituent power is intra-constitutional and subject to the
Doctrine of Basic structure and Separation of Powers thus establishing the Supremacy of the
Constitution. He believed that the Constituent power of the Parliament is a constitutional
Power and is subject to judicial review. That way this judgement lends a new dimension to
the concept of basic structure where he dispenses with the idea of the meta legal and supra
constitutional power lurking in Article 368 in the name of constituent power.


If there were any doubts lingering about the nature of Constituent power, this case
puts them at rest. In this case, the courts unanimously held that any amendment that seeks to
convert the constituent power in article 368 into an unlimited, uncontrolled cask is highly
violative of the doctrine of basic structure. According to the Forty-second amendment which
brought about tremendous change in article 368 both semantically and purposively, the Court
observed that no Constituent power could conceivably go higher than the sky-high power
conferred by clause(5) of the amended article for it even empowers Parliament to “: repeal
the provisions of this Constitution”. The power to destroy is not the power to amend. This
case is the one where the Doctrine of Basic structure is consecrated as now it has become an
indispensable part of the Indian Constitutional jurisprudence. It lays down three propositions:

\textsuperscript{75} Ibid at 215
1. The Indian Constitution has a basic structure and the constituent amending power cannot tamper with it. The Supreme Court is the custodian of the basic structure.\textsuperscript{76}

2. The ‘limited’ constituent amending power is a part of the basic structure and the amending body cannot convert this limited power into unlimited power.\textsuperscript{77}

3. Part III and Part IV, which embody Fundamental rights and Directive Principles respectively, are like two wheels of the chariot, one no less important than the other. They are like the twin formula for achieving social revolution.”

This proposition was made in the context of an amendment to article 31C for a saving of laws made in pursuance of the directive principles of state policy in Part IV even if they may be inconsistent with, or take away or abridge any of the Fundamental rights conferred by article 14 and 19 of the Constitution.

As Prof. Upendra Baxi says: “it is for a moment not to say that the doctrine of basic structure enables the Parliament to know how far it can precisely move in the direction of the amendment of the Constitution: but in no far as the Doctrine has been crystallised, it offers more clear guidance to Parliament than do judicial affirmations that Parliament can amend the constitution without any inhibition whatsoever——affirmations which judges doing their job conscientiously cannot fairly implement in all situations.\textsuperscript{78}

4.7. Conclusion

The Constitution makers conferred very wide amending powers on Parliament because it was believed that Parliament elected on adult franchise would be fully representative of every section of the Indian people and that such a Parliament should have the right to have fresh look at the Constitution and to make such changes therein as the entire people whom it represents. But this has undergone a huge transition since then. The amending power is but a power given by the Constitution to the Parliament. It is a higher power than any other given to Parliament but nevertheless it is power within and not outside the Constitution. If the Constitution is a framework for Indian society and polity; article 368 is one part of the Constitution. It would be most appropriate to pronounce here that the ever-changing nature of the constituent power has indisputably impacted the province and the ambit of the Parliament time and again.

\textsuperscript{76} Minerva Mills v. Union of India (1980) 3 SCC 625 at 643
\textsuperscript{77} Ibid. at 660
\textsuperscript{78} Upendra Baxi,” Some Reflections on the ‘Nature of Constituent Power ‘, Rajeev Dhavan and Alice Jacob(eds.) Indian constitution : Trends and Issues ,122(1978) at 143