# CHAPTER FIVE

# CHAPTER V

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# CHAPTER V

## Parliament's Attempt To Take Away Judicial Review Power

One of the enemies of Constitutionalism is absolutism of any form. The judicial review is a linkage between the individual liberties and social interest, and political stability to counter balance the ultra vires Acts or actions by judicious decisions. However, at some point, judicial review assumes the characteristics of law making. Constitutional interpretation is more than a technical exercise or display of judicial erudition. The power to interpret the law is the power to make the law. Judicial review can be another name for judicial legislation. A Bishop Hoadley announced in 1717, "Whosoever hath an absolutes authority to interpret any written or spoken law, it is he who is truly the law-giver, to all intents and purposes, and not the person who first wrote or spoken them."[295]

Justice Khanna in Keshavananda Bharati v. State of Kerala[296], observed:

> Judicial review has thus become an integral part of our constitutional system and power has been vested in the High Courts and the Supreme Court to decide about the validity of the provisions of statutes. If the provisions of the statute area found to be violative of any Articles of the

[295] James Bradley Thayer, 7 Harv. ZL. Rev. 129, 152 (1903), Vide A. Laxminath, "Basic Structure and Constitutional Amendments" p.15

[296] AIR 1973 SC 1641

Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts arte empowered to strike down the provision."

Justice K. Ramaswamy in *S. S. Bola v. Sardana*[297] while reiterating that judicial review is the basic feature upon which hinges the checks and balances blended with hind sight in the Constitution as people's sovereign power for their protection and establishment of egalitarian social order under the rule of law, emphasized that judicial review is an integral part of the Constitution. Judicial review adjusts the Constitution to meet new conditions and needs. It is the Constitutional duty and responsibility of the constitutional courts, as assigned by the Constitution to maintain the balance of power between the legislature, executive and judiciary.

Within a democracy it is right that political institutions should be kept under review and criticized in the light of their performance in the service of changing needs of society. This function is performed by the judiciary in the exercise of its judicial review power. The power of judicial review also includes is the power to overturn or annul decisions of the Cabinet and parliament. The record revels that the judges have not been chary of exercising their powers. During the first seventeen years of its existence, there were 128 decisions in which the court ruled legislation invalid in part (70 State laws, 27 Central laws), or in its entirety (27 State laws, 4 Central laws).[298] In many cases, the Government's response to an "adverse" decision has been a revision of the legislation found wanting by the Court,

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[297] AIR 1997 SC 3127

[298] Gadbois, "Indian Judicial Behaviour", E.P.W. V (1970) p. 140

along lines suggested by the Court. But official response to a significant number of major decisions that have gone against the government has been an effort to circumvent such decisions via amendment of the Constitution, the sheltering of certain legislation from court scrutiny in the Ninth Schedule, the devising of new limitations on the court's power, or some other step believed capable of solving the problem presented by the Court. Of 45 Amendments enacted between 1951-1980, 21 sought to limit the exercise of judicial review power.

Judicial determination that a particular act or ordinance is unconstitutional or otherwise ultra vires seldom settles the matter or results in the issue being removed from the political agenda. The Court claims that the Constitution is what the court says it is, and even claims power to determine the validity of constitutional amendments. The reality is that the Parliament-executive provides very serious competition when it comes to interpreting the Constitution. Indeed, since 1950, the following scenario has been repeated on a number of occasions. Parliament passes a law, aggrieved private interests move to the Court and claim that the statute infringes their constitutionally guaranteed rights, the court aggress and declares the law invalid in part or its entirety, Parliament response either by passing a revised version of the measure with the intent of either meeting the judges' criticisms or making their own intent more clear' or takes the stronger step of enacting a constitutional amendment designed to eliminate or at least constrict the court's review

powers in an effort to eliminate further judicial road blocks.[299] This is how Parliament tries to take away judicial review power.

## 5.1 Property Rights: Court v. Parliament

In the first three decades of its working, judicial review power has been extensively used in the area of property rights and one can say the activism of the Supreme Court of India was confined to cases on right to property. Parliament and the Supreme Court clashed on their interpretations of the provisions on the right to property. Although the Constituent Assembly had taken utmost care to avoid judicial interference with the programme of economic reforms to which the Congress party had been committed since the days of the National Movement, the court did the hold the laws authorizing changes in property relations unconstitutional.

### 5.1.1 Concept of property right

A system of property, in the sense of a set of norms allocating control over the physical resources at its disposal, is essential to any community. According to Ely, by property, we generally mean an exclusive right to control an economic good. By private property, we mean the exclusive right of a private person to control an economic good. By public property, we mean the exclusive right of a political unit-city, state, nation etc. to control an economic good.[300]

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[299] George Gadbois, "The Supreme Court of India as a political institution", in 'Judges and Judicial power' p. 253, edited by Rajeev Dhavan and R. Sudarshan, N. M. Tripathi Pvt. Ltd, Bombay

[300] 13 Cornell Law Quarterly 8.

The classical view of property as a right over things resolves it into component rights such as the *jus utendi, jus disponendi*, etc. But the essence of private property is always the right to exclude others. In so far as the right to property existed, it was an exclusive right, that is, it excluded others, but it was not a right without limitations and qualifications.

The right to life and property is according to the natural law theory, the pre-supposition of every positive legal order. The legal order does not confer the right. It only protects these rights with the power, power to law. Property, therefore, is no arbitrary idea as some people would imagine, but is founded in man's natural impulse to extend to his personality. Property is an essential guarantee of human dignity, for, in order that a man may be able to develop himself in a human fashion, he needs a certain freedom and a certain security. The one and the other are secured to him only through property.[301] Property, therefore, can and should become again a right to life and liberty. Property is necessary for the subsistence and well being of men. No man would become a member of a community in which he could not enjoy the fruits of his honest labour and industry. The preservation and security of the property is one of the primary objects of the social compact that induce man to unite in society.

Property as defined in dictionaries as means the right, specially the exclusive right, to possession, use or disposal of any thing. It is the act of appropriating or making proper to oneself some part of the resource of [302]the universe. Austin said, "property taken in its strict sense denotes a right, infinite in point of use,

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[301] Justice K. K. Mathew, "The Right to Equality and Property under the Indian Constitution", p.75

[302] Jenks, book of English law, 6th edition p. 249

unrestricted in point of disposition and unlimited in point of duration over a determinant thing."[303] Noyes, who has examined many definitions rendered by courts by time to time and some accepted by economists, describes it as a protected right or bundle of rights with direct or indirect regard to any external object which is material or quasi material and which society permits to be either private or public.[304]

### 5.1.2 Recognition of the right to property

Part III of the Indian Constitution guarantees following fundamental rights.

i. Right to equality
ii. Right to freedom
iii. Right against exploitation
iv. Right to freedom of religion
v. Cultural and educational rights
vi. Right to property

However these rights are not absolute and they are limited by reasonable restrictions in the public interest. The question whether parliament can amend these rights so as to abridge or take away them has become a complicated constitutional problem in India.

There is no democracy in the world where as a matter of constitutional law the right to property is not recognized and respected. It appears in Magna Carta (1215) and the French Declaration of the Rights of Man (1789). Article 5 of the United

[303] Austin, Jurisprudence, 1873, lecture47, p. 817-820
[304] C. Reinolds Noyes, Institution of property , Macmillian, p. 351

States Bill of rights (1791) lays down that no person shall be deprived of property "without due process of law", "nor shall private property be taken for public use, without just compensation."

Article 51 of the Australian constitution secures the right to property by enacting that Parliament shall have power to acquire property on "just terms" which has been construed by the Australian courts to signify fair compensation.

Article 29 of the Japanese constitution (1947) provides that "the right to own or to hold property is inviolable" and that "private property may be taken for public use upon just compensation therefore".

Section 1 of the Canadian Bill of Rights (1960) lists "enjoyment of property" among human rights and fundamental freedoms.

Article 16 of the socialist constitution of the United Arab Republic (1964) enacts that "private ownership is safeguarded that and the law organizes its social function, and ownership id not expropriated except for the general good and against a fair compensation in accordance with the law."

Section 299 of the Government of India Act read as:

(1) No person shall be deprived of his property in British India save his authority by law.
(2) Neither a federal nor a provincial legislature shall have power to make any law authorizing the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking. Or ant interest in or in any company owing, any commercial or industrial undertaking, unless the law

provides for the payment of compensation, or specifies the principles on which, and the manner in which it is to be determined.

(3) No bill or amendment making provision for transference to public ownership of any land or for the extinguishments or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor General I his discretion, or in Chamber of provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in fore at the date of the passing of this Act.

(5) In this section 'land' includes immovable property of every kind and any rights in or over such property, and 'undertaking' includes part of an undertaking.

The Government of India Act, 1935 was silent about any remedy which a party aggrieved could have apart from those under the land acquisition Act, 1894. The Government of India act, 1935 had a fifteen-year run before the present Constitution came. During this time the Privy Council and the federal court were not called upon even once then to construe this section or the instructions, the Land acquisition act govern such cases. During this period the noted case decided by the Privy Council was *Raja Vyaricherla v. revenue divisional Officer*,[305] which dealt with subject o compensation and how it was to be determined. In this case the Privy Council laid down that land compulsorily acquired must be valued not merely by reference to the use to which it

[305] (1939) L. R. 56 I. A. 104

was being put at the time at which its value had to be determined, but also with the reference to the use to which it was reasonably capable of being put in the future. In laying down the law the judicial Committee observed that neither the buyer nor the vendor must be considered as acting under compulsion and the price must be the price a wiling vendor expects to obtain from willing buyer. It was not the price that would be paid by a 'driven' buyer to an 'unwilling' vendor. The potentiality of the land foe lucrative future use must be considered.

### 5.1.3 Right to Property and Constituent Assembly Debate

When the Constitution was being drafted the question of property and its compulsory acquisition or requisitioning for public purposes was before the Constituent assembly. The choice was whether to make property rights subject to law or to treat them differently.[306] The Constitutional adviser to the Constituent Assembly, Shri B. N. Rau, in his preliminary notes on Fundamental Rights saw the difficulty of reconciling freedom as a fundamental right and freedom cut into by the state for public good. He said:

> "The difficulty is in defining the precise limits in each case and in devising effective protection for the rights so limited. Some of the Constitutions have attempted to define the limits of some of these rights and in doing so have gone far towards destroying them. As an example, we may take Article 153 of the Germen Constitution. Law

[306] M. Hidaytullah, 'Right to Property and the Indian Constitution', Calcutta University, 1983

> defines its extent and restrictions placed upon it. Expropriation may be effected only for the benefit of the general community and upon the basis of law. It shall be accompanied by due compensation save in so far as may be otherwise provided by a law of the Reich..... In other words, rights of private property are said to be inviolable except where the law otherwise provides, which means that the rights are not inviolable."

Sir Alladi Krishnaswamy and K. M. Munshi went by the American precedent, which says: "No person shall be deprived from his life liberty and property without due process of law." However, in Article X where the right to property was dealt with it was said in the description of right:

> "(4) Expropriation for public uses only shall be permitted upon condition determined by law and in return for just and equitable consideration determined according to principles laid down by it."

Here 'just and equitable consideration' is condition precedent. In the discussion it was noticed that if sub clause (4) were included as a Fundamental right. 'Tenancy legislation which takes away certain rights from landlords and transfers them to tenants, without payment of compensation, may become invalid except on payment of compensation which the court regards as just.' However this argument neither was nor accepted and by majority of 5 to 2 the clause was retained with the words 'just' and 'equitable'. However clause (4) was recast again to make it applicable generally and in its final shape it read:

"No property, movable or immovable, of any person or corporation including any interest in any commercial or industrial undertaking shall be taken or acquired for public use unless the law provides for payment of just compensation for the property taken or acquired and specifies the principles on which and the manner in which compensation is to be determined."

By the decision of the Advisory Committee to remove from private property the protection of due process the Legislature had gained in power at the expense of the Judiciary and perhaps of abstract justice. The day after the Advisory Committee took this action; it moved to restrict further the power of the Courts to review property legislation. On 22 April the Advisory Committee took up the rights Sub-Committee's draft clause that property could be acquired for public use only on the payment of just compensation-'just' being the word that clearly left the provision open to judicial interpretation. Ayyar opined that the wording of the clause was close to that of section 299 of the 1935 Act, which have never interfered with the acquisition of property. He added: 'After all, "compensation" carries with it the idea of "just compensation". Therefore the word just compensation has been used.[307]

With the right to possess property guaranteed in the Constitution, the Assembly again considered the extent of the state's power to deprive a person of his property in the name of social justice, Article 24 of the draft Constitution was little

[307] Granville Austin, "Indian Constitution: Cornerstone of Nation" p. 88, Oxford University Press

different from sec. 299 of the 1935 Act and was thus, in essence like the provision the Assembly had adopted in May 1947.

Finally at the time of the adoption of the Constitution on 26th November 1949, Article 31 was read as:

"(1) No person shall be deprives of his property save by authority of law.

(2) No property, movable or immovable including any interest in or in any company owing, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession of such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

One may notice that the words 'just' and 'equitable' were finally dropped from Article 31(2). The only safeguard was the president assent. The die was cast, the Constitution guaranteed compensation or the principles on which the compensation was to be determined It also made the right of property a Fundamental Right which meant that remedies for the enforcement of Fundamental rights guaranteed by the Constitution were available.

Several speakers warned Pandit Nehru and others of the danger of second clause of Article 31, but it seems that the Constituent assembly quite content that under it the judiciary would have no

say in the matter of compensation.[308] Mahatma Gandhi too of the opinion that if compensation had to be paid we would have to rob Peter to pay Paul! Burt in the Constituent Assembly, the Congress was satisfied with the report of the Congress agrarian Reform Committee 1949 which declared itself in favour of the elimination of all intermediaries between the state and the tiller and imposition of prohibition against subletting. Thus, in the debate, many amendments and suggestions to alter the draft article-protecting property was failed.

This section and section 300 have corresponding provisions in our constitution. Section 300 protects certain rights, privileges and grants and this section represent safeguards against arbitrary state action.

The Constituent Assembly examined the Constitution of several countries, which guaranteed these basic rights. While drafting Article 19 (1)(f) and Article 31, the debate in the constituent assemble clearly indicate that the framers of our Constitution attached sufficient importance to property to incorporate in the chapter of fundamental rights.

To sum up, the guarantee of the property rights was there, the consequences of the breach of the guaranteed were clearly stated and the remedy itself was guaranteed under Article 32 of the Constitution. Even the Court's power could not be suspended arbitrarily. The High Courts were also given cognate powers but the provisions were only enabling and did not erect a guarantee. Looking to the development relating to the property rights, one can say that if the Constituent Assembly thought that by not

[308] M. Hidaytullh, 'right to property and the Indian Constitution', p.141, Calcutta University, 1983

using the words 'just' and 'adequate', interference from Courts would be avoided they were mistaken. The Problems arose almost at once in two cases.[309]

The First case was in relation to the Bihar Land Reforms Act, 1950.

### 5.1.4 The (Constitution First Amendment) Act, 1951

The earlier concept for private property conflicts with the preambular pledge to secure Social justice. The post-Constitution development intensified this conflict. The Planning commission of independent India in its first plan proposed programme of development for structural changes in the economic order to help the poor which stroke to the concept of private property retained by the constitution.

Nehru has identified the first task of free India- "to feed the starving people and clothe necked masses and to give every Indian fullest opportunity to develop himself according to his capacity."[310] He warned, "If we cannot solve this problem soon, all our paper Constitutions will become useless and purposeless."[311] He said, "India, which was about to break loose from bondage, as on the eve of revolutionary changes, revolutionary in every sense of the word."[312] He wondered

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[309] M. Hidaytullh, 'right to property and the Indian Constitution', p.146, Calcutta University, 1983

[310] II Constituent Assembly Debate, 316 (Government of India publication)
[311] *ibid* at p. 317
[312] *ibid* at p.323

whether the Constitution could withhold "the bursting forth of energy of a mighty nation."[313]

Under Article 31 persons are protected against state interference with their property. It does not purport to prevent wrongful individual acts. Moreover, article 31 does not prevent acquisition by the Union of property belonging to state. Before a party can complain of an infringement of its fundamental right to property, it must establish that it had title to it and if this title is in dispute and sub-judice it cannot put forward any claim based on its title until it is established in law.[314]

Thus, Article 31 protects the right to property by defining limitations on the power of the state to take away private property without the consent of the owner.

Though, Article 31 remains no more part of the Constitution, affords very fascinating area in the study of judicial response to exclusion of jurisdiction and its repercussions. The Supreme Court in eagerness to protect the right to property took advantage of the ambiguity in the constitutional provisions. The failure of the court to act in tune with the intention of the legislature ultimately led to the deletion of the fundamental right to property.[315] Various stages of confrontation between the Supreme Court and Parliament in the arena of property rights are interesting and deserve our attention.

Article 31(2), as it originally was, read as follows:

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[313] *ibid* at p. 324

[314] Bokaro v. State of Bihar, AIR 1963 SC 516

[315] N. K. Jayakumar, 'Judicial Process in India', P.16 APH publishing corporation, New Delhi

"No property movable or immovable, including any interest taken in, or any company owing, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides foe compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined or give The two essential ingredient of the doctrine of eminent domain, viz. public purpose and payment of compensation, were included in the article. There was a conflict in the constitutient assembly between those who wanted 'just' compensation for the acquisition of the property and those who thought that it would be denial of 'social justice to masses'.[316] Instead of resolving this conflict in clear and unequivocal terms, the Constituent assembly left the matter to the judicial process.[317]Legislations and state laws passed within a certain period were expressly protected, thereby leaving the validity of future laws open to judicial scrutiny. Neither the meaning of the word 'compensation' nor its justiciability was clearly spelt out. "

It has been observed by Austin, that Nehru may or may not have believed that Article 31 would stand the test of time, that it was adequate to India's social needs as he saw them. In any case the first moves to amend Article 31 began with five months of Patel's

[316] Constituent Assembly Debate, III p. 511

[317] Mohammed Ghouse, "Agrarian Reforms: Power, Politics v. Social Engineering" X Indian Bar Review 599(1983)

death, and there have been several subsequent amendments to the property provision.

Immediately after the commencement of the Constitution, certain agrarian reform measures were passed by a number of state legislatures. The High Courts were moved on behalf of the land lords, whose lands had been taken away as much less than their prevailing market value. These were challenged in the courts as inconsistent with Articles 14, 19 and 31.[318] The Patana High Court upheld the objection that the differential rates of compensation provided under the land reform legislation, whereby the rates of the compensation tapered down as the value of the land went up, were discriminatory. In order to clarify the situation, the Constitution (First Amendment Act) was passed in 1951. One can also say that the decision in two cases[319] led to the First Amendment of the Constitution. The amendments were in many directions. They were:

1. Insertion of Article 31 A Retrospectively from 26th January 1950
2. Insertion of Article 31 B
3. Insertion of 9th Schedule containing a list of 13 acts of the Sate Legislatures.

Article 31 A saved any law which provided for the acquisition by the State of any 'estate' or any rights therein or for the extinguishments of or modifications of any such rights and they would not be deemed to be void on the ground that they were inconsistent with or took away or abridge a Fundamental Right.

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[318] Kameshwar v. Sate of Bihar

[319] Kameshwar Singh v. Sate of Bihar AIR 1952 SC 252, Bela Benerjee v. State of West Bengal, AIR 1952 Cal. 554

The new Article 31 B was included which, read with Schedule 9 validated 13 Acts and regulations. They were 'not to be deemed void' or 'ever to have become void' on the ground that they took away or abridged the provisions of part III on Fundamental Rights, and no judgment to the contrary was to prevail. Schedule 9 mentioned the titles of the 13 Acts, saved from the onslaught of part III.

These provisions silenced not only the Courts but emasculated Article 13 (1) and (2). Even if any of the Acts had driven a coach and pair through the Fundamental Rights guarantees, it could not be questioned and if it was in fact unconstitutional, it became constitutional.[320]

The validity of the Constitution (First Amendment) Act was questioned before the Supreme Court in *Shankari Prasad v. Union of India*[321], which became the landmark in the history of the Indian Constitution. The judgment of the court was delivered by Patanjali shastri J. The learned judge summarized the arguments made by Counsel challenging the Act. They are:

- That the power of amendment was conferred on the two Houses of parliament by Art. 368 and the Provincial Parliament was, therefore, not competent to act having only a single House.
- The powers conferred by Art. 379 on the Provincial Parliament could only refer to such powers as were capable of being exercised by the Provisional Parliament consisting of only one chamber.

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[320] M. Hidaytullah, "Right to Property", p. 148, Calcutta University, 1983
[321] AIR 1951 SC 458

- Art. 368 did not provide for amendments during the passage of the Bill but amendments were suggested and accepted, which was not permissible.
- The Amendment fell within the force of Art. 13(2) and thus void.
- Art. 31 and 31 B required ratification by at least half the States because the protected Acts related to matters, which were in the state list.

The Supreme Court rejected all these contentions and upheld the amendment of the Constitution. The Supreme Court however, refrained from expressing an opinion on the latter part of Art. 31 B as the point was not argued before the Court.

### 5.1.5 The (Constitution Fourth Amendment) Act, 1955

In *Gujarat v. Shantilal*[322], the question of compensation arose again. Two important propositions on the meaning of compensation and its justiciability were laid down in this case.

1. If compensation fixed by the Legislature and by the use of the expression "compensation" we mean what the Legislature justly regard as proper and fair recompense for compulsory expropriation of property and not something which by abuse of legislative power though called compensation is not a recompense at all or is not a just equivalent...the principles specified for determination of compensation will also be not open to challenge on the plea that the compensation determined by the application of those principles is not just equivalent.

[322] AIR 1969 SC 634

2. Principles may be challenged on the ground that they are irrelevant to the determination of compensation, but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation.

The scope of judicial review was admitted to be limited to two instances:

I. When the compensation is illusory, which amounts to an abuse of legislative power;
II. When the principles are irrelevant to the determination of compensation

One would have expected the Supreme Court to admit frankly that this was an area where the legislative will had to prevail and the scope of judicial scrutiny was limited to the extreme case of an abuse of legislative power or fraud on the Constitution.

In *State of Gujarat v. Shantilal Mangaldas*,[323] Shah J. observed:

> "The decision of this Court in two cases- *Mrs. Bela Banerjee's case* and *Subodh Gopal Bose's case* were therefore likely to give rise to formidable problems when the principle specified by the Legislature as well as the amounts determined by the application of those principles, were declared justiciable. By qualifying "equivalent" by the adjective "just" the inquire was made more controversial; and apart from the practical difficulties, the law declared by this Court also placed serious obstacles in giving effect

[323] AIR 1969 SC 648

to the directive principles of state policy incorporated in Article 39."[324]

Now the 'relevance test' propounded by the learned judge in *Shantilal* showed its ugly face. The principle should be relevant to the determination of compensation, satisfying two conditions, viz.

1. That it should be an equivalent in money of the property compulsorily acquired;
2. It should be reasonable

It has to be noted that the concept of 'reasonableness' in Article 19 was thus introduced into Article 19 for the first time.[325]

The Supreme Court's decision in *West Bengal v. Bela Benerjee*[326] that 'compensation' was a justiciable matter cannot, therefore, be characterized as an attempt to assume jurisdiction where none existed. However, the other interpretation of the word 'compensation' as just equivalent of the property expropriated ignoring the concept of "equitable compensation" marks the beginning of the attitude dominated by a strong desire to safeguard the right to property. This approach, in a later stage, prevailed over the Supreme Court to go even against express words in the Constitution. It is also observed that this approach of the Supreme Court has raised serious problems in the implementation of certain socio-economic measures.

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[324] *ibid*
[325] AIR 1969 SC 601
[326] AIR 1954 SC 170

The conflict between the judiciary and the legislature in the matter of interpretation of the relationship between clauses (1) and (2) of Article 31 and of the word 'compensation' in Article 31(2) resulted in the Fourth Amendment to the Constitution in 1955.

One can also say that the Parliament quickly reacted to *Bela Banerjee* and Constitution (Fourth Amendment) Act was introduced. It is clear that the Amendment was introduced to do away with the hazardous problems created by *Bela Banerjee* in the enactment of socio-economic legislations. Article 31(2) was amended to make adequacy of the compensation non justiciable. In *Vajravelu v. Special Duty Collector*,[327] reliance was placed on the retention of the word 'compensation' and principles as defined by the Court in *Bela Banerjee*. Any law for acquisition or requisition had, therefore, to provide for a just equivalent of what owner had been deprived of or specify the principles for the purpose of ascertaining the "just equivalent" of what the owner had been deprived of.[328] This decision had been characterized to be the product of "Marshall-like resourcefulness" by blackshield.[329]

Here, in our discussion, the ideological bias of the Supreme Court is not of crucial relevance. We are concerned with the constitutional limitations on judicial decision-making. The main queries to be answered in this context are:

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[327] AIR 1965 SC 1017

[328] *ibid*

[329] Blackshield, " Fundamental Rights and the institutional viability of the Indian Supreme Court", 8, J.I.L.I. 139, (1966)

1. What was the scope and extent of exclusion of judicial review proposed to be achieved by the Constitution (Fourth Amendment) Act, 1955?
2. How did the judiciary react to this exclusion of jurisdiction, and why?
3. How far this judicial attitude was in consonance with the broader objectives and pattern of the Constitution and the legal system?

Now if we peep into the past one can observe that the predominant opinion in the Constituent Assembly, as revealed from the speeches of leading members, was that the adequacy of compensation would not be open to judicial scrutiny.[330] They however failed to give unambiguous expression to this in the relevant constitutional provisions, deliberately or by oversight. The decision of the Supreme Court in *Bela Benerjee* that compensation in Article 31 (2) meant a "just equivalent" cannot, therefore, be criticized as an attempt to usurp judicial review power of by the judiciary. But it cannot be said of the decisions of the Court after the Fourth Amendment. It is clear that the Amendment was introduced to do away with the hazardous problems created by *Bela Banerjee* in the enactment of socio-economic legislation. A clear and express exclusion was inserted in Article 31 (2), which gave expression to the unequivocal intention of the law-making body to place the question of compensation beyond the reach of judiciary.

The *Bela Benerjee case*[331] was indeed a landmark in the history of judicial interpretation of property right in India, and a great

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[330] Granville Austin, "The Indian Constitution: Cornerstone of a Nation" p. 87
[331] AIR 1954 SC 170

challenge to the government and the Parliament, which wanted to fulfill their social and economic programmes for public welfare. While speaking for majority, Shastri C. J. observed:

> "While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principle must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of."[332]

In *Sagir Ahmed v. State of U.P.*,[333] the Court held that substantial deprivation of property amounts to acquisition, hence compensation must be provided. The Constitution (Fourth Amendment) Act, 1955 was, therefore, passed by the Parliament to counteract all these decisions and to keep the question of adequacy of compensation outside the purview of justiciability.

### 5.1.6 The (Constitution Seventeenth Amendment) Act

It is to be noted when Parliament, in exercise of its constituent power, amends the Constitution to curtail or take away judicial review power in a particular area; the wisdom of that decision is beyond challenge. In the case of Fourth Amendment, the competency of parliament, to make such an amendment was not questioned. Once the Amendment is validly incorporated in the Constitution, it is the duty of the judiciary to give full effect to the amendment. The refusal of the court to do so dragged it into

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[332] *ibid*
[333] AIR 1954 SC 728

the arena of political controversy. The court was accused of adopting a "right wing" attitude.[334]

Without entering into the question of political bias, one may observe that the Supreme Court ignored a constitutional limitation on its power of review, imposed by Parliament in exercise of its constituent power. Such an attitude appears to have originated from a misconceived notion of the role of the judiciary, i.e. in spite of constitutional or other limitations; it is the task of the judiciary to perform the role of adjudicator in every dispute and to safeguard the rights of individuals against any encroachment. The Court place undue emphasis on the right to property and the role of the court as the defender and the protector of that right. In its enthusiasm, the Supreme Court placed a strained interpretation on the effect of the Fourth Amendment, which in fact rendered it nugatory. The Court thus overstepped the jurisdictional limitations imposed by the Parliament in exercise of its constituent power through a validly enacted constitutional amendment.

The question of interpretation of Article 31 (2) came for consideration in several cases after enactment of the Fourth Amendment. The Supreme Court neutralized the effect of those constitutional amendments through two decisions, namely, *K. K. Kochuni v. State of Madras*[335] and *P. Vajravelu v. Sp. Deputy Commissioner*[336]. In *Kochuni v. State of Madras*,[337] the Court came to the conclusion that in all cases of deprivation of property other than those involving a transfer of ownership or

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[334] H. M. Jain, "Right to Property Under the Indian Constitution" p.124
[335] AIR 1960 SC 1080
[336] AIR 1965 SC 1017
[337] AIR 1960 SC 1080

right to possession of that property to the state, the validity of that law should be tested under clause (5) of Article 19. All laws that fall under Article 31 (1) should necessarily fall under Article 19 (1) (f) read with Article 19 (5). The Court thus made radical departure from its previous position regarding the relationship between Article 19 (1) (f) and Art. 31 (1), and also held these two Articles deal with the same subject, namely, property. The effect of the *Kochuni decision* was to provide a complete umbrella to property rights in matters of restrictions, deprivation, acquisition and requisition.[338]

In this case, Article 19 (1) (f) and Article 31 (1) have been so interpreted as in effect to bring the requirement of due process of law in field of property rights in Indian law. In spite of the meticulous wording of the Fourth amendment, the result which achieved, only indicates the operation of a sort of Parkinsonion law in constitutional draftsmanship, whereby over-elaborate statutory provisions merely result in leaving the Court with a choice of alternative interpretations.[339] The scope of Art. 19 (1) (f) was, indeed, expanded to limits never intended by the Constitution makers, and it is no wonder that after this decision, 19 (1) (f) became the "sheet anchor of vested interests in their oppositions to progressive legislation."[340] In *Kunhikoman v. State of Kerala*,[341] the validity of Kerala Agricultural Relations Act of 1961 was involved. The Supreme Court held that the interest covered by Kerala law were not protected by that Article, but that the law offended the equality provisions of Art. 14, by failing to

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[338] V. S. Rekhi, "The Kochuni Decision: A rejoinder", In Journal of the Indian Law Institute, Vol. 8 p. 111

[339] T. S. Rama Rao," Chief Justice Subba Rao and Property Rights" in Journal of Indian Law Institute, Vol. 9, No. 4, p. 574

[340] H. M. Jain, " Right to Property Under the Indian Constitution", p. 132, 1968

[341] AIR 1962 SC 723

meet 'intelligible differentia' test for classification of land ceilings, by making unfair discrimination in its definition of 'family', and by its discriminatory scheme of graduated compensation.

he decision in *Kunhikoman case* provoked the introduction of the Constitution (Seventeenth Amendment) Bill in the Lok Sabha, which came in way of government's answer to the Supreme Court's decision in this case, and which was reportedly brought about for the purpose of giving further effect of certain socio-economic policies laid down by various provisions. The Constitution (Seventeenth Amendment) Act, 1964, sought to exclude in effect most of the laws from the protection of Fundamental Rights conferred on all persons. Art. 31 A was expanded so as to bar the application of Arts. 14, 19 and 31. The Ninth Schedule was enlarged to 64 Acts dealing land reforms, and these were not to be challenged on the ground that they are violative of Fundamental rights.

The conflicting pattern of judicial decisions in relation to property rights became more evident, during the post-Seventeenth Amendment era.

In P. *Vajravelu Mudliar v. Special Deputy Collector, Madras,*[342] the Madras Government Amendment of the Central land Acquisition Act of 1894 to cover the acquisition of land for urban housing schemes was involved. The Supreme Court, in this case had to interpret Art. 31 (2) and the scope of judicial power to scrutinize the quantum of compensation and the principles applied in determining compensation in the light of the Fourth Amendment. The Court once again sought to strike at the 4th

[342] AIR 1965 SC 1017

and the 17th Amendments. It held that the 17th Amendment Act to be discriminatory since it could not be upheld on the principle of reasonable classification, because if a land is acquired for housing scheme under the Amending Act, the owner would get lesser value than he would have got for the same land under the principal Act.

Art. 31 A, as amended by the Amendment Act is confined to agrarian reforms and does not apply to acquisition of property for other purposes. Subba Rao C. J. in delivering the judgment of the Court, observed that "the expressions 'compensation' and 'principles' in Art. 31 (2) before the Constitution (Fourth Amendment) Act, 1955, have received an authoritative interpretation by the Supreme Court and it must be presumed that Parliament did not intend to depart from the meaning given by the Court to the said expressions, namely, that 'compensation' was a 'just equivalent' of what the owner had been deprived of and the 'principles' were only principles for ascertaining the 'just equivalent'."[343]

The decision of the Supreme Court in Vajravelu case sought to echo the spirit of the *Bela Benerjee case* by opening the question of the adequacy of compensation, and consequently, by entering into the field of legislative policy.[344] In the case of Vajravelu, the learned Chief Justice further observed:

> "Under Art. 31 (2) as amended by the Constitution (Fourth Amendment) Act, neither the principles

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[343] *ibid*

[344] S. N. Ray, Judicial Review and Fundamental Rights, p. 235, Eastern law House, Calcutta, 1974

prescribing the 'just equivalent' nor the 'just equivalent' can be question by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. But, if the compensation is illusory, or the principles prescribed are not relevant to the property acquired or to the value of the property at or about time it is acquired, it can be said that the legislature committed a fraud on power and, therefore, the law is bad."

In this case, the Chief Justice introduced the concept of 'colourable legislation', meaning that "the legislature has transgressed its legislative powers in a covert or indirect manner; it adopts a device to out step the limits of its power." Also, he summarized the scope of judicial review by pointing out that

> "If the question pertains to inadequacy of compensation, it is not justiciable; if the compensation is fixed or the principles evolved for fixing it disclose that the Legislature made the law in fraud of powers in the sense we explained, the question is within the jurisdiction of the Court."

*Vajravelu*[345] devised a method to devitalize any amendment of the right to compensation so long as the Land Acquisition Act continues to insist on payment of potential value of the acquired property together within 15 percent solatium. The Supreme Court held that availability of two different modes of compensation, one more favourable to the government than

[345] AIR 1965 SC 1017

other, was repugnant to equal protection of laws enshrined in Article 14.

In *Union of India v. Metal corporation of India Ltd.*[346], the Supreme Court struck down as unconstitutional the Metal Corporation of India (Acquisition of Undertakings) Act of 1965 which was passed with a view to acquiring in the public interest a business undertaking of the Metal Corporation of India. In dismissing the appeal of the Government of India, Subba Rao, C. J., observed that under Art. 31 (2) of the Constitution, no property could be acquired and either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given.[347] The decision in this case would result in a position in which the provision of the Fourth Amendment saying that no law can be called in question in any court on the ground that the compensation provided by that law is not adequate must be taken to have been substantially abrogated.[348]

The Metal corporation decision was, however overruled by the Supreme Court in State of *Gujarat v. Shantilal Mangaldas*[349] involving the Bombay Town Planning Act of 1955. The Court observed, per Shah, J. that compensation payable for compulsory acquisition of property is not, by the application of any principles, determinable as a precise sum, and by calling it a 'just' or 'fair' equivalent, no definiteness could be attached thereto; that valuation of lands, buildings and incorporeal rights has to be made on the application of different principles; that the

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[346]AIR 1967 SC 637
[347] *ibid*
[348] H. M. Jain, Right to Property
[349] AIR 1969 SC 634

application of different principles leads to widely divergent amounts, and since compensation is not capable of precise determination by the application of recognizes rules, by qualifying the expression 'compensation' by the adjective 'just', the determination was made more controversial.[350]

Further the court felt inclined to exercise its power of review if the compensation paid was "illusory", or the principles laid down to assess the same were "irrelevant" for the purpose of determining compensation. The *Shantilal* decision, by all accounts, therefore, marks a great retreat from the *'Vajravelu'* and "Metal Corporation" approaches, and seems to have restored much greater freedom to the Parliament in the sphere of 'compensation' and correspondingly much greater restriction on judicial discretion.

Before dealing with the next landmark in judicial decisions, viz., the famous Bank Nationalization case,[351] it would be appropriate to refer briefly the very famous case of *Golaknath* v. State of Punjab.[352] The issue behind this case was the validity of the Constitution (Seventeenth Amendment) Act, 1964 on the touchstone of the fundamental rights, especially the protection afforded by Art. 31 and Art.19 (1) (f), as well as a protest against a ceiling on the amount of land that an individual could continue to hold. So far as right to property is concerned, it was pointed out that the Constitution (First Amendment) Act, 1951, the Constitution (Fourth Amendment) Act, 1955 and the Constitution (Seventeenth Amendment) Act, 1964, abridged the

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[350] *ibid*
[351] AIR 1970 SC 564
[352] AIR 1967 SC 1643

scope of fundamental rights, especially the right to property, and were therefore invalid.

The Court held that nevertheless, because these amendments had been regarded as valid in the past and had served as the basis for a redistribution of rights in land, they would be accepted as operative. On the basis of the doctrine of 'Prospective overruling' the court ruled that the said Amendments would continued to be valid, but that Parliament would have no power from the date of this decision to amend any provision of part III so as to take away or abridge the Fundamental Rights enshrined therein. In his separate concurring judgment, Hidaytullah J., after review of the past decisions of the Supreme Court that had led the Government to amend the Constitution, found that the need for most of these amendments could have been avoided if the Court had interpreted the Constitution by a more flexible attitude responsive to Parliamentary and government policies. According to him, the three Amendments had made deep inroads into the original right to Property; but he wondered why this right, one of the weakest, was included in the chapter on Fundamental Rights. He expressed his definite opinion against the Seventeenth Amendment which had added 44 acts and regulations to the Ninth Schedule making them immune from judicial challenge on the basis of the Fundamental rights, and was apprehensive that "the erosion of the Right to Property may be practiced against other Fundamental Rights."[353] Upendra Baxi has made critical comment on *Golaknath* decision:

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[353] Justice Hidaytullah, Right to Property and Indian Constitution, p. 164 Calcutta University, 1983

> "One major drawback of judicial reasoning in *Golaknath* is the astonishing indifference to economic, as distinct from political aspects of decision. While the learned judges no doubt showed Marshallian awareness that it was a Constitution they were expounding. They showed little or no awareness that simultaneously it was the right to, property, in a mid-twentieth century subsistence economy, that they were also expounding... in thus being abstractly preoccupied with 'democracy' and 'fundamental rights', the decision results in a disservice to both."[354]

The judicial response to clause 2 (A) of Article 31, A which leaned towards protecting property rights in relation to Rayatwari lands, was the provocation for the Constitution (Seventeenth Amendment) Act, 1964. Even here it is significant to note that the second proviso to Article 31 A (1) as substituted by this Amendment provided for the principle of market value compensation for agricultural lands taken for a public purpose, from holdings within permitted ceilings. In *Sajjan Singh v. state of Rajsthan*,[355] certain entries to the 9th Schedule on the ground that such addition to 9th Schedule was to take away the citizen right to challenge the validity of the Acts added to 9th Schedule and consequently the relevant fundamental rights of the citizens. The essence of this challenge was to place limits for Parliament's power of amendment arising probably from distrust of Parliament protecting selected community values. The challenge sought to protect the preferred value of 'judicial review' of the acts of lesser Sovereignty. For the First time the challenge also

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[354] Upendra Baxi, "The Little Done, the Vast Undone-Some Reflections on reading Granville Austin's The Indian Constitution", in Journal of Indian law Institute, Vol. 9, No. 3, 1967, p. 382

[355] AIR 1965 SC 845

sought to make the point that constitutional guarantee of rights was part of the value structure of the Constitution and could not be upset by any act of the lesser Sovereignty.

Now if we discuss the latest in the series of judicial decisions, namely *R. C. Cooper v. Union of India and others*, popularly known as the *'Bank Nationalization Case'*[356], which not only sparked off a fresh spate of controversy in the country by striking down a Parliamentary enactment apparently intended to "serve better the needs of development of the economy in conformity with national policy and objectives." (The Banking Companies (Acquisition and transfer of Undertaking) Ordinance, 1969) The significance of this case also lies in the fact that is not only "created immediate problems relating to the acquisition of Banks," but also raised a larger and more fundamental question relating to the extent of authority of the supreme Court over other organs of the Government, when they are vested with specific powers under the Constitution itself.[357]

The fact of the case is that on July 19, 1969, the Vice President of India, acting as President, in exercise of the power conferred by clause (1) of Art. 123 of the Constitution of India, promulgated The Banking Companies (Acquisition and Transfer of Undertakings) Ordinance 8 of 1969, transferring to and vesting the undertaking of 14 named commercial banks in corresponding new banks set up under the Ordinance. The said bill to enact provisions relating to acquisition and transfer of undertakings of the existing banks was introduced in the

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[356] AIR 1970 SC 564

[357] S. N. Ray, "Judicial Review and Fundamental Rights", p. 239, Eastern law House, Calcutta, 1974

Parliament, and was enacted on August 9, 1969. The validity of the Ordinance and the Act was challenged by the petitioner, Mr. R. C. Cooper, on the following grounds:

1. That the Ordinance promulgated in exercise of the power under Art. 123 of the Constitution was invalid, because the condition precedent to the exercise of the power, that is, the satisfaction of the President, did not exist.
2. That in enacting the Act, Parliament encroached upon the state list in the Seventh Schedule of the Constitution, and to the extent, the Act was outside the legislative competence of the Parliament.
3. That by enactment of the Act, Fundamental Rights of the petitioner guaranteed by the Constitution under Articles 14, 19 (1) (f) and (g) and 31 (2) were impaired.
4. That by the Act the guarantee of Freedom of trade under Article 301 was violated.
5. That in any event retrospective operation given to Act 22 of 1969 was ineffective, since there was no valid Ordinance in existence. The provision in the Act prospectively validating infringement of the Fundamental Rights of citizens was not within the competence of Parliament. That sub-sections (1) and (2) of section 11 and section 26 were invalid.

In this case the Supreme Court by majority of 10:1 declared the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, entirely void on the grounds:

1. That it had made "hostile discrimination" against the 14 nationalized banks by prohibiting them from carrying on

banking business...while permitting other Indian and other foreign banks to carry on such business

2. That it imposed unreasonable restrictions on these banks from carrying on non-banking business as defined in Sec. 5 (8) of the Banking Regulation Act, 1949
3. That it violated the guarantee of compensation under Art. 31 (2) in that it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation of the undertaking of the 14 named banks, and by the method prescribed the amounts so declared could not be regarded as 'compensation'.

Thus, in this case, the Court admitted that the Act was within the legislative competence of Parliament under Entry 45 list I and Entry 42 List III, that it was not the forum for considering relative merits of the different political theories or economic policies, and that it would not sit in appeal over the policy of the parliament in enacting a law. Yet, on the question of compensation, the Court did not hesitate to strike down the Act since, according to the Court, the Act failed to provide to the expropriated banks compensation determined according to relevant principles. The Court, speaking through Shah, J., defined compensation as being "the equivalent in terms of money of the property compulsorily acquired"-thus signaling a reversion to *'Bella Benerjee'*, *'Vajravelu'* and 'Metal corporation' after a brief interlude in *'Shantilal Mangaldas'*.[358] The Court declared that a "principle specified b the Parliament for determining compensation of property to be acquired is not conclusive", and

[358] S. N. Ray, "Judicial Review and Fundamental Rights", p. 242, Eastern law House, Calcutta, 1974

if that view be accepted, "the Parliament will be invested with a charter of arbitrariness and by abuse of legislative process the constitutional guarantees of the right to compensation may be severely impaired". Also it was held that the Act, instead of providing for valuing the entire undertaking, as a unit, provided for determining the value of only some of the components, which constituted the undertaking, minus the liabilities.[359] The *'Bank Nationalization'* judgment has served to highlight the conflicting trends in judicial decisions in relation to property rights since the very beginning of the working of the Indian Constitution. Two broad conclusions emerge from a survey of these decisions. They are:

i. The Supreme Court's interpretations of the nature and extent of Right to Property, especially of the controversial question of 'compensation', scope of Art. 31 (2) and the inter-relationship between Art. 31 (1) & (2) and art. 19 (1) (f) & Art. 19 (5), have displayed a perplexing variety and contradiction so that it becomes positively difficult to discover a definite direction or dimension so far as constitutional philosophy is concerned.

The Supreme Court's judgment in the *Bank Nationalization case* undoubtedly created problems for the Government in its endeavor to bring about rapid economic development in the country. These problems had duly met in the shape of the historic 25th Amendment to the Constitution.

ii. In spite of the conflicting patterns and directions, one can deduce a general tendency towards 'judicial activism'

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[359] *ibid*

in the decisions of the Supreme Court on the question of compulsory acquisition of private property for public purpose. The same Court, which rejected the 'due process of law' clause in the *Gopalan case* as inapplicable in the field of personal liberty, sought to introduce this phrase in the domain of property rights. By and large, except in certain specific cases, the Court has tended to follow a policy of strict constructionism and, by its rigid adherence to the sanctity of right to property, it has ignored the claims of social justice and economic development.

Also, by forsaking the doctrine of "judicial self-restraints" and "judicial deference" to legislative policy, it has brought itself into open confrontation with the legislative organ. But this precisely what the judicial should avoid. It has been very persistently observe that in dealing with legislative enactments undertaken by Parliament or state legislature for implanting the economic principles in question, judicial approach must take into the account the felt necessities of the time, the philosophy of social justice which has been accepted by the nation, not as a mere code of abstraction, but as a hard and compelling realities.[360] Also, Upendra Baxi observed, "Maintenance to Right to Property either in its liberal ideological purity, or in its constitutional chastity, may ill prove dysfunctional for the viability of a constitutional regime which the law and its upholders, the Courts, are dedicated to promote, and have been so far instrumental in promoting."[361]

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[360] P. V. Gajendragadakar, "The Indian Parliament and the Fundamental Rights" p. 202, Eastern law House Calcutta, 1972

[361] Upendra Baxi. "The little done- The vast undone" JILI Vol. 9 No. 3 p. 384

So in nutshell, what the Supreme Court of India has failed to understand, and appreciate is that in interpreting such controversial and explosive word like "compensation", it should take into the account not only the aspirations and ambition and nation, but also the socio economic realities of the country. The Supreme Court judgment in *"Bank Nationalization"* case forced the government to enact the Constitution (Twenty Fifth Amendment) Act, 1971 which brought about drastic and far reaching changes in the nature of quantum of property rights under the Constitution of India. As explained by Shri H. R. Gokhale, the then Union Law minister, on the floor of Lok Sabha,[362] "in the *Bank Nationalization case,* the continued use of the word 'compensation' led to the interpretation that the money equivalent of the property acquire must be given for any property taken by the State for a Public purpose.

This interpretation completely renders nugatory the provision of the Fourth Amendment, which made the adequacy of the compensation fully non-justiciable. What is now sought to be done this amendment is to restore the status quo ante, which prevailed after *Shantilal Mangaldas case,* and before the judgment in the *Bank nationalization case* was delivered."[363] It is also important to remember that the amendment sought to "provide for the exclusion of the applicability of Art. 19 (1) (f) in property, which is covered by Art. 31.[364]

### 5.1.7 The Constitution (Twenty-fifth Amendment) Act

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[362] Lok sabha Debates, Fifth Series, Vol. IX, No. 12 1971, p. 220
[363] *ibid*
[364] Ibid

Thus, the Twenty Fifth Amendment has three outstanding features, and has sought to introduce three sweeping changes in the context of the Right to Property in particular and Fundamental Rights in general.

Firstly, it amended Art. 31 (2) of the Constitution by substituting the expression 'amount' for the expression 'compensation' which had been subjected to conflicting interpretations by the Supreme Court in different cases since 1951. In place of old clause (2), a new clause (2) was inserted which says that:

> "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the whole or any part of such amount is to be given otherwise than in cash."

Secondly, The Twenty Fifth amendment Act inserted a new Clause 2(b) after Cause. 2 (A) in order to exclude the applicability of Art. 19 (1) (f) to cases of acquisition or requisitioning of property under Art. 31 (2). It provides that "nothing in sub clause (f) of Clause (1) of Art. 19 shall affect any such law as is referred to clause (2). This was evidently done to set at rest the varying and sometimes contradictory interpretations given by the Court on this very important issue concerning property rights vis. a vis. Social welfare, whose

climax was reached in the *"Bank Nationalization" case.* The effect of this change is that Art. 31 (2) become an exclusive and complete code relating to infringement of the right tom property by compulsory acquisition, and scope of judicial review is substantially reduced to the point of elimination.

Thirdly, the 25th amendment inserted a new article 31 C after Article 31 B, and thus brought a radical change in the schematic pattern of the Constitution bearing on the interrelationship between the Fundamental Rights and the Directive Principles of State Policy. By virtue of Art. 31 C, once Parliament certified that a law was intended to ensure equitable distribution of material resources or to prevent concentration of economic power, it could not be challenged under Art. 14, Art. 19 or Art. 31.

However it has been pointed out that "the substantive provision introduce by the first part of Article 31 C marks the beginning of new era in the constitutional and political history of our country. It recognizes the primacy of two important economic principles enshrined in Article 39 (b) and (c), and enables the legislatures to give effect to them by appropriate legislation and in doing so, it provides that, even if the implementation of these two principles is not consistent with the fundamental rights guaranteed by Art. 14, 19 and 31, it will not be struck down as constitutionally invalid."[365]
Article 31 C seeks to subvert seven essential features of the Constitution.

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[365] P. V. Gajendragadakar, "The Indian Parliament and the Fundamental Rights" p. 199, Eastern law House Calcutta, 1972

a. There is vital distinction between two cases of constitutional amendment:
    - Where the fundamental rights are amended to permit laws to be validly passed which would have been void before the amendment; and
    - Where the fundamental rights remained unamended but the laws, which are void as, offending those rights are4 validated by a legal fiction that they shall not be deemed to be void.

In the first case the law is constitutional in reality' because fundamental, rights themselves stand abridged. In the second case the law is unconstitutional in reality but is deemed by a fiction of law not to be so; with the result that the Constitution-breaking law is validated and there is repudiation of the Constitution pro tanto.[366] If the second case is permissible as a proper exercise of the amending power, the Constitution could be reduced to a scrap of paper. If Article 31 C is valid, it would be equally permissible to Parliament to so to amend the Constitution as to declare all laws to be valid which are passed by Parliament or State Legislatures in excess of their legislative competence, or which violate any of the basic Human Rights in part III or the freedom of inter-state trade under Art. 301. Thus, Article 31 C clearly damages or destroys the supremacy of the Constitution, which is one of the essential features. It gives a blank charter to Parliament and all the State Legislatures to defy and ignore the Constitutional mandate regarding human rights.[367]

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[366] N. A. Palkhiwala, "Our Constitution Defaced and Defiled" p. 53, Macmillan Co. Of India Ltd. 1974

[367] *ibid*

b. Article 31 C subordinates the fundamental rights to the Directive principles of state policy and in effect abrogates the rights as regarded laws, which the legislature intends or declares to be for giving effect to the directive principles. To abrogate the fundamental rights when giving effect to the directive principles is to destroy another basic element of the Constitution.

c. It is a Fundamental principle of the Constitution that it can be amended only in the "form and manner" laid down in article 368 and according to that Article's basic Scheme. This principle sought to be repudiated by Article 31 C.

d. Within its field Article 31 C completely takes away following fundamental rights:

   - The right to acquire, hold and dispose of property [Article 19 (1) (f)],
   - The right not to be deprived of property save by authority of law[Article 31 (1)],
   - The right to assert that property can be acquired or requisitioned by the state only for a public purpose [Article 31 (2)], and
   - The right to receive an "amount", however small, when the state seizes the property [Article 31 (2)]

   In short, Article 31 c expressly authorizes outright confiscation of any property, large or small, belonging to anyone, poor or rich, citizen or non-citizen.

e. A citizen is not even permitted to raise the question whether the proposed law will result, or is reasonably calculated to result, in securing the directive principles laid down in Article 39 (b) and (c).

f. A basic principle of the Constitution is that no State Legislature can amend the fundamental rights or any other part of the Constitution. This essential feature is repudiated by Article 31 C, which empowers even State Legislature to pass laws, which virtually involve a repeal of fundamental rights. The wholly irrational consequence is that whereas the state Legislature cannot abridge a single fundamental right, it is now open to them to supersede a whole series of such rights.

Thus, newly inserted Article 31 C by way of 25th amendment to the Constitution has damaged the very heart of the Constitution. In fact, after having clear mandate from the people, the ruling Congress at the Center first proceeded to remove the constitutional hurdle in regard to its Constituent power created by the decision of the Supreme Court in *Golaknath.* This was done by the passage of the Constitution (Twenty Fourth Amendment) Act, 1971 which restored constituent power to Parliament. As a result of the *Golaknath* and the *Bank Nationalization cases* the unamendable Right to Property became an irremovable obstacle to planned development. Parliament therefore enacted 24th Amendment to overrule *Golaknath* and 25th Amendment to overrule *Bank Nationalization case.* These two Amendments provoked a great debate on the amendability of fundamental rights.

A need was felt to challenge these two Amendments in order that the whole issue could be re-examined and re-assessed by the Supreme Court, and the controversies arising out of the *'Golaknath'* judgment could be set at rest. Such a challenge was made through a batch of Writ petitions in the Supreme Court

filed by his holiness *Keshavananda Bharati* challenging the constitutional validity of the 24th, 25th and 29th amendment to the Constitution. *Keshavananda Bharati* challenged the Kerala Land Reforms Act, 1969, by which land could be taken away without adequate compensation. During pendency of the writ petition in the Supreme Court, the Kerala Land Reforms Act was included in the Ninth Schedule of the Constitution so as to immunize the Act from the challenge that it contravened in any of the fundamental rights. This case gave an opportunity to the Court to reconsider its approach to the amendability of fundamental rights and the importance of tight to property in the light of the self-evident socio-economic problems of the country. An enlarged Constitution Bench of 13 judges of the Supreme Court, after a record of 69 days of hearing in which 93 lawyers were engaged, pronounced its long-awaited judgment in the Fundamental Rights case[368] on April 23, 1973, by a 7:6 majority the Court held that the Constitution invested Parliament with the right to alter, abridge or abrogate the Fundamental Rights guaranteed by the Constitution, and that judgment given by the court in the appeal by *Golaknath* against the State of Punjab in 1967 was incorrect. While the full Court declared the 24th and 29th Amendments to be valid, the majority held that Sec. 2 (A) and 2 (B) of the 25th Amendment were declared valid.

The first part of sec. 3 of the 25th Amendment was also declared valid, but the second part namely, the words "no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not

[368] Keshavananda Bharati v. State of Kerala AIR 1973 SC 1461

give effect to such policy," was held to be unconstitutional and void."[369] Thus, a portion of Article 31 C invalidated. If we recall, the 25th Amendment, had substituted the word "compensation" in Art. 31 (2) by word "amount", and had provided that no law foxing the amount or specifying the principles determining the amount "shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that whole or any part of such amount is to be given otherwise than in cash." It had also inserted a new provision, namely, Art. 31 C, which provided that "notwithstanding anything contained in Art. 13, no law giving effect to the policy of the state towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14, Article 19 or Article 31." The Court declared these amendments valid. However, Sikri, the then C. J. has opined that the substance of fundamental right to property under Article 31 consists of three things:

I. The property shall be acquired by or under a valid law
II. It shall be acquired for a public purpose
III. The person whose property has been acquired shall be given an amount in lieu thereof, which is not arbitrary, illusory or shocking to judicial conscience or the conscience of mankind.[370]

Eight out of the thirteen judges seem to be in favour of interpreting the amended Article 31 (2) in such a way that did not oust judicial review altogether. Justice Palekar wanted to

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[369] *ibid*
[370] *ibid*

retain review when a particular law fixes an amount, which is illusory, or a fraud on power.[371] Justice Chandrachud thought that the amount should not be illusory. Justice Mathew was of the opinion that the amendment deprived the Court of any yardstick or norm for determining the adequacy of the amount and the relevancy of the principles fixed by law.

It is submitted that the view of the majority on justiciability of compensation fails to give effect to the changes introduced by the amendment. By substituting the word 'amount' foe 'compensation' and by declaring that its adequacy shall not be called in question in any Court of law. The fixation of the amount or the determination of the principles for that purpose was left entirely to legislative judgment. The amount or the principles have to be fixed with reference to considerations of social justice and not with reference to any fixed standard.

The Court asserted its power of judicial review when it pointed out that the amount should not be fixed arbitrarily and, when fixed, should not be illusory, and that the question whether the amount fixed had been done arbitrarily or illusory, or the principle laid down for determining the amount was relevant to the subject matter of the acquisition or requisition at the relevant time was open to judicial review.[372] The second part of Article 31 C referred above, was declared invalid by seven judges but on different lines of reasoning. It would be interesting to mention these reasoning.

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[371] "Whether a particular law fixes an amount which is illusory or is otherwise a fraud on power denying the fundamental right to receive an amount specifically conferred by clause (2) will depend upon the law when made and is tested on the basis of clause (2)". Keshavananda Bharati v. State of Kerala AIR 1973 SC at 1824

[372] Per Hegde & Mukherjee, JJ.

Sikri, C. J. declared it void as it delegate power to State legislatures to amend the Constitution. Khanna, J. argued that it contained "the seed of national disintegration". Hegde and Mukherjee, JJ. Though that the power conferred under Article 31 C was an "arbitrary power" and could take away in a very wide area of human activities, ant that it could be used, even by a small majority, to "stifle" the seven basic freedoms of Article 19 and thereby to "truncate or even destroy democracy".

According to Shelat, Grover and Mathew, JJ. Article 31 C permitted the destruction of the "basic" features of the Indian Constitution, and was clearly out of tune with it.

The minority view of A. N. Ray, J. was, however different. The learned judge thought that Article 31 C did not delegate or confer any power on the State legislature to amend the Constitution. It merely removed restrictions on part III from any legislation giving effect to the Directive Principles of State of Policy under Article 39 (b) and (c).

Reddy, J. in considering sec. 3 of the 25th Amendment as valid. Introduced the doctrine of severability as applied to Article 31 C, and observed, "the new Article 31 C is valid only if the words 'inconsistent with or takes away or', the words 'Article 14', and the declaration portion 'and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy', are severed."[373]

[373] Op. cit., n. 66

Beg, J. in pronouncing the validity of all the three Amendments, argued that the declaration contemplated by Article 32 C is like certificate giving after considering the relevancy of the principles specified in Article 39 (b) and (c) of the Constitution, and therefore, according to him, the jurisdiction of the Court was not ousted. Courts can still consider and decide whether the declaration is was really good or mere pretence attached to a colourable piece of legislation or to a law in Article 39 (b) and (c) of the Constitution.

According to Justice Dwivedi, so far as 29th Amendment was considered, by which certain enactments were placed within the Ninth Schedule of the Constitution and thereby protected against challenge on certain grounds, the full Court upheld its validity, but gave a direction that the Constitution Bench would now deal with the petitions by *Keshavananda Bharati* against the validity of the Constitution (Twenty Ninth Amendment) Act in accordance with the decision in this case.

Thus, the Supreme Court of India in this case, [374] has positively reversed the *'Golaknath'* ruling of blanket ban on Parliament's competence to amend the Fundamental Rights and, for that matter, the right to property, and has thereby restored to it power of amendment of the Fundamental Rights, albeit within a limited sense to mean only alteration or abridgement of the Fundamental Rights. It has, therefore, greatly facilitated the Parliament to proceed with the socio-economic measures unhindered by the prospect of judicial annulment.

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[374] AIR 1973 SC 1461

Although the invalidation of the second part of Article 31 C would appear to be regrettable, the recognition of its power to legislate to give effect to the Directive Principles of State of Policy must be appreciated. The judgment has apparently sought to strike a mean between Parliament's acknowledgement power to restrict property rights in community's interest and the responsibility of the Court to prevent abuse of this power by exercising its prerogative of judicial review.

Justice Untwalia emphasizes on "the overwhelming view of the majority judges in *Keshavananda Bharati's case* is that the amount payable for that for the acquired property either fixed by the legislature or determined on the principles engrafted in the law of acquisition cannot be wholly arbitrary and illusory[375] and thus asserts the jurisdiction of the courts to go into the question whether the amount is illusory or arbitrary. Justice Krishna Iyer's accent, on the hand, was not on the importance of retaining judicial review in this area, but on the need to be guided by "the dynamics of development".[376] He declares "quantum of the amount or the reasonable of the principles are out of bounds for the Court."[377]

In *Bhimsinghji v. Union of India,*[378] a provision in the Urban Land (Ceiling and Regulation) Act, 1976 which prescribed an amount of Rs. 2,00,000 as maximum limit on the quantum payable in respect of excess vacant land acquired under the Act, was challenged. Here the value of the petitioner's land acquired,

[375] AIR 1978 SC 215 at 224
[376] *ibid* at 239
[377] *ibid* at 249
[378] AIR 1981 SC 234

according to the principles stated for quantification of compensation, amounted to Rs. 2 crores, but he had to be satisfied with Rs. 2 Lakh, which was only 1/100 of the value of the property. The majority, in this case, did not find the amount illusory and upheld the validity of the provision. Justice Krishna Iyer Observed:

> "The various amendments to Article 31 culminating in the present provision which provided for the payment of an 'amount' disclose a determined approach by Parliament in exercise of its constituent power to ensure that full compensation or even fair compensation cannot be claimed as a fundamental right by private owner and the short of paying as 'farthing for a fortune' the question of compensation is out of bounds for the court to investigate."[379]

The decision of the Court in *Bhimsinghji* clearly shows that despite the amendments there still remains a pathway, which may lead the Court to the pre-Twenty-Fifth or even for that matter pre-Twenty-Fourth Amendment approach. The words and expression used by a judge may change; but the result produced may be the same. So, *Keshavananda* leaves the Parliament free to abrogate the right to property but not to authorize payment of any amount it deems fit to the owner of the acquired property. This curious conflict is a unique feature of this case.

Thus, right to property has become the most controversial of the fundamental rights. The citizen and the lawyer have challenged

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[379] *ibid* at 239

every kind of restriction that the Government has imposed on the right to property. That has infused and made popular the Western belief that a man's property is his own and that he can use the provisions of the Constitution to protect it. This is at variance with the Indian attitude that claims to property must be considered together with the demands of others, rather than considered exclusively.

In a final stroke, to put an end to the compensation conundrum, the Constitution (Forty fourth Amendment) Act, 1978 deleted Article 31. The new Article 330-A that was inserted by the Amendment, reads as:

> "No person shall be deprived of his property save by authority of law."

Not only this, Article 19 (1) (f) that was guaranteed the fundamental right "to acquire, hold and dispose of property" was also deleted. This was the culmination of a confrontation. The legislature wanted to exclude the judiciary from an area of decision-making; but the judiciary asserted their right to be the final decision-makers. They insisted on their right to review and were intolerant to further legislative attempts to exclude it. At times they hesitated, but again the assertive posture. This inconsistent attitude created inconvenience and retarded the implementation of several socio-economic measures.[380]

It is also opined that had the judiciary appreciated better its own limitations and shown a sense of self-restraint, the right to property would have remained in the Constitution as a

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[380] Prof. Mohammed Ghouse, "The Right to Property and Planned Development in India", R. Dhavan and Alice Jacob (ed.), Indian Constitution: Trends and Issues (1978) (1978) pp. 79

fundamental right. The failure of the Indian Supreme Court to evolve a social concept of 'property' relevant to the Indian context was the root cause of extinguishments of this fundamental right.[381]

Lastly, one can observe that it is evident from the judgment of the Bombay High Court in *Basanti bai v. State,*[382] the judicial bench inclined in favour of safeguarding the right to property at any cost and to nullify the deletion of Article 31. In this case, drawing sustenance from such concepts as eminent domain, the natural right to property and the rule of law, the Court declared "in spite of deletion of Article 31, the Constitution obligation to pay adequate amount to the expropriated owner is not taken away."[383]

Thus we can see that although the new powers of review have emerged slowly after inconsistent voting and some opposition within the Court itself, in the main all the judges appear to have approved of the new approach of the Court. In fact the Court, prompted partly by Constitutional Amendment, appears to have acquired powers of review, and used them to sustain in India the principles of Western jurisprudence.[384]

## 5.2 The (Constitution Forty-second Amendment) Act, 1976: Curbing of Judicial Review Power

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[381] N. K. Jayakumar, "Judicial Process in India: Limitations and Leeways", p. 39, APH Publishing Corporation, 1997

[382] AIR 1984 Bom. 366

[383] *ibid* at 379

[384] Rajeev Dhavan, The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques", p. 205, N. M. Tripathi Pvt. Ltd. Bombay, 1977

Jawaharlal Nehru pointed out with great force to our Constituent Assembly, He Said:

> "There is no permanence in the Constitution. There should be certain flexibility. If you make any thing rigid and permanent, you stop a nation's growth, the growth of a living vital organic people. Therefore, it has to be flexible. What he may do today may not be wholly applicable tomorrow. Therefore, while we make a Constitution which is sound and basic as we can, it should also be flexible and for a period, we should be in a position to change it with a relative facility.[385]

If we look in retrospect to the period of last forty years of India one would find that the picture has been that of a complete dominance of the executive over Parliament. It has been a fact that the executive had taken the Parliament for granted. Even the most drastic of laws affecting the lie, liberty and property of the people were passed by the Parliament without any murmur or demur by the legislators. The clear and the most appropriate example would be Forty-second Amendment Act which was passed hurriedly without any kind of debate or even application of mind by the legislators. Parliament without the slightest hitch endorsed the government sponsored draconian measures which had the effect of further strengthening executive and legislative powers and eroding judicial review.[386]

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[385] Vide, D. D. Basu, "Commentary on the Constitution of India", p. 584, Vol. II 3rd edition, 1956

[386] S. N. Jain, "Judicial Review and Forty-second Amendment", in 'Indian Constitution: Trends and issues' edited by Rajeev Dhavan, N. M. Tripathi Pvt. Ltd., Bombay, 1978

### 5.2.1 Aims and objectives

The Swaran Singh Committee Report which was the basis of the 42nd Amendment, stated:

In making these recommendations, the Committee has kept before it certain objectives. Our Constitution has functioned without any serious impediment during the past 26 years and more. While this is so, difficulties have been thrown up from time to time in the interpretation of some of its provisions, more particularly where they concern the right of Parliament to be the most authentic and effective instrument to give expression and content to the sovereign will of the people.

It is the scheme of the Constitution that the three main pillars of our Parliamentary democracy namely, the legislature, the Executive and judiciary have to function harmoniously if we are to achieve our desired objectives of securing to all citizens justice, social, economic and political. Ours is a dynamic, moving and changing society, and the need to quicken the pace of socio-economic progress of our people has never been more urgent.

The statement of some of the objects and reasons for introducing of the Constitution (Forty-fourth Amendment) Bill, (Bill No. 91 of 1976) reads as follows:

- Parliament and State Legislatures embody the will of the people and the essence of the democracy is that the will of the people and the essence of democracy is that the will of the people should prevail. Even though Article 368 of the

Constitution is clear and categoric with regard to the all-inclusive nature of the amending power, it is considered necessary to put the matter beyond doubt. It is proposed to strengthen the presumption in the favour of the constitutionality of the legislation enacted by Parliament and State legislatures by providing for a requirement as to the minimum number of Judges for determining questions as to the constitutionality of laws and for a special majority of not less than two-thirds for declaring any law to be constitutionally invalid. It is also proposed to take away the jurisdiction of the High Courts with regard to determination of constitutional validity of Central laws and confer exclusive jurisdiction in this behalf on the Supreme Court so as to avoid multiplicity of proceedings with regard to validity of the same Central law in different High Courts and the consequent possibility of the Central law being valid in one State and invalid in another State.

- To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and special other matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supremes Court in regard to such matter under Article 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of High Courts under article 226.

### 5.2.2 Major Changes

The main changes introduced through this Amendment which tried to take away judicial review power are as follow:

1. Requirement of special majority in courts for determining the constitutional validity of central and state laws.
2. Limiting the jurisdiction of the High Courts to matters involving substantial injury or substantial failure of justice while preserving their jurisdiction to issue writs for enforcement of fundamental rights.
3. Provision for limiting the proclamation of emergency to areas where its need is most imperative.
4. Provision for the creation of administrative tribunals for adjudication of service matters, matters relating to revenue, customs, foreign exchange, etc.
5. Provision for amending Article 368 of the Constitution to emphasize the mutability of the Constitution and every part thereof, and restore the legitimate power of Parliament.

### 5.2.3 The (Constitution Forty-second Amendment) Act: Some Provisions

- Section 5 of the Constitution (42nd Amendment) Act Article 31 D after Article 31 C of the Constitution. Newly inserted Article 31 D reads as:

Article 31 D. *Saving of laws in respect of anti-national activities.*

1. Notwithstanding anything contained in Article 13, no law providing for-

(a) The prevention or prohibition of anti-national activities; or

(b) The prevention of formation of, or the prohibition of, anti-national associations,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, article 14, article 19 or article 31.

A big bite from the power of courts to review legislative action was taken away by further amending article 31 C and introducing Article 31 D. Under the Forty-second Amendment fundamental rights covered under article 14, 19 and 31 became subservient to all the directive principles in the cases where the law has been passed giving effect to all or any of the principles laid down therein. Further, a Parliamentary law providing for the above sub-clause (a) and (b) was not to be void for violating Articles 14, 19 and 31.

Fundamental rights have been a powerful source of challenge to the constitutionality of laws. Most of the cases of constitutional validity arose under article 14, 19 and 31 and with the laws getting immunity from these articles, what is left for the court for testing the validity of laws may not be much or substantial. It is gratifying that the Forty-third Amendment Act, 1977 has deleted the all-harsh 31 D provision.

- Section 6 of the Constitution (42nd Amendment) Act inserted Article 32 A after article 32, namely:

Article 32 A. *Constitutional validity of State Laws not to be considered in proceedings under article 32.-*
Notwithstanding anything in article 32, the Supreme Court shall not consider the constitutional validity of any State Law in any proceedings under that article unless the constitutional validity of any Central Law is also in issue in such proceedings.

- Section 25 of the Constitution (42nd Amendment) Act inserted a new Article after Article 144 of the Constitution, namely:-

  "144 A Special provisions as to disposal of questions relating to constitutional validity of law.-
  (1) The minimum number of judges of the Supreme Court who shall sit for the purpose of determining any question as to the constitutional validity of any central law or State law shall be seven.
  (2) A Central law or a State law shall not be declared to be constitutionally invalid by the Supreme Court unless a majority of not less than two-thirds of the Judges sitting for the purpose of determining the question as to the constitutional validity of such law hold it to be constitutionally invalid."

  So, The Forty –second Amendment introduced dual judiciary to a certain extent by restricting the Supreme Court's jurisdiction in the matter of constitutionality of State law and depriving the High Court in respect of central law. This was an erosion of judicial power in a subtle manner on account of the difficulties for a person situated at a distant place to approach the supreme Court to challenge the constitutionality of a central Act or a rule. Fortunately, the Forty-third Amendment has done away with this dualism and restored status quo ante.

- Section 28 of the Constitution (42nd Amendment) Act reads as:

  "Amendment of Article 166.- In Article 166 of the Constitution, after clause (3), the following clauses shall be inserted, namely:
  (4) No Court or other authority shall be entitled to require the production of any rules made under clause (3) for the more convenient transaction of the business of the Government of the State."

- Section 39 of the said Act inserted Article 226 A after the Article 226, namely:-

  "226 A. Constitutional validity of central laws not to be considered in proceedings under article 226.- Notwithstanding anything in Article 226, the High Court shall not consider the constitutional validity of any central law in any proceedings under that article."

- Section 228 A inserted by the Sec. 42 of the said Act provided that High shall have no jurisdiction to declare ant central law to be constitutionally invalid. It also provided that the minimum number of judges who shall sit for the purpose of determining any question as to the constitutional validity of any State shall be five.
- Section 55 of the Constitution (42nd Amendment) Act inserted clause (4) and (5) to Article 368, namely:-

  (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 Sec. 55 of the Constitution (42nd Amendment) Act, 1976) shall be called in question in any court on any ground.

(5) For the removal of the 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 provision of this Constitution under this article."

- Apart from this, Article 226 was substituted altogether by the Constitution (42nd Amendment) Act, 1976. The thrust of the new provisions being to restrict judicial review over governmental action. Judicial review of administrative action under the article has been retained as it is in relation to other rights, three changes have been made for issuing the writs:
  (a) There should be injury of a substantial nature.
  (b) There has been an illegality in the proceedings and it has resulted in substantial failure of justice.
  (c) There is no other remedy available for redress of the injury.

It has been well said that the more the words there are in statute, the more the words for interpretation, and the greater the problem with interpretation. The newly substituted article is an excellent illustration of this proposition. Article 226 is an embodiment of confusion, ambiguities and uncertainties. There are several objections to the new article.

1. When the administrative powers are all pervading and the government possesses immense powers to affect the life, liberty and property of the people, and when the original article 226 provided merely a restrictive and limited judicial review of governmental action, it is ironical that an attempt should be made to further narrow down the limited power of judicial review, immunizing governmental

action from being controlled or prevented from going astray or wayward.

2. On the one hand the article retains the prerogative writs, but on the other hand, it tries to curtail their traditional scope. This creates the problem of reconciliation of these two factors. A pertinent question is raised: how far should the courts go by such old doctrines as error of jurisdiction, error of law apparent on the face of the record, no legal evidence rule? Should the courts cease to worry about such doctrines and principles and intervene when in their view there is substantial failure of justice?
3. Thirdly, already the writ jurisdiction is characterized by technicalities and the jungle of wilderness. The two systems will now exist side by side- one relating to the Fundamental rights and the other relating to any other purpose-increasing further the area of confusion.
4. The phrases "injury of a substantial nature" or "substantial failure of justice" are vague and will give much flexible area for the courts to operate, leading to its own uncertainties.
5. The amendment introduces a significant limitation on the writ jurisdiction of the High Courts and also of the Supreme Court by providing for the creation of administrative tribunals. Administrative tribunals may be created by the Parliament by law for adjudication of disputes foe service matters relating to public services and posts in connection with the affairs of the Union or any State or any local or other

authority within the territory of India or of any cooperation owned or controlled by the government.

The effect of this amendment as summed up by Shri Basu may be explained as:

1. The writ jurisdiction of High Court under Article 226 has been curtailed in various directions by this Amendment Act.
2. Under the amended article, a High Court shall have powers to issue writ in the nature of prerogative writs only for the following purposes:

(a) Enforcement of Fundamental Rights: The existing jurisdiction on this point will be continued, subject to changes when the constitutionality of an Act is challenged in such proceedings (vide Article 226 A, 228 A (10)).

(b) Where there has been a violation of any mandatory provision of the Constitution other than the fundamental rights, provided there is no other remedy (Article 226 (1) (b), and Article 226 93)).

(c) Where there has been a contravention of any statutory law, including subordinate legislation, subject to the following conditions;

- It will not extend to contravention of laws relating to the matters specified in article 323A-B.
- In other cases of violation of statutory law, this remedy will not be available-

a) Where an alternative remedy is available under the Constitution or any statutory law (Article 226 (3))

b) The Court shall have no power to issue an ex parte interim stay or injunction or similar Order (Clause (4)). An interim order can be issued only after notice to the respondents and giving them an opportunity to be heard (Clause (4)-(5)), but no interim order shall be available at all in cases specified in clause (6).

(d) Where proceedings by or before any authority have been vitiated by any illegality, provided such illegality has caused injury and a substantial failure of justice (clause (1) ©), and there is no other remedy for the redress of such injury.

Palkhiwala[387] laments that in four respects at least, the amendments of the Constitution aims at altering or destroying the basic structure of the Constitution.

1. It throws the supremacy of the Constitution and installs Parliament (a creature of the Constitution) as the supreme authority to which the Constitution will be subservient. The instrument will become the master, and master the instrument.
2. Secondly, the Act seeks to enact that the eternal values enshrined as fundamental rights in the Constitution will no longer be justiciable or operates as brakes on legislative and executive action in most fields.

[387] Palkhiwala,, "The Light of the Constitution" 9, Forum of free Enterprise, 1976

3. The balance between the executive, the legislature and the judiciary will be rudely shaken, and the executive and the Centre will enormously gain in power at the expense of the other organs of the state, particularly, the judiciary.
4. The said Act envisages the enforcement of laws even after they are held unconstitutional by a majority of the Supreme Court or the High Court.

## 5.3 Functions of President and Governors: Court v. Parliament

The Constitution commits certain areas of decision making to the President and the Governors, and by conferring finality on their decisions seeks to exclude judicial review. It does not necessarily mean that in making these decisions the President or the Governor acts according to his own discretion or judgment. In some cases the decision is only expressed to be that of the President or the Governor; but the actual decision will be of some other authority. In some cases, there may be provision for consultation, and in other cases the President or the Governor will have to act on the advice of the Council of Ministers. The courts have not been very keen on asserting jurisdiction in these areas. The limitations have been generally well understood and maintained. Though there are some instances wherein, the scope of exclusion of judicial review power has been questioned.

### 5.3.1 Political power: A forbidden territory for judges

The question whether the President of India possesses any political power, which is beyond the reach of judicial scrutiny, arose in relation to Article 363, in *Madhava Rao Scindia v. Union of India.*[388] The issue that arose related to the power of the President to derecognize a ruler. It was contended that the power of the President to derecognize a "ruler" under Article 366(2) was a political power. However, the real issue to be answered in a case was whether the order of the President de-recognizing all the 'Rulers' was protected by the exclusion of jurisdiction under Article 363 (1).[389] For deciding the issue before the Court in the *Privy Purse case*[390], it was necessary to consider only the following questions, viz.

2. Whether the dispute was one arising out of any provision of a treaty etc., or
3. Whether the dispute was in respect of any right accruing under or any liability or obligation arising out of any of the provisions of the Constitution relating to any such treaty etc.

Ultimately, the court held that the bar of Article 363 was inapplicable. According to Chief Justice Hidaytullah, the order of

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[388] AIR 1971 SC 530

[389] Article 363 (1): "Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of the Constitution by any Ruler of Indian State and to which the Government of the dominion of India or any of its predecessor Government was a party and which has or has been continued in operation after such commencement, or in dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument."

[390] AIR 1971 SC 530

the President was a nullify being wholly outside Article 366(22)[391] and hence the bar of Article 363 would not be attracted.

The majority judgment in the *Privy Purse case*[392] clearly shows that it is neither the express provisions of the Constitution, nor the well-settled rules of constitutional interpretation and the precedents laid down by themselves, which determine the judicial choice. In the ultimate analysis, it is the judicial 'conscience' in the subjective sense of what is morally right or wrong that is decisive. Once they feel that something, which is repulsive to their sense of morality, is being done, they find leeway to assert their jurisdiction and impose their decision notwithstanding the fact that their jurisdiction is specifically excluded.[393]

### 5.3.2 Emergency and limitation on judicial power

A national emergency, whether caused by insurrection or external aggression, demands extreme adjustments from the legal system. Special laws have to be made and put to force effectively. Individual rights and right to judicial remedies may have to be curtailed in the interest of national security, and extra-ordinary powers may have to be given to the executive. All

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[391] Article 366 (22): " 'Ruler' in relation to an Indian State means the Prince, Chief or other persons by whom any such covenant or agreement as is referred to in clause (1) of Article 291 was entered into and who for the time being is recognized by the President as the Ruler of the States, and includes any person who for time being is recognized by the President as the successor of such ruler."

[392] AIR 1971 SC 530

[393] N. K. Jayakumar, "Judicial Process in India" p.97, APH Publishing Corporation, 1997, New Delhi

these measures place severe limitations on the decision-making role of the judicial process.

The Constitution of India contains several special provisions designed to meet an emergency. The President is empowered to make a proclamation of emergency when he is "satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether by war, or external aggression or armed rebellion."[394] While such a proclamation is in operation. "nothing in Article 19 shall restrict the power of the State as defined in part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take."[395] Moreover the President is also empowered to suspend, by order, "the right to move any court for the enforcement of such of the rights conferred by part III except Article 20 and 21 as may be mentioned in the order."[396] The power vested in the President to take away the administration of any state, when he is satisfied that "a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the Constitution"[397] also forms the part of emergency provisions. The extent to which these emergency provisions limit the scope of judicial action is to be examined.

The question whether a proclamation of emergency under Article 352 is amenable to judicial review has not been conclusively answered by the Supreme Court. In *Ghulam Sarwar v. Union of*

[394] Article 352
[395] Article 358
[396] Article 359
[397] Article 356

*India,*[398] and *Bhut Nath v. West Bengal,*[399] the question was raises but not considered by the Court. However, in *Minerva Mills v. Union of India*[400], Justice Bhagwati in his separate judgement expressed the view that a proclamation of emergency was undoubtedly amenable to judicial review though on the limited ground that no satisfaction as required by Article 352 was arrived at by the President in law or that the satisfaction was absurd or preserve or mala fide or based on an extraneous or irrelevant ground.[401] But the learned judge conceded that " in most cases it would be difficult if not possible, to challenge the exercise of power under Article 352 clause (1) even on this limited ground, because the facts and circumstances on which the satisfaction is based would not be known."[402] The purpose of judicial review in this area, assuming that it exists, can only be symbolic. But even the need for such symbolic jurisdiction in relation to the exercise of power under Article 352 seems doubtful in view of the safeguards introduced in the provision by the Constitution (Forty-second Amendment) Act, 1978.[403]

The judiciary retain the power to examine the validity of a Presidential order under Article 359 (1) was asserted in case of

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[398] AIR 1967 SC 1335
[399] AIR 1974 SC 806
[400] AIR 1980 SC 1789
[401] *ibid* at 1839
[402] *ibid*
[403] The safeguards are: (1) The President shall not issue a proclamation unless the decision of the Union Cabinet that such a Proclamation may be issued has been communicated to him in writing; (2) Every Proclamation shall be laid before each House of Parliament before the expiration of one month, and approved by resolutions of both Houses of Parliament by a majority of total membership of the House and by a majority of not less than two-thirds of the members present and voting; and (3) a Procalamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of passing the resolution.

*Ghulam Sarwar v. Union of India.*[404] In this case, a distinction was made between the suspension of Article 19 under Article 358 and the suspension of enforcement of other fundamental rights under Article 359 (1). In the former case, the suspension was by force of the constitutional provision itself, whereas in the latter case it was suspended by an order made by the President under the relevant constitutional provisions.

It was, therefore, observed that unless the President made valid order it was liable to be struck down. In the instant case, the court upheld the Presidential order since it did not violate Article 14.

The view expressed in *Ghulam Sarwar* did not hold for long. An awareness of the limitations of judicial decision-making in an emergency can be discerned in *Mohammed Yaqub v. State of Jammu & Kashmir,*[405] which overruled *Ghulam Sarwar.*[406] It was held that an order under Article 359 derived its force from Article 359 itself and could not be tested under any of the Provisions of Part III of the Constitution, which it suspended. If we analyze these case, we realize that the learned judged, was in favour of retaining the power of judicial review in clear cases of abuse of power by the President.

The enforcement of fundamental rights can be suspended by a Presidential order and executive action, which is otherwise invalid. This position has been asserted time and again by the

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[404] AIR 1967 SC 1335 The Court consisted of Subba Rao, C.J. Hidaytullah, Sikri, Bachawat and Shelat, JJ.
[405] AIR 1968 SC 765
[406] AIR 1967 SC 1335

Supreme Court in several decisions.[407] The right to any court in Article 3259 (1) refers not only to the constitutional right under Article 32 and 226 but also rights under any other statute.[408] The Presidential order only removes the limitations imposed by the relevant fundamental rights and the 'State' may take legislative or executive action if it competent to do so. If the 'State' is competent to take away such action will be nullity ab initio. But this well-settled view has been given a jolt in the decision of the Supreme Court in *A.D.M. Jabalpur v. Shiva Kant Shukla.*[409]

In this case the Court held that when a Presidential Order suspending the enforcement of Article 21 was in force, no person had locus standi to move any petition on the ground that the order is not under or in compliance with the Act or is illegal or it is vitiated by mala fides legal or factual or is based on extraneous considerations or on any ground whatsoever.[410] This decision represents the greatest instances of judicial self-abnegation in the history of the Indian Judicial process.

The validity of Presidential Proclamation under Article 356 has been challenged before the various High courts. The Courts have consistently taken the view that a proclamation under Article 356 is not justiciable.[411] The reasons for treating proclamation non-justiciable were stated as follows:[412]

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[407] Durga das v. Union of India, AIR 1966 SC 1078; Ram Manoha Lohia v. State of Bihar, AIR 1966 SC 740

[408] Makhan Singh v. State of Punjab, AIR 1964 SC 381

[409] AIR 1976 SC 1207

[410] ibid

[411] Rao Birinder Singh v. Union of India, AIR 1968 P & H 441

[412] Per Chinappa Reddy, In re A. Sreeramulu, AIR 1974 A.P. 106

> ...the very nature of question involved, the circumstances that it is the Head of the State that is entrusted with the discharge of the duty and the fact that it is the Parliament that is the final arbiter lead to inevitable conclusion that the Court can never go behind the Proclamation issued by the President...The ouster of the jurisdiction of Courts is intrinsic to the very nature of the power exercised by the President under Article 356 of the Constitution.

The ouster of jurisdiction, which was accepted as 'intrinsic to the very nature of the power' under Article 356 was made explicit by the Constitution (Thirty-eighth Amendment) Act, 1975 which madder the satisfaction of the President 'final and conclusive' and provided further that it "shall not be questioned in any court on any ground."[413] However, the Supreme Court has asserted its jurisdiction, despite of the express exclusion, and that too in a case where there was no challenge to the validity of a Proclamation under Article 356. In *Rajasthan v. Union of India*,[414] the petitioners were afraid that a Proclamation would be issued, unless the advice of the Union Home Minister in a letter addressed to the Chief Ministers of nine states to dissolve the legislatures and to seek fresh mandate from the people, was not complied with. In this case, no cause of action has actually has arisen and the Supreme Court unanimously dismissed the petition. In this case, the Supreme Court wanted to make the scope of judicial review under Article 356 wider than it was under the unamendable Article. Thus, the existence as well as the grounds of judicial review were established in *State of*

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[413] Article 356 (5), Subsequently deleted by the Constitution (forty-fourth) Amendment Act, 1978.

[414] AIR 1977 SC 1361

*Rajasthan v. Union of India,*[415] though there was no occasion to exercise the power of review in this case. The Karnataka High Court, thirteen years later, in *S. R. Bombai v. Union of India*[416], took upon itself the task of determining the validity of a Presidential Proclamation under Article 356 applying the tests laid down in Rajasthan case.[417] The proclamation was, however, upheld, reinforcing the impression that the assertion of judicial review in this context would rather remain symbolic.

All the nine judges constituting the Bench in *Bombai* held that the Presidential Proclamation is justiciable. But there was no unanimity on the scope of judicial review. Ahmadi C. J. was of the view that the Court cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the order was made malafidely. Sawant and Kuldip Sing J.J. identified three grounds of judicial review, viz. (i) whether the proclamation was issued on the basis of any material at all; (ii) whether the material was relevant; and (iii) whether the Proclamation was issued in the malafide exercise of power.[418] Broadly in agreement, but more cautious in approach, is the opinion rendered by K. Ramaswamy J. who was in favour of judicial review when the 'satisfaction reached by the president is unconstitutional, highly irrational or without any nexus.' The learned judge made it clear that the court cannot go into the adequacy of the material circumstances justifying declaration of President's rule.[419] According to B. P. Jeevan Reddy and S.C. Agravala JJ. "if the proclamation is found to be malafide or is

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[415] AIR 1977 SC 1361
[416] AIR 1990 Kant. 5
[417] AIR 1977 SC 1361
[418] *ibid* at 148
[419] *ibid*

found to based wholly on extraneous and/or irrelevant grounds is likely to be struck down....the truth or correctness of the material cannot be questioned by the Court nor will it go into the adequacy of the material."

A close reading of the opinions in *Bombai* would show that the three judges, (Sawant, Kuldeepsing and Pandian JJ.) favoured a high degree of activism, while three other (Ahamadi, J. S. Verma, Yogeshwar Dayal J.J.) preferred more restraint. The remainng three (K. Ramaswamy, Jeevan Reddy and Agrawal jj.) broadly advocate a balanced approach, not necessarily confining judicial review only when there is malafide exercise of power, but at the same time not equating the situation with the exercise of an administrative power.