CHAPTER XLI

AMENDMENT OF THE CONSTITUTION

SYNOPSIS

Times are not static. Times change and, therefore, the life of a nation is not static but dynamic, living and organic; its political, social and economic conditions change continuously. Social mores and ideals change from time to time cre-

ating new problems and altering the complexion of the old ones. It is, therefore, quite possible that a constitution drafted in one era, and in a particular context, may be found inadequate in another era and another context.

The ideas upon which a constitution is based in one generation may be spurned as old fashioned in the next generation. It thus becomes necessary to have some machinery, some process, by which the constitution may be adapted from time to time in accordance with contemporary national needs.

The modes of adapting the constitution from time to time to new circumstances may either be informal or formal. Informal methods are judicial interpretation and conventions; the formal method is the constituent process.

A. INFORMAL METHODS

(a) JUDICIAL INTERPRETATION

In this case, the constitutional text does not change, but its interpretation undergoes a change.[1] The words in the constitution having one meaning in one context may be given somewhat different meaning in another context. "While the language of the constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning."[2]

Judicial interpretation is a process of slow and gradual metamorphosis of constitutional principles, and is somewhat invisible, for the change has to be deciphered by an analysis of a body of judicial precedents. In this process, the courts play a dominant role, for it is their function to interpret the constitution.

The process is slow for it develops from case to case over a length of time and it may take long for a view to crystallise. It is also somewhat haphazard because the courts do not take the initiative; they interpret the constitution only when the question is raised before them and the course of interpretation depends on the nature of cases and constitutional controversies which are presented to the courts for adjudication.

Though the process of judicial interpretation goes on in every constitution to a greater or lesser extent, yet it assumes a crucial importance in a country in which the formal method of constitutional amendment is very tardy and difficult, and the language used in the constitution is general.

The best example where this process has been used effectively for adaptation of the constitution is the United States where the Supreme Court has from time to time given a new meaning to phrases and words in the constitution so as to make the 18th century, *laissez faire era*, document subserve the needs of a vast, expanding and highly industrialized civilization of the twentieth century without many formal amendments being effectuated in its text.

The U.S. Constitution being skeletal and brief and couched in general language, offers a vast scope for judicial creativity. For example, the First Amendment to the U.S. Constitution guarantees freedom of speech in very broad terms.

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1. *Constitutional Interpretation*, Ch. XL, *supra*; WHEARE, MODERN CONSTITUTIONS, 146-77 (1964).

2. Justices BLACK and FRANKFURTER, CONFLICT IN THE COURT, 57.

The Amendment says: "Congress shall make no law… abridging the freedom of speech or of the press". The provision lays down no limits or restrictions on the Fundamental Right to freedom of speech. But there can be no unlimited right. Therefore, the U.S. Supreme Court has taken upon itself to spell out the restrictions on this right.

To a limited extent, in Canada and Australia also, the judiciary has adapted the constitution to the changing circumstances.[3]

The process of judicial interpretation is in progress in India as well.[4] The Supreme Court by holding that it can reconsider its decisions from time to time has kept the way open for adjustments in constitutional interpretation so as to adapt the Indian Constitution to new situations. The Court has on several occasions changed its views about the significance and meaning of several constitutional provisions.[5]

Even though, due to the Indian Constitution being very detailed, and its language being rather specific, and not general, opportunities available to mould the Constitution by the judicial interpretative process are somewhat limited,[6] yet, there have been several outstanding judicial decisions which have had a deep impact on constitutional development. Since 1978, the interpretative process has entered a very dynamic phase because of judicial creativity. This aspect has already been discussed in detail in the last Chapter.[7]

(b) CONVENTIONS AND CONSTITUTIONAL USAGES

The operation of constitutional provisions may be modified by the growth of conventions, practices and observances. This is another process of slow metamorphosis, of imperceptible change, where the constitutional text retains its original form and phraseology, where there is no visible modification on the face, but where, underneath the surface, a change has come about so far as the working and operation of the provision is concerned.

The conventions and usages, though operating within the famework of the provisions of the constitution, nevertheless, do modify their content and effect. One way to distinguish between rules and conventions may be to say that while rules are made, conventions are not made. Conventions evolve out of practices followed over a period of time.[8]

Conventions operate in several ways.

One, a convention may nullify a constitutional provision in practice without formally abolishing it. A well known example of this is to be found in the fact that in some countries, the legal power of the Head of the State to veto a bill passed by the Legislature is never exercised by him except on the advice of the Ministry.

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3. For the working of the judicial process in the area of legislative powers in these countries, see, *supra*. Chs. X and XI.
See also, Ch. XV on Commerce Clause.
4. *Supra*, Ch. XL.
5. *Ibid.*
6. *Ibid.*
7. *Supra*, Ch. XL.
8. *Supra*, Ch. I.

Two, a convention may work by transferring powers granted to one authority in the constitution to another authority. This is what usually happens in a country with a parliamentary form of government where legal powers formally vested in the Head of the State are effectively exercised by the Ministry.

Three, a convention may affect a constitution by supplementing a provision therein.[9]

Britain affords by far the best example of this process where conventions play a very important role in the constitutional process. Conventions have made it possible for a monarchical constitution to work on democratic lines. The prerogative power of the British Crown to veto a bill passed by Houses of Parliament has disappeared through desuetude.

The Indian Constitution is very detailed and comprehensive. Some of the conventions of the British Constitution have been expressly incorporated in the text of the Constitution.[10] Still, there remains scope for the growth of conventions. Reference may be made in this connection to the foregoing discussion on the following topics: Council of Ministers and the Prime Minister;[11] President's position *vis-a-vis* the Council of Ministers;[12] Cabinet;[13] a Minister's responsibility for his subordinates' actions;[14] summoning, prorogation and dissolution of Lok Sabha[15] and State Legislative Assembly;[16] Governor's relations with his Council of Ministers and with the Central Government;[17] assent by the President or the Governor to Bills passed by Parliament or the State Legislature respectively;[18] acceptance of the Finance Commission's recommendations by the Central Government.[19]

Under the stresses of planning, new conventions have arisen in India. To take only two examples: (1) the Planning Commission, an extra-constitutional non-statutory body, has come to have a good deal of control over Central-State policies:[20] (2) the National Development Council is another extra-constitutional body, the powers and functions of which are regulated not by law but by conventions.[21]

Conventions have often been characterised as 'non-legal rules'—'non-legal' because the courts do not apply them: 'rules' because they are regarded as 'binding' and are observed in practice. In this connection, it needs to be pointed out that there are cases where the courts have recognised conventions thus blurring the distinction, to some extent, between 'legal' and 'non-legal' rules.[22]

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9. WHEARE, MODERN CONSTITUTIONS, 178-201 (1964); COLIN R. MUNRO, Laws & Conventions Distinguished, 91 *LQR* 218; K.J. KEITH, Courts & Conventions of the Const., 16 *Int. & Comp LQ* 542 (1967); O. HOOD PHILLIPS, CONSTITUTIONAL LAW, 77-91 (1973); G. MARSHALL, CONSTITUTIONAL CONVENTIONS (1984).
10. *Supra*, Ch. I.
11. *Supra*, Chs. III, Sec. A(iii) and VII, Sec. A(ii).
12. *Supra*, Ch. III, Sec. B.
13. *Ibid;* also, *supra*, Ch. VII, Sec. B.
14. *Supra*, Chs. III, Sec. B(f) and VII.
15. *Supra*, Ch. II, Sec. G.
16. *Supra*, Ch. VI, Sec. C.
17. *Supra*, Ch. VII, Secs. B and C.
18. *Supra*, Chs. II, Sec. J(c) and VI, Sec. F(i).
19. *Supra*, Ch. XI, Sec. L.
20. *Supra*, Ch. XIV, Sec. G.
21. *Ibid.*
22. For example, see : *U.N.R. Rao v. Indira Gandhi*, AIR 1971 SC 1002; *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192. *supra*, Ch. XL.

Some Supreme Court Judges have even gone to the extent of denying that there is any distinction between "constitutional law" and an established "constitutional convention". For example, KULDIP SINGH, J., has observed:[23]

> "We are of the view that there is no distinction between the "constitutional law" and an established "constitutional convention" and both are binding in the field of their operation. Once it is established to the satisfaction of the Court that a particular convention exists and is operating then the convention becomes a part of the "constitutional law of the land and can be enforced in the like manner."

B. FORMAL METHOD

Practically every constitution has some formal method of constitutional amendment. This consists of changing the language of a constitutional provision so as to adapt it to the changed context of social needs.

In some countries, the process may be easier than in others, and, accordingly, the constitutions are sometimes classified into flexible or rigid. A flexible constitution is one in which amendment can be effected rather easily, as easily as enacting an ordinary law. The best example of such a constitution is the British Constitution which can be amended by an ordinary Act of Parliament, and there is, thus, no distinction between ordinary legislative process and constituent process.[24]

A rigid constitution is regarded as the fundamental law of the land in the sense that it lays down the basic principles for the country's governance which are considered to be of a permanent value. It is, therefore, thought that the method of constitutional amendment should ensure that the basic principles are changed only after thorough consideration and deliberation and that hasty and ill-considered changes under political pressures of the day are avoided. Accordingly, in such a constitution, the process of constitutional amendment is more elaborate and difficult than the enactment of ordinary legislation. There thus exists a distinction between legislative and constituent process; the former denotes making of an ordinary law; the latter denotes amendment of the constitution.

If a constitution is amendable easily by passing an ordinary law, then it will lose all permanence and supremacy. A written constitution usually is of the rigid type. A federal constitution has to be rigid, for it seeks to achieve a balance of powers between the Centre and the States, and it ensures that this balance is not disturbed lightly or unilaterally.

The terms 'rigid' or 'flexible' constitutions are somewhat relative, the difference being one of degree, because, in the ultimate analysis, a constitution which is incapable of adjustment and adaptation will fail to endure, and even a constitution of the flexible type may not be lightly amended owing to political repercussions apprehended, and the social values of the people. A constitution which may be *prima facie* rigid may, in practice, prove to be easily changeable, as has been the case in India so far.

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23. *S.C. Advocates on Record Association v. Union of India*, AIR 1994 SC at 405, Ch. IV, Sec. B(d); Ch. VIII, Sec. B(d), *supra*.

24. *Supra*, Ch. I.
Also see, *infra.*

Formal amendment is perhaps the most significant way of adapting the constitution to changing circumstances. The judicial interpretation may help to some extent in this respect but it cannot change the wordings of the basic law and certain desired changes may not be attainable without verbal changes in the constitutional text. Further, the judicial process is slow and a change may be desired early. At times, some principles laid down by the courts may appear to be against public *mores* and political needs and may need to be changed. An example of such a situation is furnished by the several amendments made in India to Art. 31 of the Constitution concerning the Fundamental Right to property to overcome inconvenient judicial interpretation thereof.[25]

Then there may be some constitutional provisions which do not usually figure before the courts and some adjustments therein may be needed and this can be effectuated by a formal amendment only. Similar reasons operate to make formal constitutional amendment a more effective instrument of constitutional change than conventions and constitutional usages.

A formal amending process is as important as the process of constitution-making and so it may rightly be characterised as the 'constituent' process. The amending provision in a constitution is of great importance as it enables the country to develop peacefully, the alternative to which may be stagnation and revolution. In the ultimate analysis, however, the process of constitutional amendment should neither be too rigid nor too easy. In the former case, the constitution may lag behind the societal needs; in the latter case, constitutional safeguards may be weakened by too frequent amendments.

The formal procedures to amend some foreign federal constitutions are as follows:

(a) U.S.A.

The process of constitutional amendment involves two separate stages: initiation and ratification.

An amendment may be proposed or initiated either—(*i*) by vote of two-thirds of each House of Congress; or (*ii*) by a constitutional convention called together by Congress on the application of the legislatures of two-thirds of the States.[26] Hitherto, all amendments have been initiated by the first method and the second method has never been employed.

An amendment proposed as above may be ratified either—(*i*) by vote of the legislatures of three-fourths of the States; or (*ii*) by the constitutional conventions in three-fourths of the States. The choice of the method is wholly within the discretion of the Congress. After ratification, the constitutional amendment becomes effective.

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25. *Supra*, Chs. XXXI and XXXII.

26. Art. V. of the US Constitution reads as follows:

> "The Congress whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the serveral States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution. When ratified by the Legislatures of three fourths of the several States, or by convention in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress…."

A restriction imposed by the Constitution on the amending process is that no State can be deprived of its equal suffrage in the Senate without its consent.[27]

The procedure of the constitutional amendment in the U.S.A. has proved to be quite difficult. During its tenure of over 200 years, while several thousand constitutional amendments have been mooted, only thirty of them have been formally proposed by the Congress, of which only twenty-five have been actually effectuated. Of these, the first ten amendments, which constitute the Bill of Rights, were adopted within two years of the initiation of the Constitution. These constitutional amendments lay down the Fundamental Rights of the people. Many amendments have been killed because of non-ratification by the States. In the words of Finer: "It was intended to make change difficult; it has made change almost unattainable."[28]

Because of the rigidity of the formal process of constitutional amendment, the courts have had to play the role of adapting it by their interpretative process. On the whole, the courts appear to have discharged the function well. The courts have moulded the rigid U.S. Constitution to the growing and shifting needs of the nation through time. The judicial task has, of course, been facilitated by the fact that the Constitution is expressed in general terms which the courts could construe according to contemporary situations, demands and exigencies.[29]

(b) CANADA

That portion of the British North America Act relating to the Provincial Constitution only (excepting the office of the Lieutenant-Governor) could be amended by the Provincial Legislature itself in the ordinary legislative process. There was no provision in the B.N.A. Act for amendment of the other portion before 1982.

Being a statute of the British Parliament, it could be amended by the British Parliament itself. The Parliament did not, however, act in this behalf *suo motu*; it acted only on the request of the Canadian Government. A convention had grown that the British Parliament would pass an amendment, as a matter of course, if presented to it by a joint address of both Houses of the Canadian Parliament. Another convention which had come into existence was that the Canadian Government consulted the Provinces before requesting the British Parliament to amend the B.N.A. Act.[30]

For long it had been felt in Canada that it was anomalous and incongruous, and an infringement of Canadian sovereignty, that the constitutional amending power should vest in British Parliament and not in an agency within Canada. But it proved to be an intractable problem[31] to evolve an agreed amending formula because of the insistence of Quebec to have a veto on all future constitutional amendments.

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27. *Supra*, Ch. II, Sec. B.

28. THEORY AND PRACTICE OF MODERN GOVT., 128 (1965).
Also see, CORWIN, UNDERSTANDING THE CONSTITUTION, 97 (1967).

29. *Supra*, Ch. XL.

30. E.R. ALEXANDER, A Constitutional Strait Jacket for Canada, 43 *Can. B.R.*, 262.

31. In 1964, the Premiers of the Centre and the Provinces in Canada agreed that unanimous consent of Parliament and the Provincial Legislatures would be required for the most significant amendments to the Canadian Constitution. But this proposal was not effectuated.

In 1949, power was given to Parliament of Canada to amend that portion of the B.N.A. Act which related to matters concerning the Central Government alone, *e.g.*, apportionment of seats in the House of Commons. But, with respect to that portion of the B.N.A. Act which concerned both the Centre and the Provinces, *e.g.*, the distribution of powers, the amending power still vested in the British Parliament as there was no agreement in Canada on the alternative procedure to be followed for the purpose.

In 1982, the British Parliament enacted the Canada Act, 1982, on the request of the Canadian Parliament conferring amending power on the Canadian Parliament and Provincial Assemblies. The federal portions of the B.N.A. Act can now be amended by resolutions of the Senate and House of Commons plus resolutions of 2/3 of the Provincial Legislative Assemblies having at least 50% of the population of all the Provinces. Each and every resolution is to be passed by a majority of members of each House if the amendment derogates from the legislative powers, proprietary rights or any other rights or privileges of the legislature or government of a Province. Where an amendment applies to some but not all Provinces, it can be made by Senate, House of Commons and the Legislative Assembly of each Province to which the amendment applies.[32]

(c) AUSTRALIA

The process of constitutional amendment involves two stages: initiation and ratification.

An amendment to the Constitution may be proposed by an absolute majority of each House of Parliament, or by an absolute majority of one House in two votes taken at an interval of at least three months. Thereafter, the proposed amendment becomes effective on ratification at a referendum by a majority of electors voting both in a majority of States and in the Commonwealth and on receiving the assent of the Governor-General (this, of course, is purely a formal matter).[33]

No amendment diminishing the proportionate representation of a State in either House of the Federal Parliament, or the minimum number of representatives of a State in the Federal Lower House, or altering the limits of the States, can be adopted unless it is also approved by a majority of electors of the State concerned.

The constitution-amending process in Australia has proved to be very rigid in practice. Many amendments deemed essential by the Commonwealth Government have been rejected at the referenda. A learned author has said: "Constitutionally speaking, Australia is the frozen continent."[34]

Since 1900, when the Constitution came into force, only 9 amendments have been effectuated, although 37 referenda involving a number of amendments have been held.[35] The process of popular referendum has proved to be a difficult method to amend the Constitution. Some proposals though approved by a majority of the electorate throughout Australia, have failed to be effective because they

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32. R.I. CHEFFINS, The Constitution Act, 1982 and the Amending formula in BELOBABA AND GERTNER, THE NEW CONSTITUTION AND THE CHARTER OF RIGHTS, 43-54 (1982).
33. Art. 128 of the Commonwealth of Australia Constitution Act, 1900.
34. SAWER, AUSTRALIAN FEDERALISM IN COURTS, 208.
35. COLIN HOWARD, AUSTRALIAN FEDERAL CONSTITUTIONAL LAW, 565 (1985).

could not secure majorities in four of the six States. No proposal has failed so far because it has secured approval in a majority of States but has not secured an over-all majority throughout Australia.[36]

C. FORMAL CONSTITUTIONAL AMENDMENT IN INDIA

Different degress of rigidity attach to different portions of the Constitution, depending on their importance and significance. The Constitution, accordingly, provides for the following three classes of amendments of its provisions:

(1) Constitutional provisions of comparatively less significance can be amended by the simple legislative process as is adopted in passing ordinary legislation in Parliament;

(2) those provisions which are material and vital are made relatively stable as these can be amended only by following the rule of special majority as laid down in Art. 368;

(3) there are certain constitutional provisions relating to the federal character, which may be characterised as the 'entrenched provisions, which need for their amendment, in addition to the passage of the amending Bill by the special majority in the two Houses of Parliament, ratification by half of the State Legislatures. This procedure is also laid down in Art. 368.

The more elaborate procedure of referendum or constitutional convention has been avoided in India. The constitution-makers thus sought to find a *via* media between the two extremes of flexibility and rigidity so that the Constitution may keep pace with social dynamism in the country.

(a) CATEGORY (1)

Several Articles of the Constitution make provisions of a tentative nature, and Parliament has been given power to make laws making provisions different from what these Articles provide for. Such a law can be made by the ordinary legislative process, and is not to be regarded as an amendment of the Constitution and is not subject to the special procedure prescribed in Art. 368. In most of the cases, the constitutional text remains intact but Parliament makes different provisions. These Articles of the Constitution are as follows:

(1) When Parliament admits a new State under Art. 2, it can effect consequential amendments in Schedules I and IV defining territory and allocating seats in the Rajya Sabha amongst the various States respectively.[37]

(2) Under Art. 11, Parliament is empowered to make any provision for acquisition and termination of, and all other matters relating to, citizenship in spite of Arts. 5 to 10.[38]

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36. BOWIE AND FRIEDRICH, STUDIES IN FEDERALISM, 830 (1954); WHEARE, FEDERAL GOVERNMENT, 222-5 (1947); WHEARE, MODERN CONSTITUTIONS, 121-45 (1964).

37. *Supra*, Ch. V, Sec. B.

38. *Supra*, Ch. XVIII, Sec. A.

(3) Article 73(2) retains certain executive powers in the States and their officers until Parliament otherwise provides.[39]

(4) Arts. 59(3),[40] 75(6),[41] 97,[42] 125(2),[43] 148(3),[44] 158(3)[45] and 221(2)[46] permit amendment by Parliament of the Second Schedule dealing with salaries and allowances of certain officers created by the Constitution.

(5) Art. 105(3)[47] prescribes parliamentary privileges until it is defined by Parliament.

(6) Art. 124(1)[48] prescribes that Supreme Court shall have a Chief Justice and seven Judges until Parliament increases the strength of the Judges.

(7) Art. 133(3)[49] prohibits an appeal from the judgment of a single Judge of a High Court to the Supreme Court unless Parliament provides otherwise.

(8) Art. 135[50] confers jurisdiction on the Supreme Court (equivalent to the Federal Court), unless Parliament otherwise provides.

(9) Under Art. 137,[51] Supreme Court's power to review its own judgments is subject to a law made by Parliament.

(10) Art. 171(2)[52] states that the composition of the State Legislative Council as laid down in Art. 170(3) shall endure until Parliament makes a law providing otherwise.

(11) Art. 343(3)[53] provides that Parliament may by law provide for the use of English even after 15 years as prescribed in Art. 343(2).

(12) Art. 348(1)[54] establishes English as the language to be used in the Supreme Court and the High Courts and of legislation until Parliament provides otherwise.

(13) Schedules V and VI deal with administration of the Scheduled Areas and Scheduled Tribes and Tribal Areas in Assam which may be amended by Parliament making a law.[55]

There are certain other Articles in the Constitution which make tentative provisions until a law is made by the Parliament by following the ordinary legislative process, but before Parliament can act, the States have to take some action.

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39. *Supra*, Chs. III, Sec. D(iii) and XII, Sec. A.
40. *Supra*, Ch. III, Sec. A(i).
41. *Supra*, Ch. III, Sec. B.
42. *Supra*, Chs. II, Sec. H and III, Sec. A(i)(f); Sec. A(ii)(b).
43. *Supra*, Ch. IV, Sec. B(i).
44. *Supra*, Ch. II, Sec. J(ii)(s).
45. *Supra*, Ch. VII, Sec. A(i).
46. *Supra*, Ch. VIII, Sec. B(l).
47. *Supra*, Ch. II, Sec. L(v).
48. *Supra*, Ch. IV, Sec. B(a).
49. *Supra*, Ch. IV, Sec. C(iv)(c).
50. *Supra*, Ch. IV, Sec. I(b).
51. *Supra*, Ch. IV, Sec. H.
52. *Supra*, Ch. VI, Sec. B(i).
53. *Supra*, Ch. XVI, Sec. B.
54. *Supra*, Ch. XVI, Sec. B; Sec. C(a).
55. Paras 7 and 21 of the V & VI Schedules respectively; *supra*, Ch. IX, Sec. C.

Thus, Art. 3 provides for the re-organisation of the States. Parliament may pass a law for the purpose and effect consequential amendments in the I and IV Schedules.[56] Before doing so, however, it is necessary to ascertain the views of the States concerned.

Under Art. 169, Parliament may abolish a State Legislative Council, or create one in a State not having it, if the State Legislative Assembly passes a resolution to that effect by a majority of its total membership and by a majority of not less than two-thirds of the members present and voting. The Parliamentary law enacted for the purpose may contain such provisions amending the Constitution as may be necessary to give effect to it, and it is not to be regarded as an amendment of the Constitution for the purposes of Art. 368.[57]

Corresponding to Arts. 75(6) and 105(3), there are Arts. 164(5) and 194(3) which make tentative provisions until a State Legislature makes other provisions. They relate respectively to salaries of Ministers in a State[58] and privileges of the Houses.[59] These are the only Articles in the Constitution which enable a State Legislature to make provisions different from what the Constitution prescribes in the first instance.

(b) CATEGORIES (2) AND (3)

The process to amend and adapt other provisions of the Indian Constitution is contained in Art. 368. The phraseology of Art. 368 has been amended twice since the inauguration of the Constitution. However, the basic features of the amending procedure have remained intact in spite of these changes. These basic features are:

(*i*) An amendment of the Constitution can be initiated only by introducing a Bill for the purpose in either House of Parliament.

(*ii*) After the Bill is passed by each House by a majority of its total membership, and a majority of not less than two-thirds of the members of that House present and voting, and after receiving the assent of the President, the Constitution stands amended in accordance with the terms of the Bill.

(*iii*) To amend certain constitutional provisions relating to its federal character, characterised as the 'entrenched provisions', after the Bill to amend the Constitution is passed by the Houses of Parliament as mentioned above, but before being presented to the President for his assent, it has also to be ratified by the legislatures of not less than one-half of the States by resolutions.

The 'entrenched provisions' which are given this additional safeguard are:

(*a*) The manner of election of the President: Arts. 54 and 55.[60]

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56. *Supra*, Ch. V, Sec. B.
57. *Supra*, Ch. VI.
For discussion on Art. 368, see, *infra*, this Chapter.
58. *Supra*, Ch. VII, Sec. A(ii).
59. *Supra*, Ch. VI, Sec. H.
60. *Supra*, Ch. III, Sec. A(i)(a).

(*b*) Extent of the executive power of the Union and the States: Arts. 73[61] and 162.[62]

(*c*) The Supreme Court[63] and the High Courts:[64] Arts. 124-147 and 214-231.

(*d*) The scheme of distribution of legislative, taxing and administrative powers between the Union and the States: Arts. 245-255.[65]

(*e*) Representation of the States in Parliament.[66]

(*f*) Art. 368 itself.

The procedure to amend the 'entrenched provisions' is in conformity with the federal principle which requires the consent of the State Legislatures also to any amendment which vitally affects federalism in which both the Centre and the States are interested.

A point of some constitutional significance came up before the Mysore Legislature with respect to Art. 368. The Constitution (Third Amendment) Bill was passed by Parliament in October, 1954. Under Article 368, it needed ratification by one-half of the State Legislatures before the President could give his assent. The Bill was circulated to all States and two days before the Mysore Legislative Assembly was to meet, the President gave his assent as one-half of the State Legislatures had ratified the measure. The Mysore Legislature had not discussed the amendment at all by then, as all the papers were not received by the time the last session was adjourned, and the President's assent was given before the Legislature met in the next session.

Now a question was raised whether the President could give his assent to an Amendment Bill even though some of the State Legislatures had not actually discussed the measure. Since the Article says that the Amendment must be ratified by one-half of the State Legislatures before it is presented to the President for assent, it may not, in the strict legal sense, be unconstitutional for the President to give his assent after ratification by one-half of the State Legislatures had been received. But the actual result may be to deprive some State Legislatures of an opportunity to consider the proposed amendment before it becomes effective. To announce the President's assent even while the process of ratification by the State Legislatures is going on, simply because one-half of the State Legislatures have already agreed to the amendment, seems like announcing a decision even while the process of counting of votes is going on. It is suggested that since the President is not obligated to give his assent as soon as one-half of the State Legislatures have ratified the Bill, a convention may be developed to postpone Presidential assent till all the State Legislatures desiring to discuss the measure have had an adequate opportunity to do so.

An unsolved question under Art. 368 is whether the 'special' majority rule applies to every stage, or only at the final stage, of passing a constitution amending bill. Since 1950, a view has been taken that this rule should be applied to all

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61. *Supra*, Chs. III, Sec. D(iii) and XII, Sec. B.
62. *Supra*, Chs. VII and XII.
63. *Supra*, Ch. IV.
64. *Supra*, Ch. VIII.
65. *Supra*, Chs. X, XI and XII.
66. *Supra*, Ch. II, Secs. B and C.

stages. On the other hand, a view may plausibly be taken that the word 'passed' in Art. 368 refers to passing at the final stage only.

When an amendment bill seeks to amend more than one Article of the Constitution, each clause of the bill has to be passed by the special majority. Under Rule 158 of the Lok Sabha Rules, 'total membership' means the total number of members comprising the House irrespective of any vacancies or absentees at any moment.

Originally, the marginal note to Art. 368 read as: "Procedure for amendment of the Constitution". In 1971, this was changed to "Power of Parliament to amend the Constitution and Procedure therefor".[67]

A clause was added to Art. 368 saying that "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." It was now clarified that after the Bill was passed by Parliament by the prescribed special majority, it would be obligatory on the President to give his assent to it. Finally, a new clause was added to Art. 368 saying that nothing in Art. 13 shall apply to any amendment made under Art. 368. Correspondingly, a clause was added to Art. 13 saying that nothing in Art. 13 shall apply to any amendment of the Constitution made under Art. 368. The rationale of, and the background to, these modifications introduced in Art. 368, and the effect thereof, are explained later.[68]

In 1976, the following two clauses were added to Art. 368 by the Forty-second Amendment of the Constitution:

> "(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 S. 55 of the Constitution (Forty-second) Amendment Act, 1976,[69] shall be called in question in any Court on any ground."
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> (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."

The rationale of, the background to, and the effect of, these amendments have been explained below.[70]

D. AMENDABILITY OF THE INDIAN CONSTITUTION

Since 1951, questions have been raised about the scope of the constitutional amending process contained in Art. 368.

The basic question raised has been whether the Fundamental Rights were amendable so as to dilute or take away any Fundamental Right through a constitutional amendment? Since 1951, a number of amendments have been effectu-

67. See, *infra*, Sub-Sec. (d).
68. *Infra*, Sub-Sec. (d).
69. S. 55 means this very clause which was being added by the Amendment in question.
70. *Infra*, Sub-Sec. (d).

ated in the Fundamental Rights. The cumulative effect of these amendments has been to curtail, to some extent, the scope of some of these rights.

The worst affected Fundamental Right has been the right to property contained in Art. 31 which has been amended several times. The basic trend of these amendments has been to immunize, to some extent, state interference with property rights from challenge under Arts. 14, 19 and 31 as well as to seek to exclude the question of compensation for acquisition or requisitioning of property by the state from judicial purview.[71] The constitutional validity of these amendments has been challenged a number of times before the Supreme Court.

(a) SHANKARI PRASAD SINGH

In *Shankari Prasad Singh v. Union of India*,[72] the first case on amendability of the Constitution, the validity of the Constitution (First Amendment) Act, 1951, curtailing the right to property guaranteed by Art. 31 was challenged.[73] The argument against the validity of the First Amendment was that Art. 13 prohibits enactment of a law infringing or abrogating the Fundamental Rights,[74] that the word 'law' in Art. 13 would include any law, even a law amending the Constitution and, therefore, the validity of such a law could be judged and scrutinised with reference to the Fundamental Rights which it could not infringe.

Here was thus posed a conflict between Arts. 13 and 368. Adopting the literal interpretation of the Constitution,[75] the Supreme Court upheld the validity of the First Amendment. The Court rejected the contention and limited the scope of Art. 13 by ruling that the word 'law' in Art. 13 would not include within its compass a constitution amending law passed under Art. 368. The Court stated on this point: "We are of the opinion that is the context of Art. 13 law must be taken to mean rules and regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power with the result that Art. 13(2) does not affect amendments made under Art. 368".

The Court held that the terms of Art. 368 are perfectly general and empower Parliament to amend the Constitution without any exception. The Fundamental Rights are not excluded or immunized from the process of constitutional amendment under Art. 368. These rights could not be invaded by legislative organs by means of laws and rules made in exercise of legislative powers, but they could certainly be curtailed, abridged or even nullified by alterations in the Constitution itself in exercise of the constituent power.

The Court insisted that there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power.

Both Arts. 13 and 368 are widely phrased and conflict in operation with each other. To avoid the conflict, the principle of harmonious construction[76] should be applied. Accordingly, one of these Articles ought to be read as being controlled and qualified by the other. In the context of Art. 13, it must be read subject to

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71. *Supra*, Ch. XXXI, Sec. C..
72. AIR 1951 SC 458.
73. *Infra*, Ch. XLII; *Supra*, Ch. XXXII, Sec. B.
74. *Supra*, Ch. XX, Sec. C.
75. See, *supra*, Ch. XL, Sec. D(a).
76. *Supra*, Ch. XL, Sec. F.

Art. 368. Therefore, the word 'law' in Art. 13 must be taken to refer to rules and regulations made in exercise of ordinary legislative power, and not to constitutional amendments made in the exercise of the constituent power under Art. 368 with the result that Art. 13(2) does not affect amendments made under Art. 368.

The Court, thus, disagreed with the view that the Fundamental Rights are inviolable and beyond the reach of the process of constitutional amendment. The Court, thus, ruled that Art. 13 refers to a 'legislative' law, *i.e.*, an ordinary law made by a legislature,[77] but not to a constituent' law, *i.e.*, a law made to amend the Constitution. The Court thus held that Parliament could by following the 'procedure' laid down in Art. 368 amend any Fundamental Right.

(b) SAJJAN SINGH

For the next 13 years following *Shankari Prasad,* the question of amendability of the Fundamental Rights remained dormant.

The same question was raised again in 1964 in *Sajjan Singh v. Rajasthan,*[78] when the validity of the Constitution (Seventeenth Amendment) Act, 1964,[79] was called in question. This Amendment again adversely affected the right to property. By this amendment, a number of statutes affecting property rights were placed in the Ninth Schedule and were thus immunized from Court review.[80]

In the instant case, the Court was called upon to decide the following questions:

> (1) Whether the amendment of the Constituion insofar as it purported to take away or abridged the Fundamental Rights was within the prohibition of Art. 13(2); and
>
> (2) Whether Articles 31A and 31B (as amended by the XVIIth Amendment) sought to make changes to Arts. 132, 136 and 226, or in any of the Lists in the VIIth Schedule of the Constitution, so that the conditions prescribed in the proviso to Art. 368 had to be satisfied?

One of the arguments was that the amendment in question reduced the area of judicial review (as under the Ninth Schedule, many statutes had been immunized from attack before a Court); it, thus, affected Art. 226 and, therefore, could be made only by following the procedure prescribed in Art. 368 for amending the 'entrenched provisions', that is, the concurrence of at least half of the States ought to have been secured for the amendment to be validly effectuated.[81]

Such an argument had also been raised in the *Shankari Pd*. case but without success. The Supreme Court again rejected the argument by a majority of 3 to 2. The majority ruled that the 'pith and substance'[82] of the Amendment was only to amend the Fundamental Right so as to help the State Legislatures in effectuating the policy of the agrarian reform. If it affected Art. 226 in an insignificant manner, that was only incidental; it was an indirect effect of the Seventeenth

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77. *Supra*, Chs. II, Sec. J(i) and VI, Sec. F(i).
78. AIR 1965 SC 845.
79. *Supra*, Chs. XXXI and XXXII; *infra*, next Chapter.
80. *Supra*, Ch. XXXII, Sec. C.
81. *Supra*, Sec. C(b).
82. *Supra*, Ch. XL, Sec. H.

Amendment and it did not amount to an amendment of Art. 226.[83] The impugned Act did not change Art. 226 in any way.

The conclusion of the Supreme Court in *Shankari Pd*. as regards the relation between Arts. 13 and 368 was reiterated by the majority. It felt no hesitation in holding that the power of amending the Constitution conferred on Parliament under Art. 368 could be exercised over each and every provision of the Constitution. The majority refused to accept the argument that Fundamental Rights were "eternal, inviolate, and beyond the reach of Art. 368."

The Court again drew the distinction between an 'ordinary' law and a 'constitutional' law made in exercise of 'constituent power' and held that only the former, and not the latter, fell under Art. 13.

However, the minority consisting of HIDAYATULLAH and MUDHOLKAR, JJ., in separate judgments, expressed some reservations on the question whether Art. 13 would not control Art. 368. "I would require stronger reasons than those given in *Shankari Prasad's* case", observed HIDAYATULLAH, J., "to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the States," because, "the Constitution gives so many assurances in Part III that it would be difficult to think that they were play-things of a special majority."

MUDHOLKAR, J., felt reluctant "to express a definite opinion on the question whether the word 'law' in Art. 13(2) of the Constitution excludes an Act of Parliament amending the Constitution and also whether it is competent to Parliament to make any amendment at all to Part III of the Constitution." But MUDHOLKAR, J.'s argument was set in a much broader frame. His basic argument was that every constitution has certain fundamental features which could not be changed.

As will be seen, *Golak Nath*, the next case, was based on HIDAYATULLAH, J.'s argument of non-amendability of Fundamental Rights, but *Kesavananda* was based on MUDHOLKAR, J.'s view of basic features.[84]

(c) GOLAK NATH

Perhaps, encouraged by the above stated remarks of the two Judges, the question whether any of the Fundamental Rights could be abridged or taken away by Parliament in exercise of its power under Art. 368 was raised again in *Golak Nath* in 1967.[85] Again, the constitutional validity of the Constitution (Seventeenth Amendment) Act was challenged[86] in a very vigorous and determined manner. Eleven Judges participated in the decision and they divided 6 to 5.

The majority now held, overruling the earlier cases of *Shankari Prasad* and *Sajjan Singh*, that the Fundamental Rights were non-amendable through the constitutional amending procedure set out in Art. 368, while the minority upheld the line of reasoning adopted by the Court in the two earlier cases.

The majority now took the position that the Fundamental Rights occupy a "transcendental" position in the Constitution, so that no authority functioning

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83. *Supra*, Ch. VIII, Sec. D.
84. *Infra*, Sec. D(e).
85. *L.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643 : 1967 (2) SCR 762.
86. See, *supra*, Ch. XXXII; *Infra*, next Chapter.

under the Constitution, including Parliament exercising the amending power under Art. 368, would be competent to amend the Fundamental Rights. The majority was worried at the numerous amendments of the Fundamental Rights which had taken place since 1950. It apprehended that if the courts were to hold that Parliament had power to take away or abridge the Fundamental Rights, a time might come when these rights are completely eroded and India would gradually and imperceptibly pass under a totalitarian regime. This fear coloured and conditioned the approach of the majority to the question of amendability of the Fundamental Rights. The majority thus sought to make the Fundamental Rights inviolable by constitutional amendment by ruling that Parliament could not, under Art. 368, amend any Fundamental Right.

SUBBA RAO, C.J., speaking on behalf of himself and four other Judges, equated Fundamental Rights with natural rights and characterised them as "the primordial rights necessary for the development of human personality": He then raised the poser that when Parliament could not affect Fundamental Rights by enacting a Bill in its ordinary legislative process even unanimously, how could it then abrogate a Fundamental Right with only a two-third majority? While Articles of less significance require consent of the majority of the States, can Fundamental Rights be amended without such a consent?

The Chief Justice developed the following line of argumentation to reach the conclusion that the Fundamental Rights could not be amended. Art. 368 (as it existed at that time) merely laid down the procedure for constitutional amendment and did not by itself confer a substantive power to amend. For this argument, the Chief Justice referred to the marginal heading of Art. 368.[87] The power to amend the Constitution was to be found in the residuary legislative power of Parliament contained in Art. 248,[88] because such a power was not expressly conferred by any article or any legislative entry in the Constitution. Accordingly, amendment to the Constitution would be a 'law' for purposes of Art. 13.

Overruling the position adopted by the Court in *Shankari Prasad* and *Sajjan Singh*, it was now ruled that the term 'law' in a comprehensive sense would include constitutional law as well. Art. 13(2) gives an inclusive definition of 'law' which would take in even constitutional law. The Court formulated its position as follows: "an amendment of the Constitution is law within the inclusive definition of law under Article 13(2) of the Constitution and, as the entire scheme of the Constitution postulates the inviolability of Part III thereof, Article 368 shall not be so construed as to destroy the structure of our Constitution".

Under Art. 368, a constitutional amendment is to be enacted by following a procedure which is very similar to the procedure for making laws. The fact that a larger majority, and in case of amendment of some Articles even ratification by State Legislatures, are provided for, would not make the constitutional amendment any the less a 'law'. Therefore, the amendment made under Art. 368 is 'law' and is subject to Art. 13. The Constitution Amendment Act in question was thus held void inasmuch as it abridged the Fundamental Right. Thus, the majority ruled that the Fundamental Rights would fall outside the amendatory process if the amendment sought to abridge or take away any of these rights.

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87. *Supra*, 2318.
88. *Supra*, Ch. X, Sec. I; Ch. XI, Sec. G.

At this stage, the five Judges took recourse to the doctrine of 'prospective overruling' because of two reasons.[89] First, the power of Parliament to amend the Fundamental Rights, and the First and the Seventeenth Amendments specifically,[90] had been upheld previously by the Supreme Court in *Shankari Pd*. and *Sajjan Singh*. Secondly, during 1950 to 1967, a large body of legislation had been enacted bringing about an agrarian revolution in India. This legislation was based on the premise that Parliament had authority to amend Fundamental Rights. If the Supreme Court were now to give effect, to its view of non-amendability of Fundamental Rights with retrospective effect and were to hold the Seventeenth Amendment void, it would affect the constitutional validity of this legislation, introduce chaos and unsettle conditions in the country. Therefore, the present decision was not to invalidate the amendmentsmade so far to the Fundamental Rights. But, in future, Parliament would have no power to take away or abridge any of the Fundamental Rights.

HIDAYATULLAH, J., in a separate judgment, held that because of Art. 13, there was no power to amend Fundamental Rights as there was no difference between legislative and amending processes. He refused to disturb the past amendments because they had stood for long and people had acquiesced in them.

Also, it was argued that the fact that the Fundamental Rights were not mentioned among the entrenched provisions meant that they were regarded as non-amendable. "It would attribute unreasonableness to the makers of the Constitution" if "while articles of less significance would require consent of the majority of States, Fundamental Rights can be dropped without such consent."[91]

To make Fundamental Rights non-amendable, the majority refused to accept the thesis that there is any distinction between 'legislative' and 'constituent' processes. It went even further and asserted that the amending process in Art. 368 is merely 'legislative' and not 'constituent' in nature. This was the crux of the whole argument. If a Constitution Amendment Act could be regarded as just an ordinary law then it could plausibly be caught by Art. 13. To bolster this position, the majority went to the extent of saying that Art. 368 did not confer any amending power but merely laid down the procedure therefor.

The majority located the amending power in Art. 248 which only grants legislative power with a view to annihilate the distinction between 'legislative' and 'constituent' power.[92] The majority found countenance to its argument from one anomalous feature of Art. 368, *viz.*, that the procedure laid down therein is very similar to the ordinary legislative process. The provision for Presidential assent is also similar to that of ordinary legislative process.

The five minority Judges delivered three separate opinions, and upheld the power of Parliament to amend Fundamental Rights. Their fear was that the Constitution would become static if no such powers were conceded to Parliament. The formalistic arguments adopted by these Judges were as follows: Art. 368 itself contains the power to amend the Constitution; such a power is not to be found in Art. 248 which confers only legislative power and that, too, 'subject to the provisions of the Constitution'; the Constitution being the fundamental law,

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89. *Supra*, Ch. XL, Sec. G.
90. *Infra*, Ch. XLII.
91. AIR 1967 SC 1643, 1658 : 1967 (2) SCR 762.
92. Art. 248 refers to the residuary power of Parliament. *Supra*, Chs. X, Sec. I and XI, Sec. G.

no law passed under the legislative power could effect a change in the Constitution itself. An amendment to the Constitution is an exercise of constituent power, while passing of an ordinary law constitutes an exercise of ordinary legislative power which is different from the constituent power.

Although the procedure laid down in Art. 368 does very much correspond with legislative process, yet the quality and nature of what is done under Art. 368 is very much different from ordinary legislation. What is done under Art. 368 is amending the Constitution and not the passage of an ordinary law. What Parliament does under Art. 368 is not subject to Art. 13(2); Art. 13 places no limitation on the amending power and, accordingly, any provision of the Constitution, even a Fundamental Right, could be amended under Art. 368. The word 'law' in Art. 13 does not include an amendment of the Constitution. Art. 368 does not use the word 'law' at all; it studiously avoids the use of the word 'law'.

The power of amendment is not subject to any express or implied restrictions. If the constitution-makers had wanted to make the Fundamental Rights unamendable, they could have easily made an express provision in the Constitution to that effect. These Judges also refused to accept the doctrine of prospective overruling as enunciated by SUBBA RAO, C.J., in his judgment.[1]

The following four major propositions can be drawn from the majority opinion in *Golak Nath*:

(1) The substantive power to amend is not to be found in Art. 368, this Article only contains the procedure to amend the Constitution;

(2) A law made under Art. 368 would be subject to Art. 13(2) like any other law;[2]

(3) The word 'amend' envisaged only minor modifications in the existing provisions but not any major alterations therein;

(4) To amend the Fundamental Rights, a Constituent Assembly ought to be convened by Parliament.

The majority opinion in *Golak Nath* emanated from the premise that Fundamental Rights are fundamental and need to be protected. The majority was afraid of a possible erosion of the Fundamental Rights if the process of amendment of these rights continued unabated and was not halted. The majority set up the major premise that these rights are transcendental and must not, therefore, be allowed to be whittled down by Parliament.[3]

It is true that far reaching amendments had been made to some of these rights, and, at times, in a hurry and not always after a cool and mature consideration, and so the majority genuinely apprehended that these rights might be completely eroded in future. Nevertheless, what the Court laid down in *Golak Nath* was unprecedented, and its logic could not stand a close scrutiny.

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1. *Supra*, Ch. XL, Sec. G.
2. *Supra*, Ch. XX, Sec. C.
3. AIR 1967 SC 1643, 1664.
For discussion on this point see: D. CONRAD, Limitation of Amendment Procedures and the Constituent Power, *Indian Year Book of International Affairs* (1966-67), 377-430.

An amending process is a recognised part of every written constitution. Howsoever rigid the amending process may be in a constitution, in no constitution any of its parts is regarded as non-amendable. Even in the U.S.A., it has not been argued that the guaranteed civil rights are beyond the reach of the amending process. In fact, they were added to the U.S. Constitution through such a process. It is difficult to imagine that the constitution-makers were not cognisant of the need to amend the Constitution in course of time and, therefore, it is inconceivable that they would have left the power to amend the constitution to be inferred from the residuary power of Parliament under Art. 248,[4] and not directly from the specific and direct provision like Art. 368. In fact, the historical evidence establishes that the members of the Constituent Assembly wanted neither a too flexible nor a too rigid constitution.[5]

It is also difficult to believe that the constitution-makers would have left such a significant point as the non-amendability of the Fundamental Rights to be inferred by a circuitous process of argumentation. Had they wished for such a result, they could have easily declared in specific terms that these rights would be non-amendable. Then, taking into consideration the totality of the constitutional process, many other portions of the Constitution like adult suffrage, parliamentary form of government, etc., are in no way less significant than the Fundamental Rights , but these parts were not held to be non-amendable in *Golak Nath*.

The apprehension entertained by the Judges regarding the introduction of a totalitarian regime by eliminating all the Fundamental Rights in course of time, could materialize, to some extent, by abolishing Art. 226, or doing away with adult suffrage, etc. Therefore, if the argument of fear were to be taken to its logical end, then not only the Fundamental Rights but many other provisions of the Constitution would have to be declared to be non-amendable. But the majority opinion in *Golak Nath* was an example of judicial creativity and policy-oriented approach by the Judges—the judicial policy being to make Fundamental Rights inviolable so as to avoid the emergence of a totalitarian regime in future. The majority Judges were prompted to adopt such judicial approach in view of the manifold amendments made to the Fundamental Rights by the ruling party since 1950.

It is true that Art. 368 suffers from an anomaly. While for amending certain provisions, characterised as the 'entrenched clauses', consent of at least half of the State Legislatures is stipulated in addition to the special majority in Parliament, it is not so with respect to the Fundamental Rights.

The majority did not assert that these rights were beyond the reach of any amending process whatsoever. What in fact it said was that such a result could not be achieved by following the procedure under Art. 368. The majority suggested the setting up of a constituent assembly to reach that result. Parliament could use its residuary power under Art. 248, to convene a constituent assembly to make a new constitution or radically changing the existing one.[6]

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4. *Supra*, Chs. X, Sec. I and XI, Sec. G.
5. See AUSTIN, THE INDIAN CONSTITUTION, 255-64.
6. For discussion on this point see, *infra*.

An interesting academic question having a bearing on the scope, range, depth and pervasiveness of Art. 368 was raised and discussed in *Golak Nath*. Art. 368 uses the word 'amendment'. Now, can this word be stretched to the point of abrogation of the Constitution, its complete rewriting, or even drastically changing some of its basic tenets like the parliamentary executive, federalism, democratic processes, etc.?

The majority in *Golak Nath* did not give a categorical answer to this poser. It merely said that there was considerable force in the argument that Art. 368 does not confer such a drastic power. Even the minority cast doubts whether such a drastic power as the power of abrogating the Constitution and substituting it by a new one could be read in Art. 368. Short of that, the minority had no doubt that the amending power would include the power to add, alter, substitute, or delete any provision in the Constitution without any limitation.[7] As events showed, this argument assumed crucial significance later in *Kesavananda*.[8]

Commenting on *Golak Nath*, this author had observed in the second edition of this book:

> "What can, therefore, be said with some definiteness is that Art. 368 does not permit an entire rewriting of the Constitution. If ever that is deemed necessary some other method will have to be thought of. What that method will be, is not clear at present. Even calling of a constituent assembly for the purpose, as has been suggested by the majority, has this logical flaw that such a body could be called only by Parliament and if the source, or the parent body, *viz.*, Parliament, cannot do something by itself, can its creature, *i.e.*, the constituent assembly, do the same?[9] A law passed by Parliament authorising the constituent assembly to rewrite the Constitution could plausibly be challenged on the ground of excessive delegation. Also how can the Assembly have a broader basis of franchise than the adult suffrage on which Parliament is elected? Perhaps, a very broad consensus, if achieved, could show the way, if and when it is felt necessary, to undertake the exercise of rewriting the Constitution. Short of that, the power of amendment can be used to effect modifications in the Constitution, subject to the poser as to how far Parliament alone or along with State Legislatures could go in this direction. For, it does appear to remain open to the Supreme Court to interpret the word 'amendment' in Art. 368 narrowly and cry a halt to the amending process if it feels at a particular moment that things are going too far in subverting the basic tenets of the Constitution on the ground that what is being done exceeds the bounds of the word 'amendment' and, thus, of the amending power contained in Art. 368."[10]

Golak Nath raised an acute controversy in the country. One school of thought applauded the majority decision as a vindication of the Fundamental Rights, while the other school criticised it as creating hindrances in the way of enactment

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7. *Ibid.*
8. *Infra*, Sec. D(e).
9. A demand for convening a constituent assembly for rewriting the Constitution was rejected by the Central Government: *Rajya Sabha Debates*, May 15, 1970.
10. JAIN, *Indian Constitutional Law*, at 790.

of socio-economic legislation required to meet the needs of a developing society.[11]

Golak Nath threw a great responsibility on the courts for, if the Fundamental Rights were to be unamendable in a formal manner, then it would be for the courts to so interpret the relevant constitutional provisions as to cause minimum hindrance in the way of enactment of legislation designed to ameliorate the condition of the poor masses. In such a context, the institution of judicial review as a method of adapting and adjusting the constitutional text to the contemporary socio-economic needs of the country would assume a far greater significance than it had ever commanded hitherto when the Fundamental Rights could have been formally amended with ease. That the courts could have coped with such a demand on them is very aptly illustrated by the history of the judicial review in the U.S.A., particularly, in the post New Deal era,[12] as well as in India after the year 1978.

(d) AMENDMENT OF ART. 368 : TWENTY-FOURTH AMENDMENT

To neutralise the effect of *Golak Nath*, Nath Pai, M.P., introduced a private member's bill in the Lok Sabha on April 7, 1967, for amending Art. 368, so as to make it explicit that any constitutional provision could be amended by following the procedure contained in Art. 368. The proposed bill was justified as an assertion of the "Supremacy of Parliament" which principle implied "the right and authority of Parliament to amend even the Fundamental Rights."[13]

Nath Pai's bill did not however make much headway in Parliament. It was criticised as "an effront to the dignity of the Supreme Court" and as placing the Fundamental Rights at the "mercy of a transient majority in Parliament." There was also a feeling that the bill when enacted would itself be subject to a challenge in the courts and could be declared unconstitutional if the Supreme Court were to reiterate its *Golak Nath* ruling.

In the 1971 general election, the Congress Party was returned with a huge majority in the *Lok Sabha* and the party was placed in the position of undoing the effect of *Golak Nath.* Accordingly, in 1971, Parliament enacted the Constitution (Twenty-fourth) Amendment Act introducing certain modifications in Arts. 13 and 368 to get over the *Golak Nath* ruling and to assert the power of Parliament, denied to it in *Golak Nath*, to amend the Fundamental Rights.[14] Thus, an attempt was now made to undo the effect of *Golak Nath.*

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11. For a jurisprudential discussion on these cases see: A.R. BLACKSHIELD, Fundamental Rights and the Economic Viability of the Indian Nation, X *JILI* 1 (1968), and Fundamental Rights and The Institutional Viability of the Indian Supreme Court, 8 *JILI* 139 (1966); UPEN BAXI, The Little Done, the Vast Undone, 9 *JILI* 323 (1967).

For analytical comments on *Golak Nath* see, SEERVAI, THE POSITION OF THE JUDICIARY, 137 *et seq*. and CONSTITUTIONAL LAW OF INDIA, 1095, 1109 (1967); SATHE, FUNDAMENTAL RIGHTS AND AMENDMENT OF THE INDIAN CONST. *(1968)*; *Int of Const. & Parl. Studies,* PARLIAMENT & CONST. AMENDMENT *(1970)*; GAJENDRAGADKAR, THE INDIAN PARLIAMENT AND THE FUNDAMENTAL RIGHTS (1972); D.D. BASU, LIMITED GOVT. AND JUDICIAL REVIEW, 498 *et seq*. (1972); RAJEEV DHAWAN, THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY *(1976)*; HARI CHAND, AMENDING PROCESS IN THE INDIAN CONSTITUTION.

12. *Supra*, Ch. XL, Sec. A.

13. Statement of Objects and Reasons appended to the Bill.

14. See, *infra*, Ch. XLII.

The rationale underlying the various clauses enacted by the Twenty-fourth Amendment was as follows.

The majority judgment in *Golak Nath* had taken the view that the word "law" in Art. 13 included a constitutional amendment as well, and, therefore, a Fundamental Right could not be curtailed or diluted.[15] To undo the effect of this pronouncement, the following changes were sought to be made in Arts. 13 and 368:

(*a*) It was now clarified that Art. 13 would not stand in the way of any constitutional amendment made under Art. 368. This was sought to be achieved by adding a clause to Art. 13 declaring that Art. 13 shall not apply to any constitutional amendment made under Art. 368.[16]

(*b*) As a matter of abundant caution, a clause was added to Art. 368 declaring that Art. 13 shall not apply to any constitutional amendment made under Art. 368.

(*c*) The marginal note to Art. 368 was changed from "Procedure for Amendment of the Constitution" to "Power of Parliament to amend the Constitution and Procedure therefor".

The majority in *Golak Nath* had asserted, by reference to the phraseology of the marginal note to Art. 368, that Art. 368 provided only the procedure for constitutional amendment and did not confer the power therefor.[17] The change in the marginal note was now made to clarify that Art. 368 conferred the power of constitutional amendment and did not lay down merely the procedure therefor.

(*d*) A clause was added to Art. 368 saying that "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".

The addition of the clause was designed to make an express grant of power to Parliament to amend any part of the Constitution including Fundamental Rights. It had been argued by Chief Justice SUBBA RAO in *Golak Nath* that since Art. 368 did not expressly authorise the curtailment of Fundamental Rights, such curtailment must be out of reach of the amending process. The Amendment now excluded such an inference being drawn by expressly including the Fundamental Rights within the scope of the amending process.

(*e*) A view had been expressed in *Golak Nath* that there was no difference between an ordinary law made under legislative process, and constitutional amendment made under constituent power. To prove this point, it had been pointed out that the Presidential power to assent, or not to assent, was similar in both cases—an ordinary law as well as a law passed under Art. 368.[18]

To meet this argument, it was now clarified that once a Constitution Amendment Bill is passed by both Houses of Parliament by the requisite majority in accordance with the procedure laid down in Art. 368, the President would have no option but to give his assent to it.

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15. *Supra*, Sec. D(c).
16. *Supra*, Ch. XX, Sec. C.
17. *Supra*, 2318, 2322.
18. *Supra*, Ch. II, , Sec. J(c).

In case of an ordinary law, the President does enjoy a choice either to give or refuse to give his assent, or to refer it back to Parliament for reconsideration.[19] In case of a bill amending the Constitution, it would be obligatory on the President to give his assent thereto. Thus, a differentiation was now sought to be made between an ordinary law and a law to amend the Constitution.

Along with the Twenty-fourth Amendment was also enacted the Twenty-fifth Amendment of the Constitution, the salient features of which, as discussed earlier,[20] were as follows:

(*i*) The word "amount" was substituted for the word "compensation" in Art. 31(2). This was done to remove any contention that the Government was bound to give adequate compensation for any property acquired by it;

(*ii*) Art. 19(1)(*f*) was delinked from Art. 31(2);

(*iii*) a new provision, Art. 31C, was added to the Constitution[21] saying—

(*i*) that Arts. 14, 19 and 31 would not apply to a law enacted to effectuate the policy underlying Arts. 39(b) and (c), and

(*ii*) that a declaration in the law that it was enacted to give effect to the policy under Arts. 39(b) and (c) would immunize the law from such a challenge in the Court.[22]

A State law could claim immunity from challenge only after receiving the assent of the President.

The effect of this clause was quite far reaching. Hitherto, Directive Principles had been treated as subservient to Fundamental Rights. Now this relationship was sought to be reversed; Directive Principles contained in Arts. 39(b) and (c) were now sought to be given precedence over Fundamental Rights contained in Arts. 14, 19 and 31. The Twenty-fifth Amendment thus further diluted the right to property.

(e) KESAVANANDA BHARATI

As could be expected, the constitutional validity of both the Amendments, *viz.*, XXIV and XXV, was challenged in the Supreme Court through an Art. 32 writ-petition in *Kesavananda Bharati v. State of Kerala*,[23] by Swami Kesavananda Bharati, a mutt chief of Kerala. The matter was heard by a bench consisting of all the 13 Judges of the Court because *Golak Nath*, a decision by a Bench of 11 Judges was under review.

Wide ranging arguments were advanced before the Court for over 60 days both for and against the validity of the Amendments. Eleven opinions were delivered by the Judges on April 24, 1973.

(a) The Court now held that the power to amend the Constitution is to be found in Art. 368 itself. It was emphasized that the "provisions relating to the

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19. *Ibid*.
20. *Supra*, Ch. XXXI, Sec. C(iii).
21. *Supra*, Ch. XXXII, Sec. D.
Also see, *infra*, Ch. XLII.
22. For Arts. 39(b) and (c), see, *supra*, Ch. XXXIV, Secs. D(e) and (f).
23. AIR 1973 SC 1461.

amendment of the Constitution are some of the most important features of any modern Constitution".

HEGDE and MUKHERJEA, JJ., found it difficult to believe that the constitution-makers had left the important power to amend the Constitution hidden in Parliament's residuary power. On this point, therefore, the views expressed in *Shankari Prasad* and *Sajjan Singh* were endorsed and the view expressed in *Golak Nath* that the power to amend the Constitution was not to be found in Art. 368 was overruled.

(b) Further, the Court recognised that there is a distinction between an ordinary law and a constitutional law.

HEGDE and MUKHERJEA, JJ., stated in this connection: "An examination of the various provisions of our Constitution shows that it has made a distinction between 'the Constitution' and 'the laws'."[24] It was asserted that the constitution-makers did not use the expression "law" in Art. 13 as including "constitutional law". This would thus mean that Art. 368 confers power to abridge a Fundamental Right or any other part of the Constitution. To this extent, therefore, *Golak Nath* was now overruled.

(c) But *Kesavananda* did not concede an unlimited amending power to Parliament under Art. 368. The amending power was now subjected to one very significant qualification, *viz.*, that the amending power cannot be exercised in such a manner as to destroy or emasculate the basic or Fundamental Features of the Constitution. A constitutional amendment which offends the basic structure of the Constitution is *ultra vires.*

(d) Some of the features regarded by the Court as fundamental and, thus, non-amendable are:[25]

(*i*) Supremacy of the Constitution:

(*ii*) Republican and democratic form of government;

(*iii*) Secular character of the Constitution;

(*iv*) Separation of powers between legislative, executive and the judiciary;

(*v*) Federal character of the Constitution.

(e) This, therefore, means that while Parliament can amend any constitutional provision by virtue of Art. 368, such a power is not absolute and unlimited and the courts can still go into the question whether or not an amendment destroys a fundamental or basic feature of the Constitution. If an amendment does so, it will be constitutionally invalid.

The justification for this judicial view is that the expression 'amend' in Art. 368 has a restrictive connotation and could not comprise a fundamental change in the Constitution. The words "amendment of the Constitution" in Art. 368 could not have the effect of destroying or abrogating the basic structure of the Constitution". The 2/3rd majority in Parliament may not represent majority of the votes of the people in the country. This means that there are inherent or implied limitations on the power of amendment under Art. 368.

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24. *Ibid.*

25. For further discussion on this point, see, *infra*, Sec. F.

(f) What is a fundamental feature of the Constitution is a moot point. The list given above is not final or exhaustive of such features. It is for the courts to decide as and when a question arises whether a particular amendment of the Constitution affects any 'basic' or "fundamental" feature of the Constitution or not. The question of basic feature has to be considered in each case in the context of the concrete problem.

Kesavananda ruling can be regarded to be an improvement over the formulation in *Golak Nath,* in at least two significant respects:

(i) It has been stated earlier[26] that there are several other parts of the Constitution which are as important, if not more, as the Fundamental Rights, but *Golak Nath* formulation only confined itself to Fundamental Rights and did not cover these parts. This gap has been filled by *Kesavananda* by holding that all 'basic' features of the Constitution are non-amendable.

(ii) *Golak Nath* made all Fundamental Rights as non-amendable. This was too rigid a formulation. *Kesavananda* introduces some flexibility in this respect. Not all Fundamental Rights *en bloc* are now to be regarded as non-amendable but only such of them as may be characterised as constituting the "basic" features of the Constitution.

According to *Kesavananda,* even a Fundamental Right can be amended or altered provided the basic structure of the Constitution is not damaged in any way. It is for the Court to decide from case to case as to which Fundamental Right is to be treated as a 'basic' feature. The right to property has not been treated as such and so the Fundamental Right to property has been abrogated.[27]

Theoretically, *Kesavananda* is, therefore, a more satisfactory formulation as regards the amendability of the Constitution than *Golak Nath* which gave primacy to only one part, and not to other parts, of the Constitution.

(g) *Kesavananda* also answers the question left unanswered in *Golak Nath,* namely, can Parliament, under Art. 368, rewrite the entire Constitution and bring in a new Constitution?[28] The answer to the question is that Parliament can only do that which does not modify the basic features of the Constitution and not go beyond that.

The immediate application of the *Kesavananda* principle as regards the amendability of the Constitution was made to assess the constitutional validity of the Twenty-Fourth and Twenty-Fifth Amendments. The entire Twenty-Fourth Amendment was held valid. From one point of view, overruling of *Golak Nath* restored the *status quo* ante making the amendment unnecessary and restoring the power of amending the Fundamental Rights to the constituent body. As some Judges pointed out, the Twenty-Fourth amendment made explicit what was already implicit in the unamended Art. 368. Parliament could amend a Fundamental Right subject, however, to the over-all restriction of non-amendability of a basic feature of the Constitution.[29]

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26. See, *supra.*
27. *Supra,* Chs. XXXI, Sec. C and XXXII, Sec. E.
Also see, *Raghunath Rao v. Union of India,* AIR 1993 SC 1267, *infra,* Sec. E.
28. *Supra,* Sec. D(c).
29. *Supra*.

As regards the Twenty-Fifth Amendment, it was upheld subject to the following qualifications:

(i) Although 'amount' was not the same concept as 'compensation', and while the courts could not go into the question of adequacy of 'amount' payable for property acquired or requisitioned, yet the 'amount' could not be 'illusory' or 'arbitrary'. The 'amount' need not be the market value of the property acquired, but it should still have some reasonable relationship with the value of the property in question. Thus, a limited judicial review of the amount payable for property acquired was still possible.[30]

(ii) The non-application of Art. 19(1)(f) to a law enacted under Art. 31(2) was held to be constitutionally valid. In a way, the Amendment only restored the *status quo ante* before *Golak Nath* when the Supreme Court had regarded Arts. 31(2) and 19(1)(f) as mutually exclusive.[31]

(iii) The first part of Art. 31C was upheld chiefly on the basis that it identified a limited class of legislation and exempted it from the operation of Arts. 14, 19 and 31. Hence no delegation of amending power was required. But the second part of Art. 31C was held to be invalid. The purport of this ruling is that while a law enacted to implement Arts. 39(*b*) and 39(*c*) may not be challenged under Arts. 14, 19 and 31, nevertheless, the courts shall have the power to go into the question whether the impugned law does in fact achieve the objectives inherent in Arts. 39(*b*) and (*c*) or not.

(iv) A legislative declaration to this effect cannot be conclusive. No legislature by its own declaration can make a law challenge-proof. When a law is challenged, the courts will have the power to consider whether the law in question can reasonably be described as one to give effect to the policy of the state towards the said objectives.[32]

In spite of the fact that it is possible to find some conundrums from the logical point of view on an analysis of the arguments adopted in the various opinions delivered in *Kesavananda*,[33] the end result of the case on the whole was satisfactory, balanced and reasonable. Parliament was now conceded power to amend any part of the Constitution subject to the ultimate restriction that the Fundamental Features of the Constitution should not be abrogated. This formulation gives a lot of leeway to Parliament to make necessary adjustments in the Constitution from time to time in furtherance of the country's socio-economic programme.

The restriction on Parliament that it should not subvert the fundamental features of the Constitution is more notional than real for no Parliament would seek to do that, and the courts will have enough manoueverability to decide whether any fundamental feature of the Constitution has been abrogated or not by a par-

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30. *Supra*, Ch. XXXI, Sec. C(iii).
31. *Supra*, Ch. XXXI, Sec. B.
32. *Supra*, Chs. XXXII, Sec. D and XXXIV.
33. For various analytical comments on the *Kesavananda* case see: JOSEPH MINATTUR, The Ratio in the *Kesavananda Bharati* case, (1974) 1 SCC (JI.) 73; P.K. TRIPATHI, *Kesavananda Bharati v. State of Kerala*: Who Wins? (1974) 1 SCC (JI.) 3; H.M. SEERVAI, The Fundamental Rights Case; At the Cross Roads, 74 *Bom LR* (JI.) 47 (1973); UPEN BAXI, The Constitutional Quicksands: Bharati and the Twenty-fifth Amendment, (1974) 1 SCC (JI.) 45; MORGAN, The Indian Essential Features case, 30 *Int'I and Comp LQ* 307.

ticular amendment. The two phrases 'fundamental features' and 'abrogation' are quite vague furnishing a good deal of scope of interpretation to the Courts.

By upholding the first limb of Art. 31C, legislatures in the country have been given power to implement the socialist socio-economic programme. It is a welcome feature of the judgment that the second limb of Art. 31C was invalidated. This avoided the possibility of the State Legislatures immunizing all sorts of laws from judicial scrutiny. To permit each and every State to enact review-proof legislation in the name of Arts. 39(b) and 39(c), could have led to socio-economic chaos in the country. The Central Government should be thankful to the Supreme Court for saving it from an embarrassment which it would have faced had it said 'no' to an arbitrary State law enacted in the name of furthering the socialist programme.

Kesavananda illustrates judicial creativity and the policy-making role of the Supreme Court of a very high order. The majority judges sought to protect and preserve the basic features of the Constitution against the onslaught of transient majorities in Parliament. An unqualified amending power could mean that a political party with a two-thirds majority in Parliament, for a few years, could make any changes in the Constitution, even to the extent of establishing a totalitarian State,[34] to suit its own political exigencies.

It was a conscious 'policy' decision on the part of the Supreme Court to read implied limitations on the amending power in order to preserve basic, core, constitutional values against the onslaught of a transient majority in Parliament. In *Kesavananda*, several Judges felt convinced that certain values and ideals embedded in the Constitution should be preserved and not destroyed by any process of constitutional amendment. The Constitution deriving its strength and sanction from the national consensus, and enacted in the name of the "People of India"[35] should not be amendable merely by a 2/3 vote in Parliament when the truth is that 2/3 of the *Lok Sabha* does not represent a very broad national consensus, as only nearly 40% of the registered voters cast their votes in the general election, and these votes are divided among several political parties contesting the general election to the Lok Sabha, and Rajya Sabha has no popular mandate as, in effect, it consists of the nominees of the various political parties elected by the various State Legislatures.[36]

The basic philosophy underlying the doctrine of non-amendability of the basic features of the Constitution, evolved by the majority in *Kesavananda* has been beautifully explained by HEDGE and MUKHERJEE, JJ., as follows:[37]

> "Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a constitution like ours contains certain features which are so essential that they cannot be changed or destroyed."

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34. PALKHIVALA characterises *Kesavananda* as "one of the milestones in the history of jurisprudence": PALKHIVALA, OUR CONSTITUTION DEFACED AND DEFILED, 147.

35. See, the Preamble to the Constitution, Chs. I, Sec. E(c) and XXXIV, Sec. A.

36. *Supra*, Ch. II, Sec. B.

37. AIR 1973 SC 1461, at 1624.

In retrospect, it would appear that the Supreme Court adopted the technique of literal interpretation of the Constitution in *Shankari Prasad* and *Sajjan Singh* and, thus, concluded that there was no restriction on the amending power. Things however changed when Chief Justice SUBBA RAO, a great protagonist of the Fundamental Rights, took over the leadership of the Court and had an opportunity to preside over the Bench deciding the *Golaknath* case.

It needs to be emphasized that the decision on the question whether the amending power should be restricted or not involved a high policy-making function on the part of the judiciary. It was not a question which could be decided merely by resorting to logical arguments, as arguments could be found on both sides of the line.

In course of time, the doctrine of basic or fundamental features of the Constitution has become very well entrenched in India. Since *Kesavananda*, the doctrine has been applied by the Supreme Court in quite a few cases. *Kesavananda* constitutes the high water mark of Judicial creativity.[38]

(f) INDIRA NEHRU GANDHI

The next case in which the Supreme Court had occasion to apply the *Kesavananda* ruling regarding the non-amendability of the basic features of the Constitution was *Indira Nehru Gandhi v. Raj Narain*.[39]

Here was involved the question of the validity of Cl. 4 of the Constitution (Thirty-ninth Amendment) Act, 1975. The background to this amendment has been explained earlier.[40]

This Amendment sought to do three things: one, generally, to withdraw the election of the Prime Minister and a few other Union officials from the scope of the ordinary judicial process; two, more specifically, to void the High Court decision declaring Indira Gandhi's election to the Lok Sabha as void; and, three, to exclude the Supreme Court's jurisdiction to hear any appeal.

Cl. 4 of the Amendment was challenged as destroying the basic feature of the Constitution insofar as it constituted a gross interference with the judicial process.[41] The contention was that the clause in question wiped out not merely the High Court's judgment, but even the election petition and the law relating thereto. The constituent power had discharged a judicial function in deciding the election dispute against the Prime Minister and in doing this it had followed no procedure and applied no law. Thus, the *Kesavananda* ruling was directly invoked.

The Supreme Court upheld the contention and declared Cl. 4 as unconstitutional. The first part of Cl. 4 was regarded to violate three "essential features" of the Constitution. According to MATHEW, J., it destroyed an essential democratic feature of the Constitution, *viz.*, the resolution of an election dispute "by ascertaining the adjudicative facts and applying the relevant law for determining the real representative of the people". In the words of MATHEW, J., again: "If Art. 329(*b*) envisages the resolution of an election dispute by judicial process by a

38. See, *supra*, Ch. XL, Sec. D, on "Judicial Creativity".
39. AIR 1975 SC 2299 : 1975 Supp SCC 1; *supra*.
40. *Supra*, Ch. XIX, Sec. F; *infra*, next Chapter.
41. For Cl. 4 see, *infra*, Ch. XLII.

petition presented to an authority as the appropriate legislature may by law provide,[42] a constitutional amendment cannot dispense with the requirement without damaging an essential feature of democracy, *viz.*, the mechanism for determining the real representatives of the people in an election as contemplated by the Constitution". Democracy could function only when there are free and fair elections. This principle was vitiated by the amendment in question.

According to CHANDRACHUD, J., Cl. 4 violated the principle of separation of powers to the extent incorporated in the Constitution, *viz.*, a purely judicial function being exercised by the legislature. CHANDRACHUD, J., also opined that 'equality of status and opportunity' being an "essential feature" of the Constitution, the same was being violated by Cl. 4 as there was no rational reason for creating a privileged regime for the election of the Prime Minister.

The Court took exception to the voiding of a judicial pronouncement and declaring it ineffective by the second part of Cl. 4. While it was possible for Parliament to amend the pre-existing law and thus knock out the basis of the judicial decision in question, a judicial decision by itself could not, however, be voided by Parliament.[43]

A more substantial ground against the proposed Amendment was that the decision of a specific election dispute was a judicial function. When the constituent body declared that the election of the Prime Minister would not be void, it discharged a judicial function. As emphasized by MATHEW, J. ".... the resolution of an election dispute by the amending body could not be regarded as 'law'." It was either "a judicial sentence or a legislative judgment like a Bill of Attainder."

A judicial power has to be exercised according to some procedure and by following some law. In the instant case, in enacting the Amendment in question, the amending body exercised judicial power in violation of the principle of natural justice or *audi alteram partem* as it gave no hearing to the person challenging the Prime Minister's election. It was not clear what norms of law, if any, had been applied by the constituent body to determine the dispute. The election law which had been in existence on the date of the enactment of the Amendment in question was excluded as regards the specific election petition. As emphasized by MATHEW, J.: "If the amending body evolved new norms for adjudging the validity of the particular election, it was the exercise of a despotic power and that would damage the democratic structure of the Constitution."

It was agreed generally that democracy was a basic feature of the Constitution. The amending body, under Art. 368, was not competent to pass an ordinary law with retrospective effect to validate the election. It could only amend the Constitution by passing a law of the same rank as the Constitution. If the amendment were taken to hold that there was no election dispute, and that the election petition in question was *non est*, it would sound the death knell of the democratic structure of the Constitution.

There was nothing on the face of the Amendment to show that the amending body ascertained the facts of the case. Adjudicative facts cannot be gathered by legislative process behind the back of the parties; facts can be gathered only by

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42. *Supra*, Ch. XIX, Sec. F.

43. See, *supra*, Ch. II, on this point, Sec. M.
Also see, *supra*, Ch. XL, Sec. I(b).

judicial process. In the instant case, the constituent body made no attempt to ascertain facts by resorting to judicial process.

RAY, C.J., emphasized that insofar as the validation of the election in the instant case was without applying any law, the principle of rule of law, which was a basic feature of the Constitution, was offended. The constituent body can exercise judicial power but it has to apply some law for the purpose. KHANNA, J., stated: "To put a stamp of validity on the election of a candidate by saying that the challenge to such an election would not be governed by any election law and that the said election in any case would be valid and immune from any challenge runs counter to accepted norms of free and fair elections in all democratic countries."

Another significant point which emerged from the various opinions in the instant case was that the principle of the 'basic features' was applicable only to a constitutional amendment and not to an ordinary legislation. As CHANDRACHUD, J., explained, the amending power and the ordinary law-making power "operate in different fields and are, therefore, subject to different limitations". A constitutional amendment is a law of a higher status and so it cannot damage the basic feature of the Constitution. The amending power under Art. 368 is subject to this over-all restriction but not the ordinary legislative power. An ordinary law has to be tested on the touchstone of competence of the enacting legislature and whether it infringes any other specific constitutional interdiction.

On this point, RAY, C.J., stated: "The theory of basic structures is an exercise in imponderables. Basic structures or basic features are indefinable. The legislative entries are the fields of legislation. The pith and substance doctrine has been applied in order to find out legislative competency, and eliminate encroachment on legislative entries.[44] If the theory of basic structures or basic features is applied to legislative measures it will denude Parliament and State Legislatures of the power of legislation and deprive them of laying down legislative policies. This will be an encroachment on the separation of powers."

But this argument of the Judges seem to be illogical. If an amendment of the Constitution (which is a higher law made in the exercise of the constituent power) cannot affect the basic features of the Constitution, then it stands to reason as to how a simple law (which is of a lower order as made in the exercise of the legislative power) can be allowed to affect the basic features of the Constitution.

It was also stated by several Judges in *Indira Nehru Gandhi* that judicial review was not a basic feature of the Constitution and that a constitutional amendment could exclude judicial review of a matter. The same is true of the principle of equality embodied in Arts. 14, 15 and 16. But these propositions have now been overruled. Both judicial review as well as equality are regarded as the basic features of the Constitution.

(g) AMENDMENT OF ART. 368 *:* 42ND AMENDMENT

The Central Government did not relish the Supreme Court's pronouncement in the *Indira Nehru Gandhi* case declaring Cl. 4 of the Thirty-ninth Amendment invalid. The Government very much desired to ensure that never in future, the

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44. *Supra*, Ch. X, Sec. G(iv).

courts should have the power to pronounce a constitutional amendment invalid. Accordingly, Art. 368 was again amended by the Forty-Second Amendment enacted in 1976.

A major argument advanced by the Law Minister in favour of such an Amendment was that the supremacy of the Parliament must be asserted in the area of constitutional amendment, and that a constitutional amendment should be taken out of judicial purview. Many adverse comments were made by him in the Houses of Parliament during the course of discussion on the Amendment Bill on the Supreme Court pronouncements in *Golak Nath* and *Kesawnanda*. The doctrine laid down by the Supreme Court in *Kesavananda Bharati* that Parliament in the exercise of its constituent power could not amend the basic features of the Constitution was much criticised by the Law Minister. It was asserted by the Law Minister that there was no basic feature of the Constitution which Parliament as the constituent power could not amend.

The Forty-Second Amendment sought to ensure that a constitutional amendment may not be challenged before any Court on any ground whatsoever. To achieve this objective, two new clauses were added to Art. 368.[45]

These clauses were very broadly worded and were designed to make it clear to the judiciary that there should be no limitation whatsoever on Parliament's constituent power under Art. 368.[46] Clause 4, mentioned above, even went to the extent of reviving the constitutional amendments held invalid by the Supreme Court earlier, *viz.*: the second limb of Art. 31C in *Kesavananda*[47] and a few clauses of the Thirty-ninth amendment in *Indira Nehru Gandhi*.[48] Originally, Clause 4 permitted a challenge to a constitutional amendment on the ground that "it has not been made in accordance with the procedure laid down by this article", *viz.*, Art. 368. But that part of the clause was dropped by Parliament and the idea appeared to be that a constitutional amendment should not be challengeable in a Court on any ground whatsoever.

It was however doubtful whether the new Amendment had given quietus to all the controversies regarding the amending power. For example, the question could still arise whether an Amendment of the Constitution made without the two-thirds of votes of the members present and voting in each of the two Houses of Parliament can be regarded as a 'constitutional amendment' under Art. 368, or will it be covered by the words "purporting to have been made" in Clause 4 and thus be non-challengeable. To take the latter view will be to nullify the procedure laid down in Art. 368 for a constitutional amendment.

There also remained the fundamental question whether the Supreme Court will reverse its position in *Kesavananda* and accept an unfettered constituent power in Parliament as constitutional. For, if the Supreme Court were to stick to its views as expressed in *Kesavananda* as regards the scope of Art. 368, then these amendments to Art. 368 made under Art. 368 itself could not be valid. If, however, the amendments to Art. 368 were to be held valid then the only restraint on Parliament in this matter would be political and moral. It meant that Parliament would only be restrained in the matter of constitutional amendment by the exi-

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45. *Supra*, 2318.
46. *Supra.*
47. *Supra*, Ch. XXXII, Sec. D.
48. *Supra*, Sec. D(f).

gencies of periodic elections, the internal composition of the Houses of Parliament, public opinion and the commitment of the members of Parliament to the ideals of democracy and constitutionalism.

In justification of the new Amendments to Art. 368, the Law Minister had claimed that—(*i*) there was no basic feature of the Constitution which needed to be protected from amendment; and (*ii*) the supremacy of Parliament ought to be established in the area of constitutional amendment. The Law Minister was wrong on both these premises.

As regards the first assertion of the Law Minister, it needs to be emphasized that there are certain values inherent in the Constitution which are worth preserving, which ought not be sacrificed even at the altar of the so-called economic development or political expediency, and without which the Constitution will be reduced to merely an empty shell with no substance. Can any one deny that constitutionalism, democracy, secularism, rule of law, Federalism are not values inherently imbibed in the constitution? What is point of having a constitution if it is devoid of all values?

As regards the second assertion, mentioned above, it needs to be pointed out that the argument of parliamentary supremacy is, in effect, only a 'myth' or a 'fiction'. In the context of the practical working of the parliamentary system, supremacy of Parliament actually boils down to supremacy of the executive government of the day, because parliamentary powers are at the disposal of the government of the day which enjoys a majority support in the House. The members in the Houses vote as per the dictates of the government. The result is that a government backed by 2/3rd of the members in the two Houses could carry out any constitutional amendment it desires. When a government shouts from the housetop to uphold "sovereignty of Parliament", what, in effect, it is seeking is to have complete, uncontrolled, freedom of action itself to do what it likes to do as it knows that the majority in Parliament would always support it. The existence of a written constitution by its very nature envisages a restriction on the power of Parliament and in other written constitutions it has been thought advisable not to vest ultimate control over the constitution in the legislature alone. This is the essence of the doctrine of constitutionalism.[49] Can an uninhibited uncontrolled amending power be left with the kind of Parliament which churns out such amendments as XXXIX and XLII without any compunction?

There was a lot of criticism of the majority rulings in *Golak Nath* and *Kesavananda*. Most of this criticism emanated from a literal approach to Art. 368, but the Supreme Court was taking recourse to a purposive, and not a literal, approach. It was argued that the constitution-makers desired a constitution which could be amended. But these critics forgot that the constitution-makers sought to design a 'controlled' constitution and not an 'uncontrolled' constitution, and the Indian Constitution, in effect, became 'uncontrolled' in practice and most of the constitutional amendments were a result not of any broad consensus on a national basis but of brute majority of the ruling party in Parliament. The situation has been described by ex-Justice HEGDE (who participated in the majority decision in *Kesavananda* but then later resigned from the Court) in the following words:

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49. See, *supra*, Ch. I, Sec. B.

> "Because of Congress's unbroken dominance at the Centre and in almost all the State Governments, India is for practical purposes a one-party State. Within the Congress Party, democracy is at a premium and power is unduly concentrated. The standard of political morality is low. The press is free only to praise .... the radio is controlled by the government. The vast majority of the people are apathetic and badly informed; the Constitution is certainly too abstract to be on their cognitive maps. In these circumstances, it is up to the Supreme Court to defend it. The Supreme Court is the last bulwark of democracy."

It was this judicial policy which led the majority Judges to rule in favour of a limited power of constitutional amendment.

The decisions of the Supreme Court of India on the question of amendability of the Indian Constitution involve a high policy-making function on the part of the judiciary. It was a conscious decision on the part of the Indian Supreme Court in *Golak Nath* and then in *Kesavananda* to read implied limitations on the amending power in order to preserve what the Court thought to be the basic, central, core of the Constitution against the onslaught of the transient majority in Parliament. Some of the Supreme Court Judges participating in the *Kesavananda* decision felt convinced in their minds that there are certain ideals or values inherent in the Constitution and these ideals or values should be preserved and protected and not destroyed by any process of constitutional amendment.

And, as the life of law is experience and not logic, the Supreme Court's approach was more than vindicated when the 39th and 42nd Amendments[50] were enacted. These Amendments represent an abuse of the amending power and laid bare the dangers of an unlimited and uninhibited power to amend the Constitution. It was then rudely realised that such a power could be misused to usher in an undemocratic regime and denude the people of their rights and many critics of the Supreme Court then became convinced of the sagacity and the rightness of the Court's approach.[51]

The Court had tried in *Kesavananda* to adopt a purposive interpretation of Art. 368 so as to make the Constitution 'controlled' which had become practically 'uncontrolled' because of political vagaries. During the period 1981 to 1984, there were many straws in the wind to amend the Constitution in several directions which might have distorted the Constitution out of recognition, but the Government felt shy of moving these amendments as it was not sure of the response of the Supreme Court. It is a safe assumption that the 'basic features' theory has protected the Constitution from being mutilated out of recognition at the altar of political expediency. The doctrine of 'basic features' has proved to be a shield to protect and preserve certain fundamental values inherent in the Constitution.

In future, amendment of the Constitution on a purely party basis may possibly become more and more difficult unless an amendment represents a broad national consensus, because the ruling party may lose its two-thirds majority in the Houses of Parliament and many State Legislatures may come to have majorities of other political parties. An amendment of the Constitution can then take place only when a national consensus emerges. That is as it should be. A constitution is national heritage and not the property of one single party howsoever mighty it

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50. For provisions of this Amendment see, *infra*, next Chapter.

51. SEERVAI, EMERGENCY, FUTURE SAFEGUARDS, HABEAS CORPUS case, 139 (1978).

may be and no single party has thus a right to institute amendments in the Constitution merely in party interest, rather than in national interest.[52]

E. LATER DEVELOPMENTS

(a) MINERVA MILLS

In *Minerva Mills Ltd. v. Union of India*,[53] the scope and extent of the doctrine of basic structure was again considered by the Supreme Court. The Court again reiterated the doctrine that under Art. 368, Parliament cannot so amend the Constitution as to damage the basic or essential features of the Constitution and destroy its basic structure.

In the instant case, the petition was filed in the Supreme Court challenging the taking over of the management of the mill under the Sick Textile Undertaking (Nationalisation) Act, 1974, and an order made under s. 18-A of the Industrial (Development and Regulation) Act, 1951. The petition challenged the constitutional validity of clauses (4) and (5) of Art. 368, introduced by s. 55 of the 42nd Amendment. If these clauses were held valid then the petitioners could not challenge the validity of the 39th Amendment which had placed the Nationalisation Act, 1974, in the IX Schedule.[54]

As already noted, S. 55 of the Constitution (Forty-second Amendment) Act, 1976, inserted sub-sections (4) and (5) in Art. 368.[55] In *Minerva*, this section was held to be beyond the amending power of the Parliament and void since it sought to remove all limitations on the power of Parliament to amend the Constitution and confer a power on Parliament to amend the Constitution so as to damage or destroy its basic or essential features or its basic structures. The true object of these clauses was to remove the limitations imposed on Parliament's power to amend the Constitution through the *Kesavananda* case.[56]

The newly introduced clause 4 in Art. 368 sought to deprive the courts of their power to call in question any amendment of the Constitution.[57] The Court stated in this connection:

> Our Constitution is founded on a nice balance of power among the three wings of the state, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws.

Depriving the courts of the power of judicial review will mean making Fundamental Rights "a mere adornment," as they will be rights without remedies. A 'controlled' Constitution will become 'uncontrolled'.[58]

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52. It has been declared in the Preamble to the Constitution : "We, the people of India… in our Constituent Assembly… do hereby adopt, enact and give to ourselves this Constitution." See, Ch. I, *supra.*

53. AIR 1980 SC 1789 : (1980) 3 SCC 625.

54. *Supra*, Ch. XXXII, Sec. B.

55. *Supra*, 2318.

56. *Kesavananda Bharati v. State of Kerala, supra,* , Sec. D(e).

57. For the text of this clause, see, *supra*, 2318.

58. AIR 1980 SC 1789 at 1799.

The newly added Cl. 5 of Art. 368 sought to demolish the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any limitation whatever. This clause even empowered Parliament to "repeal the provisions of the Constitution."[59] Parliament can thus abrogate democracy and substitute for it a totally antithetical form of government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals.

"The power to destroy is not a power to amend." The Constitution confers only a limited power on Parliament to amend the Constitution; Parliament cannot therefore by exercising that limited power enlarge that very power into an absolute power. "The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."[60]

A limited amending power is indeed one of the basic features of the Constitution. Therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Art. 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features.

The 42nd Amendment also amended the Preamble. By this Amendment, the 'sovereign democractic republic' becomes a 'sovereign socialist secular democratic republic' and the resolution to promote the 'unity of the nation' was elevated into a promise to promote the 'unity and integrity of the nation'.[61] No exception could be taken to this Amendment, as it furnishes "the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution". This amendment offers "promise of more"; it does not "scuttle a precious heritage."[62]

S. 4 of the 42nd Amendment amended Art. 31C as well. As already stated, the unamended Art. 31C was upheld in *Kasavananda* up to an extent.[63] To that extent, Art. 31C would remain valid. But the new amendment vastly expanded the scope of Art. 31C[64], and this extension was now declared to be invalid as being beyond the amending power of Parliament since it destroyed the basic or essential features of the Constitution, insofar as it totally excluded a challenge in a Court to any law on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by, Art. 14 or 19, if the law was for effectuating any of the Directive Principles.

The majority Judges insisted that Fundamental Rights occupy a unique place in the lives of civilized societies; they constitute the 'ark' of the Constitution. ".... the Indian Constitution is founded on the bedrock of the balance between Parts III and IV.[65] To give absolute primacy to one over the other is to disturb the har-

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59. For the text of this clause, see, *supra*, 2318.
60. AIR 1980 SC 1789 at 1798.
61. *Supra*, Chs. I and XXXIV, Sec. D.
62. AIR 1980 SC 1789 at 1799.
63. *Supra*, Ch. XXXII, Sec. D.
64. For this change see, *supra*, Chs. XXXII, Sec. D(ii)(iii) and XXXIV, Sec. C.
65. Part III of the Constitution contains the Fundamental Rights; Part IV contains the Directive Principles of State Policy.

mony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution."

The Court pointed out that the goals set out in Part IV of the Constitution (*i.e.*, Directive Principles)[66] must be achieved without the abrogation of the means provided for by Part III *viz*., Fundamental Rights. In this sense, Fundamental Rights and Directive Principles both together constitute the core of the Indian Constitution and combine to form its conscience. "Anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of the Constitution."[67]

The Amendment sought to abrogate Arts. 14 and 19 in regard to laws described in Art. 31C. A bulk of modern legislation can easily be justified as having been passed for effectuating the policy of the State towards securing some principle or the other laid down in the Directive Principles. Such laws will cover an extensive gamut of the relevant legislative activity. In respect of all such laws, Arts. 14[68] and 19[69] would stand wholly withdrawn. Arts. 14 and 19 confer rights which are elementary for the proper and effective functioning of a democracy. They are universal as becomes evident from the Universal Declaration of Human Rights. If Arts. 14 and 19 were put out of operation in regard to bulk of legislation, Art. 32[70] would be drained of much of its life blood. The nature and quality of the amendment were such that "it virtually tears away the heart of basic fundamental freedoms."[71] The State Legislatures were given "an almost unfettered discretion to deprive the people of their civil liberties".

BHAGWATI, J., expressed the minority view. He agreed with the majority in holding amendments to Art. 368 as invalid and unconstitutional on the ground of damaging the basic structure of the Constitution. In his view, Cl. (4) of Art. 368 was unconstitutional as the consequence of excluding judicial review of constitutional amendments would be to enlarge the amending power of Parliament contrary to the decision in *Kesavananda,* and destroy the basic structure of the Constitution. Cl. (5) could not remove the doubt which did not exist, and so it was outside the amending power of Parliament. The two clauses, (4) and (5) were interlinked. BHAGWATI, J., failed to appreciate "how Parliament, which has only a limited power of amendment and which cannot alter the basic structure of the Constitution, can expand the power of amendment so as to confer upon itself the power to repeal or abrogate the Constitution or to damage or destroy its basic structure; or "to convert it into an absolute and unlimited power."

BHAGWATI, J., also commented adversely on the attempt made to exclude judicial review of the Constitutional amendments. He explained:

> "It is a cardinal principle of our Constitution that no one however highly placed and no authority however lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the

66. *Supra*, Ch. XXXIV.
67. *Supra*, Ch. XXXIV, Sec. C.
68. *Supra*, Ch. XXI.
69. *Supra*, Ch. XXIV.
70. *Supra*, Ch. XXXIII, Sec. A.
71. *Supra*, Chs. XXXIII, Sec. A and XXXIV, Sec. A.

> Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of rule of law…."

But the Amendment to Art. 31C was held valid by BHAGWATI, J., subject to the gloss put by him thereon. He argued that where protection was claimed for a statute under the amended Art. 31C, the Court would first determine whether there is a "real and substantial connection" between the law and a Directive Principle and that the predominant object of the law is to give effect to such Directive Principle. If the answer to this question turns out to be 'yes', the Court would then consider which provisions of the law are basically and essentially necessary for effectuating the directive principles and only such provisions would be protected under Art. 31C. If the Court finds that a particular provision is subsidiary or incidental or not essentially and integrally connected with the implementation of the Directive Principle or is of such a nature that though seemingly a part of the general design of the main provisions of the statute, its dominant objective is to achieve an unauthorised purpose, it would not be protected under Art. 31C. In this formulation, the Court would have discharged a much more overt policy-making role which the courts do not usually relish.

The following observation of BHAGWATI, J., is worth taking note of:

> "It is possible that in a given case, even an abridgement of a fundamental right may involve violation of the basic structure. It would all depend on the nature of the fundamental right, the extent and depth of the infringement, the purpose for which the infringement is made and its impact on the basic value of the Constitution. Take for example, right to life and personal liberty enshrined in Article 21. This stands on an altogether different footing from other fundamental rights. I do not wish to express any definite opinion, but I may point out that if this fundamental right is violated by any legislation, it may be difficult to sustain a Constitutional amendment which seeks to protect such legislation against challenge under Act. 21."

(b) WAMAN RAO

In the instant case, the Supreme Court considered the constitutional validity of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961. The Act imposed ceiling on agricultural holdings in the State. As the Act had been placed in the IX Schedule,[72] the constitutional validity of Arts. 31A, 31B and the unamended Art. 31C (as it existed before the 42nd Amendment) was also challenged on the ground of damaging the "basic structure" of the Constitution.

The proposition that Parliament cannot, under Art. 368, so amend the Constitution as to destroy its basic features was again reiterated and applied by the Supreme Court in *Waman Rao v. Union of India*.[73] Accordingly, the Court ruled that the First and the Fourth Amendment Acts introduced in 1951 and 1955 did not damage any basic or essential feature of the Constitution or its basic structure and were thus valid and constitutional being within the constituent power of the

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72. For IX Schedule, see, *supra*, Ch. XXXII, Sec. 31B.
73. AIR 1981 SC 271; *supra*, Sec. E(b).

Parliament. The First Amendment was aimed at removing social and economic disparities in the agricultural sector.[74]

The First Amendment introduced Art. 31A into the Constitution with retrospective effect as well as Art. 31B.[75] The Fourth Amendment amended the First Amendment.[76] Art. 31A(1) obliterates Arts. 14, 19 and 31 totally and completely for the laws falling within its scope.[77] In this connection, the Court stated:

> ".... every case in which the protection of a fundamental right is withdrawn will not necessarily result in damaging or destroying the basic structure of the Constitution. The question as to whether the basic structure is damaged or destroyed in any given case would depend upon which particular Article of Part III is in issue and whether what is withdrawn is quintessential to the basic structure of the Constitution."[78]

About Art. 31A, the Court said:

> ".... if Art. 31A were not enacted, some of the main purposes of the Constitution would have been delayed and eventually defeated and that by the 1st Amendment, the constitutional edifice was not impaired but strengthened."[79]

The First and the Fourth Amendments, according to the Court, "were made so closely on the heels of the Constitution that they ought indeed to be considered as a part and parcel of the Constitution itself."[80] These Amendments were passed to effectuate Art. 39 clauses (b) and (c).[81] The Court concluded that the First and Fourth Amendments strengthened rather than weakened the basic structure of the Constitution. They made the ideal of equal justice a living truth. The First Amendment aimed at removing social and economic disparities and it therefore did not damage or destroy the basic structure of the Constitution.

Article 31B contains a device for saving laws from challenge on the ground of violation of Fundamental Rights. Art. 31B is to be read along with the Ninth Schedule.[82] Art. 13(2) of the Constitution invalidates a law inconsistent with a Fundamental Right. Art. 31B extends a protective umbrella to such a law if it is included in the IX Schedule. Art. 31B is, in substance and reality, a constitutional device employed to protect State laws from being declared void under Art. 13(2). Parliament can insert a State Law in Schedule IX by passing a constitutional amendment under Art. 368.[83]

The Court declared in *Waman Rao* that all Acts and Regulations included in the Ninth Schedule uptil the land-mark case of *Kesavananda* (April 24, 1973) will receive the full protection of Art. 31B. Since the IXth Schedule is a part of the Constitution, no additions or alterations can be made therein without complying with the restrictive provisions governing amendments to the Constitution. Therefore, the Acts and Regulations included in the IXth Schedule after *Kesa-*

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74. *Supra*, Ch. XXXII; *supra*; *infra*, Ch. XLII.
75. *Supra*, Ch. XXXII, Sec. C; *infra*, Ch. XLII.
76. *Ibid.*
77. *Ibid.*
78. AIR 1981 SC at 279.
79. AIR 1981 SC at 283-284.
80. *Ibid*, at 284.
81. *Supra*, Chs. XXXII, Sec. B; XXXIV and XLII.
82. *Ibid.*
83. *Sasanka Sekhar v. Union of India*, AIR 1981 SC 522.

vanand (*i.e*., on or after April 24, 1973) will not receive the protection of Art. 31B for the plain reason that in the face of the *Kesavananda* judgment, there is no justification for making additions to the IX Schedule with a view to conferring a blanket protection on the laws included therein. "The various constitutional amendments, by which additions were made to the IX Schedule on or after April 24, 1973, will be held valid only if they do not damage or destroy the basic structure of the Constitution."

These laws would not receive the protection of Art. 31B *ipso facto*. Each law has to be examined individually for determining whether the constitutional amendment by which it has been put in the IX Schedule damages or destroys the basic structure of the Constitution in any manner. If however any such Act is protected by Art. 31A or 31C (as it stood prior to the 42nd Amendment) then the Act will be valid.

Article 31C as it stood prior to the 42nd Amendment made in 1976 is valid to the extent its constitutionality has been upheld in the *Kesavananda* case.[84] Laws passed truly and *bona fide* for giving effect to the Directive Principles in Cls. (b) and (c) of Art. 39 "will fortify that structure". The Court expressed a hope that Parliament would utilise to the maximum its potential to pass laws genuinely and truly related to the principles contained in Clauses (b) and (c) of Art. 39.[85]

However, in *Sanjeev*,[86] the Supreme Court has dissented from *Minerva*[87] as regards the validity of Art. 31C. as amended by the 42nd Amendment. But the *Sanjeev* ruling is more in the nature of an *obiter dicta* as the Act in question pertained to Arts. 39(*b*) and (*c*) and could be held valid under the original Art. 31C as held valid in *Kesavananda*.

(c) RAGHUNATH RAO

In *Raghunath Rao v. Union of India*,[88] the Supreme Court has reiterated the proposition that the basic features of the Constitution cannot be amended by following the procedure laid down in Art. 368. The Court has observed that the Constitution is the supreme law of the land and all organs of government—executive, legislative and judiciary derive their powers and authority from the Constitution.

The Courts are entrusted with the important constitutional responsibilities of upholding the supremacy of the Constitution. The amendment of the Constitution is only for the purpose of making the Constitution "more perfect, effective and meaningful." An amendment should not result in "abrogation or destruction of its basic structure or loss of its original identity and character and render the Constitution unworkable."

The Court is not concerned with the wisdom behind or propriety of the constitutional amendment because these are the matters for consideration of those who have the power to make constitutional amendments. All that the Court is concerned with are:—(1) whether the procedure prescribed by Art.

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84. *Supra*, Chs. XXXII, Sec. D and XXXIV, Sec. D(e).
85. AIR 1981 SC at 292.
86. *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*, AIR 1983 SC 239; *Supra*, Chs. XXXII, Sec. C and XXXIV.
87. *Supra*, , Sec. E(a).
88. AIR 1993 SC 1267, 1287 : 1933 (1) JT 374.

368 is strictly complied with; and (2) whether the amendment has destroyed or damaged the basic structure or the essential features of the Constitution.

If an amendment transgresses its limits and impairs and alters the basic structure or essential features of the Constitution then the Court has power to undo that amendment. "An amendment of a Constitution becomes *ultra vires* if the same contravenes or transgresses the limitations put on the amending power because there is no touchstone outside the Constitution by which the validity of the exercise of the said powers conferred by it can be tested."[89]

The Supreme Court has stated that "unity and integrity of India" and the principle of equality contained in Art. 14 constitute the basic structure of the constitution.

(d) APPLICATION OF THE RULE OF SEVERABILITY TO A CONSTITUTION AMENDMENT ACT

The Anti-defection law is contained in the X Schedule to the Constitution[90] which was added to the Constitution by the Constitution (Fifty-second) Amendment Act, 1985.[91] A member of a Legislature defecting form his party to another party becomes disqualified from membership of the Legislature. The question of disqualification because of defection is to be decided by the Chairman/Speaker of the House and "his decision shall be final." There is a privative clause saying that "no Court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule."[92] The question of disqualification is to be decided by the Speaker of the House concerned and his decision is final.

The Constitutional validity of the 52nd Amendment was challenged in *Kihota Hollohan v. Zachillu.*[93]

The first question was whether the constitutional amendment disqualifying a member of a Legislature from membership on defection from his original party to another party was valid. The Court maintained that although there is no specific enumerated substantive limitation on the power in Art. 368, but as arising from very limitation on the amending power such that the amendment does not alter the basic structure or destroy the basic features of the Constitution.

The object of the Amendment in question is to curb the evil of political defections motivated by lure of office which endanger the foundations of democracy in India. The Amendment, the Court has held by a majority of 3:2, is salutary as it seeks to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections. The argument that the amendment violates the basic structure of the Constitution was rejected by the Court.

The second question which was raised in *Kihoto,* was like this: The finality clause does not completely exclude the jurisdiction of the courts but it does have

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89. Also see, *R.C. Poudyal v. Union of India,* AIR 1993 SC 1804; *Supra,* Ch. V; *Infra,* next Chapter.

90. *Supra,* Chs. II, Sec. F and VI, B(iv).
Infra, Ch. XLII.

91. *Ibid.*

92. *Ibid.*

93. AIR 1993 SC 412 : 1992 Supp (2) SCC 651, *supra,* Ch. II, Sec. F(a).

the effect of restricting the power of judicial review conferred on the Supreme Court and the High Courts under Arts. 136, 226 and 227. Accordingly, under Art. 368(2),[1] the constitutional amendment ought to have been approved by one-half of the State Legislatures before being presented to the President for his assent. In the instant case, this essential formality had not been gone through. Therefore, the question raised was whether the whole of the Amendment Act would be invalid, or whether the rule of severability could be applied to the Amendment Act so that the invalid part, *i.e.*, the finality clause could be severed and the rest of the Act held valid as it did not need State ratification.

The Supreme Court divided 3:2 on this issue. The majority took recourse to the rule of severability, discussed earlier,[2] and held the rest of the Amendment Act valid after severing therefrom the invalid finality clause.

The Court stated that the principle of severability can be applied to a composite amendment which contains—(*i*) amendments in provisions which do not require ratification by the States, as well as (*ii*) amendments in provisions which require such ratification. By applying the doctrine of severability, the amendments in category (*i*) can be upheld and amendments falling in category (*ii*) may be struck down failing ratification by the States.

However, the test of severability can be applied if the Legislature would at all have enacted the law if the severed part would not be the part of the law, and whether after severance what survives can stand independently and is workable. In the instant case, the majority ruled, that the constituent body would have still enacted the X Schedule to curb the evil of defection, and the finality clause was only incidental. Even if this clause is found unconstitutional and is thus severed, the rest of the provisions in the X Schedule can stand on their own.

On the other hand, the minority judges [VERMA and SHARMA, JJ.] took a more rigid stand on this issue. They took the view that under Art. 368(2), the Constitution Amendment Bill could not have been presented to the President for his assent unless the Bill had been approved by half of the State Legislatures. Therefore, the Presidential assent given to the Bill without such ratification was *non est* and so the whole Constitution Amendment Act was still born. The rule of severability could not apply as the whole of the Act was unconstitutional.

(e) A.K. ROY

A question of great importance as regards the amending power was considered by the Supreme Court in *A.K. Roy v. Union of India*.[3]

S. 1(2) of the 44th Amendment says: "It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act."

The 44th Amendment Act has made several modifications in Art. 22[4] liberalising its provisions but the same have not yet been effectuated because the Government has not issued any notification under S. 1(2). In *Roy*, S. 1(2) was chal-

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1. *Supra*, Sec. C(b).
2. *Supra*, Chs. XX, Sec. H and XL.
3. AIR 1982 SC 710 : (1982) 1 SCC 271.
4. *Supra*, Ch. XXVII, Sec. B.
Also, *infra*, Ch. XLII.

lenged on the ground that by conferring an unreasonable, arbitrary and unguided power on the executive, it violated Arts. 14 and 21 which are an integral part of the basic structure of the Constitution. The failure of the Government to issue the notification was also challenged as *mala fide*. It was also argued that the Government was obligated to bring the whole of the 44th Amendment into force within a reasonable time since the executive cannot veto or nullify or negate a constitutional amendment. It was argued that "the executive cannot defer or postpone giving effect to a constitutional amendment for policy reasons of its own which are opposed to the policy of the constituent body as reflected in the constitutional amendment".

By majority of 3 to 2, the Court rejected these arguments and sustained the validity of S. 1(2) of the 44th Amendment arguing that the power to issue a notification for bringing into force the provisions of a constitutional amendment "is not a constituent power of the Parliament because it does not carry with it the power to amend the Constitution in any manner." Parliament can therefore vest in an outside agency the power to bring a constitutional amendment into force. The Supreme Court cannot compel the Government to do that which lies in its discretion to do when it considers it opportune to do. If the Parliament considers that the executive has betrayed its trust by not bringing the amendment into force, it can censure the executive.

GUPTA, J., in a dissenting judgment argued that S. 1(2) could not be construed to mean that Parliament left it to the unfettered discretion of the Central Government when to bring into force the provisions of the 44th Amendment. The Central Government is obligated to bring them into operation within a reasonable time: "The Central Government could not in its discretion keep it in a state of suspended animation for any length of time it pleased". There is no practical or administrative difficulty in effectuating the amendments to Art. 22.

GUPTA, J., was in favour of issuing *mandamus* to the Government directing it to issue a notification under S. 1(2) of the 44th Amendment effectuating the amendments to Art. 22 for S. 1(2) does not empower the executive to scotch an amendment of the Constitution duly enacted. TULZAPURKAR, J., also agreed with GUPTA, J., on this point.It is submitted that the minority view is more sound than the majority view because the executive ought not to be permitted to set at naught the will of the constituent power. The executive cannot annihilate the constitutional amendment by the simple expedient of not bringing it into force. The power given to the executive to bring the amendment into force can only mean within reasonable time needed to make the necessary administrative arrangements to give effect to the law. Delaying the enforcement of the amendment for an long as 22 years goes against the intention of the constituent power. The Court should therefore assess the *bona fides* and reasonableness of the executive action if it unduly delays the bringing into force of a constitutional amendment.

In the opinion of the author, S. 1(2) of the 44th Amendment Act ought to have been held constitutionally invalid as it amounts to delegation of constituent power which Parliament is not authorized to do. The power to issue the notification to bring a constitutional amendment into force cannot but be characterized as the constituent power, for, without such a notification, the Constitutional Amendment in question cannot be effectuated.

The best thing to do will be for the constituent power either to bring the amendment into force straightaway, or fix a ceiling on time-limit within which it should be brought into force and not leave the matter to the unfettered discretion of the executive. Further, the executive should not seek to thwart the wish solemnly expressed by the constituent authority through an amendment of the Constitution giving safeguards to the people against violation of their personal liberty.

(f) THE CONSTITUTION (FORTY-FIFTH) AMENDMENT BILL, 1978

Article 368 relating to the power of Parliament to amend the Constitution was again sought to be amended by the 45th Constitution Amendment Bill (CB 45).[5]

In *Kesavanada*, the Supreme Court, by a majority, had propounded the view that the fundamental or basic features of the Constitution could not be amended by Parliament under Art. 368. But the Court did not lay down conclusively as to what the basic features of the Constitution were. Some illustrations were given by some of the Judges but it was also stated that these were not exhaustive categories.[6] Also, it was not clear as to how these features could be amended if any amendment therein became absolutely necessary at any time.

The 42nd Amendment (CA 42) sought to amend Art. 368 with a view to give Parliament an unrestrained power to amend the Constitution including its basic features.[7] But the constitutional validity of CA 42 in this respect remained a matter of doubt. It remained a moot point whether the Supreme Court would overrule its view expressed in *Kesavananda* and accept the validity of amendments introduced in Art. 368 by CA 42. The odds were that the Court would reiterate its stand and declare Cls. (4) and (5) of Art. 368 (added by CA 42) unconstitutional.[8]

To cope with these various difficulties in the process of amendment of the Constitution, CB 45 proposed to amend Art. 368 so as to introduce therein the procedure of referendum to amend certain features of the Constitution. It was proposed to lay down a few features in Art. 368 and to provide that any amendment of any of these stated features of the Constitution would require approval of the people of India at a referendum. Thus, any amendment having the effect of—(a) impairing the secular or democratic character of the Constitution, or, (b) abridging or taking away the rights of citizens under Part III (*i.e.*, Fundamental Rights), or (c) prejudicing or impeding free and fair elections to the Lok Sabha or the State Legislative Assemblies on the basis of adult suffrage, or, (d) compromising the independence of the judiciary—was required to be approved by the people at a referendum.

Any amendment seeking to modify or omit the requirement as to such referendum was also required to be approved at such a referendum. The referendum was to be through a poll at which all voters for the Lok Sabha election were to be eligible to vote. An amendment was to be deemed to have been approved by the

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5. CB 45 is the abbreviation used in the text for the Constitution (Forty-fifth Amendment) Bill, which later became the Constitution (Forty-fourth Amendment) Act.
For its provisions, see, *infra*, next Chapter.

6. See, *supra*, Sec. D(e).

7. *Supra*; *infra*, Ch. XLII.

8. The Supreme Court ultimately declared this Amendment as unconstitutional in *Minerva Mills*, Sec. D(a).

people if approved by a majority of the voters at such poll at which at least fifty-one per cent eligible voters voted. The management of the referendum was to vest in the Election Commission. The result of the referendum as declared by the Election Commission was not to be called in question in any Court. Subject to these constitutional provisions, Parliament could make provisions with respect to all matters relating to the referendum. CB 45 also proposed to delete Cls. (4) and (5) introduced in Art. 368 through CA 42.[9]

The proposed amendments in Art. 368 were very wholesome. Referendum is a democratic process as it involves people's participation. Any constitutional amendment approved by the people at a referendum would signify approval of the amendment through national consensus. This could have been regarded as reiteration of the declaration in the Preamble that the Constitution of India has been adopted and enacted by the people of India.

For long, the Constitution had been the plaything of political parties having transient majority in Parliament, and amendments had often been introduced because of political expediency at the time. With the proposed amendments in Art. 368, this would have ceased and constitutional amendments would be mooted only when absolutely necessary.

These amendments would have also scotched the heresy that Parliament created by a written constitution was sovereign and could mutilate the Constitution in any way it liked. The proposed amendment would have made it impossible for a transient majority in Parliament to effectuate amendments in certain basic features of the Constitution including the Fundamental Rights. At the same time, no part of the Constitution was to be beyond amendment in theory. The provision for referendum would have deterred amendments being lightly introduced in some of the significant aspects of the Constitution. The role of the courts would have become confined to deciding, if a question were raised, whether a proposed amendment belonged to that category mentioned in Art. 368 which needed the procedure of referendum for being enacted. The Constitution would have come to enjoy that deep emotional respect in the hearts of the people which had been lacking so far because of its too frequent constitutional amendments.

Unfortunately, the *Rajya Sabha* where the Congress Party had a majority did not approve of these proposals although the *Lok Sabha* had passed the same by the requisite majority.

F. BASIC FEATURES OF THE CONSTITUTION

It is necessary to identify the basic features of the Constitution which are non-amendable under Art. 368. The question has been considered by the Court from time to time, and several such features have been identified, but the matter still remains an open one; no exhaustive list of such features has yet emerged and the Court has to decide from case to case whether a constitutional feature can be characterised as basic or not.

In the seminal *Kesavananda* case,[10] SIKRI, C.J., mentioned the following as the "basic foundation and structure" of the Constitution:

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9. *Supra*, Sec. D(g).
10. *Supra*, Sec. D(e).

(1) Supremacy of the Constitution;

(2) Separation of Powers between the legislature, the executive and the judiciary;[11]

(3) Republican and democratic form of Government;

(4) Secular character of the Constitution.

(5) Federal Character of the Constitution.

SIKRI, C.J., maintained that the above features are easily discernible not only from the Preamble but the whole scheme of the Constitution.

Other Judges mentioned in addition to the above three more basic features:

(6) The dignity of the individual secured by the various Fundamental Rights and the mandate to build a welfare state contained in the directive principles;

(7) The unity and integrity of the nation.[12]

(8) Parliamentary system.[13]

The above features have been mentioned as only illustrative and the list is not by any means exhaustive. Whether a feature of the Constitution is 'basic' or not is to be determined from time to time by the Court as and when the question arises.

Since *Kesavananda,* the matter has been considered by the Supreme Court in several cases and the Court has had occasion to declare several features of the Constitution as fundamental features or basic structures of the Constitution.

It is generally agreed that all Fundamental Rights do not constitute basic features. For example, in *Kesavananda* itself it has been held that the right to property does not pertain to the basic structure of the Constitution.[14] Now that Art. 31 has been repealed, and Art. 300A included in the constitution, right to property has ceased to be a Fundamental Right,[15] as well as basic feature of the Constitution. It is merely a constitutional right.[16]

In *Kihoto Hollohon*,[17] the Supreme Court has declared: "Democracy is a basic feature of the Constitution" and Election conducted at regular prescribed intervals is essential to the democratic system envisaged in the Constitution. So is the need to protect and sustain the purity of the electoral process. That may take within it the quality, efficiency and adequacy of the machinery for resolution of electoral disputes."

Again, in the same case, VERMA, J., in his minority opinion has declared: Democracy is a part of the basic structure of our Constitution; and the rule of law, and free and fair elections are basic features of democracy. One of the postulates

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11. Also see, *State of Bihar v. Bal Mukund Shah,* AIR 2000 SC 1296 : (2000) 4 SCC 640.
12. *Raghunath Rao v. Union of India,* AIR 1993 SC 1267; supra, Sec. E(c).
13. AIR 1973 SC at 1535, 1603, 1628 and 1860.
14. Also see, *Jilubhai Nanbhai Khachar v. State of Gujarat,* AIR 1995 SC 142 : (1955) Supp (1) SCC 596.
15. See, Ch. XLII, *infra,* under Forty-fourth Amendment, *supra,* Ch. XXXII, Sec. E.
16. *J.N. Khachar v. State of Gujarat,* AIR 1995 SC 154; *Waman Rao v. Union of India,* AIR 1981 SC 271; supra, Sec. E(b).
17. AIR 1993 SC 412; *supra,* Chs. II, Sec. F, III; VI, Sec. B(iv) and VII.

of free and fair elections is provision for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority.

In *Bommai*,[18] SAWANT and KULDIP SINGH, JJ., have observed: "Democracy[19] and Federalism are essential features of our Constitution and are part of its basic structure." This view is supported by RAMASWAMI, J., who has observed: "Federalism envisaged in the Constitution of India is a basic feature."[20]

In the same case, the Supreme Court has ruled that secularism is a basic or an essential feature of the Constitution. The concept of secularism is embedded in the Constitution. The concept means that the State is to accord equal treatment to all religions and religious sects and denominations.[21]

Secularism is also regarded as a facet of equality. How can the concept of equality be promoted if the state prefers and promotes one particular religion, race or caste which necessarily means being less favourable to other religious groups, sects or castes.[22]

In *Indira Gandhi v. Rajnarain*,[23] the Supreme Court has unequivocally ruled that the Preamble to the Indian Constitution guarantees equality of status and of opportunity and that the Rule of law is the basic structure of the Constitution.

The concept of equality which is the basic rule of law and that which is regarded as the most fundamental postulate of republicanism are both embedded in Art. 14. The doctrine of equality enshrined in Art. 14 of the Constitution, which is the basis of the Rule of law, is the basic feature of the Constitution.[24] Art. 16(1) is a facet of Art. 14. This point has been re-emphasized by the Court in *Indra Sawhney* (II):[25] "The Preamble to the Constitution of India emphasizes the principle of equality as basic to our Constitution."

In a plethora of cases,[26] the Supreme Court has asserted that independence of judiciary is a basic feature of the Constitution as it is the *sine qua non* of democracy; it is the most essential characteristic of a free society. This means that the judiciary ought to be kept free from the influence of political considerations and, therefore, judicial appointments cannot be left to the absolute discretion of the executive.[27]

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18. AIR 1994 SC 1918, at 1976 : (1994) 3 SCC 1.
19. *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 229 : (1975) 3 SCC 34; *supra*, Ch. XIX; *supra*, this Chapter.
20. AIR 1994 SC 1918 at 2045.
Also see, *Shri Kumar v. Union of India*, (1992) 2 SCC 428 : AIR 1992 SC 1213.
21. See, *supra*, Ch. XXIX, Sec. A, under 'Freedom of Religion'.
22. See, *S.R. Bommai v. Union of India*, *supra*. *M. Ismail Faruqui v. Union of India*, AIR 1995 SC 605 : (1994) 6 SCC.
23. AIR 1975 SC 2299 : 1975 Supp SCC 1.
24. *Nachane, Ashwini Shivram v. State of Maharashtra*, AIR 1998 Bom 1; *Raghunath Rao v. Union of India*, AIR 1993 SC 1267; *supra*, Sec. E(c).
25. *Indra Sawhney v. Union of India (II)*, AIR 2000 SC 498, at 517 : (2000) 1 SCC 168.
26. BHAGWATI, J., in *Union of India v. Sankal Chand Himmatlal* Sheth, AIR 1977 SC 2328 : (1977) 4 SCC 193 and the *Gupta* case, AIR 1982 SC 149 at 197, 198; *supra*, Ch. VIII; *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213 : (2000) 4 SCC 640; *supra*, Ch. IV, Sec. K, Ch. VIII, Sec. F; *State of Bihar v. Bal Mukund Shah*, AIR 2000 SC 1296.
27. *Supreme Court Advocates-on-Record Assn. v. Union of India*, AIR 1994 SC 268; *supra*, Chs. IV, Sec. B(d) and VIII, Sec. B(d).

(a) JUDICIAL REVIEW

Several Articles in the Constitution, such as, Arts. 32, 136, 226 and 227, guarantee judicial review of legislation and administrative action.[28] It can be appreciated that protection of the institution of judicial review is crucially interconnected with the protection of Fundamental Rights, for depriving the Court of its power of judicial review would be tantamount to making Fundamental Rights non-enforceable, "a mere adornment", as they will become rights without remedy. In the absence of judicial review, the written constitution will be reduced to a collection of platitudes without any binding force. Accordingly, judicial review has been declared to be a basic feature of the Constitution. KHANNA, J., has emphasized in *Kesavananda*:[29]

> "As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened.…judicial review has thus become an integral part of the constitutional system."

In *Minerva Mills*,[30] CHANDRACHUD, C.J., speaking on behalf of the majority observed:

> "It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled."

In the same case, BHAGWATI, J., has observed:

> "It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which *inter alia* requires that the exercises of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law. The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution."

BHAGWATI, J., however, went on to say that "effective alternative institutional mechanisms or arrangements" for judicial review can be made by Parliament. But he did emphasize that judicial review is a vital principle of the Constitution and if power of judicial review is taken away by a constitutional amendment, "it will be nothing short of subversion of the Constitution." But, according to BHAGWATI, J., it is not necessary to concentrate judicial review in the courts; if alternative tribunals are set up which are as efficacious and independent as the High Courts, then the power of judicial review can be transferred to such tribunals.

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28. See, *supra*, Chs. IV, VIII, Secs. D and E; Sec. C(iv), XX, Sec. C; and XXXIII, Sec. A. Also see, *supra*, XL.
29. *Supra*, Sec. D(e).
30. *Supra*, Sec. D(a).

In *Sampath Kumar,*[31] Bhagwati, C.J., observed : "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. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is."

In *Subhesh Sharma v. Union of India,*[32] the Supreme Court has asserted that "judicial review is a part of the basic constitutional structure and one of the basic features of the essential Indian Constitutional policy." This means that the independence of the judiciary ought to be safeguarded. This means that the Chief Justice of India should play the primary role in the appointment of the High Court and Supreme Court Judges and not the executive. The Court has expressed the view that "the primacy of the Chief Justice of India in the process of selection would improve quality of selection." Again, in the case noted below,[33] the Supreme Court has asserted that "the powers conferred on it under Articles 32, 136, 141 and 142 form part of the basic structure of the Constitution."[34]

Article 323A has been added to the Constitution by the 42nd Amendment.[35] The Constitutional provision makes it possible for Parliament to set up tribunals for adjudicating upon service matters pertaining to government servants. Under Art. 323A(d), Parliament may "exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Art. 136, with respect to the disputes or complaints" assigned for decision to the service tribunal.

In pursuance of Art. 323A, Parliament enacted the Central Administrative Tribunal Act to set up a Central Administrative Tribunal to adjudicate upon disputes between the Central Government and its employees in service matters. Originally, the Tribunal was to be subject to the Supreme Court's jurisdiction under Art. 136. The Supreme Court's jurisdiction under Art. 32 and the High Court's jurisdiction under Arts. 226 and 227 were to be excluded. The constitutional validity of Art. 323A as well as that of the Administrative Tribunal Act came to be questioned before the Supreme Court in *S.P. Sampath Kumar v. Union of India.*[36]

The Court upheld both subject to certain modifications being introduced into the Act in question. The Supreme Court however made it clear at the earliest opportunity that it would not accept exclusion of its own jurisdiction under Art. 32 and, accordingly, Parliament suitably amended the Act to restore this jurisdiction of the Supreme Court. The Supreme Court's jurisdiction remaining intact, the basic question which arose for the Supreme Court's consideration was whether the Constitutional Amendment providing for exclusion of the High Court's jurisdiction could be regarded as constitutionally valid in view of what was said in *Minerva*.[37] Did it not affect one of the basic or fundamental features of the Constitution?

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31. *S.P. Sampath Kumar v. Union of India,* (1987) 1 SCC 124 : AIR 1987 SC 386.
32. AIR 1991 SC 631 at 646.
33. *Delhi Judicial Service Association, Tis Hazari Court v. State of Gujarat*, AIR 1991 SC 2176, at 2204 : (1991) 4 SCC 406
34. For these constitutional provisions, see, Chs. IV and XXXIII, *supra*.
35. *Supra*, Ch. VIII, Sec. I..
36. AIR 1986 SC 386 : (1986) 1 SCC 23.
37. *Supra*, Sec. D(a).

RANGANATH MISRA, J., delivering the Court's judgment, pointed out how in the face of mounting pressure of work on the High Courts which resulted in delayed justice, it became necessary to provide some alternative modes of dispute settlement. Even in *Minerva*, it was envisaged that "effective alternative institutional mechanisms or arrangements for judicial review" could be made by Parliament. As, in the instant case, judicial review by the Supreme Court remains intact, "exclusion of the jurisdiction of the High Courts does not totally bar judicial review". It was thus possible to provide an alternative institution to perform judicial review instead of the High Courts. But the condition was that the proposed tribunal should be a "real substitute", a "worthy successor" of the High Courts in all respects. The Court then proceeded to make a few suggestions for amendment of the Act in question for removal of certain deficiencies in the composition of the proposed Administrative Tribunal so as to make it a real and effective substitute for the High Courts. In the words of RANGANATH MISRA, J.:

> "What, however, has to be kept in view is that the Tribunal should be a real substitute of the High Court—not only in form and *de jure* but in content and *de facto*. As was pointed out in *Minerva Mills* the alternative arrangement has to be effective and efficient as also capable of upholding the constitutional limitations."

In a separate but concurring judgment, BHAGWATI, C.J., agreed with the majority view. He observed in this connection:

> "... judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision (*Minerva*) that though judicial review cannot be altogether abrogated by Parliament by amending the Constitution in exercise of its constituent power, Parliament can certainly, without in any way violating the basic structure doctrine, set up effective alternative institutional mechanisms or arrangements of judicial review."

And, the Chief Justice went on to state further:

> "The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is not less efficacious than the High Court. Then, instead of the High Court, it would be another institutional mechanism or authority, which would be exercising the power of judicial review with a view to enforcing the constitutional limitations and maintaining the Rule of Law."

Therefore, according to *Sampat*, a constitutional amendment transferring from the High Court the power of judicial review in any specific area to any other institution, may not be violative of the basic structure doctrine so long as the essential condition is fulfilled, *viz.*, that the alternative institutional arrangement or mechanism or authority set up by parliamentary amendment is no less effective than the High Court.

Article 371-D was added to the Constitution in 1973 by the Thirty-Second Constitutional Amendment to make special provisions for the State of Andhra Pradesh for providing equitable opportunities and facilities to the people belonging to different parts of the State in such matters as education, public employ-

ment, etc.[38] Clause 3 of the above provision authorises the President to appoint an administrative tribunal to exercise jurisdiction, power and authority, including that exercised by any Court, except the Supreme Court, before the commencement of the 32nd Amendment Act, in respect of matters mentioned in Art. 371-D(3). According to Cl. 5, "the order of the Administrative Tribunal finally disposing of any case shall become effective upon its confirmation by the State Government or on the expiry of three months from the date on which the order was made, whichever was earlier." A proviso to this clause provided further that the State Government might, by a special order in writing and for reasons to be specified therein, "modify or annul" any order made by the Tribunal before it became effective and in such a case the order of the Tribunal would have effect only in such modified form or be of no effect as might be the case.

The constitutional validity of Clause 5 was challenged and in *P. Sambamurthy v. State of Andhra Pradesh*,[39] the Supreme Court struck it down, as being violative of the basic structure of the Constitution. BHAGWATI, C.J., delivering the Court's opinion, took objection to the power of the State Government to modify or nullify a Tribunal decision. The State Government would itself be a party in the dispute on which the Tribunal adjudicated. The Government could set at naught any Tribunal decision given against it. BHAGWATI, C.J., criticised this provision in the following words:

> "Such a provision is, to say the least, shocking and is clearly subversive of the principles of justice. How can a party to the litigation be given the power to override the decision given by the Tribunal in the litigation, without violating the basic concept of justice? It would make a mockery of the entire adjudicative process...We do think that this power conferred on the State Government is clearly violative of the basic concept of justice."

It was also held as "violative of the rule of law which is clearly a basic and essential feature of the Constitution." The Court also pointed out that for the validity of the constitutional provision authorising exclusion of the High Court's jurisdiction and vesting it in the Tribunal, it was necessary that the Tribunal "must be as effective an institutional mechanism or authority for judicial review as the High Court". "If the Administrative Tribunal is less effective and efficacious than the High Court in the matter of judicial review in respect of specified service matters, the constitutional amendment would fall foul of the basic structure doctrine." If the State Government, a party to the litigation before the Administrative Tribunal, had power to override Tribunal decision then the Tribunal would be deprived of its effectiveness and efficacy.

The power of judicial review vested in the High Court under Arts. 226 and 227 does not suffer from any infirmity of the character which the order of the Administrative Tribunal suffered in view of the provisions of Cl. (5) of Art. 371-D in as much as whatever the High Court decides is binding on the State Government and it cannot, for any reason, set at naught the decision of the High Court. But the decision of the Tribunal was, by reason of proviso to Cl. (5) of Art. 371-D, subject to the veto of the State Government. This made the Tribunal a less effective and efficacious institutional mechanism for judicial review. Hence BHAGWATI, C.J., observed:

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38. *Supra*, Ch. IX, Sec. B(e).
39. AIR 1987 SC 663 : (1987) 1 SCC 362.

> "....the conclusion is inescapable that the proviso to Cl. (5) of Art. 371-D by which power has been conferred on the State Government to modify or annul the final order of the Administrative Tribunal is violative of the basic structure doctrine since it is that which makes the Administrative Tribunal a less effective and efficacious institutional mechanism or authority for judicial review."

Therefore, the proviso to Cl. (5) was struck down as being outside the constituent power of Parliament. Not only that, the whole of Cl. 5 was struck down "as unconstitutional as being *ultra vires* the amending power of Parliament for if the proviso goes, Cl. 5 must also fall along with it" since it was closely interrelated with the proviso and could not have any rationale for existence apart from the proviso.[40]

But, then, the Supreme Court has reconsidered the ratio in the above cases and has changed its position in *L. Chandra Kumar v. Union of India*.[41] The Court has now ruled that the power of judicial review which is vested in the High Courts under Arts. 226 and 227 and the Supreme Court under Art. 32 of the Constitution, is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, this power of the High Courts and the Supreme Court to test the constitutional validity of the legislation can never be ousted or excluded. Therefore, no constitutional amendment can exclude the power of the High Courts and the Supreme Court to test the constitutional validity of the legislation.

It is the function of the courts "to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations".[42] Accordingly, the Supreme Court has declared unconstitutional Cl. 2(d) of Art. 323A and Cl. 3(d) of Art. 323B,[43] to the extent these clauses exclude jurisdiction of the High Courts under Arts. 226 and 227 and of the Supreme Court under Art. 32. The Court has observed in this connection:[44]

> "The jurisdiction conferred upon the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 of the Constitution is part of the inviolable basic structure of the Constitution. While this jurisdiction cannot be ousted, other courts and tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution."

The Supreme Court has thus ruled that the writ jurisdiction vested in a High Court under Art. 226, and in the Supreme Court under Art. 32, as well as the power vested in the High courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions are all part of the basic structure of the constitution.

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40. The rest of Art. 371(D) has been held to be constitutional : *C. Surekha v. Union of India*, AIR 1989 SC 44; *Fazal Gafoor v. Union of India*, AIR 1989 SC 48 : 1988 Supp SCC 794; *S. Prakash Rao v. Commr. of Commercial Taxes*, AIR 1990 SC 997 : (1990) 2 SCC 259; *B Sudhakar Dr. v. Union of India*, AIR 1995 AP 86.

41. AIR 1997 SC 1125, at 1149-50 : (1997) 3 SCC 261.
Also see, *supra*, Ch. VIII, Sec. I.

42. AIR 1997 SC 1125 at 1150, 1156.
The Supreme Court has observed in *S.S. Bola v. B.D. Sardana*, AIR 1997 SC 3127 at 3167 : "Judicial Review, therefore, is an integral part of the Constitution as its basic structure."

43. For discussion on these provisions, see, *supra*, Ch. VIII, Sec. I.

44. AIR 1997 SC 1125 at 1156.

The Supreme Court has thus ensured that judicial review in an inseparable part of the Constitution, and that it cannot be excluded even by a constitutional amendment. Therefore, the position now is that while tribunals can be created to adjudicate upon various matters, the jurisdiction of the High Courts under Arts. 226/227 and that of the Supreme Court under Art. 32 cannot be excluded even by a constitutional amendment. Subject to these constitutional provisions, the tribunals may perform a supplementary role.

A finality clause in an Article in the Constitution conferring finality on the actions or decisions of an authority does not totally exclude judicial review of the actions and decisions of the concerned authority. A finality clause may however restrict to some extent the scope of judicial review. The broad categorisation is that actions falling within the jurisdiction of the authority are non-reviewable, but those falling outside its jurisdiction are reviewable by the courts. The category of 'outside jurisdiction' is quite broad. An action or decision of the authority falls outside its jurisdiction if—

(*i*) it is in contravention of a provision of law conferring power on the authority;

(*ii*) it is vitiated by *mala fides* or is colourable exercise of power based on extraneous or irrelevant considerations;

(*iii*) there is failure of natural justice;

(*iv*) it is based on no evidence.

This matter falls more appropriately within the realm of Administrative Law. According to modern judicial thinking, the category 'outside jurisdiction' is an expanding category. The above grounds are not exhaustive but rather illustrative.[45]

(b) *NON OBSTANTE CLAUSES*

Some provisions of the Constitution have *non obstante* clauses to the effect: "Notwithstanding anything in the Constitution…." For example, Cl. (2) of Art. 371 says: "Notwithstanding anything in this Constitution the President may by order…" And then, Cl. (10) of Art. 371D says: "The provisions of this Article and of any order made by the President thereunder shall have effect notwithstanding anything in any other provision of this Constitution…"

The question has been raised whether such a *non obstante* clause comes in the way of testing the provision against the touchstone of violation of the basic features of the Constitution. The Supreme Court has answered such a question in the negative. The Court has ruled that in spite of such a clause, the principle that no constitutional amendment can be made so as to damage any basic feature of the Constitution will prevail. Accordingly, in *Sambamurty*,[46] Art. 371D(5) was declared unconstitutional in spite of the presence of Cl. 10 of Art. 371D.[47]

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45. *State of Rajasthan v. Union of India*, AIR 1977 SC 1361 : (1977) 3 SCC 592; *Union of India v. Jyoti Prakash Mitter*, AIR 1971 SC 1093 : (1971) 1 SCC 396; *Kihoto Hollohon v. Zachillu*, AIR 1993 412 at 450-51 : 1992 Supp (2) SCC 651; M.P. JAIN, A TREATISE ON ADMINISTRATIVE LAW, II.

46. See, *supra*, footnote 39.

47. For discussion on these provisions, see, *supra*, Ch. IX, Sec. B(e).

Article 371F opens with the words "Notwithstanding anything in this Constitution…"[48] The validity of Cl. (f) of Art. 371F was questioned. It was argued that since Art. 371F opens with a *non obstante* clause, other provisions of the Constitution cannot limit the power of Parliament to impose conditions under Cl. (f). But the Supreme Court rejected the contention and observed in *R.C. Poudyal v. India*:[49]

> "But Art. 371-F cannot transgress the basic features of the Constitution. The *non obstante* clause cannot be construed as taking Clause (f) of Article 371-F outside the limitations on the amending power itself. The provisions of clause (f) of Article 371-E and Article 2[50] have to be construed harmoniously consistent with the foundational principles and basic features of the Constitution…"

In *Nachane*,[51] the Bombay High Court has held that the *non obstante* clause in Art. 371(2), as mentioned above, cannot come in the way of assessing the constitutionality of an order made by the President under Art. 371, *vis-à-vis* Art. 14. The Court has observed:[52]

> "…. the power of judicial review vested in the High Courts under Art. 226 of the Constitution is a part of the basic and essential feature of the Constitution constituting part of its basic structure. By virtue of the *non obstante* clause appearing at the beginning of Article 371 of the Constitution, this Court is not precluded from considering the validity of a rule made by the State Government…"

To sum up, it may be stated that the Supreme Court has made a very great contribution to the cause of constitutionalism in India by enunciating the doctrine of inviolability of the basic features of the Constitution. The doctrine is the result of a feeling among the judges that certain values and ideals embedded in the Constitution should be preserved and not destroyed by any process of constitutional amendment. The doctrine places an embargo on the erosion of basic features, but a constitutional amendment seeking to promote, strengthen and enlarge a basic feature would be most welcome. Undoubtedly, the doctrine has deterred the ruling party having a majority in both Houses of Parliament from effecting ill considered constitutional amendments, such as, the infamous 39th Amendment. The doctrine seeks to preserve the basic, core, constitutional values against the onslaught of a transient' majority in Parliament. The Constitution is not a party manifesto which can be amended by the party at its will to suit political expediency, but a national heritage which ought to be amended only when there is a broad national consensus favouring a specific amendment.

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48. See, *supra*, Ch. IX, Sec. D.
Also *infra*, Ch. XLII.
49. *Ibid*.
50. For Art. 2, see, *supra*, Ch. V.
51. *Nachane Ashiwni Shivram v. State of Maharashtra,* AIR 1998 Bom 1.
52. *Ibid*, at 22.