

Amendment of Constitution – Basic Structure Theory

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Amendment of Constitution-Need

- Times & Life of Nation - Not Static
- Constitution - Living Organism
- Constitution- Drafted in one era, often inadequate for another
- Change in political, social and economic conditions of a nation
- Right of every generation to mould its future

Modes of Constitutional Change

- **Informal & Formal**
- **Informal** – through Judicial Interpretation, Conventions and Constitutional usages
- **Formal** – Through Amendments
- **Position in USA** – only 27 amendments since 1789 - Rigid procedure [U/A V]
- **Position in Australia** – 8 since 1901 [Sec.128]
- **Position in Canada** – Under BNA 1867 & Constitution Act of 1982

Constitutional Amendment in India

- Article 368
- **Amendment by Simple Legislative Procedure**
Admission & Formation of New States, Citizenship, Parliamentary privileges etc
- **By Special Majority**- by not $< 2/3^{\text{rd}}$ members of House present & voting + majority of its total membership
- **By Special Majority + Ratification by not $< 1/2$ of State Legislatures** – **Entrenched Provisions**
manner of President's election, extent of executive power of union & States, VII Schedule & jurisdiction of SC & HCs etc.

Scope of Constitutional Amendment Process in India

- I stage 1951-1973
- II Stage After 1973
- Sankari Prasad v.UoI (1951,SC),Sajjan Singh v.Rajasthan (1965,SC),Golaknath v.Punjab (1967,SC) – relating to Right to Property
- “Fundamental Rights cannot be playthings of a majority ” – Hidayatullah,j &”fundamental features cannot be changed’- Mudholkar,J in *Sajjan Singh*
- “Fundamental Rights occupy ‘transcendental position in Constitution, no authority including art.368 can amend fundamental rights, & Law includes Amendments also”- Koka Subba Rao,CJ in *Golaknath*
- **Effect- Law u/A 13 = Am. u/A 368**

Scope of Constitutional Amendment Process in India

- **24th Am. ,1971 to neutralize Golaknath judgment**
- Marginal note u/A 368 changed from ' Procedure for Amendment' to 'Power of Parliament & procedure for Amendment'," parliament's power to amend any provision of Constitution'
- **Kesavananda Bharati v. State of Kerala(1973,SC)** – Challenge to validity of 24 7 25th Am.
- **Ratio:** Amendments under challenge – upheld
- **Evolution of Basic structure Theory:** 'The amending power can't be exercised to destroy or emasculate basic features/fundamental features of the constitution' "2/3rd members of Parliament may not represent votes of majority people in this country"
- **7 majority judges identified 11 features** of including – **Supremacy of constitution**, **Republican** & **Democratic** form of Govt, **Secular** Character, **Federal** character etc

Post 1973 Developments

- **Indira Nehru Gandhi v. Raj Narain (1975,SC)** - 39th Am, Cl.(4)- declared unconstitutional as violative of 3 basic features 'free & fair elections', 'separation of powers' & 'rule of law'
- **Minerva Mills v .UoI (1980,SC)** – 42nd Am & Art.31-C- 'power to destroy, not a power to amend' & 'Harmony between F.Rts & DPSP' & 'Jud.Review' are basic features
- **Kihoto Hollohan v.UoI (1993,SC)**- democracy is a Basic Feature
- **S.R.Bommai v.UoI (1994,Sc)**-federalism,democracy & secularism are Basic Features
- **L.Chandra Kumar v.UoI (1997,SC)**- Judicial Review
- **I.R.Coelho v.State of T.N. (2007,SC)**- Judicial Review of enactments added in IX Schedule

Pertinent Issues

- Is the will of people undermined by Basic Structure Theory?
- Why the doctrine of “Political Questions” is not applied in India?
- Can the judiciary regulate the amending power and process?
- Is the Basic Structure doctrine a myth?
- Can brute majority override intention of framers of constitution?

Conclusion

- Thank you for your Attention