

MODULE 1.21

AMENDMENT OF THE CONSTITUTION

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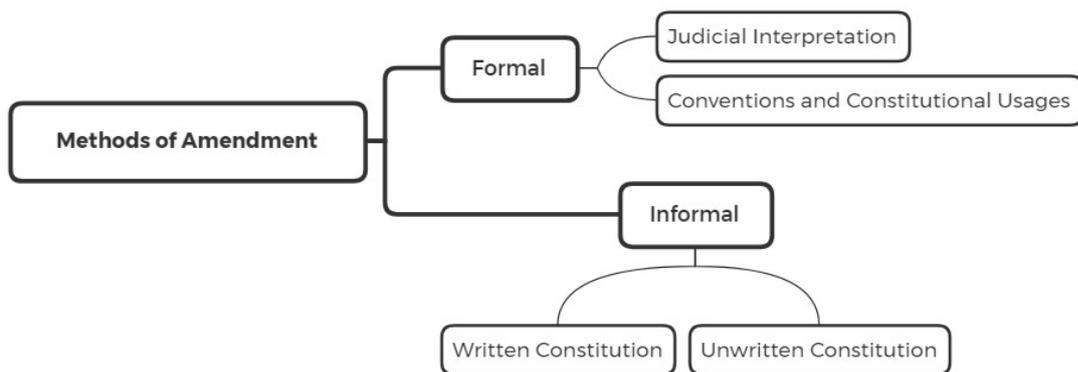
MODULE 1.21

AMENDMENT OF THE CONSTITUTION

1. Introduction:

The words and letters of a constitution which guides a nation require to be moulded from time to time keeping in view the ever changing requirements of society. As one of the greatest philosophers had said, change is the only unchangeable law of nature. Hence the letter and spirit of a constitution requires to be changed with passage of time and hence the concept of amendment.

2. Recognised methods of amendment:



2.1 **Informal methods of amendment:**

2.1.1 **Judicial interpretation:**

- Judicial interpretation even though is invisible but the same remains one of the most important process of change in respect of constitutional provisions. Even though judicial interpretation is a slow and gradual process yet it assumes crucial importance when the formal methods of amendment becomes tardy and politically difficult.
- E.g. the US Constitution despite being extremely skeletal and brief offers immense scope of judicial creativity. Many of the important fundamental rights which a US citizen enjoys today is a result of progressive judicial interpretation.
- In Indian context the same holds true and a classic example is the celebrated *Keshavananda Bharati Case* where article 368 has been interpreted in such a manner that the power of amendment has been restricted to a large extent.

2.1.2 **Conventions and Constitutional usages:**

- Conventions emanate out of practices which are followed over a period of time. Conventions have also been understood as non-legal rules because

even though they are considered as binding but they do not have a binding force alike a rule. In Indian context many important provisions regarding council of ministers and the prime minister, the concept of Cabinet, practices followed in Lok Sabha and State Legislative Assemblies, Governors relation with Council of Minister etc. have evolved by convention and can be changed by conventions over a period of time.

2.2 **Formal methods:**

2.2.1 **For flexible constitutions**

- A flexible constitution is one in which effectuating an amendment is rather easy. In such constitutions, e.g. the British Constitution, an amendment can be effected like an ordinary law.

2.2.2 **For Rigid constitutions:**

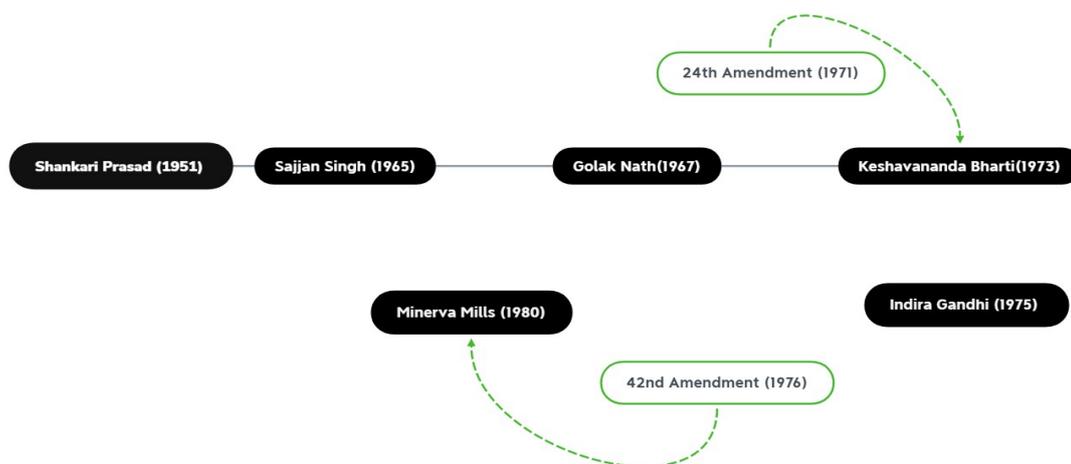
• In a rigid constitution, the process of formal amendment is technical and sometimes difficult. Like the constitutions of USA, Canada and Australia, the Indian constitution also provides for provisions of formal amendment which can be found in Article-368 of the Constitution. However, in the Indian constitution the degree of rigidity varies and accordingly there are three categories of amendment procedure.

- **Category - 1:** Provisions which are technical relatively lesser legal significance can be modified through ordinary legislative process and are not regarded as amendment within the meaning of Article-368. e.g. Admission of a new State under Article-2, Number of Judges in Supreme Court and High Courts, Second schedule of the constitution dealing with salaries and allowances of certain officers etc.

- **Category- 2:** Amendment through the special procedure as prescribed in the constitution. But do not require ratification by the legislatures of not less than one half of the states.
- **Category - 3 :** Amendment through the special procedure as prescribed in the constitution and requiring ratification by the legislatures of not less than one half of the states (entrenched provisions) e.g. Provisions regarding the Supreme Courts and High Courts, Scheme of distribution of legislative taxing and administrative powers between the Union and the States, Article-368 etc.

3. Evolution of the scope of amending process :

The scope of constitutional amending process as contained in Article-368 has evolved through a series of judicial decision. Such evolution is as follows :



3.1 Sankari Prasad Singh vs. Union of India (1951)

- Validity of the constitution (first amendment) Act 1951 as regards right of property guaranteed by Art-31 was under challenge.

- Held that the terms of Art-368 are general and empowers the parliament to amend the constitution without any exception.
- The word 'Law' as mentioned under Art-13 does not include a constitution amending law passed under Art-368. Hence the bar as contained under Art-13 (2) regarding restriction to pass any law violating fundamental rights, does not affect the amendments made under Art-368.
- Article-13 and 368 were constructed harmoniously.

3.2 ***Sajjan Singh vs. State of Rajasthan (1965)***

- Question: Validity of the constitution (Seventeenth Amendment) Act, 1964 as regards right to property guaranteed by Art-31 was in question as a number of statutes affecting property rights were placed in the ninth schedule thereby excluding judicial review thereof.
- The ratio of *Shankari Prasad Singh* was broadly followed and was held that the power of amendment under Art-368 can be exercised over each and every provision of the constitution.
- An argument that placing a statute in ninth schedule reduces the scope of judicial review thereby affecting Art-226 and that such amendment requires ratification by the State legislatures was rejected.
- A dissenting opinion was delivered where doubts were expressed as to whether fundamental rights can be included within the power of amendment and whether every constitution has certain fundamental features which could not be changed.

3.3 ***I.C. Golak Nath vs. State of Punjab (1967)***

- Validity of the constitution (seventeenth amendment) Act 1964 as regards right to property was again under scrutiny.

- It was held that fundamental rights occupy a transcendental position and no authority even the parliament is competent to amend the same.
- Fundamental rights were equated with natural rights and the same was characterised as primordial rights necessary for the development of human personality.
- The term 'Law' under Art-13 was interpreted to include constitutional law as well.
- In order to avoid chaos and socio economic difficulties, the Court took recourse to the **doctrine of 'prospective overruling'** thereby holding that the decision shall not invalidate the amendments made prior to the judgment.

3.4 **The 24th amendment – Amendment of Article-368 (1971)**

- On the strength of brute majority, the Government enacted the 24th Amendment Act in 1971 modifying Article 13 and 368 to get over the Golak Nath Judgment.
- The amendment clarified that Art-13 shall not stand in the way of constitutional amendment made under Art-368. Further, a clause was added to Art-368 declaring that Art-13 shall not apply to constitutional amendments made under Art-368.
- Marginal note of Art-368 changed from '**Procedure for amendment of the constitution**' to '**power of parliament to amend the constitution and procedure therefore**'.
- A further clause added to Art-368 thereby granting unfettered power of the parliament to exercise its constituent power for addition, variation of repeal of any provision of the constitution.

3.5 **Kesavananda Bharti Vs. State of Kerala (1973):**

- Constitutional validity of the 24th and 25th Amendment Act was under challenge.
- The Court held that the substantive power of amendment originates from Art-368 itself but the same is not an unlimited power.
- The amending power is subject to an important consideration that such power cannot destroy or emasculate the basic or fundamental features of the constitution.
- Some of the features which were considered as fundamental are:- (i) Supremacy of the constitution, (ii) Republican and Democratic form of Govt, (iii) Secular character, (iv) Separation of powers, (v) Federal character of the constitution.

3.5 ***Indira Nehru Gandhi vs. Rajnarain (1975):***

- Constitution (39th Amendment) Act, 1975 touching upon the election of the prime minister and the existing judicial process for hearing election petitions were under challenge.
- The Court reiterated the basic structure doctrine and held that the principle of separation of powers and democracy is an essential feature of the constitution which cannot be amended.

3.6 ***The 42nd Amendment (1976):***

- The amendment sought to ensure that a constitutional amendment may not be challenged before any Court on any ground whatsoever and to further render the constituent power of the parliament free from any limitation.
- The amendment was sought to be justified on the basis that there was no basic feature of the constitution which requires to be protected from

amendment and that supremacy of parliament ought to be established in the domain of constitutional amendment.

3.7 *Minerva Mills Ltd. vs. Union of India (1980)*

- Clauses 4 and 5 of Art-368 introduced by the 42nd amendment, was under challenge.
- The said provision inserting sub-section 4(5) in Article-368 was declared void on the basis of the ratio of *Keshavananda Bharti*.
- **Limited amending power** itself was held to be one of the basic features of the constitution.

3.8 The same position was further confirmed in ***Waman Rao vs. Union of India (1981)*** and ***Raghunath Rao vs. Union of India (1993)***.

4. Basic features of the constitution:

- **In the light of *Keshavananda Bharti* and the subsequent judgments, it was important to identify the basic features of the constitution. Even though some of the basic and foundational features of the constitution were identified in *Keshavananda Bharti* itself, no exhaustive list of such features has yet emerged. However, some of the features as identified by the Supreme Court are indicated below :-**

Keshavananda Bharti vs. Union of India	<p>SIKRI, C.J.</p> <p>(i) Supremacy of the constitution, (ii) Republican and Democratic form of Govt, (iii) Secular character of the constitution, (iv) Separation of powers between legislature executive and judiciary , (v) Federal character of the constitution.</p> <p>Other Judges :</p> <p>(vi) Dignity of individual and fundamental rights. (vii) Mandate to build a welfare state. (viii) The unity and integrity of the nation. (ix) Parliamentary system.</p>
Indira Gandhi vs. Raj Narain	<p>(i) Equality of status and opportunity. (ii) Rule of Law.</p>
Kihoto Hollohon vs. Zachillu	<p>(i) Democracy. (ii) Free and fair elections.</p>
S.R Bommai vs. Union of India	<p>(i) Democracy. (ii) Federalism. (iii) Secularism and equal treatment of all religions.</p>
S.P Gupta vs. Union of India	<p>(i) Independence of judiciary.</p>

5. **Concept of Judicial Review:**

- Art-32, 136, 226 and 227 guarantees judicial review of legislation and administrative action. Protection of judicial review is interconnected with the protection of fundamental rights and to ensure that a citizen does not go without remedy.
- Judicial review has been declared as a basic feature by Khanna J. in *Keshavananda Bharti*.

- In **S.P Sampath Kumar vs. Union of India (1987)** it was observed that judicial review is a basic and essential feature of the constitution and no law passed by parliament in exercise of its constituent power can abrogate it or take it away. In absence of the power of judicial review, the constitution becomes a dead letter.

- In **Sampath Kumar**, the constitutional validity of Art-323(A) empowering parliament to set-up tribunals and the Administrative Tribunal Act were under consideration and the question was whether exclusion of the power of judicial review by High Courts is constitutional even though the jurisdiction of Supreme Court under Art. 136 is retained. The Court held a constitutional amendment transferring the power of judicial review of a High Court to any other institution may not be violative of the basic structure doctrine if an alternative and effective mechanism is setup. (e.g. Tribunals).

- However in **L. Chandra Kumar vs. Union of India (1997)**, Sampath Kumar was modified and the Court held that the power of judicial review of High Courts under Art-226 and 227 and of the Supreme Court under Art-32 are essential features of the constitution.

- In **P. Sambamurthy vs. State of Andhra Pradesh (1987)**, it was held that a finality clause excluding judicial review is unconstitutional. Hence, 'Non-obstante clauses' to the effect 'notwithstanding anything in the constitution...' does not take away the power of judicial review.

6. **Supplementary topics:**

6.1 **Rule of Severability as regards a constitution Amendment Act:**

- It has been settled by the Supreme Court that the rule of severability can be applied even for a Constitutional Amendment Act. This implies that one

part of an Amendment Act can be sustained whereas any part of portion thereof can be discarded being unconstitutional.

- Accordingly in ***Kihoto Hollohan vs. Zachillu*** the Court upheld the constitutional validity of the anti-defection law as contained in tenth schedule of the constitution but *struck down the finality clause restricting the jurisdiction of Supreme Court and High Courts* under Art-136, 226 and 227.

6.2 ***Power of the Executive to delay notification of constitutional amendments.***

- A question of some constitutional significance arose in ***A.K. Roy vs. Union of India (1982)*** where the question arose that when a Constitutional Amendment Act provides that it shall come into force on such date as the Central Govt may, by notification appoint, whether the Govt in exercise of executive power can delay such notification indefinitely.
- The majority judgment in *A.K. Roy* upheld such delay stating that the power to issue a notification belongs to the executive and does not fall within the constituent power of the parliament. The Court cannot compel the Govt to do something which lies in its discretion.
- However, the dissenting judgment appears to be more sound wherein it was observed that delay in enforcing an amendment for an unreasonable period of time goes against the intention of the constituent power. The power to issue such notification amounts to delegation of constituent power and as such should not be left to the unfettered discretion of the Central Govt.

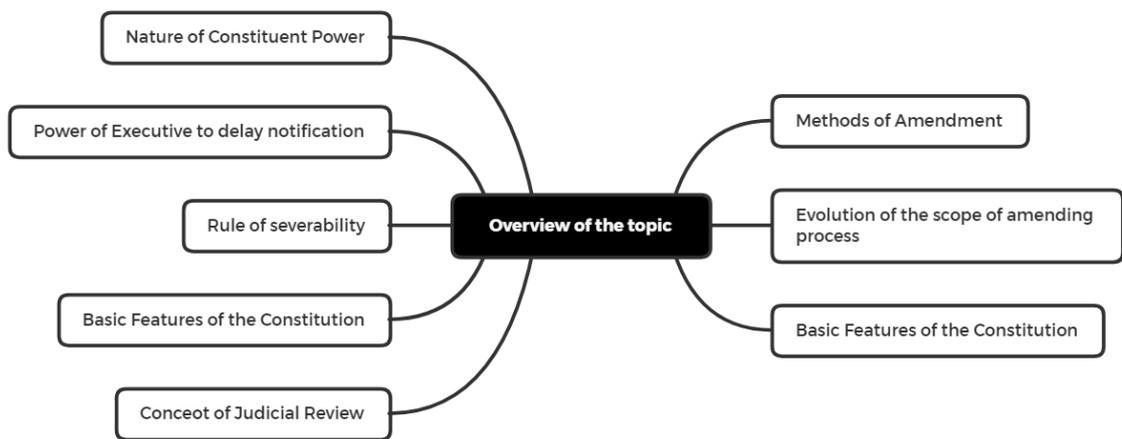
7. **The nature of constituent power:**

- The notion of constituent power as used in the decisions of the Supreme Court has certain ambiguities. The term is used to connote the power of amendment of the constitution and the power to make remake and unmake the constitution. Two powers i.e. the legislative and the constituent power are distinct though related.
- In **Shankari Prasad**, the concept of constituent power was clearly distinguished from legislative power. It was held that Art-368 manifest sovereign constituent power which may be exercised to amend or alter the constitution without any fetters.
- However, in **Keshavananda Bhararti**, the said power was interpreted to be a limited power which cannot be exercised to abrogate or emasculate the basic feature of the constitution.
- Unlike British parliament which is completely sovereign, the Indian parliament being itself a creature of the constitution of India has certain inherent limitations. The power of the Indian parliament to legislate flows from the constitution itself and hence such power of the parliament is not supreme. Hence, the constituent power of the parliament also suffers from certain inherent limitations which broadly imply that save and except preserving the basic feature of the constitution and the limitations laid down by the constitution, the constituent power of the parliament is unlimited.

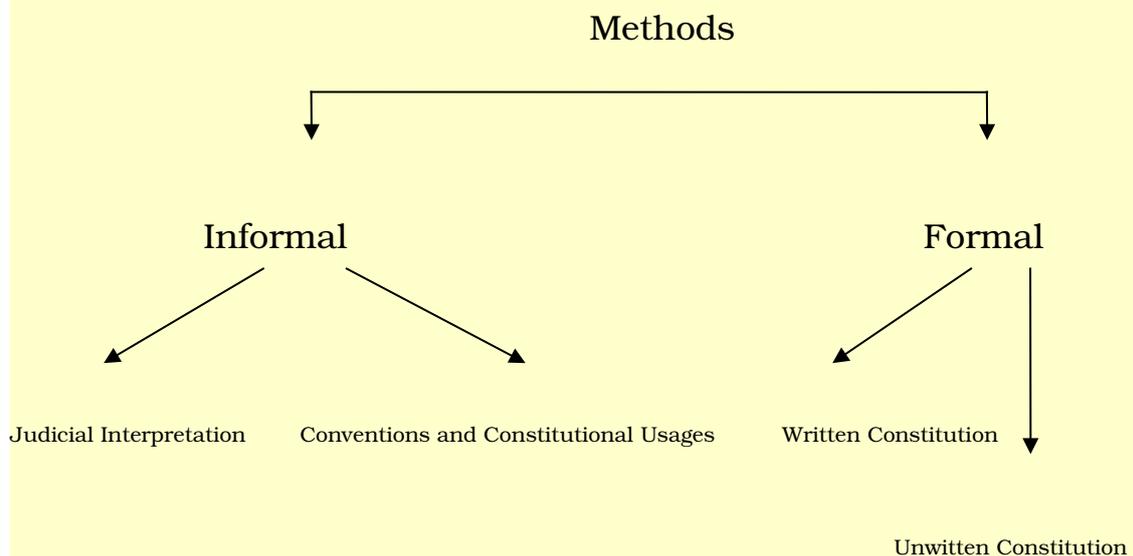
Constituent power of the Constituent Assembly.	Constituent power of the Parliament.
Source : The Independence of India Act, 1947	Source: The Constitution of India.
Unlimited power. No limitations whatsoever	Limited power subject to the limitations as laid down by the constitution and the basic structure doctrine.
Ceased with the enactment of the constitution of India.	continuing till the constitution of India is in force.

AMENDMENT OF THE CONSTITUTION

REVISION NOTES



1. Recognised methods of amendment:



For flexible constitutions

A flexible constitution is one in which effectuating an amendment is rather easy. In such constitutions, e.g. the British Constitution, an amendment can be effected like an ordinary law.

For Rigid constitutions:

In a rigid constitution, the process of formal amendment is technical and sometimes difficult. Like the constitutions of USA, Canada and Australia, the Indian constitution also provides for provisions of formal amendment which can be found in Article-368 of the Constitution.

2. Evolution of the scope of amending process :

Shankari Prasad (1951)

Sajjan Singh (1965)

Golak Nath(1967)

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Indira Gandhi(1975) ← Keshavananda Bharti(1973) ← 24th Amendment (1971)



42nd Amendment (1976)



Minerva Mills (1980)

Sankari Prasad Singh vs. Union of India (1951)

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The amendment sought to clarify that Art-13 shall not stand in the way of constitutional amendment made under Art-368 thereby granting unfettered power of the parliament to exercise its constituent power for addition, variation or repeal of any provision of the constitution.

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The 42nd Amendment (1976):

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Minerva Mills Ltd. vs. Union of India (1980)

The said provisions of the 42nd Amendment Act, 1976 declared unconstitutional. Limited amending power itself was held to be one of the basic features of the constitution

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constitution becomes a dead letter. **S.P Sampath Kumar vs. Union of India (1987)** it was observed that judicial review is a basic and essential feature of the constitution and no law passed by parliament in exercise of its constituent power can abrogate it or take it away. In **L. Chandra Kumar vs. Union of India (1997)**, Sampath Kumar was modified and the Court held that the power of judicial review of High Courts under Art-226 and 227 and of the Supreme Court under Art-32 are essential features of the constitution.

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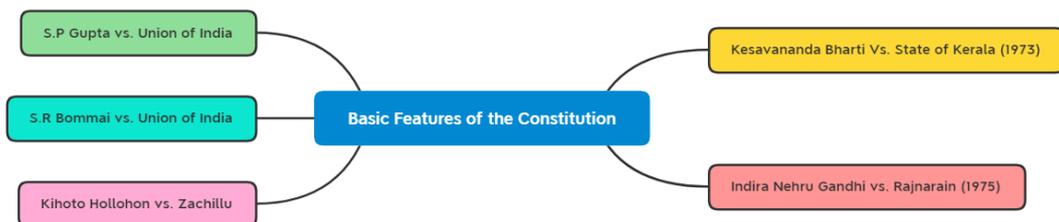
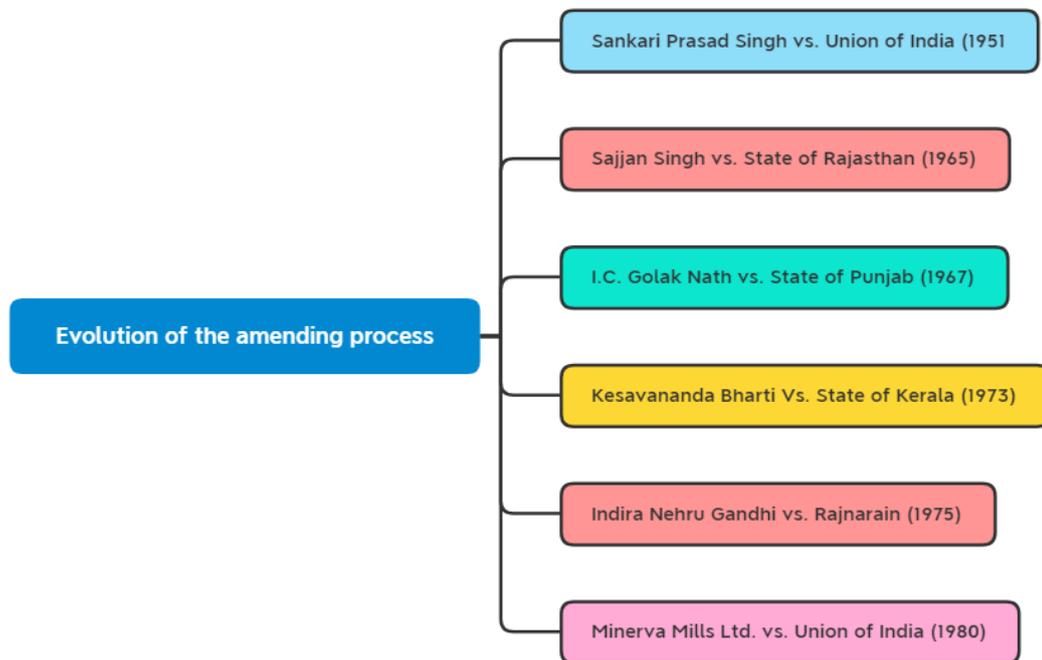
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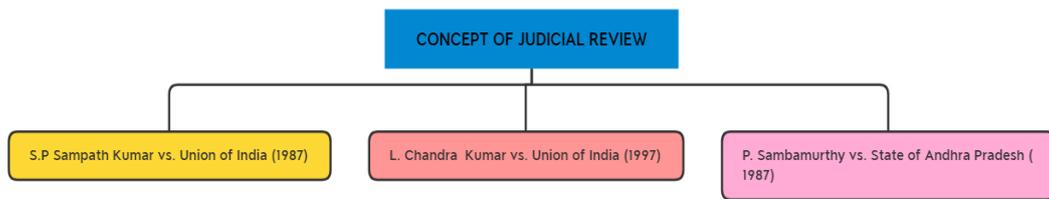
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AMENDMENT OF THE CONSTITUTION

CASE MINDMAPS





RULE OF SEVERABILITY

Kihoto Hollohan vs. Zachillu

• POWER OF THE EXECUTIVE TO DELAY NOTIFICATION OF CONSTITUTIONAL AMENDMENTS

A.K. Roy Vs. Union of India

THE NATURE OF CONSTITUENT POWER

Sankari Prasad Singh vs. Union of India (1951)

Kesavananda Bharti Vs. State of Kerala (1973)