

# **BASIC STRUCTURE OF THE CONSTITUTION OF INDIA**



**Justice M. S. Sonak  
High Court of Bombay**

# Basic Structure of the presentation

- . What is the constitution?
- . Judicial review of legislation
- . Power to amend constitution
- . Prelude to Keshavananda
- . Keshavananda Bharati case
- . The aftermath
- . Conclusion



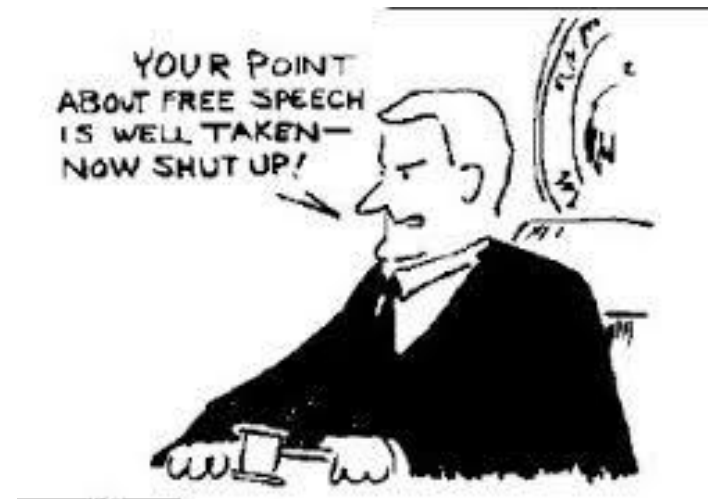
# What is the constitution

- . A living organ, not a fossil
- . Source of legislation, not a product
- . A fundamental norm
- . Touchstone with which to test other laws
- . Documents aspirations, social values, commitments
- . Political philosophy, path to future
- . Stable yet flexible



# Fundamental rights

- . Injunctions against the state - Article 12
- . Part III (Articles 12 - 35)



# Directive Principles



- . **Article 37 – Directive Principles**
- **Not enforceable ?**
- . **Political philosophy**
- . **Fundamental rights – means**
- . **Directive principles – ends**



# Judicial review of legislation

- . Article 13 of the constitution
- . Pre-constitution laws
- . Post constitution laws
- . What is 'law' ?
- . Does law include 'constitutional amendment'?



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# Article 13

*Laws inconsistent with or in derogation of the fundamental rights .-*

- 1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.*
- 2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.*
- 3) In this article, unless the context otherwise requires,-*
  - a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law;*
  - a) "laws in force" includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas*
- 1) Nothing in this article shall apply to any amendment of this Constitution made under Article 368**

Ins. by the Constitution  
(Twenty-fourth Amendment) Act, 1971,  
sec.2 (w.e.f. 5-11-1971)

# Article 368

## Power of Parliament to amend the Constitution and procedure therefor

1. *Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.....*

24th  
Amendment  
1971

2. -----

3. ***Nothing in article 13 shall apply to any amendment made under this article***

4. ***No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty second Amendment) Act, 1976] shall be called in question in any court on any ground.***

42nd  
Amendment, 1976

42nd  
Amendment, 1976

5. ***For the removal of doubts, it is hereby declared 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***



# Power to amend the constitution

## Article 368



- . Can parliament amend or do away with the fundamental rights?
- . Scope of judicial review of constitutional amendments
- . Relative positions of legislature and judiciary in constitutional scheme



# Prelude to Keshavananda

## . Right to property

- **Kameshwar Singh v/s State of Bihar  
( AIR 1951 Patna 91)**
- **First amendment in 1951**
- **Article 31 B – Ninth schedule**



# Legislature v/s Judiciary

## Round 1

. **Shankari Prasad vs. Union of India  
(1952) 1SCR 89**



➤ **Legislative Power and Constituent Power - Different**

. **Sajjan Singh vs State of Rajasthan  
AIR 1965 SC 845**

➤ **Hidayutallah and Mudholkar – Dissent**

➤ **Seeds of basic structure?**



# Struggle for supremacy

## Round 2

### . **Golaknath vs State of Punjab** **AIR 1967 SC 1643**



- **Majority of 6:5**
- **No distinction between**
- **Legislative and Constituent power**



**v / s**



# Struggle for supremacy continues Round 3

## Parliament hits back

- . 24th amendment Act,  
1971
- . Article 13 (4)
- . Article 368 (2 ) and (3)



# Keshavananda Bharati

## Challenges in Keshavananda Bharati

### . Challenge to 24th, 25th, 29th amendments

#### . 24th amendment

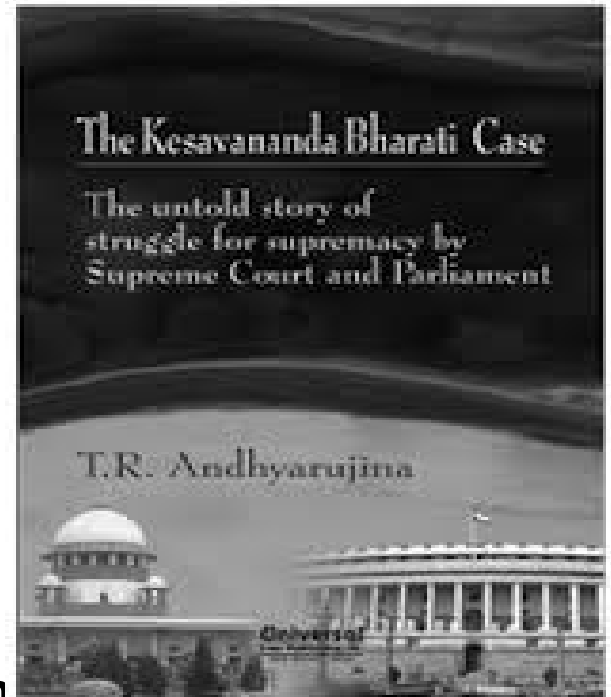
- Articles 13 (4), 368 (2) and (3)

#### . 25th amendment

- Articles 39 (b), 39 (c )
- Precedence to directive Principles
- Immunity from judicial review

#### . 29th Amendment

- Several land reform laws included in ninth



# Petitioners contentions

- . No distinction between Constituent power and Legislative Power
- **Golaknath correctly decided**
- . 'We the people' have given only limited rights to the Parliament
- . Donee cannot convert them to unlimited rights
- . Article 368 - not a charter to sign death wish
- . Parliament not official liquidator of the Constitution
- . Parliament only a creature of the Constitution not its master



# The Verdict

- . Arguments – Five months
- . Judgment - 11 separate opinions, 800 pages, 420,000 words
- . Six judges – Parliament has unlimited amending power
- . Six Judges – Parliament has only limited amending power
- . Justice H R Khanna –  
Can amend Fundamental rights but not the basic structure
- . Judiciary to decide what constitutes the basic structure
- . Strategic retreat by Supreme Court?
- . Contributes to Survival of Democracy in India

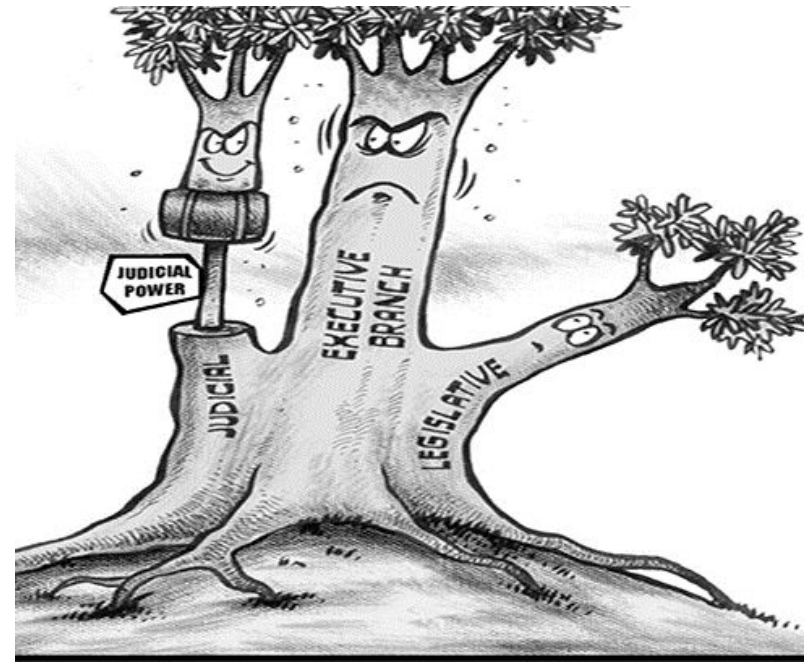




# What is the basic structure?

## . Illustrative and not exhaustive list

- **Supremacy of the Constitution**
- **Democracy**
- **Separation of power between the three arms**
- **Federal Character**
- **Dignity of individual**
- **Sovereignty of India**
- **Independence of Judiciary**
- **Free and fair elections**



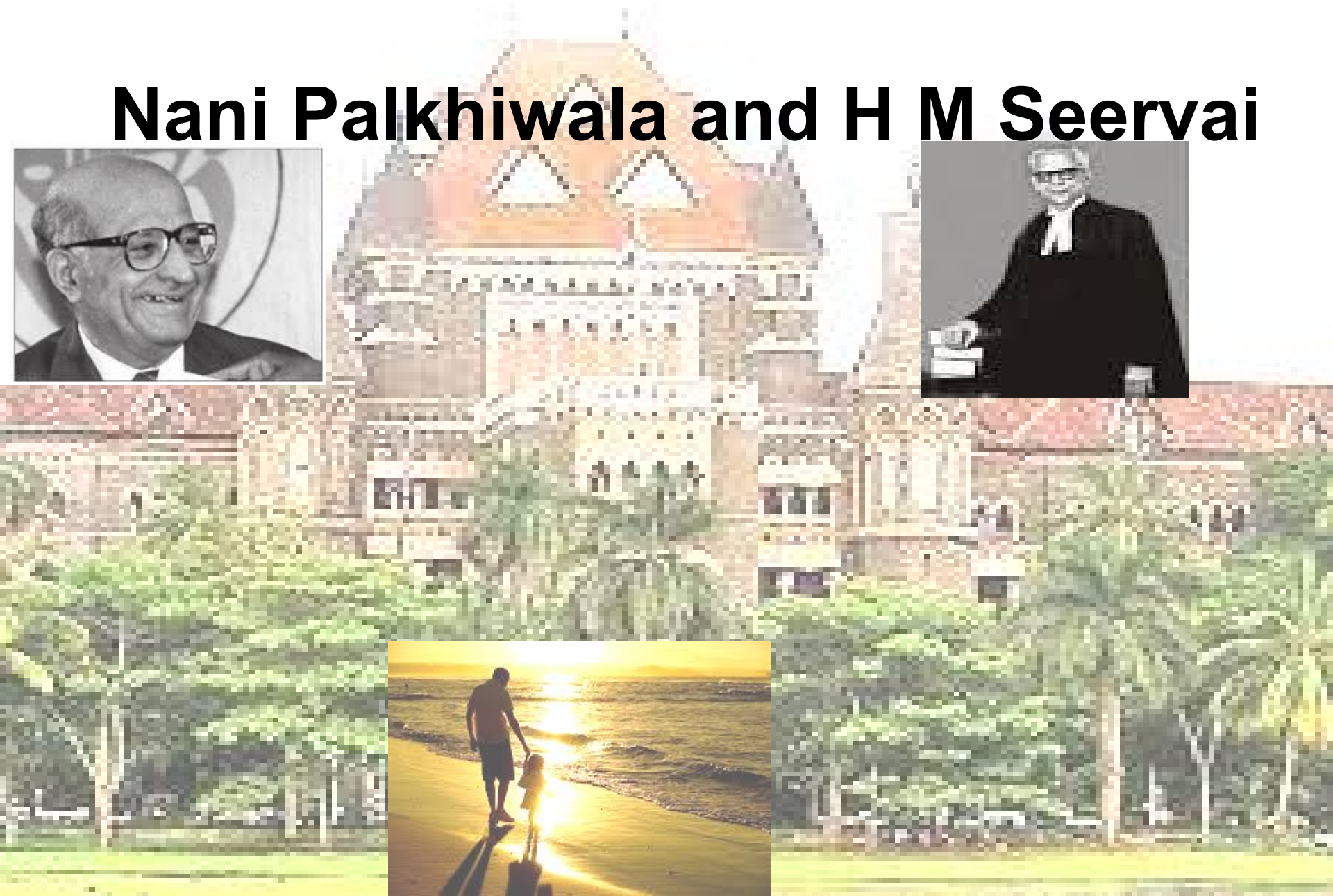
# Criticism

- . Outstanding study in lack of consensus
- . Too long, too confusing
- . Determination of basic structure whims and variable judicial perceptions
- . No reference to basic structure in text of the Constitution
- . Judicial overreach?
- . Counter majoritarian?



# Contribution of Bombay

## Nani Palkhiwala and H M Seervai



# The aftermath



- . Verdict – 24th April 1973
- . 25th April 1973 – Supersession of Shelat, Grover, Hegade
- . 12th June 1975 – Allahabad High Court unseats Indira Gandhi
- . 24th June 1975 – Justice Krishna Iyer – Conditional stay
- . 25th June 1975 – Emergency imposed
- . 10th Aug 1975 – 39th Amendment Act, 1975
  - Election of Prime Ministers and others immune from judicial review
  - Retrospective amendments to Election laws
- . 10th Nov 1975 Attempt to review Keshavananda Bharati
  - Palkhiwala's finest hour
- . 3rd Jan 1977 – 42nd Amendment Act, 1976
- . Article 368 (4) and (5) – Unlimited amending powers



# Balance Restored

## . Raj Narain vs Indira Gandhi

- 39th amendment struck down
- Basic structure doctrine applied

## . Minerva Mills vs Union of India

- 42nd Amendment struck down
- Limited amending power is itself basic structure
- Fundamental rights and directive principles constitute the Arc of the Constitution

## . I R Coelho vs State of Tamil Nadu

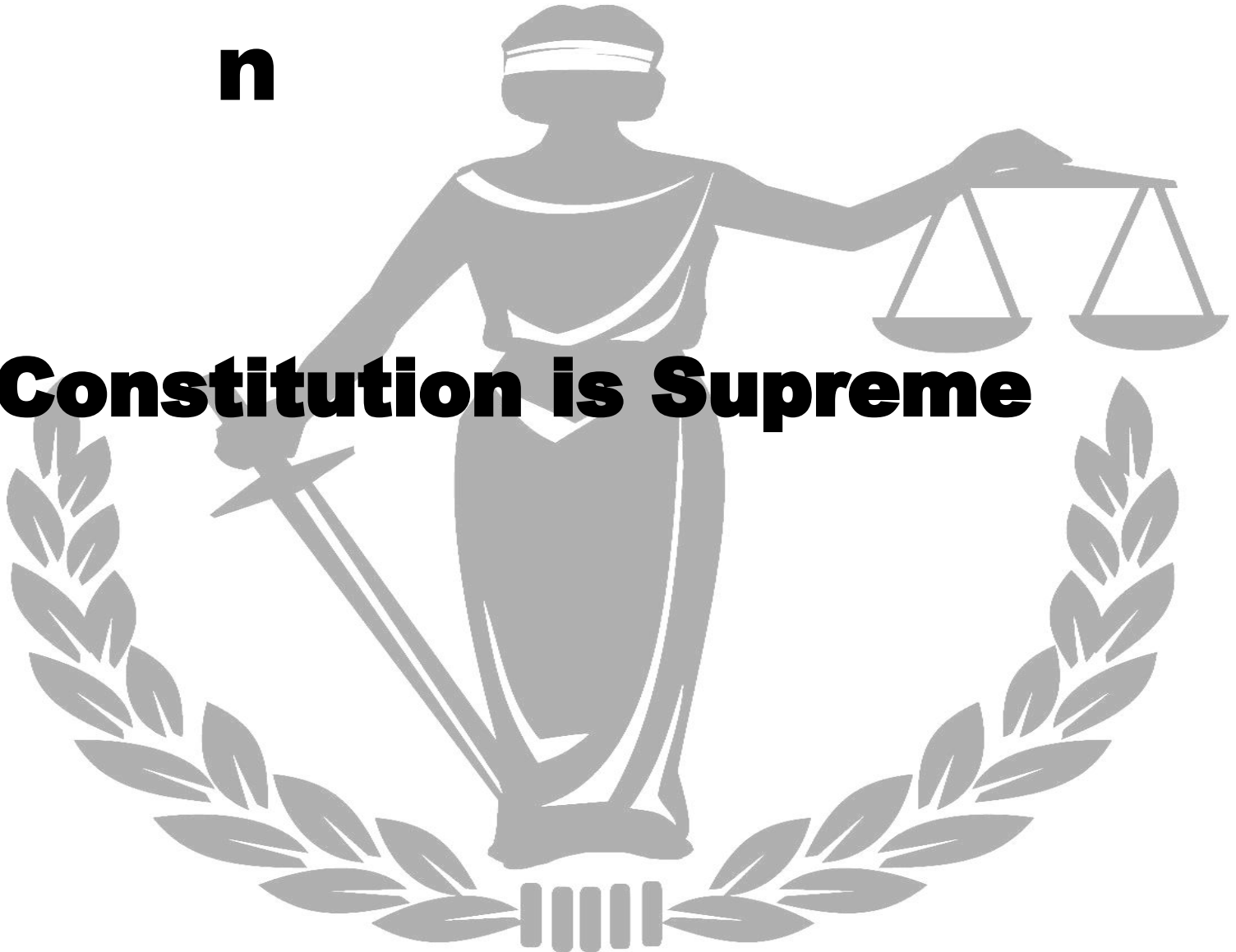
- Articles 14, 19, 21 – Golden triangle – Basic structure
- Ninth schedule is not ‘black hole’ of the Constitution of India



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# **Conclusion**

**Constitution is Supreme**



Thank You