

BASIC STRUCTURE OF CONSTITUTION OF INDIA

**JUSTICE MAHESH S. SONAK
HIGH COURT OF BOMBAY**

- **CORE OF CONSTITUTIONALISM**
- **WRITTEN CONSTITUTION**
- **CHAPTER ON FUNDAMENTAL RIGHTS**
- **LIMITED GOVERNMENT**
- **GOVERNMENT OF LAWS, NOT OF MEN**
- **RULE OF LAW**

FUNDAMENTAL RIGHTS

“..... SOME RIGHTS ARE FUNDAMENTAL AS THEY REPRESENT THE VERY ESSENCE OF A SCHEME OF ORDERED LIBERTYPRINCIPLES OF JUSTICE SO ROOTED IN THE TRADITIONS CONSCIENCE OF OUR PEOPLE AS TO BE MARKED AS FUNDAMENTAL.....”

JUSTICE CARDOZO

THE PURPOSE OF HAVING A BILL OF RIGHTS WAS TO WITHDRAW CERTAIN SUBJECTS FROM THE VICISSITUDES OF POLITICAL CONTROVERSY, TO PLACE THEM BEYOND THE REACH OF MAJORITY AND TO ESTABLISH THEM AS LEGAL PRINCIPLES TO BE APPLIED BY THE COURT. ONE’S RIGHTS TO LIFE, LIBERTY AND PROPERTY, TO FREE SPEECH, A FREE PRESES, FREEDOM OF WORSHIP AND ASSEMBLY, AND OTHER FUNDAMENTAL RIGHTS MAY NOT BE SUBMITTED TO THE VOTE; THEY DEPEND ON THE OUTCOME OF NO ELECTIONS.

BOARD OF EDUCATION v. BARNETTE

NATURE OF FUNDAMENTAL RIGHTS

FUNDAMENTAL RIGHTS ARE NOTHING BUT NATURAL RIGHTS. THESE ARE BASED ON THE PRIMARY INSTINCTS OF HUMAN BEINGS, AS SHAPED BY THEIR INHERENT PERCEPTION OF WHAT IS RIGHT AND WRONG. THESE RIGHTS ARE UNIVERSAL IN ALL AGES AND INHERE IN EVERY HUMAN BEING. THE FIRST COROLLARY OF THIS THEORY IS THAT THESE RIGHTS, BEING INHERENT IN HUMAN BEINGS, EXISTED EVEN BEFORE THE EVOLUTION OF THE STATE.

HOWEVER, WITH THE GROWTH OF THE STATE BY WAY OF SOCIAL CONTROL, THE AMBIT OF THESE INHERENT RIGHTS IS LIMITED BY THE COLLECTIVE INTERESTS OF THE SOCIETY OR STATE IN WHICH A PERSON LIVES. THEREFORE, ANY CIVILIZED STATE WILL HAVE TO RECOGNISE THESE RIGHTS, NOT IN AN UNBRIDLED FORM, BUT REGULATED IN THE LARGER AND COLLECTIVE INTERESTS OF THE STATE. AS IT IS OFTEN SAID, I HAVE A RIGHT TO SWING MY ARM, BUT I MUST NOT HURT SOMEONE'S NOSE WHILE DOING SO.

ARE FUNDAMENTAL RIGHTS THE GIFT OF THE CONSTITUTION ?

FUNDAMENTAL RIGHTS ARE NOT GRANTED BY THE STATE OR LEGISLATURE, BUT ARE NATURAL RIGHTS OF HUMAN BEINGS AND HAVE BEEN RECOGNIZED BY THE STATE AS FUNDAMENTAL BUT NOT ABSOLUTE, AND THE POWER OF THE LEGISLATURE IS SUBJECT TO THESE RIGHTS. MOST OF THESE FUNDAMENTAL RIGHTS UNDER PART III OF OUR CONSTITUTION ARE NATURAL LAW RIGHTS. THEY ARE THE IRREDUCIBLE, MINIMUM CONDITIONS FOR THE FREE EXISTENCE OF MAN.

“THE SACRED RIGHTS OF MANKIND ARE NOT TO BE RUMMAGED FOR, AMONG OLD PARCHMENTS OR MUSTY RECORDS. THEY ARE WRITTEN, AS WITH A SUN BEAM, IN THE WHOLE *VOLUME* OF HUMAN NATURE, BY THE HAND OF THE DIVINITY ITSELF; AND CAN NEVER BE ERASED OR OBSCURED BY MORTAL POWER”.

ALEXANDAR HAMILTON

FUNDAMENTAL RIGHTS & DIRECTIVE PRINCIPLES

- ❖ FUNDAMENTAL RIGHTS ARE INJUNCTIONS AGAINST THE STATE, LIMITATIONS IMPOSED UPON THE STATE – LARGELY NEGATIVE RIGHTS**
- ❖ DIRECTIVE PRINCIPLES, THOUGH IN THEORY NOT ENFORCEABLE ARE POSITIVE DIRECTIVES TO THE STATE**
- ❖ DIRECTIVE PRINCIPLES EMBODY GOALS – ENDS**
- ❖ FUNDAMENTAL RIGHTS EMBODY MEANS – THE MODE TO ACHIEVE GOALS**

JUDICIAL REVIEW OF LEGISLATION

- ❖ **ARTICLE 13 : PRE-CONSTITUTION AND POST CONSTITUTION LAWS**
- ❖ **DOES “LAW” IN ARTICLE 13 INCLUDE A LAW TO AMEND THE CONSTITUTION ?**
- ❖ **IS THERE ANY DISTINCTION BETWEEN LAW MADE IN EXERCISE OF ‘CONSTITUENT POWER’ AND “LEGISLATIVE POWER” ?**

TEXT OF ARTICLE 13

LAWS INCONSISTENT WITH OR IN DEROGATION OF THE FUNDAMENTAL RIGHTS:-

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.

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.

IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES, -

"LAW" INCLUDES ANY ORDINANCE, ORDER, BYE-LAW, RULE, REGULATION, NOTIFICATION, CUSTOM OR USAGES HAVING IN THE TERRITORY OF INDIA THE FORCE OF LAW;

"LAWS IN FORCE" INCLUDES LAWS PASSED OR MADE BY A 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.

NOTHING IN THIS ARTICLE SHALL APPLY TO ANY AMENDMENT OF THIS CONSTITUTION MADE UNDER ARTICLE 368.

AMENDMENT OF THE CONSTITUTION

“EACH GENERATION MUST BE CONSIDERED AS A DISTINCT NATION, WITH A RIGHT OF THE WILL OF THE MAJORITY TO BIND THEMSELVES, BUT NONE TO BIND THE SUCCEEDING GENERATIONS MORE THAN THE INHABITANTS OF ANOTHER COUNTRY”.

STATE WITHOUT MEANS OF SOME CHANGE IS WITHOUT MEANS OF ITS OWN CONSERVATION

– BURKE

STABLE BUT FLEXIBLE PRINCIPLE

THE CONSTITUTION MUST BE FLEXIBLE BUT NOT SO FLEXIBLE THAT IT IS REDUCED TO A PLAY THING IN THE HANDS OF POLITICIANS

TEXT OF 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.

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) SHALL BE CALLED IN QUESTION IN ANY COURT OR ANY GROUND.

5] FOR THE REMVOAL OF DOUBTS, IT IS HEREBY DECLARED THAT THERE SHALL BE NO LIMITATION WHATEVER ON THE CONSTITUTENT POWER OF PARLIAMENT TO AMEND BY WAY OF ADDITION, VARIATION OR REPEAL THE PROVISIONS OF THIS CONSTITUTION.

- **DO ARTICLES 13 AND 368 CANCEL EACH OTHER ?**
- **CAN THE PARLIAMENT AMEND OR EVEN GO TO THE EXTENT OF DELETING THE CHAPTER ON FUNDAMENTAL RIGHTS ?**
- **IS THE PARLIAMENT POWER TO AMEND THE CONSTITUTION UNLIMITED ?**

UPTO 20TH JUNE 1979, RIGHT TO ACQUIRE, HOLD AND DISPOSE OF PROPERTY WAS A FUNDAMENTAL RIGHT UNDER ARTICLE 19 (1) (f)

IN KAMESHWAR SINGH V/S. STATE OF BIHAR

(AIR 1951 PATNA 91) LAWS TO ABOLISH ZAMINDARI SYSTEM WERE STRUCK DOWN BY THE HIGH COURT AS *ULTRA VIRES* ARTICLE 19 (1)(f)

CONSTITUTION FIRST AMENDMENT – 1951

ARTICLE 31 B – NINTH SCHEDULE

SHANKARI PRASAD V/S. UNION OF INDIA

(1952) 1 SCR 89

BENCH OF THREE JUDGES OF SUPREME COURT

**CHALLENGE TO CONSTITUTION FIRST AMENDMENT
REJECTED BY HOLDING THAT “LAW” IN ARTICLE 13
MEANT LAW MADE IN EXERCISE OF ORDINARY
LEGISLATIVE POWER AND NOT A CONSTITUTIONAL
AMENDMENT IN EXERCISE OF CONSTITUENT
POWER**

**SAJJAN SINGH V/S. STATE OF RAJASTHAN
AIR 1965 SC 845**

**BENCH OF FIVE JUDGES OF SUPREME
COURT**

**SHANKARI PRASAD APPROVED BUT
HIDAYUTALLAH AND MUDHOLKAR
EXPRESSED SERIOUS RESERVATIONS**

**MUDHOLKAR, J. REFERRED TO
JUDGEMENT OF CORNELIUS, J. OF
PAKISTAN SUPREME COURT TO SOW THE
SEEDS OF BASIC STRUCTURE DOCTRINE**

GOLAKNATH V/S. STATE OF PUNJAB
AIR 1967 SC 1643

MAJORITY OF 6 : 5

SHANKARI PRASAD AND SAJJAN SINGH OVERRULED

**NO DISTINCTION BETWEEN LAW MADE IN EXERCISE
OF LEGISLATIVE AND CONSTITUENT POWER**

**CONSTITUTIONAL AMENDMENT IS “LAW” UNDER
ARTICLE 13 THEREFORE PARLIAMENT CANNOT AMEND
CHAPTER ON FUNDAMENTAL RIGHTS**

DOCTRINE OF PROSPECTIVE OVERRULING

24TH CONSTITUTIONAL AMENDMENT ACT - 1971

**ARTICLES 13 AND 368 AMENDED TO CLARIFY THAT
THEY ARE MUTUALLY EXCLUSIVE**

**25TH CONSTITUTIONAL AMENDMENT ACT - 1971.
PRECEDENCE TO DIRECTIVE PRINCIPLES OVER
FUNDAMENTAL RIGHTS**

**29TH CONSTITUTIONAL AMENDMENT ACT - 1972
SEVERAL LAND REFORMS INCLUDED IN NINTH
SCHEDULE**

- **Keshavananda Bharati V/S State of Kerala
1973 (4) SCC 225**
- **Supreme Court Bench of 13 Judges**
- **Challenge to 24th , 25th , and 29th Amendments**

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 ?**

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 AUGUST 1975 – 39TH AMENDMENT ACT, 1975

**ELECTION OF PRIME MINISTER AND OTHERS IMMUNE FROM JUDICIAL
REVIEW**

RETROSPECTIVE AMENDMENTS TO ELECTION LAWS

**10TH NOVEMBER 1975 ATTEMPT TO REVIEW KESHAVANANDA BHARATI
PALKHIWALA'S FINEST HOUR**

3RD JANUARY 1977 – 42ND AMENDMENT ACT, 1976

ARTICLE 368 (4) AND (5) – UNLIMITED AMENDING POWERS

BALANCE RESTORED

**RAJ NARAIN V/S. INDIRA GANDHI
39TH AMENDMENT STRUCK DOWN
BASIC STRUCTURE DOCTRINE APPLIED**

**MINERVA MILLS V/S. 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 V/S. STATE OF TAMIL NADU
ARTICLES 14,19,21 – GOLDEN TRIANGLE – BASIC STRUCTURE
NINTH SCHEDULE IS NOT ‘BLACK HOLE’ OF THE
CONSTITUTION OF INDIA**

CONCLUSION

CONSTITUTION IS SUPREME

THANK YOU