

## Paper – 1

Total Question Discussed: 05

Question Numbers: Q.1 (a), (b), (c), (d), (e)

**1.(a) The goals specified in the Preamble contain the basic structure of the Constitution, which can not be amended under Article 368 of the Constitution. Analyse this statement in the light of leading decided cases.**

<b>Introduction</b>	<ul style="list-style-type: none"> <li>● Write preamble in general, its major objectives. In brief</li> <li>● Focus on keywords of preamble like Secularism, equality etc which is basic structure.</li> </ul>
<b>Body</b>	<ul style="list-style-type: none"> <li>● Write basic structure doctrine in sort</li> <li>● Connect meaning of basic structure with major provisions of preamble, how they sometime overlap</li> </ul>
<b>Conclusion</b>	<ul style="list-style-type: none"> <li>● Write decided cases where secularism, Democratic form of government etc has been held as basic structure.</li> </ul>

Answer Hint:

Preamble represents the quintessence, the philosophy, the ideals, the soul or spirit of the entire Constitution of India. It had the stamp of “deep deliberation”, was “marked by precision”: it was “an epitome” of the broad features of the Constitution which were an amplification or condensation of the concepts set out in the Preamble (Madhlokar, J. in *Sajjan Singh v State of Rajasthan* AIR 195 5 SC 845).

1. It indicates the source of the Constitution.
2. A statement of objectives of the Constitution - which the legislation is intended to achieve (e.g. implementation of Directive Principles). It epitomizes principles on which the Government is to function.
3. It serves as a challenge to the people to adhere to the ideals enshrined in it (Justice, Liberty, Equality, Fraternity, etc.).
4. It is a sort of introduction to the statute and many a times very helpful to understand the policy and legislative intent. It is a ‘Key- Note’ i.e. key to the minds of the framers of the Constitution.
5. Several decisions of the Supreme Court pointed out the importance and utility of it. By itself, it is not enforceable in a Court of Law, yet it states objects and aids legal interpretation of the Constitution, where language is ambiguous...construction which fits the preamble may be preferred

**The doctrine of basic structure:** The Supreme Court recognized BASIC STRUCTURE concept for the first time in the historic *Kesavananda Bharati* case in 1973. The Supreme Court declared that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution and parliament could not

use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the constitution.

### Preamble and Basic Structure:

The preamble contains various basic features of the constitution including the democratic and republican nature of the state, secularism, equality, individual freedom, sovereignty, etc. Thus, it is clear that major keywords of the preamble overlap with the doctrine of basic structure.

### Evolution of Basic structure through Decided Cases.

In **Shankari Prasad Singh Deo v. Union of India** (AIR. 1951 SC 458), the Supreme Court unanimously held, "The terms of article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever.

In 1967, **Golak Nath V State of Punjab**, the Supreme Court adopted a new vision to see the powers of parliament that it cannot amend the part III of the constitution.

After the **Keshavananda Bharati** case recognized the theory of Basic Structure in 1973, in the case of **Indira Nehru Gandhi v. Raj Narain**, the 39th amendment act (which removed the authority of the Supreme Court of India to adjudicate certain petitions related to the elections of the President, Vice President, Prime Minister and the Speaker of the Lok Sabha) was quashed down with the help of doctrine of basic structure.

In the **Minerva Mills case**, the **Supreme Court** provided key clarifications on the interpretation of the basic structure doctrine. Under the limited power of parliament to amend the constitution, two important factors were added-

- To keep harmony and balance between the rights and directive principles.
- Judicial review

**b. Make a distinction between judicial review and judicial power. Explain the scope of judicial review with reference to the cases arising under the Xth Schedule of the Constitution.**

<b>Introduction</b>	<ul style="list-style-type: none"><li>● Introduce with the concept of Judicial Review</li></ul>
<b>Body</b>	<ul style="list-style-type: none"><li>● Differentiate Judicial Review with Judicial Power</li><li>● Determine the Scope of Judicial Review for cases under Xth Schedule</li></ul>
<b>Conclusion</b>	<ul style="list-style-type: none"><li>● Cite decided cases on Judicial Review of Xth Schedule</li></ul>

Judicial review is recognized as a necessary and a basic requirement for construction up of a novel civilization in order to safeguard the liberty and rights of the individuals. The power of judicial review is significantly vested upon the High Courts and the Supreme Court of India.

**Judicial Review under Indian Constitution:** Under Article 13 of the Indian Constitution, the compulsion of judicial review was described in fundamental rights in Part III. It is stated that the State or the Union shall

not make such rules that takes away or abridges the essential rights of the people. If any law made by the Parliament or the State Legislature contravenes the provisions of this Article, shall be void.

**Judicial Power and Judicial Review:** The Judiciary has power to decide upon the legality of claims and conduct, to determine what the law is and what the rights of parties are with respect to transactions already had. Judicial Review on the other hand brings in check the constitutionality of legislative or administrative action. It can be said, that judicial review is a specific type of judicial power.

**Judicial Review under Xth Schedule:**

The Xth schedule provided for anti-defection law, which is as follows-

If a member of a house belonging to a political party involves in the following activities, he/she stands disqualified

- Voluntarily gives up the membership of his political party, or
- Votes, or does not vote in the legislature, contrary to the directions of his political party. However, if the member has taken prior permission, or is condoned by the party within 15 days from such voting or abstention, the member shall not be disqualified.
- If an independent candidate joins a political party after the election.
- If a nominated member joins a party six months after he becomes a member of the legislature.

**Kihoto Hollohan Case:** A constitutional challenge to the Tenth Schedule was settled by the apex court in Kihoto Hollohan.

The principal question before the Supreme Court in the case was whether the powerful role given to the Speaker violated the doctrine of Basic Structure — the judicial principle that certain basic features of the Constitution cannot be altered by amendments by Parliament, laid down in the landmark judgment in Kesavananda Bharati vs State Of Kerala (1973).

The apex court has mentioned that anti-defection law is valid as a political party functions on the strength of shared beliefs. Its own political stability and social utility depend on the concerted action of its members in furtherance of those commonly held principles.

**Q.1.b. Make a distinction between judicial review and judicial power. Explain the scope of judicial review with reference to the cases arising under the Xth Schedule of the Constitution.**

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**Q.1.c. Analyse the relevance of doctrine of eminent domain under the Constitution of India. Explain the limitation of this doctrine with the help of case law.**

Introduction	<ul style="list-style-type: none"> <li>● Explain what is the doctrine of eminent domain.</li> <li>● Explain how it evolved and how it was treated as inherent attribute to sovereignty.</li> </ul>
Body	<ul style="list-style-type: none"> <li>● Importance of Eminent Domain</li> <li>● Limitation on the scope of the Doctrine</li> </ul>
Conclusion	<ul style="list-style-type: none"> <li>● Case laws on the limitation of the doctrine</li> </ul>

The Doctrine of Eminent Domain, a concept taken from America, allows the sovereign to capture any private land and make it a public land that may benefit the public at large. The need is to just give compensation for it and this was done without taking into account the owner’s opinion.

**Meaning of Eminent Domain:** Doctrine of ‘Eminent domain’, in its general connotation means the supreme power of the king or the government under which property of any person can be taken over in

the interest of the general public. Doctrine of 'eminent domain' is based on two maxims namely *salus populi supreme lex esto* which means that the welfare of the people is the paramount law and *necessita public major est quan*, which means that public necessity is greater than the private necessity.

**Importance:** It is so often necessary for the proper performance of governmental functions to take private property for public use. The power is inalienable for it is founded upon the common necessity and interest and appropriate the property of the individual members of the community to the greater interests of the whole community.

**Limitation on the Doctrine:** However in doing so the State should reconcile the corresponding rights of individuals to claim their property.

Acquisition or taking possession of private property which is implied in clause (2) of Article 31 of Indian Constitution, such taking must be for public purpose. The other condition is that no property can be taken, unless the law authorizes such appropriation containing a provision for payment of compensation in the manner as laid down in the clause.

**Judicial Pronouncements on Eminent Domain:** In explaining the power, the Court held that eminent domain was "the power of the sovereign to take property for public use without the owner's consent".

The Supreme Court in **Sooraram Reddy v. Collector, Ranga Reddy District**, has articulated the following grounds for review of this power:

- malafide exercise of power;
- a public purpose that is only apparently a public purpose but in reality a private purpose or collateral purpose;
- an acquisition without following the procedure under the Act;
- when the acquisition is unreasonable or irrational;
- when the acquisition is not a public purpose at all and the fraud on the statute is apparent

In **Chemili Singh v. Slate of U.P.**, it has been held that compulsory acquisition of land for providing houses to dalits cannot be challenged on the ground of violation of right to livelihood which is an integral part of right to life under Article 21.

**d. Enumerate the list of Fundamental Duties as provided in the Constitution of India. What is the rationale of incorporation of Fundamental Duties under the Indian Constitution through the Constitutional (Forty-second Amendment) Act, 1976?**

Introduction	<ul style="list-style-type: none"><li>● Introduce generally with the origin of the concept of fundamental duties in the Indian Constitution</li></ul>
Body	<ul style="list-style-type: none"><li>● Discuss the rationale for the incorporation of fundamental duties</li></ul>
Conclusion	

The Fundamental duties have been incorporated in the constitution to remind every citizen that they should not only be conscious of their rights but also of their duties. The concept of Fundamental Duties was taken from the constitution of USSR along with the concept of Five Year Plan.

Fundamental Duties are as follows:

List all the Duties

**Rationale for incorporation of Fundamental Duties:**

Fundamental duties are intended to serve as a constant reminder to every citizen that while the constitution specifically conferred on them certain Fundamental Rights, it also requires citizens to observe certain basic norms of democratic conduct and democratic behaviour because rights and duties are co-relative.

The Fundamental Duties are defined as the moral obligations of all citizens to help promote a spirit of patriotism and to uphold the unity of India. These duties, set out in Part IV–A of the Constitution concern individuals and the nation. Citizens are morally obligated by the Constitution to perform these duties.

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**e. What are the various modes of judicial control of delegated legislation?**

<b>Introduction</b>	<ul style="list-style-type: none"><li>● Explain the meaning of delegated legislation</li></ul>
<b>Body</b>	<ul style="list-style-type: none"><li>● Enumerate the modes of judicial control over delegated legislation</li><li>● Explain the various modes with the help of decided cases</li></ul>
<b>Conclusion</b>	<b>Conclude Generally</b>

Delegated legislation is generally a type of law made by the executive authority as per the powers conferred to them by the primary authority in order to execute, implement and administer the requirements of the primary authority.

**Modes of Controlling Delegated Legislation:**

In India the invalidity of delegated legislation may arise from any of the following reasons:

(1) The enabling Act or delegating statute being unconstitutional: Where the enabling Act or some of its provisions, under which delegated legislation is provided, are in contravention of the Constitution, the court would declare the Act or its provisions, as the case may be, ultra vires.

In *Hamdard Dawakhana v. Union of India*, Section 3(d) of the Drugs and Magic Remedies

(Objectionable Advertisement) Act was declared ultra vires. The 'whole Act was not struck down, because the other provisions were found to be good law. The Court held that the words used in Section 3(d) do not lay down any certain criteria or proper standard and surrender unguided and uncanalised power to the Executive. There must be definite boundaries within which the powers of administrative authority are exercisable.

(2) The subordinate legislation violating the Constitution: The second mode for judicial review comes into play where the delegated legislation violates the provisions of the Constitution or any of the fundamental rights given thereunder. In all the countries having written Constitution this mode of control is taken very seriously.

The well known case of *M/s. Dwarka Pd. v. State of U.P.*, is an instance of subordinate legislation being in conflict with Constitution and hence was ultra vires. In this case clause 3(1) of U.P. Coal Control Order, 1953 was held ultra vires because it gave unrestricted power to the State Controller to make exceptions and even if he acted arbitrarily there was no check over him and no redress was available against it. The Court held that it is violative of Article 19(1)(g) and could not be justified as a reasonable restriction under clause (6) of the same Article.

(3) The subordinate legislation being ultra vires the delegating Act.

In the control-mechanism, judicial control has emerged as the most outstanding controlling measure. Judicial control over delegated legislation is exercised by applying two tests:

- Substantive ultra vires; and
- Procedural ultra vires.

The Supreme Court recently in *Kerala State Electricity Board v. Indian Aluminium Co.*,<sup>14</sup> laid down that notwithstanding the subordinate legislation being laid on the Table of the House of Parliament or the State Legislature and being subject to such modification, annulment or amendment as they may make, the subordinate legislation cannot be said to be valid unless it is within the scope of the rule-making power provided in the statute.