CHAPTER SIX

CHAPTER VI

JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENT

CHAPTER VI

Judicial Review Of Constitutional Amendments

In the earlier chapter, the duel between Supreme Court and legislature, vigorously fought in the arena of exercise of judicial review power is discussed. This duel was re-enacted with equal vigour in the arena of amending power also. In the former, the fight culminated in the deletion of the right to property from part III of the Constitution and expanding the horizons of judicial activism while in the latter the Court has secured a victory by its decision in *Minerva Mills v. Union of India,*[420] which nullified the clauses (4) and (5) of Article 368 introduced by the Constitution (Forty-Second) Amendment Act, 1976.

Constitution is the basic law-Fundamental document of the land-at once binding on the Government and the people. Indian Constitution is not merely a political document it is as much as socio-economic and politico-legal document. It is a paramount law from where all laws flow and take their source. Our Constitution is the Constitution of "We the people of India" as projected in the Preamble. The Preamble is the identity of the Constitution, reflecting the mind of the people, proclaiming their determination to secure the four philosophical and noble objectives-justice, Liberty, Equality and Fraternity. Our constitution was framed by the Constituent Assembly elected on a narrow franchise and it was not ratified by the people by any

[420] AIR 1980 SC 1789

referendum. Prof. Where emphasized that "In India, 'the people' enacted the Constitution 'in our Constituent Assembly', but that Assembly was composed of representatives elected by minority of people of India and the Constitution itself was never submitted to the people directly.[421]

Constitution is a basic document and has a special legal sanctity setting out the framework and principal functions of the organs of the government of a state and declaring principles governing the operations of those organs. It does not merely create, organize and distribute governmental power but also regulates the exercise of such power. As law is at once a regulator and controller of individual power as well as social power, the Constitution balances the conflicting interest and secures orderly Government. The purpose of the Constitution is to regulate, restraint, refine, control and civilize the might of the Government as well as promote happiness of all sections of society-striking a balance between authority of Government and the fundamental freedoms of Man and Society-a balance which is vital to a free society.

6.1 The Nature Of Constituent Power

The Parliament has power to make laws for the whole of India. This legislative power is different from constituent power, which enables amendment of the Constitution. A Constitution, if rigid, stops the nation's growth and growth of 'living vital organic people'. The Constitution has to be amended to meet the needs

[421] Prof. K. C. Where, "Modern Constitutions", p. 143

of the dynamic society and to maintain socio-economic and political solidarity of the country.

The need for the power to amend a Constitution can never be gainsaid. It was recognized by the makers of the Indian Constitution when they provided Article 368. It was recognized by the Supreme Court immediately after the adoption of the Constitution in *Shankari Prasad v. Union of India.*[422] In this case, Supreme Court ruled that Parliament can amend any provision of the Constitution including fundamental rights in accordance with Article 368. It was also not denied by the subsequent case[423], which followed. However the limit of that power has been questioned even in the crying need to change the Constitution. A razor thin majority in *Golaknath* ruled that part III of the Constitution cannot be so amended as to abridge or take away Fundamental Rights. In *Keshavananda case,* by majority of 7:6 the Court overruled *Golaknath* and held that Parliament cannot in exercise of amendatory power under Article 368 of the Constitution alter the basic structure of the Constitution. There is a limitation on the power of the amendment by necessary implications. Thus, there are two theories-the theory of 'basic structure' and the theory of 'implied limitation' on amending power of the Parliament. Theses two theories are mutually intertwined. The super-power, the amending power, the constituent power, is enshrined in Article 368, which rocked the Parliament on many occasions.

This Article itself suffered amendments and provoked so many juristic controversies as well as the battleground for the

[422] Shankari Prasad V. Union of India, AIR 1951 SC
[423] Sajjan Singh v. State of v. State of Punjab

supremacy of power of Parliament vis-à-vis power of judiciary. This Article is one of the most controversial Articles in the Constitution. It is by the interpretation of the Article that the Supreme Court carved out the theory of Basic Structure. It is in this Article that the Supreme Court found the constituent power.

The nature and ambit of constituent power has been described in several ways. It is described as sovereign power not subject to any limitations whatsoever. It is independent of Separation of powers and comprises legislative, executive and judicial powers. It is sui-generis. According to Seervai, the distinction between legislative and constituent power is crucial in a rigid Constitution like ours but not in a flexible Constitution. The unamended Article 368 was said to possess the constituent power according to several decisions of the Supreme Court. If it is considered that Constituent Power is unlimited than the lawmaking power, then Supreme Court cannot limit the unlimited power. Therefore, the power of Parliament under Article 368 is different from the power exercised by the Constituent Assembly. Though both are called Constituent power, both are not and cannot be the same. Seervai calls the power to frame the Constitution as primary power and the power to amend the constitution as derivative power.[424] Once the constituent power is exercised in enacting or framing the Constitution, it channels into judicial, legislative and executive powers. The amending power under Article 368 is no doubt higher than judicial, executive and legislative powers but lower than the constituent power in the true sense. The Parliament at the least can exercise power resembling the Constituent power

[424] Seervai, Indian Constitutional law, 2nd Edition

which may broadly be termed as "Quasi-Constituent Power'. It is this quasi-constituent power in true sense which can be exercised by the Parliament. Only the Constituent Assembly can exercise can exercise Constituent power in true sense. This quasi-constituent power has limitations because it cannot do what can be done by primary Constituent Power itself. These limitations are implied from the very nature of the quasi-Constitutient power. The power is limited to the Basic Structure of the Constitution. " What is basic structure will depend upon what is vital to Indian democracy and that cannot be determined except with reference to history, politics, economy and social milieu in which the Constitution functions.[425] The amendment power outlined by Article 368 is unique and par excellence.

However, the concept of "constituent power" was clearly recognized in Shankari Prasad case[426], where Patanjali Shastri J. distinguished "constituent " law from "legislative" law. In that decision which held sway from 1951 to 1967, the Supreme Court affirmed that Article 368 manifests "sovereign Constituent Power" which may be exercised to produce "abridgement or nullification" of fundamental rights by "alterations of the Constitution". It saw no difficulty in equating amendatory power with constituent power. In addition to this, in *SajjanSingh*, Chief Justice Gajendragadakar and Justices Wanchoo Raghubir Dayal, described the power given by article 368 as "comprehensive power".[427] They declined the invitation to examine that power "on any theoretical concept of political

[425] S. P. Sathe, "Constitutional Amendments: 1950-1988, p. 94
[426] Shankari Prasad v. Union of India, AIR 1951 SC 458
[427] Sajjan Singh v. State of Rajsthan, AIR 1965 SC 845

science that sovereignty vests in people and that the legislatures are merely the delegates of the people."[428]

It must be noted here, that the dissentient judges in *Golak Nath* left open several questions concerning the nature and scope of constituent power. Justice Wanchoo noted the Union of India's argument that the "power contained in Article 368 is the same sovereign power possessed by the Constituent Assembly when it made the Constitution and, therefore, not subject to any fetters of any kind".[429] However he did not decide whether this was actually so. Also, Justice Wanchoo observed "it may be open to doubt whether the power of amendment contained in Article 368 goes to the extent of completely abrogating the present Constitution and substituting it by an entirely new one."[430]

Keshavananda invited judicial consideration of the nature and scope of "constituent power" rather directly. The six judges[431] led by Justice Ray, regarded constituent power as *sui generis* and "Sovereign". Justice Ray, said:

> "When the power under Article 368 exercised, Parliament acts as a recreation of Constituent Assembly".[432] Justice Palekar described the amending power as "sovereign constituent power".[433] Justice Dwivedi holds that amending power is a constituent power of the same order and quality as the power possessed by the Constituent

---

[428] *ibid* at 858
[429] Golaknath at 1679
[430] *ibid*
[431] M. H. Beg, D. G. Palekar, K. K. Mathew, Y V. Chandrachud, A. N. Ray, Dwivedi, J.J.
[432] Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461 at para 532
[433] *ibid* at 676

Assembly. He along with Chandrachud J. also maintained "Parliament acts as a perpetual Constituent Assembly."[434]

6.2 Amending Process and power Of Constitutional Amendment

According to John Burgess, a complete Constitution consists of three fundamental parts. The first and most important part is the organization of the State for the accomplishment of future change in the Constitution. This is called the amending clause and the power it describes and regulates is called the amending power. The second and third being the Constitution of Liberty and the Constitution of Government. The amending provision is all the more necessary in the modern world, which is growing constantly, crowded and complicated, and there is constant pressure on Constitution for amendment or abandonment.

A Constitution, which does not contain provisions for its amendment with development, growth and expansion of the community, is the most inadequate and imperfect "deed of partnership."[435] It could collapse to break beneath the pressure of national forces, which it cannot control or resist, and without help of reconstruction. The Constitution of a nation must be responsive to the changes; change is the law of the life. Hence to be responsive to the outward changes, the Constitution must have the essence of workableness and this can be achieved through an amending clause. Any stagnation is sure to cause

---

[434] *ibid* at 986

[435] P. H. Lane, "Annotated Constitution of the Australian Commonwealth", p. 989 as cited by A. Lakshminath in Basic Structure and Constitutional Amendments: Limitations and Justiciability, p. 31

steadily depending discontent and to invite recourse to extra constitutional devices, which border revolution.[436]

Amending the Indian Constitution has become a serious national joke. It has become something of a joke because successive Parliaments and State legislatures have amended the Constitution with ever-increasing alacrity.[437] It is serious because the Indian Constitution has been amended 86 times. This leads us to ask us some important questions. Such as,

- Was the Indian Constitution intended to be an enduring framework for political, constitutional, economic and social activity for generations to come?
- Was the Constitution merely a makeshift interstitial arrangement to be chopped and changed whenever those in power though it right it to do so?
- Did the Constitution project a certain political ideology, and was it susceptible to change to change in order to suit the furtherance of this political ideology?
- Was the Constitution regarded as a mere interim document, wholly negotiable, to be moulded by the hammer and anvil of future politics?

However, an ordinary citizen of India may resolve all these questions by simply saying:

---

[436] Rose Water, "A curious Chapter in Constitution changing" in Political Science Quarterly, 409 (1921), p. 36

[437] Rajeev Dhavan, "The Amendment: Conspiracy or Revolution" p. 1, Wheeler Publishing, 1978

> "A Constitution is a Constitution. It took three years to devise this Constitution. The Constitution was designed to serve the people of India for many generations to come. It was to be the basic framework by which the politics, economics and social life of the nation was to be run. Each Constitution has to be adjusted from time to tome. The Constitution makers very wisely included a power of amendment to make these adjustments possible."[438]

This is of course, a hypothetical statement, but here is no doubt that it represents a common sense attitude to the Constitution and the intention of the framers of the Constitution. The Constitution was indeed designated to be what a foreign observe has called "the cornerstone of a nation.

However, this is just the theory behind the Indian Constitution. Practical experiences were quit different one. The Constituent Assembly, which promulgated the Indian Constitution itself, became India's first Parliament in 1950-51. Strangely, the same members who had created the "cornerstone of the nation" themselves chipped this cornerstone. They enacted the First Amendment to the Constitution. This Amendment sough to take away property rights of certain landowners in order to further the cause of agrarian reform and the redistribution of rural property. In fact, the First Amendment of the Constitution merely sought to give effect to certain policies, which the Constituent Assembly had agreed to effectuate. The First Amendment therefore did a repair job. The Constitution had sprung a leak because the Courts had allegedly misunderstood

[438] Granville Austin, "Indian Constitution: Cornerstone of Nation" Oxford University Press

the real intentions of the Constituent Assembly. The First Amendment sought to clear the misunderstanding; repair the leak and re launch the Constitution.

6.2.1 Plenary power of amendment

The Founding Fathers who illuminated the Constituent Assembly were great jurists, experienced politicians and statesmen. They formulated Article 368 after thorough and meaningful deliberations. At the same time discussion in the Constituent assembly a proposal of putting express limitations on amending power pertinently figured.

The question of limiting the power of Parliament to amend the Constitution is a subject matter of considerable discussion both in the Supreme Court as well as in Parliament. This has generated enormous amount of controversy, though reconciled temporarily. Yet one is not sure as to when the controversy may further revive, since the policy-makers of each Parliament would like to implement their promises and assurances they have given, without, sometimes, going deep into the repercussions on the public opinion. In *Golak Nath,* the dissenting judges identified the amendatory power as "Constituent power" to "change the fundamental law" The Twenty fourth Amendment introduced into the text of the Constitution the notion of "constituent power" both in article 368 and article 13. So, the Supreme Court till 1967 had also admitted that Parliament has plenary power to amend the Constitution. The erroneous interpretation of article 13 and article 368 made by the Supreme court in *Golaknath* compelled the Parliament to amend Article 13 and 368 by the Constitution 24th Amendment Act, 1971. What

was implicit in Article 368 was made explicitly clear by that Amendment. When the Constitution 24th Amendment was challenged in *Keshavananda Bharati*, all thirteen judges, by a unanimous vote, upheld the impugned Amendment Act. They clearly reasserted the plenary power of amendment of the Parliament. A close scrutiny of *Keshavananda Bharati* reveals that if there emerged any clear and unambiguous ratio decidendi; it is unanimous opinion of all the thirteen judges, on the constitutional validity of 24th Amendment.[439]

6.2.2 History of Amending Power

The framers of a Constitution were never oblivious of the fact that in the working of the Constitution many difficulties would have to be encountered, and that it is beyond the wisdom of one generation to hit upon permanently workable solution for all problems which may be faced by the State in its onward march towards further progress. Sometimes, a judicial interpretation may make a constitution broad based and put life into dry bones of a Constitution so as to make it vehicle on nation's progress. Occasions may also arise where judicial interpretations may rob some provisions of the Constitution or a part of its efficacy as was contemplated by the Framers of the Constitution. If no provision is madder for the amendment of the Constitution, the people would be left without remedy except recourse to extra constitutional methods of changing the Constitution by revolution or the like. As observed by Mukherjee J. "a Constitution which cannot be constitutionally amended is an

[439] P.K.Tripathi, "Keshavananda Bharati v,. State of Kerala, who wins? Published in The Fundamental Rights Case- The critics speak, p. 89, Edited by S. Malik, 1975

invitation to revolution."[440] According to Finer, the amending clause is so fundamental to a Constitution that it may be called Constitution itself. The amending clause is the most crucial part of the constitution.[441]

According to John Stuart Mill, no Constitution can be expected to be permanent unless it guarantees progress as well as order. Human societies grow and develop with the lapse of time, and unless provision is made for such constitutional re-adjustments, as their development requires, they must stagnate it retrogress. The machinery of amendment, it has been said, should be like safety valve, so devised as neither to operate the machine with too great facility nor to require, in order setting in motion, an accumulation of force sufficient to explode it. The letter of Constitution must neither be idolized as a sacred instrument with that mistaken conservatism which clings to its own worn-out garments until the body is ready to perish from cold, nor it ought to be made plaything of politicians, to be tempered with and degraded to the level of an ordinary statute.[442]

The framers of the Indian constitution were conscious of the desirability of reconciling the urge for change with the need of continuity. Change with continuity means progress. The Constitution-makers struck balance between the danger of having non-amendable Constitution and a Constitution, which is too easily amendable. In fact the main problem before the framers of the Constitution consisted in striking the balance between rigidity and flexibility. No Constitution of a country in

---

[440] H. R. Khanna, Judicial review of confrontation, P. 4
[441] Finer, "The theory and Practice of Modern Government", p. 34, Vol. I, 1932
[442] Jameson, "Amending the Constitution"

the world has been amended so many times within short period of time as India's. The question arises: Was the Constitution too hastily drafted by inexperienced draftsmen who failed to consider the implication of social, economic, political and legal aspects of India's life? Answer would be "No" because the India's constitution was drafted by learned jurists, who took three years to complete this work, after studying most of the existing Constitutions of the world and adopting such of their provisions as were found suitable to Indian life. Let us examine this answer.

The drafting of amending provision started in June 1947 when the Union Constitution Committee began its meeting. The Draft Constitution of K. T. Shah provided that amendments should first be passed by a two-thirds majority in each House of Parliament and then be ratified by a similar majority of Provincial Legislatures and approved by the majority of the population in a referendum.[443] K. M. Munshi's Draft Constitution required a two-thirds majority in each House of Parliament and ratification by one half of the provinces. However, B. N. Rau, the constitutional advisor to the Government of India played his unique role in regard to the amending provision. His view was that an amending bill should be passed by a two-thirds majority in Parliament and ratified by a like majority of Provincial Legislatures. But he wanted to insert a 'removal-of-difficulties clause in the Constitution so that parliament might make adaptations and modifications' in the Constitution by amending it through an ordinary act of legislation. This removal-of difficulties clause was to remain in

[443] Shah, Draft Constitution, I. N. A. Cited by Austin, p. 257

force for three years from the commencement of the Constitution.[444] In its Draft constitution of September 1947, he further explained in a note that the clause was derived from Art. 51 of the Irish Constitution.[445]

K. M. Munshi also supported Rau on this point and he justified it on the ground that: "In framing a Constitution as we are doing under a great pressure, there are likely to be left several defects; and it is not necessary that we should have a very elaborate and rigid scheme for amending these provisions in the first three years."[446] Moreover, many members have apprehensions that the Constitution might turn out to be bad when put into practice because this was the first attempt to frame a Constitution and they lacked experience of Constitution-making.[447]

In October 1947 Rau went to Europe to consult various justices and statesmen of the U.S.A., Canada and Ireland. Most of them supported him on a provision for easy amendment of the constitution in the first three rather than five years of the Constitution. Rau wrote a letter to Dr. Prasad, the President of the Assembly who passed the information to the Drafting Committee and to the Assembly. But the Drafting committee rejected the proposal of inserting a clause for easy amendment of the Constitution in the Transitional Provisions. Though the provision was rejected, yet the principle of easy amendment was adopted in that in some articles it has been provided that certain matters can be amended by a simple majority in Parliament.

---

444 Rau B. N., 'India's Constitution in the Making', p. 96, 1960
445 Rau, Draft Constitution, cl. 238 Cited by Hari Chad, Amending Process in the Indian Constitution, p. 12
446 Constituent Assembly Debate Vol. IV, I, P. 546
447 Constituent Assembly Debate Vol. IX, 37

According to Granville Austin, "it appears that Rau was stretching the customary meaning of a removal-of-difficulties clause into a device for the easy amendment of the Constitution-the need for which he strongly believed."[448]

After reaching the end of this long journey, one realizes that the final form and shape which Art. 368 attained, emerged out of a hard battle of ideas favouring rigidity on the one hand, and flexibility on the other, sometimes rigidity having the upper hand and sometimes flexibility gaining ground. In this struggle-taking place mostly in the committees, supporters of rigidity persisted strongly and were not prepared to give in. On the whole, flexibility seems to have suffered considerably, though it entered through the back door. This will make clear in the following chapters in which Art. 368 it self will be subjected to minute scrutiny and through analysis. The ease or difficulty with which a Constitution may be amended has come to be used by constitutional theorists as the primary measure of its 'flexibility' or 'rigidity'. By this Yardstick the Indian Constitution during the decade and a half of its existence has proved very flexible-in fact too flexible for the critics who charge that the 'sanctity' of the Constitution is disregarded or light he4artedly ignored.

Thus, the three mechanisms of the amending process were compromises worked out by the Drafting Committee, and were designed, as Dr. Ambedakar said while introducing the Draft Constitution, to achieve a flexible federation. The compromise was between a small group of Assembly members, who recommended the adoption of an amending process like that of

[448] Austin, "Indian Constitution: Cornerstone of nation" p. 258

the United States, and a somewhat larger group that advocated amendment of the entire Constitution, at least during an initial period, by a simple majority of Parliament.

As time moved on, the Constitution was amended time and again. Those who supported the amendments defended by saying that the projected amendments were, in fact, no more than repair-jobs designed to give effect to the real intentions of the Founding Fathers. Now, the real question is: Were all these Constitutional Amendments really repair jobs? Have they, in fact, been enacted to give effect to the real intentions of the Founding Fathers?

Amendments to the Constitution have, however, gone on. Some of these amendments have been very strange, in that it would be difficult to correlate the purpose of these amendments with intention of the Founding Fathers. At the same time a new theory of constitutional amendment was also evolved. The new theory was based on the idea that the Indian constitution can be amended time and again in order to protect the future of the Indian people as a whole. This new theory has very wide implication. It suggested that each successive Parliament or party in power could decide what India's future needs were and change the Constitution accordingly. It constituted significant shift in approach to the use of power of amendment. In fact, the Constitution of India is a national heritage, it should be amended only when it is felt by the people that amendment is essential.

6.2.3 Provision for Amendment under the Indian Constitution

"Article 368: Procedure for amendment of the Constitution:

An Amendment to this Constitution may be initiated only by the introduction of a bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

a. Article 54, Article 55, Article 73, Article 162 or Article 241, or
b. Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part IX, or
c. Any of the lists of the Seventh Schedule, or
d. The representation of the States in Parliament, or
e. The provision of this article.

The amendments shall also require to be ratified by the legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provisions for such an amendment is presented to the President for assent."

In addition to this there were several articles, which could be amended by Parliament by a simple majority. One example of this is the provisions of the Constitution, which deal with the territorial composition of the states.

If we analyze the amending provisions it is evident that all or any of the provisions of Constitution can be amended provided the specific procedure for amendment is followed. It is unique position of the Indian Constitution that different procedures have been laid down for amending different provisions of the Constitution. The Constitution lays down the following three amendment procedures:

a. *Amendment by Simple Majority*

This category embraces provisions in the Constitution, which permit easy changes to be made with or without a constitutional amendment. Generally such provisions have been characterized as alterable by simple majority in each House of parliament as assented to by the President. Dr. Hari Chand divides these provisions into two categories.

Those provisions which necessarily entail an amendment of the Constitution, and

1) Those provisions under which no formal amendment need be effected to the Constitution but which nevertheless have the effect of making a change in the law.

The provisions falling under category (1) above are Art. 4 read with Art. 2 and 3, Art. 169, Schedule V, Para 7, and Schedule VI Para 21. Art. 2 empower Parliament to enact a law by an ordinary majority and admit into the Union of India or establish new states.

Similarly, Art. 3 empower Parliament to form new States and to alter their areas, boundaries or names of existing States. A Bill affecting such changes may be introduced in either House of parliament on the recommendation of the President. The President is further required to refer such a Bill to the legislature of the state so affected for expressing its views thereon within such period as the President may allow and the period so specified or allowed must expire before the Bill is introduced. Any such law relating to Art. 2 or 3 shall contain such provisions for the amendment of the first Schedule and the fourth schedule as may be necessary to give effect to the provisions of that law.[449] Art. 4 92) specifically provides that such a law as aforesaid shall not be deemed an amendment of the Constitution for the purpose of Art. 368.

Art. 169 (1) provides that parliament may by law abolish the Legislative council of a State, if it has one, or create one on a state having no such Council, if the Legislative assembly by a majority of not less than two-thirds of its members present and voting. But such a law shall not be deemed an amendment of the constitution for the purpose of Art. 368.

Similarly, Para 7 of Schedule V and Para 21 of Schedule VI empower Parliament to add, vary or repeal any of the provisions of fifth and sixth Schedules by an ordinary law. In Category (2) fall all those provisions under which formal amendments are not effected but otherwise they have the effect of making a change in the law. The important provision of the Constitution which come under category (2) are, inter alia, rights of citizens Art.11

[449] Art. 4 (1)

provisions permitting changes in the second Schedule, salaries and allowances of the Members of Parliament and the state Legislatures (Art. 106 and 195), official language (Art. 124(1)), Jurisdiction and powers of the supreme court in certain matters (Art. 133(3), 135, 137, 142(1)), composition of the Legislative Councils (Art. 171 (2)), duties and powers of the Comptroller and auditor general (Art. 149) and powers of the President to make certain ordinances (Art. 275(2), 37)

b. *Amendment by special Majority*

This category includes the articles, which are amendable under the substantive part of Art. 368, that is, when an amending bill is introduced in either House of parliament and passed in each House.

- By a majority of the total membership in each House, and
- By a majority of not less than two-thirds of the members present and voting in each Hose.

c. Amendment by Special Majority and Ratification by States

This category includes Articles specifically mentioned in the proviso to Art. 368 under items (a) to (e). These Articles require not only a majority of total membership in each House and majority of not less than two-thirds of the members present and voting in each House, but also ratification by at least one-half of the states Legislatures. The reason for entrenching these articles was given by Ambedakar in the Constituent assembly. He explained:

"If Members of the House who are interested in this are to examine the articles that have been put under the proviso; they will find that they refer not merely to center but to the relations between the center and the provinces. We cannot forget that the fact that we have in a large number of cases invaded provincial autonomy, we still intend and have as a matter of fact seen to it that federal structure of the constitution remains fundamentally unaltered."

The entrenched provisions are:

1. The method of election of the president of India (Art. 54, & 55)
2. Distribution of legislative Powers between the union and the states (Art. 245, Chapter I of Part IX; seventh schedule)
3. Extent of the executive power of the Union and the states (Art. 73 and 162)
4. Representation of the states in Parliament.
5. Provisions relating to the Supreme court and high Courts (Art. 124-127, chapter IV of Part V; Art. 214-232; Chapter V of Part VI; and Art. 241)
6. Art. 368 itself.

The founding fathers of the Constitution, thus, devised a unique process of amendment of the different provisions of the Constitution. Such a categorization as obtainable in the Indian Constitution did not hitherto exist in any other written Constitution. Commenting upon it, K. C. Where remarked. "This variety in the amending process is wise but is rarely found."

Now what exactly was the purpose behind these provisions? Several members of the Constituent Assembly took the view that no Constitution should be absolutely rigid. A Constitution should have an in built element of flexibility, and the capacity to adapt to changing needs. It was felt that the very fact that amending certain parts of the Constitution was more difficult than amending certain other parts would force future Parliaments and State legislatures to weight certain amendments with greater care.

However, the Constituent Assembly did not want to force its view on posterity. Posterity and future politicians representing the people of India could weigh the need for change and determine whether a particular amendment was justified or not. But there were clearly some members of the Constituent Assembly who were quite troubled by these wide powers of amendment. They were concerned that future Parliaments might use the power of amendment to take away the rights of the people. At some stage of proceedings Mr. Santhanam and Mr. Deshmukh proposed the following two amendments respectively. Mr. Santhnam's amendment went as follows: "Nor shall any right be taken away or abridged except by an amendment to the Constitution."[450]

Deshmukh amendment also conveyed more or less same message:

> "Notwithstanding anything contained in the Constitution to the contrary no amendment which is calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a person or persons with respect to property or

[450] III Constituent Assembly Debate, 398

otherwise, shall be permissible under the Constitution, and any amendment which is or likely to have such an effect shall be void and ultra vires of any legislature."[451]

However, these amendments were loosely phrased. As it happens, the first was accepted and dropped at some stage and the second withdrawn on the same day it was dropped.

One cannot give reason why this happened. However, Dr. Ambedakar himself felt that the whole Constitution should be amendable by succeeding generations of the Indian people. He hinted that the whole Constitution could be amended on several occasions. One may wonder, why did he say like this? One possible explanation for this extremely generous attitude may have been that the Founding Fathers did not claim to be either perfect or representative. They may have taken the attitude that "This is what we consider to be a good Constitution; if you do not like it' you should feel free to reject or change it."

In this regard Dr. Ambedakar expressed:

> "Those who are dissatisfied with the Constitution have only to obtain a two-thirds majority, and if they cannot obtain even a two-thirds majority in the Parliament elected on an adult franchise in their favour, their dissatisfaction cannot be deemed to be shared by the general public."[452]

From all this it would appear that the Founding Fathers had, in fact, considered the terribly weighty argument that the power of

---

[451] IX Constituent Assembly Debate, 944
[452] XII C.Assembly Debate 972

amendment could be used to destroy the rights of the people. It could be used for other purposes to change the Constitution, which the Founding Fathers had constructed after much deliberation. The Founding Fathers regarded their work as important but not excathedra, significant but not infallible, enduring bit subject to the demands of change. However, it is doubtful that the Founding Fathers-individually and collectively would have liked their work to be destroyed by capricious Parliament or set aside for dubious political purposes.

A few observations may be noted with regard to procedure for amending the Constitution. The power of initiating an amendment is vested exclusively in the Union Parliament. The states have no right to propose constitutional amendment, except under article 169 (1) when the Legislative assembly of a state may propose the creation or abolition of the Legislative Council of a state. Nor is the right to initiate a constitutional amendment conceded to the people. The exclusion of the states from the process of amending the Constitution is a negation of the federal principle and contrary to the practice followed in other federal countries.

The rules of procedure and conduct of business of the Lok Sabha as framed under art. 118 of the Constitution provide that the rules of procedure applicable to an ordinary Bill. It means that Art. 368 of the Constitution is not a complete code by itself and the procedure prescribed in Art. 368 is to be supplemented by the rules made by the rules made by each House regulating its procedure and the conduct of business.

If we compare amending process in the Indian constitution with that of the United states, Australia or Switzerland, it is to be noticed that

the flexibility or rigidity of the Constitution would depend inter alia, on the complexion of political parties having control at the centre and in the states the amending process in regard to entrenched provisions can hardly be made use of. We witnessed that the great difficulties were faced by the National Front Government at the centre in getting passed the Constitution 66th and 68th Constitution Amendment bill due to non-cooperation attitude of Congress (I) M.Ps. The said Bill could be passed in Lok Sabha, only when the Congress (I) M.Ps. gave up their cooperation. This example is sufficient testimony to prove that the amending procedure cannot be easily invoked when there is a thin majority of the ruling party and the opposition party is in formidable position in Parliament.

However, the amending provision is all the more necessary in modern Constitution because the world in which we are living is growing very fast and is becoming more complex and there is constant pressure on Constitution for amendment, or abandonment.

However, the Indian Constitution presents a unique model in respect of the amending process. Till the year 1967 (*Golaknath decision*) the apex Court has never read any limitations on the amending power of the Parliament. But in *Keshavananda case* the Court while acknowledging that there is no limitation on the Parliament's power to amend the Constitution including Fundamental Rights, held the basic structure as an inherent limitation of the Parliament's power to amend.

However, it is not correct to say that Art. 368 is a "complete code" in respect of the procedure provided by it. There are gaps in the procedure as to how and after what notice a Bill is to be introduced, how it is to be passed by each House and how the President's assent

is to be obtained. Having provided for the Constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (Art. 118) the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as it may be applicable, consistent with the express provisions of Art. 368, when they entrusted to it the power of amending the Constitution.

6.2.4 Amending Procedure

Amending procedure in a Constitution requires skilful drafting because in the absence of such a mechanism a Constitution can be converted into a "frozen one". The changes in the Constitution on which countries base their political institutions are brought about by two different processes, which may be classified as:

- De jure or formal modifications
- De facto or informal modification.

Formal modification of the Constitution is made by using the amended process provided in the Constitution itself, which may be either by the people themselves directly participating in it or indirectly through their chosen representatives. The formal procedure of amending a Constitution is of greater importance and is more effective than the informal method of updating the Constitution, because it is the method of an authority, which is superior to every other. Article V of the U.S. Constitution and Article 368 of the Indian Constitution provide for indirect participation. Informal modifications in the Constitution can be made through:

- Judicial Process,
- Executive actions, and
- Desuetude

6.2.5 Supreme Court on the Wording of Article 368

The question of limiting power of Parliament to amend the Constitution is a subject matter of considerable discussion both in Supreme Court as well as in the parliament. This has generated enormous amount of controversy on this issue. And one is not sure as to when the controversy may further revive again, since the policy-makers of each Parliament would like to implement their promises and assurances they have given, without, sometimes, going deep into the repercussions on the public opinion.

The Framers of the Indian constitution have incorporated in Part III, the Fundamental rights and vested the power of judicial review through Art. 13 of the Constitution.

Article 13 declares that all laws in force so far as they are inconsistent with the provisions of Part III of the Constitution, are void to the extent of inconsistency and it also forbids the State from making any such law. The fundamental rights are given special sanctity by being kept beyond the reach of ordinary legislative process. Whether the Parliament has the power to make any law, amounting to amending the Constitution in order to take away or abridge any of these rights, is a question, which has to be dealt within the perspective of the actual relations between Arts. 368 and 13 (2) as envisaged by the scheme of the Indian Constitution.

Now if we analyze the provisions empowering judiciary for reviewing the legislations violating the basic constitutional tenets. Art. 13 declares that all laws in so far as they are inconsistent with the provisions of Part III of the Constitution, are void to the extent of inconsistency and it also forbids the state from making any such law. The Fundamental rights are given special sanctity by being kept beyond the reach of ordinary legislative process. Whether the Parliament has power to make any law, amounting to amending the Constitution in order to take away or abridge any of these rights, is a question, which has to be dealt within the perspective of the actual relations between Arts. 368 and 13 (2) as envisaged by the scheme of the Indian Constitution.

At first the Supreme Court supported the common sense view that the Constituent Assembly intended Parliament and, where necessary, the State legislatures, to have plenary and complete powers of amendment in the hope that these bodies and the electorates that supported them would ensure that the power was judiciously used. In 1951, Supreme Court on various ground, was asked to strike down the First Amendment, taken as a whole. But Supreme Court suggested that the power of Parliament to amend the Constitution was not unlimited. Justice Patanjali Shastri took the view that although some of the arguments were attractive, the amending power in the Indian Constitution was a plenary power and not amenable to any control other than the procedural; control of a two-thirds majority in both Houses of Parliament and, where necessary, the ratification of one-half of the states. The controversy is whether article 368 gives the plenary power to amend or prescribes only the procedure.

6.2.6 Amendment: Meaning

In common parlance, "amendment" might convey the sense of "improvement" or a slight change in the main instrument but the word "amendment", when used in relation to a Constitution, carries all shades of meaning such as alteration, revision, repeal, addition, variation, or deletion of any provision of the Constitution. By usage it has come to mean every kind of change brought about by the process of amendment in the Constitution, it is used in the widest possible sense an it is appropriate and indispensable that the word "amendment" be including all kinds of change.

However, the word 'amendment' used in Article 169 conveys more restricted meaning, again Para 7 of part D, Fifth Schedule which bears the word "amend" expresses a much wider sense. It provides "Parliament may from time to time by law amend by way of variations or repeal any provisions of the schedule and if the Schedule is so amended, any reference to this Schedule in this constitution shall be construed as a reference to such Schedule as amended." Here the word "amend" has been used in expanded sense by using the words "by way of addition, variation or repeal" after the word 'amend' so as to enable it to cover a much wider field. A similar enlargement of the scope of the word 'amend' may be found in Para 21 of the sixth Schedule of the Constitution.

From this discussion, it appears that the word "amendment" has been used in different senses in different parts of the constitution. But one point is crystal clear, that the Constitution-makers did not want the whole constitution to be repealed.

In Article 368, the expression "amendment" has been used in a very wide sense. When this article was discussed in the Constituent Assembly, Mr. H. V. Kamath moved an amendment to add to Article 368 that any provision of the Constitution might be amended by way of variation, addition or repeal in the manner provided in the Article. But this Amendment negatived.[453] The reason may be for not adding the explanatory words "by way of variation, addition or repeal" to the Article was that by then words "amendment" itself as used in respect of the Constitution had come to attain an all comprehensive sense of change and, therefore, there was no need of having an explanatory words.

So, the meaning of the word 'amendment' in legal parlance is to mend but not end the Constitution. According to Herman Finer, "to amend is to deconstitutte and reconstitute."[454]

6.3 Judicial Review Of Some Constitutional Amendments: A Unique Experience Of India

Judicial review of constitutional amendments is not generally permissible except on procedural grounds or to prevent the violation of the express limitations mentioned in the Constitution itself. Before 1967 even the Indian Supreme Court had held that it had no power to strike down constitutional amendments on substantive grounds and therefore could not exercise power of judicial review in this respect. It was only after the *Golaknath case* in 1967 that the Supreme Court assumed the power of judicial review of

---

[453] C.A.D. Vol. IX, p. 1649 op. cit. by Hari Chand in "The Amending Process in the Indian Constitution", p. 18

[454] Finer Herman, "Theory and Practice of Modern Government", Vol. 1 (1932)

constitutional amendments. The opinion on the scope of judicial review of constitutional amendments is divided:

One view upholds the Supreme Court's power to strike down constitutional amendments even on substantive grounds; where as the other view does not concede this power to the court. Whether the power of judicial review ought to be extended to constitutional amendments or not can be decided by dispassionately examining the relevant provisions of the constitution.

Art. 368, which confers the power to amend the constitution to Parliament, is a part of the constitution. A Bill foe amendment of the Constitution introduced there under cannot be said to be a "law" within the meaning of Article 245 (1), because after the Amendment Bill is passed, its subject matter becomes a part of the Constitution and it is not an ordinary piece of Parliamentary legislation. Art. 245(1) deals only with those laws, which are a part of the Constitution; it does not deal with laws, which are a part of the Constitution. As apart of the Constitution, the amendment is as such a fundamental law as is the rest of the Constitution. The question of its being inconsistent with the rest of the Constitution, therefore, cannot arise. Such a question can arise only in respect of laws, which are not a part of the Constitution. There is no doubt that even the Constitution is called law, rather, the basic law and in that sense an amendment is also a law, but certainly it is not an ordinary law that can be struck down as violative of the Constitution. The distinction between the amendments of the Constitution made by Parliament under Article 368 in its constituent capacity and a law made by its under Art. 245 (1) must be appreciated.

Constitutional amendment derives its validity from the Constitution. Irrespective of subject matter, the moment a provision becomes validly embodied in the Constitution, it acquires a validity of its own and cannot be challenged. By declaring constitutional amendment as unconstitutional the Supreme Court conveys the message that judiciary and not the Constitution is supreme."[455]

6.3.1 The Constitution (First Amendment) Act, 1951

The question whether Art. 368 of the Constitution empowers the Parliament to amend the Constitution, especially so as to affect the fundamental rights, was first considered by the Supreme Court in *Shankari Prasad Singh v. The Union of India*[456]in which the validity of Constitution (First Amendment) Act, 1951 was challenged. It was in this case, that the first attack on Parliament's power to amend the constitution was made.

When the Bihar Land Reforms Act of 1950 was held to be void as violating Art. 14, the Constituent Assembly, functioning as the provisional Parliament under Article 379 passed the Constitution (First Amendment) Act, 1951. By the First Amendment, clause (4) of Article 15 was inserted to carry out the directives Principles contained in Article 46, clause (2) and (6) of Article 19 were amended with retrospective effect and Article 31 A and 31 B and Ninth Schedule were inserted. By this amendment certain fundamental rights contained in Article 19 were abridged. It had never been the intention of the framers of the constitution that the provisions relating to fundamental rights contained in Part

[455] M. K. Bhandari, ": Basic Structure of the Indian Constitution" p.353, Deep and Deep Publication, 1993
[456] AIR 1951 SC 458

III of the Constitution could not be amended so as to take away or abridge the fundamental rights. However, In *Shankari Prasad case*[457], the petitioner challenged the validity of the amendment mainly on five grounds.

Contentions raised

Firstly, the power of amending the Constitution provided for under Art. 368 was conferred not on Parliament but on the two Houses of Parliament as a designated body and therefore, the provisional Parliament was not competent to exercise that power under Art. 379. Even if it was assumed that the power was conferred on Parliament, it did not devolve on the provisional Parliament by virtue of Art. 379 as the words "All the powers conferred by the provisions of this Constitution on Parliament" could refer only to such powers as are capable of being exercised by the provisional Parliament consisting of a single chamber. The power conferred by Art. 368 calls for the co-operative action of two Houses of Parliament and could be appropriately exercised only by the Parliament to be duly constituted under Chapter 2 of Part V.

Secondly, so far as the Constitution (Removal of Difficulties) Order No. 2 made by the President, purports to adopt Art. 368 by omitting "either House of" and "in each House" and substituting "Parliament" for "that House" are beyond the powers conferred on him by Art. 392, as "any difficulties" sought to be removed by adoption under that article must be difficulties in the actual working of the Constitution during the transitional

---

[457] *ibid*

period and whose removal is necessary for carrying on the Government. No such difficulty could possibly have been experienced on the very date of the commencement of the Constitution.

Thirdly, in any case Art. 368 is a complete code in itself and does not provide for any amendment being introduced in the House. The Bill in the present case having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in Art. 368.

Fourthly, the Amendment Act, in so far as it purports to take away or abridge the rights conferred by part III of the Constitution, falls within the prohibition of Art. 13 (2).
Lastly, as the newly inserted Art. 31 A and 31 B seek to make changes in Arts. 132 and 136 in Chapter 4 of Part V and Art. 226 in Chapter 5 of Part VI, they require ratification under cl. (b) of the provision to Art. 368 and not having been so ratified they are void and unconstitutional. They are also ultra vires as they relate to matters enumerated in list II, with respect to which the state Legislatures and not Parliament have the power to make laws.

Arguments

On the first point, it was submitted that whenever the constitution sought to confer a power upon Parliament, it specifically mentioned "Parliament" as the donee of the power as in Arts. 2, 3, 33, 34 and numerous other articles, but it deliberately avoided the use of that expression in Art. 368.

Realizing that the Constitution, as the fundamental law of the country, should not be liable to frequent changes according to the whim of party majorities, the framers placed special difficulties in the way of amending the Constitution and it was a part of that scheme to confer the power of amendment on a body other than the ordinary legislature as was done by Art. V of the American Constitution.

However majority did not appreciate this view. Various methods of constitutional amendments have been adopted in written Constitutions, such as by referendum, by a special convention, by legislation under a special procedure, and so on. But which of these methods the framers of the Indian constitution have adopted must be ascertained from the relevant provisions of the Constitution without any leaning based on prior grounds or the analogy of other Constitutions in favour of one method in preference to another.

The argument that a power entrusted to Parliament consisting of two houses cannot be exercised under Art. 379 by the provisional Parliament sitting as a single chamber overlook the scheme of the constitutional provisions in regard to Parliament. These provisions envisage a Parliament of two houses functioning under the Constitution framed as they have been on that basis. But the framers were well aware that such a Parliament could not be constituted. It thus became necessary to make provisions for the carrying on, in the mean time, of the work entrusted to Parliament under the Constitution. Accordingly, it was provided in Art. 379 that the Constituent Assembly should function as the provisional Parliament during

the transitional period and exercise all the powers and perform all the duties conferred by the Constitution on Parliament.

The other contention that "State" includes Parliament and "law" must include a constitutional amendment, and that it was the intention of the framers of the Constitution to make immune the fundamental rights from interference not only by ordinary laws but also by constitutional amendments. It is not uncommon to find in written Constitutions a declaration that certain fundamental rights conferred on the people should be "eternal and inviolate" as for instance Article 11 of the Japanese Constitution. Art. V of the American Constitution provides that no amendment shall be made depriving any State without its consent "of its equal Suffrage in the Senate".

The framers of the Indian constitution had the American and Japanese models before them, and they must be taken to have prohibited even constitutional amendments in derogation of fundamental rights by using aptly wide language in Art. 13 (2). However this was not accepted. The reason is although law must ordinarily include constitutional law; also, there is clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of Constituent power. No doubt our Constitution does incorporate certain fundamental rights in part III and have made them immune from interference by law made by the State. However, it is difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendments. The wording of Art. 368 is perfectly general and empower Parliament to amend the Constitution, without any exception whatsoever. Had it been

intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a provision to that effect.

So, in this case, the Supreme Court did not say that the Constitutional Amendment is beyond its power of judicial review. The Court examined the validity of the First Amendment in detail and declared that the amendment s was validly made.

6.3.2 The Constitution (Fourth Amendment) Act, 1955

The Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance, 1954 was passed to take over the properties of the Company and to put the management and administration of the Company under the control of the directors appointed by the Government. A shareholder of the Company questioned the validity of the ordinance in *Dwarka Dass Sriniwas v. Sholapur Spinning and Weaving co.*[458] on the ground that it violated the provisions of Art. 31 (2) of the Constitution as it had made no provision for paying compensation to the company. Similar question arose in *State of West Bengal v. Mrs. Bella Banerjee*[459]where the Court was called upon to consider the question whether compensation provided for under the West Bengal Land Development and Planning Act, 1948 was in compliance with the provisions of Article 31 (2) of the Constitution. The Supreme Court held that the provisions of the said Act fixing a ceiling on compensation without reference to value of the land was arbitrary and therefore, contrary to the terms of Art. 31 (2) of the Constitution. In order to overcome the

[458] AIR 1954 SC 119
[459] AIR 1954 SC 170

difficulties created by the above judgments of the Supreme Court changes in Art. 31 (2) were made by the Constitution (Fourth Amendment) Act 1955 and the Ninth Schedule of the Constitution, which was made immune from attack on the ground of violation of the provisions of the Constitution, was enlarged by adding seven more Acts including the above West Bengal Act, 1948.

6.3.3 The Constitution (Seventeenth Amendment) Act, 1964

In 1965, fourteen years after the decision of the Supreme Court in *Shankari Prasad's case*, the Constitution (Fourth Amendment) Act and Constitution (Seventeenth Amendment) Act, which protected a large number of agrarian statutes from challenge on the ground of encroaching on the fundamental rights, was challenged in *Sajjan Singh v. State Rajasthan.*[460] The Act amended the Ninth Schedule to the Constitution, adding thereby several Acts to the list in that Schedule. The Act so added to the list in the Ninth Schedule was consequently rendered immune from attack before the Courts on the ground that they violated fundamental rights. The main argument of the petitioners was that the impugned amending Acts disabled the High Court from reviewing the protected Acts under Art. 226 of the Constitution and was therefore, in effect, an amendment of Art. 226 itself. In this case, the majority judgement was delivered by Chief Justice Gajendragadakar for himself and Wanchoo and Raghubir Dayal, JJ. The following issues arose from the decision.

[460] AIR 1965 SC 845

1. Whether an amendment under Art. 368 to a fundamental right is a "law' within the meaning of Art. 13 (2)?
2. Can Parliament at all make an amendment under Art.368 of a fundamental right in part III of the Constitution?
3. Does an amendment under Art. 368 to a fundamental right curtail the jurisdiction of the High Courts under Art. 226?
4. Whether Art. 368 besides laying down the procedure of constitutional amendment also confer on Parliament a specific power to amend the Constitution?
5. Is it desirable for the Court to discuss an issue which has not been raised before it?

If we take the first point for the discussion that whether amendment under Art. 368 is a "law" within the meaning of Art. 13 (2) of the Constitution. The majority judgment in Sajjan Singh agreed with the view taken by Patanjali Shastri, J. In Shankari Prasad, that a distinction had to be drawn between an ordinary law enacted in exercise of its legislative power and a constitutional law, made in exercise of constitutional power, because an amendment under Art. 368 was not made by Parliament in the exercise of legislative power, and it could not be termed as "law" so as to fall within Art. 13 (2). However, Justice Hidaytullah observed that the definition of the word "law" in Art. 13 (2) did not seek to exclude constitutional amendments. Other wise there would have been added a clause that "law under this Article shall not include an amendment of the Constitution." Madholkar J. also held that a legislative action of a legislature could not often be other than law and that art. 368 nowhere said that Parliament while making an amendment

to the constitution assumed a different capacity viz. that of a constituent body.

The next issue whether Parliament can at all make an amendment under Art. 368 to a fundamental right in part III of the Constitution is nothing but a corollary of what has been said earlier. It would be erroneous to think that Parliament does not have any such power. According to majority view the constitution-makers could have hardy thought of making fundamental rights completely immutable, not to subject to even an amendment. However, Justice Hidaytullah expressed his disapproval of the earlier holding of the Court in *Shankari Prasad* case saying:

> "I would require stronger reasons than those given in Shankari Prasad's case...to make me accept the view that fundamental rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the State."

Justice Madholkar also raised doubt that though the Constituion did not directly prohibit the amendment of part III it would be strange that rights which were considered to be fundamental. Including the remedies guaranteed under Art. 32 should be capable of being abridged or restricted easily than any of the matters contained in the proviso to Art. 368 some of which were less vital than fundamental rights.

Another issue is of the power that is being conferred on Parliament regarding the amendment of the constitution. I.e.

whether Art. 368 confer specific powers on Parliament to amend the constitution. Madholkar J. observed that it was quite possible that Art. 368 merely laid down the procedure to be followed for amending the constitution and did not confer a power on parliament to amend it which would be ascertained from the provision sought to be amendment or other relevant provisions.

So, in this case, though Hidaytullah and Madholkar J.J., concurred with the decision on the main issue of the case, they dissented on the question of the substantive limits on the amending power of Parliament. It can be said that Hidaytullah J., viewed the fundamental rights as inviolable and eternal because he failed to distinguish between an ordinary law and a constitutional law. And for him there was no difference between an ordinary law and an amendment of the Constitution for purposes of judicial review. And it is now known fact that Justice Madholkar's poser regarding the amendability of the basic features of the Constitution acquired tremendous importance, when Nani Palkhivala, a legal luminary, made a dextrous use of doctrine of the Constitution in *Keshavananda Bharati* case.

So, in nutshell, the decision of the Supreme Court in *Shankari Prasad's case* remained operative from 1951 to 1967. According to the decision Article 368 manifested "sovereign constituent power" which might be exercised to produce abridgment or nullification of fundamental rights by "alteration of Constitution". While in *Sajjan Singh's case,* the petitioners did not challenge Parliament's power o amend fundamental rights;

the basis of their challenge to the 17th amendment was that the requirement of the proviso to Art. 368 had not been complied with.

In *Shankari Prasad* and *Sajjan Singh* cases constitutional amendments have traditionally been held to be out of the reach of judicial process, as they are being equated with the same legal status as that of the Constitution itself. However, it received a sever blow from the Supreme Court in the famous case *Golaknath v. State of Punjab*[461], in which the Court held that the Parliament's power to amend the Constitution did not extend to abridging or taking away of the fundamental rights guaranteed by part III of the Constitution.

In *Golak Nath v. State of Punjab*[462] the constitutionality of the Seventeenth Amendment and the correctness of the decisions of the Supreme Court in *Shankari Prasad* and *Sajjan Singh* were questioned. The petitioners filed writ petitions against the State of Punjab challenging the Financial Commissioner's order under Punjab Security of Land Tenures Act, 1953 which was included in the Ninth Schedule on the ground that the 17th Amendment was itself unconstitutional which was also attacked on the same grounds. It was alleged that provisions of the Punjab Security of Land tenure Act, 1953 which deprived them of lands and which were inherited by succession are violative of Art. 14, 19 (1)(f) and (g) and that by placing the Act in the Ninth Schedule of the Constitution by virtue of the 17th Amendment Act, they were denied the remedy of challenging the validity. The petitioner's challenge was based manly on the following contentions:

---

[461] AIR 1967 SC 1642
[462] AIR 1967 SC 1642

Contentions raised

- The power of Constitutional amendments is only a legislative power, traceable to the residuary power, under the Constitution, for Art. 368 by itself does not confer any power of amendment, but only provides for the procedure for amendment and that the power to amend is a legislative power conferred by Arts. 245, 246 and 248;
- Amendment under Art. 368 is also "law" under Art. 13 (2) and therefore subject to limitations therein contained.
- Art. 368 confer only power of amendment. It cannot be exercised to destroy the framework of the Constitution.
- The limits on the power of amendment are implied in Art. 368, for the word "amend" has limited meaning;
- Fundamental Rights are part of Basic Structure of the Constitution and hence cannot be destroyed; and
- The impugned amendment disabled the High courts from reviewing under Art. 226, an extrenched provision thus was in effect an amendment of Art. 226 itself and therefore resolutions by one-half of the States ratifying the amendment are required. Since no such ratification had been obtained the amendment is void.

Arguments

The contentions urged by respondent State in favour of the validity of the amendments were as follows:

- The constitutional amendments are effected in exercise of constituent power, while ordinary law is made in exercise of legislative power;

- The provisions of Art. 368 are clear and unequivocal. There is no scope for invoking implied limitations;
- There are no basic features of the constitution and that the Constitution itself is basic and hence can be amended for the progress of the country.
- The Constituent assembly debates cannot rely on for interpretation of Art. 368 and even otherwise, there is nothing in the debates to show that Fundamental rights are non-amendable.
- In order to fulfill and achieve the directive principles of state policy, the Constitution has been amended from time to time and any reversal or interference of previous decisions would introduce economic chaos; and
- Art. 31 A or Ninth Schedule do not effect the power of High Courts under Art. 226.

In this case, of the 11 judges, a majority of six judges held that Parliament could not amend or abridge the fundamental rights, and reversed its earlier decision in *Shankari Prasad* and *Sajjan Singh*. Some of the highlights of the majority judgement is as under.

- Art. 368 does not confer any power to amend the Constitution. It is necessarily prescribes, various procedural steps in the matter of the amendment. The power to amend the Constitution cannot be read into Art. 368 by implication, since wherever the Constitution seeks to confer such a power it expressly says so.

- The fact that there are other conditions in Art. 368 such as requirement of large majority and in the case of Articles mentioned in the proviso, ratification by the state Legislatures,

does not make the amendment any less a law and the amending agency a different body. Moreover, an amendment of the Constitution can be made only by the legislative process, with ordinary majority or with special majority, as the case may be. So, an amendment of the Constitution can be nothing but "law" and "law" in its comprehensive sense includes constitutional law. Art. 13(2) give an inclusive definition of the word "law" and does not exclude, but, in fact, prima-facie takes in constitutional law.

H. M. Seervai, sharply reacting to the majority argument observed that:

> "If a law made by the Parliament to amend part III in the exercise of its residuary power and in compliance with Art. 368 is void as contravening Art. 13(2), a law passed by the same Parliament convening a Constituent Assembly and authorizing it to do very thing must be equally void. For what Parliament cannot do itself, if cannot authorize another body to do. Therefore, a Constituent Assembly is either legally impossible or wholly unnecessary."[463]

The majority view of the nature of fundamental rights vis-a-vis amendatory power of parliament taken in *Golaknath case* has evoked both criticism and approbation. And as a result of the *Golaknath decision*, Art. 13(2) has become an impervious rock of prohibition against the State and any amendment of the fundamental rights so as to take away or abridge them has become legally impossible. Now, if we see the history there is one ambiguous statement of dr. Ambedakar that throws some doubt regarding the

[463] H. M. Seervai, "Constitutional law of India: A critical commentary"

amendability of the fundamental rights, but does not make clear what he had in mind.[464] Explaining the final form of the amending procedure under Art. 304 of the Draft Constitution (Art. 368), he informed the Assembly that Art. 368 divides all the Articles under three categories, namely first, Articles amendable by Parliament by a simple majority, secondly, by two-thirds majority and an absolute majority, thirdly, those provisions require ratification by half of the States. He then went on to say:

> "If the future Parliament wishes to amend any particular article which is not mentioned in part III or Art. 304, all that is necessary for them is to have a two-thirds majority. They can amend it."[465]

There can be no more convincing proof of the intentions of the founding fathers than the fact that the Constitution 9First Amendment) Bill, which drastically abridged certain fundamental rights, was passed by the same house(i.e. Constituent Assembly) which enacted the Constitution. During the passage of the Bill no member raised any objection in regard to the competence of the house to amend part III.

6.3.4 The Constitution Twenty-fourth, Twenty-fifth and Twenty-ninth Amendment

Within a few weeks of the *Golaknath* verdict the Congress party suffered heavy losses in the parliamentary elections and lost power in several states. Though a private member's bill - tabled

---

[464] Subba Rao, C. J. relied upon this paragraph in Golaknath case op. cit; p. 1657
[465] *ibid*

by Barrister Nath Pai - seeking to restore the supremacy of Parliament's power to amend the Constitution was introduced and debated both on the floor of the house and in the Select Committee, it could not be passed due to political compulsions of the time. But the opportunity to test parliamentary Supremacy presented itself once again when Parliament introduced laws to provide greater access to bank credit for the agricultural sector and ensure equitable distribution of wealth and resources of production and by:

a) Nationalizing banks and
b) Derecognising erstwhile princes in a bid to take away their Privy purses, which were promised in perpetuity - as a sop to accede to the Union - at the time of India's independence?

Parliament reasoned that it was implementing the Directive Principles of State Policy but the Supreme Court struck down both moves. By now, it was clear that the Supreme Court and Parliament were at loggerheads over the relative position of the fundamental rights vis-à-vis the Directive Principles of State Policy. At one level, the battle was about the supremacy of Parliament vis-à-vis the power of the courts to interpret and uphold the Constitution.

At another level an affluent class much smaller than that of the large impoverished masses for whose benefit the Congress government claimed to implement its socialist development programme over the sanctity of property as a fundamental right jealously guarded the contention.

Less than two weeks after the Supreme Court struck down the President's order derecognizing the Princes, in a quick move to secure the mandate of the people and to bolster her own stature Prime Minister Indira Gandhi dissolved the Lok Sabha and called a snap poll.

For the first time, the Constitution itself became the electoral issue in India. Eight of the ten manifestos in the 1971 elections called for changes in the Constitution in order to restore the supremacy of Parliament. A.K. Gopalan of the Communist Party of India (Marxist) went to the extent of saying that the Constitution is done away with lock stock and barrel and is replaced with one that enshrined the real sovereignty of the people8. The Congress party returned to power with a two-thirds majority. The electorate had endorsed the Congress party's socialist agenda, which among other things spoke of making basic changes to the Constitution in order to restore Parliament's supremacy.

Through a spate of amendments made between July 1971 and June 1972 Parliament sought to regain lost ground. It restored for itself the absolute power to amend any part of the Constitution including Part III, dealing with fundamental rights.9 Even the President was made duty bound to give his assent to any amendment bill passed by both houses of Parliament. Several curbs on the right property were passed into law. The right to equality before the law and equal protection of the laws (Article 14) and the fundamental freedoms guaranteed under Article 19(1) were made subordinate to Article 39 (b) & (c) in the Directive Principles of State Policy. Privy purses of erstwhile princes were abolished and an entire category of legislation

dealing with land reforms was placed in the Ninth Schedule beyond the scope of judicial review.

Now in order to meet the challenges and hurdles created by the decision of Supreme Court in *Golaknath's case*4, Parliament passed the 24th, 25th, 26th, and 29th Constitution Amendment Acts. The main object behind passing of the Constitution (24th Amendment) Act was to nullify the *Golaknath's decision* and to restore to the Parliament the power of amending any provision of the Constitution. The Constitution (24th Amendment) act amended Art. 13 to the effect that "Nothing in this Article 13 shall apply to any amendment of the Constitution made under Art. 368." Also Art. 368 amended and marginal heading made it clear that Art. 368 do not merely contain the procedure for amendment, but also contains the power of amendment. Moreover, the original Art. 368 was renumbered as clause (2) thereof and a new clause (1) was added to the effect that the Parliament in exercise of its constituent power may amend by way of addition, variation or repeal any provision of the Constitution. The amended clause (2) made it obligatory for the President to give an assent to an Amendment Bill duly passes and introduced. Also it introduced by way of clause (4) to Art. 368 that nothing in Art. 13 shall apply to an amendment made under Art. 368.

So, the Twenty Forth Amendment leads to the following results.

1. When Parliament makes a constitutional amendment under Article 368, it acts "in exercise of its constituent power". Thus the source of amending power is Article 368 itself.
2. In place of the word 'amendments' the words 'amend by way of addition, variation or repeal any provision of this constitution' have been substituted.

3. The President is bound to give his assent to any bill passed under Article 368.
4. The bar in Article 13 against abridging or taking away any of the fundamental rights would not apply to an amendment made under article 368.

Moreover, within few weeks from the enactment of the Constitution (24th Amendment) Act, the Parliament passed the Constitution (25th Amendment) Act, to remove the difficulties created by the Supreme Court in the *Bank Nationalization case.* (Elaborately discussed in the earlier chapter) In this case the Supreme Court held that the compensation for property so acquired or requisitioned is to be equivalent in money/property so acquired or requisitioned. This interpretation of the Supreme Court ran contrary to the provision of the constitution (4th Amendment) Act, 1955, which made adequacy of compensation non-justiciable. The Court also held that a law, which seeks to acquire or requisition property for public purpose, should satisfy the requirement of Art. 19 (1)(f). The 25th Amendment Act amended Art. 31(2) and substituted the word "amount" in place of "compensation'. It added a new clause 2A, which made clear that any deprivation pursuant to law passes under Art. 31 could not be challenged on the ground that it infringes the rights guaranteed in Art. 19 of the Constitution. Also 25th amendment Act added Art. 31 C, which provided that laws passed for giving effect to, the directive principles specified in Art. 39 (b) and (c) cannot be challenged on the ground that it is inconsistent with or takes away or abridges any of the rights guaranteed under Arts. 14, 19 and 31 of the Constitution. With this clause the Parliament rearmed itself with the power to introduce socio-economic changes in the society.

The Constitution (26th Amendment) Act 1971 was necessitated by the decision of the Supreme Court in *Privy Purse case*[466], in which the Presidential Order derecognizing the privileges of ex rulers of Indian States was declared unconstitutional. In this case, it was held that Privy Purse was property and therefore could not be taken away merely by an executive order. The amendment omitted Art. 291 and Art. 362 and inserted a new Art. 363 A which abolished the rights of Privy Purse and all rights, liabilities and obligation in respect of Privy Purse.

The Constitution (29th Amendment) Act inserted two Kerala Land Reforms Act of 1969 and 1971 in the 9th Schedule to the Constitution thus giving them the protection under Art. 31 B and it cannot therefore be said that protection would not be available unless it is shown that the Act relates to agrarian reforms.

6.3.5 Emergence of the Basic Structure Concept- The Keshavananda Milestone

Inevitably, the constitutional validity of these amendments was challenged before a full bench of the Supreme Court (thirteen judges). Their verdict can be found in eleven separate judgements.13 nine judges signed a summary statement, which records the most important conclusions reached by them in this case. Granville Austin notes that there are several discrepancies between the points contained in the summary signed by the judges and the opinions expressed by them in their separate judgements.14 Nevertheless, the seminal concept of **'Basic Structure'** of the Constitution gained recognition in the majority verdict.

---

[466] AIR 1971 SC 530

All judges upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution. All signatories to the summary held that the *Golaknath case* had been decided wrongly and that Article 368 contained both the power and the procedure for amending the Constitution.

However they were clear that an amendment to the Constitution was not the same as a law as understood by Article 13 (2). [It is necessary to point out the subtle difference that exists between two kinds of functions performed by the Indian Parliament: a) it can make laws for the country by exercising its legislative power15 and b) it can amend the Constitution by exercising its constituent power.

The 24th, 25th and 29th Amendment altered the relationship between the Parliament and the judiciary within the constitutional framework of the country. The amendment was challenged in *Keshavananda Bharati v. State of Kerala*[467] in Supreme Court and the case is popularly known as "Fundamental Rights Case". In this case, the petitioner contended that there were certain basic freedoms meant to be permanent: that there were other basic features besides fundamental rights like sovereignty and integrity of India' the people's right to vote and elect their representatives, the independent judiciary, the secular State, the republican form of Government, the dual structure of the Union and the separation of executive, legislative, judicial powers, that the power of Parliament to change these basic features as the Parliament itself happens to be a constituted authority.

[467] AIR 1973 SC 1461

On the other hand, the respondent claimed an unlimited power for amending body and contended that

- The power to amend under Art. 368 of the Constitution was unlimited provided the conditions laid down in Art. 368 were satisfied;
- The power extended to abrogating or taking away the rights of freedom guaranteed in part III of the Constitution;
- Article 32 of the constitution could not be repealed and abrogated;
- Directive Principles in Part IV could be altered drastically or even abrogated; and
- The form of the Government could be wholly changed and the power of judicial review could be taken away.

N. A. Palkhivala and others representing petitioners contended:

> "Certain limitations were fairly and properly deducible from the scheme of the Constitution which must restrict the amending power. An amendment, was at best piece of Constitutional law, and could not be sustained if it was in contravention of Art. 13(2); or else if it impaired any essential aspects of the central part of the Bill of rights. Hence, the Parliament, despite the amending power vested in it could not amend the Constitution so as to alter the core of fundamental rights."

On the other hand, Late H. M. Seervai, the then Advocate General of Maharashtra, on behalf of the respondent State of Kerala, submitted that the amending power had no limitations, and it could be used "to enlarge" that power as well. Seervai felt that Art. 368 could be

amended in any manner and the amending power could not be restricted on the basis of any imaginary abuse of power.[468] Actually, he was against the theory of implied limitations. Niren De, the then Attorney General of India, described the amending power under Art. 368 as absolute and beyond the theories of implied limitations and essential features of the constitution, and that even the fundamental features of the constitution can be modified. He added that the 24th Amendment explicitly gave the powers to Parliament to deconstitutte or reconstitutes the Constitution or any part of it. Unexpressed or implied limitations would defeat the purpose of amending power, which was to keep the Constitution responsive to the needs of changing times. Thus, he observed, the amendment reached every provision of the Constitution including the preamble.[469]

The Advocate general of Maharashtra pointed out: "unless the power of amendment is coextensive with the judicial power of invalidating laws made under the Constitution, the judiciary would be Supreme. Therefore, the power of amendment should be coextensive with the judicial power.[470]

In this regard an interesting argument put forward by the judges was that two-thirds majority in Parliament did not necessarily represent a majority of the people of India. Hence, if the amending power is unlimited, the Parliament and the people could be working at cross-purposes, particularly, when the basic changes in the Constitution were invoked. They further held that the President would not be true to Art. 60 of the Constitution under which he had taken an oath to, "preserve, protect and defend the Constitution", if

---

[468] *ibid* at p. 1535
[469] *ibid* at p. 1576
[470] *ibid* at p. 1601

he were to give his assent to any amendment seeking basic changes in the Constitution and that the basic features of the Constitution were expected to be permanent.

In this case, Justice Khanna distinguished between a statutory law made in exercise of the legislative power and constitutional law made in exercise of constituent power because an ordinary law was made under the authority of the basic law, the Constitution. Hence, Justice Khanna held, that the Art. 13(2) were not intended to cover amendments of the Constitution made in accordance with Art. 368 nor the amending power under Art. 368 was curtailed by implication under Art. 13(2) should not be read in isolation but along with Art. 368.[471] So, Justice Khanna was very much clear on this point that the amending power could not be pretence for subverting the structure of the Constitution nor could Art. 368 be so constructed as to embody the death wish of the Constitution or provide sanction for what might be called its "lawful harakiri".

In this case, Justice Ray held that the Constitution did not distinguish between essential and non-essential features and therefore the theory of inherent and implied limitation on the amending power because of the essential features of the Constitution, was without substance. According to him, "if the Parliament did not distinguish between essential and non-essential features, it could not amend the Constitution. If, on t6he other hand, the Court were to find out whether or not the amendment made by the Parliament violated or not the amendment made by the Parliament violated or abridged the essential features it would drop

[471] *ibid* at p. 1842

the Parliament of the power of amendment and repose a final power of expressing validity of amendment in the Courts.[472]

On the question of unamendability of the "essential features, basic elements or fundamental principles of the Constitution", Palekar J. observed that it was not possible to identify the body or norms to decide which provisions of the Constitution were or were not essential. In one sense, every provision was essential, because if law made by Parliament or the State Legislature contravened even the most insignificant provision of the Constitution that law would be void. Therefore, for the courts, all provisions had an equal standing. In this case, he realized that agreeing with Palkhivala would have meant resorting to the substantive due process doctrine of the Supreme Court of America in the interpretation of a constitutional amendment a power for court which was not even remotely imagined by the makers of the Indian constitution.

K. K. Mathew, J., another judge subscribing to the minority opinion in this case, observed that the power to amend even under unamended Art. 368 included the power to add, alter, substitute or delete any provision of the Constitution and could change the complexion of the Constitution, including its essential features. According to him, there was no merit in Palkhivala's famous theory of implied limitations according to which the Constitution of every republic has three basic features:

1. The ultimate legal sovereignty resides in the people'
2. Parliament is a creature of the constitution, and

[472] ibid

3. The power to alter, destroy the essential features of the Constitution belongs only to the people, the ultimate legal; sovereign.

Thus, the judge averred that the theory would mean that the representatives of the same people-the framers of our Constitution-could bind the whole people for all time and prevent them from changing the constitutional structure through their representatives. In other words, he was of the opinion that the amending power could not be subject to them.[473]

Justice Dwivedi, upholding the unfettered power of Parliament to amend the Constitution and underlining the limitations of judicial review, he observed "the Constitution does not recognize the supremacy of this Court over Parliament." And the Court could test legislative laws only on the touchstone of authoritative norms established by the Constitution.[474]

So, the central issue in *Keshavananda case* was the scope of amending power of Parliament under Art. 368. Despite the lengthy discussion on the nature of the power of Parliament, nature of Constitution of India, sovereignty of the people and the efficiency of the democratic process, Shelat, Grover and Hegde JJ. felt that Constitution was a liberal document and had to be interpreted in that light. And the eleven separate judgements appear to deepen rather than remove the uncertainty over the vital issue. In this case the Supreme Court conceded wide amending powers to Parliament and lifted the embargo of Art. 13 placed by the Golaknath case on this power. But at the same time it widened the scope of judicial

[473] *ibid* at 1947
[474] *ibid* at p. 2008

review on the notion of Basic Structure to which all valid exercise of amending power must conform.[475]

Broadly speaking the theory of implied limitation is that even plenary powers are subject to the broad implied limitation that the basic structures and fundamental principles of the Constitution cannot be tampered with. As observed by Rajeev Dhavan:

> "On closer examination it appears that Golaknath has not been overruled at all. All that seems to have happened is that the whole court seems to have agreed that an amendment is not a law within the meaning of Art. 13. But the *Golaknath* was a wider decision. It relied on the principle that there was no distinction between the legislative power and the Constituent power, apart from a minor procedural distinction. It is clear from the majority judgments that the *Golaknath* view on this distinctions has been retained"

So, in nutshell, in *Keshavananda Bharati's case*, the Supreme Court upheld the validity of the 24th Amendment saying that the amendment did not more than to clarify in express language what was implicit in the unamended Article 368. A majority of the judges, however, strongly held that the Parliament's power of amendment was subject to an implied limitation; namely, the Parliament could not amend the Constitution to bring about a change in the basic features of the Constitution. Accordingly, the Supreme Court invalidated a portion of the Twenty-Fifth Amendment Act. "What the basic structure was not explained by the Court which reversed to itself the right to adjudicate upon every future amendment of the

[475] Upendra Baxi, The Indian supreme Court and Politics, p. 22, Lucknow, 1980

Constitution, whether such amendment altered the basic structure or not."[476]

Basic Features of the Constitution according to the Keshavananda verdict

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

Sikri, C.J. explained that the concept of basic structure included:

- Supremacy of the Constitution
- Republican and democratic form of government
- Secular character of the Constitution
- Separation of powers between the legislature, executive and the judiciary
- Federal character of the Constitution

Shelat, J. and Grover, J. added two more basic features to this list:

- The mandate to build a welfare state contained in the Directive Principles of State Policy
- Unity and integrity of the nation

Hegde, J. and Mukherjee, J. identified a separate and shorter list of basic features:

- Sovereignty of India
- Democratic character of the polity

[476] Justice O. Chinappa Reddy, Socialism, Constitution and the Country today (inaugural Address: Seminar at New Delhi, 8-9 January 1983) p.6 vide Sunder Raman's Article on Parliament's power to amend the Constitution: A critique in Journal Constitutional and parliamentary Studies, Vol. XVI, 1982 p. 86

- Unity of the country
- Essential features of the individual freedoms secured to the citizens
- Mandate to build a welfare state

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

- Sovereign democratic republic

However certain constitutional amendments must be ratified by at least half of the State legislatures before they can come into force. Matters such as the election of the President of the republic, the executive and legislative powers of the Union and the States, the High Courts in the States and Union Territories, representation of States in Parliament and the Constitution amending provisions themselves, contained in Article 368, must be amended by following this procedure.

- Parliamentary democracy
- Three organs of the State

Out of 13 Only six judges on the bench (therefore a minority view) agreed that the fundamental rights of the citizen belonged to the basic structure and Parliament could not amend it.

The minority view

The minority view delivered by Justice A.N. Ray (whose appointment to the position of Chief Justice over and above the heads of three senior judges, soon after the pronunciation of the

Keshavananda verdict, was widely considered to be politically motivated), Justice M.H. Beg, Justice K.K. Mathew and Justice S.N. Dwivedi also agreed that *Golaknath* had been decided wrongly. They upheld the validity of all three amendments challenged before the court. Ray, J. held that all parts of the Constitution were essential and no distinction could be made between its essential and non-essential parts. All of them agreed that Parliament could make fundamental changes in the Constitution by exercising its power under Article 368.

In summary the majority verdict in *Keshavananda Bharati* recognized the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what constitutes to that basic structure. Though the Supreme Court very nearly returned to the position *of Shankari Prasad* (1952) by restoring the supremacy of Parliament's amending power, in effect it strengthened the power of judicial review much more.

Dr. Rajeev Dhavan has rightly criticized the basic structure doctrine propounded in the *Keshavananda Bharati case.* The case does not just protect the basic nature of Fundamental rights; it also questions the power of the Parliament to make basic changes in the Constitution. The argument in favour of preserving the basic structure of a Constitution was first advanced in England by Chief Justice Cole in 1640 and a few years later by Chief Justice Hobart. However, the basic structure doctrine was ultimately abandoned in

England and America too. It was mentioned in a dissenting judgment in Eire in 1933, but that was all.[477]

The Keshavananda Review Bench

Within three days of the decision on the *Election case* Ray, C.J. convened a thirteen-judge bench to review the *Keshavananda* verdict on the pretext of hearing a number of petitions relating to land ceiling laws, which had been languishing in high courts. The petitions contended that the application of land ceiling laws violated the basic structure of the Constitution. In effect the Review bench was to decide whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution. The decision in the Bank Nationalization case was also up for review.

Meanwhile Prime Minister Indira Gandhi, in a speech in Parliament, refused to accept the dogma of basic structure. It must be remembered that no specific petition seeking a review of the *Keshavananda* verdict filed before the apex court a fact noted with much chagrin by several members of the bench. N.N. Palkhivala appearing for on behalf of a coal mining company eloquently argued against the move to review the *Keshavananda* decision. Ultimately, Ray, C.J. dissolved the bench after two days of hearings. Many people have suspected the government's indirect involvement in this episode seeking to undo an unfavorable judicial precedent set by the *Keshavananda* decision. However no concerted efforts were made to pursue the case.

---

[477] Rajeev Dhavan, "The Supreme Court and Parliamentary Sovereignty" p. 71, New Delhi, 1976

However, on the basis of the law expounded in *Keshavananda*, the protection accorded to fundamental rights from inconsistent constitutional amendments is not absolute, but limited and conditional in the sense that an amendment of a fundamental right would risk judicial invalidation only on affirmative showing that the effect of the amendment was to so completely destroy or otherwise damage an essential feature of the Constitution as to attract the bar of the basic structure. Thus, the scope for invoking fundamental rights as an aid to judicial review of constitutional amendments has somewhat narrowed as a result of Court's decision in *Keshavananda Bharati*. The full implications of the Basic structure limitation on the amendment power can be adequately understood only by taking into account the Supreme Court's decision in the famous Election case[478] in which the scope and nature of constituent power fell to be considered.

6.3.6 The Constitution Thirty-second Amendment

Article 371 D was inserted in the Constitution by Sec. 3 of the Constitution (Thirty-second Amendment) Act, 1973. In *P. Sambhamurthy v. State Andhra Pradesh*[479], the validity of clause (5) of Article 371 D of the Constitution was challenged in the Supreme Court. The Court declared that clause (5) was unconstitutional on the ground of its violation of the basic structure of the Constitution. The Court further said that the judicial review is part of the basic structure and transferring of power of judicial review from High Court to other effective institution would not violate the basic structure.

---

[478] AIR 1975 SC 2299
[479] AIR 1987 SC 663

6.3.7 The Constitution (Thirty-ninth Amendment) Act, 1972

Basic Structure concept reaffirmed- the Indira Gandhi Election case

In 1975, The Supreme Court again had the opportunity to pronounce on the basic structure of the, Constitution. The Allahabad High Court on grounds of electoral malpractice upheld a challenge to Prime Minister Indira Gandhi's election victory in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the Thirty-ninth amendment to the Constitution, which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.

Amendments were also made to the Representation of Peoples Acts of 1951 and 1974 and placed in the Ninth Schedule along with the Election Laws Amendment Act, *1975* in order to save the Prime Minister from embarrassment if the apex court delivered an unfavourable verdict. The *mala fide* intention of the government was

proved by the haste in which the Thirty-ninth amendment was passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day. The Rajya Sabha (Upper House or) passed it the next day and the President gave his assent two days later. The amendment was ratified by the state legislatures in special Saturday sessions. It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment.

In *Indira Nehru Gandhi v. Raj Narain*[480], the challenge to Art. 329-A (4) inserted by the (Constitution 39th Amendment) Act, 1975 was very different, and arose under the following circumstances. In this case, the appellant, prime Minister of India, filed an appeal before the Supreme Court from the decision of a judge of the High Court of Allahabad holding that the appellant had committed certain electoral malpractices. Before the appeal could be heard, Parliament passed the Election Laws (Amendment) Act, which came into force on August 6, 1975.

This Act, if valid, virtually seals the controversy in the appeal filed in the Supreme Court by the successful candidate from the decision of the Allahabad High Court. On August 7, 1975 a bill to amend, inter alia, Art. 71, and to insert a new Article 329 A making special provisions as election to Parliament in the case of Prime Minister and the Speaker, was gazetted, and was introduced and passed by the House of the people on the same day. On August 8, it was passed by the Council of States. On August 9 several State Legislatures ratified the Bill. It was gazetted on August 10, 1975 as

---

480 *ibid*

the Constitution (39th Amendment) Act, 1975. All this was done hurriedly because 11th August 1975 was the date fixed for hearing the appeal filed by Indira Gandhi in the Supreme Court. It will not be an exaggeration to say that in the history of constitutionalism, to save a single individual, the Constitution was amended. The amending power was used to strike off the cause of list of the appeals and cross appeals pending before the Supreme Court.

No doubt, the lamented Prime Minister Indira Gandhi felt herself to be a victim of monumental injustice at the way in which the Allahabad High Court convicted her of corrupt practices, and the way in which justice Krishna Iyer dealt with her request for an absolute stay of her appeal.[481]

Art. 329 A (4) and (5) inserted by the 39th Amendment was as follows:

> Art. 329 A: "Special provisions as to election to Parliament in the case of Prime Minister and Speaker.....
> (4) No law made by Parliament before the commencement of the constitution (Thirty Ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person such as it referred to in clause (1) to either house of Parliament and such election shall not be deemed to be void or ever to have become on ground on which such election could be declared under any such law and notwithstanding any order made by any Court, before such commencement, declaring such election to

[481] Upendra Baxi, "Indian Supreme Court and Politics" p. 46, 1980

be void, such election shall continue to be valid in respect and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any Court as is referred to in clause (4) pending immediately before the commencement of the Constitution Thirty Ninth Amendment) Act, 1975; before the Supreme Court shall be disposed of in conformity with the provision of clause (4).

(6) The provisions of this article shall have effect notwithstanding anything contained in this Constitution."

On clause (4) of Art. 329 A, Ray C. J., said:

"Clause (4) in Article 329 A has done four things. First it has wiped out not merely the judgement but also the election petition and the law relating thereto. Secondly, it has deprived the right to raise a dispute about the validity of the election by not having provided about the validity of the election by not having provided another forum. Third, there is no judgement to deal with and any right or dispute to adjudicate upon. Fourth, the constituent power of its own legislative judgment has validated the election."

Art. 329 A was challenged on three grounds; first, that the Amendment was passed when several members of parliament were under preventive detention; secondly, that the amendment violated the Basic Structure or framework of the Constitution; thirdly, that the amending power did not extend to deciding private disputes.

Three things are very clear from this case. For the first time a constitutional amendment was challenged not in respect of rights of property or social welfare but with reference to an electoral law designed to ensure free and fair elections which lie at the basis of a democratic parliamentary form of government. Secondly, for the first time, a constitutional amendment purported to decide an election dispute between two contesting parties, and to direct Supreme Court to dispose of appeal by holding that Art. 329 A(4) has declared the appellant's election valid. And thirdly, for the first time it was contended that in the exercise of constituent power, Parliament could exercise judicial power, and Parliament had done so by Art. 329 A.

In this case, all the judges rejected the first ground. The second ground of challenge that art. 329 A (4) was void, raised the question "what was the ratio of the majority judgments in Keshavananda case which held that amending power did not extend to damaging or destroying the Basic Structure or frame work of the Constitution?" The qualification to this answer is that if all 7 judges said that a particular feature of the Constitution was a part of its Basic structure, then, if an impugned amendment damaged or destroyed that feature the amendment would be ultra vires. The third ground of challenge to Article 329 A, namely, that the amending power does not extend to deciding private disputes. This ground connected with the challenge that that Article 329 A was void as is violated the separation of powers and thereby damaged the basic structure of our constitution was accepted by the Court.

In the result, Khanna, Mathew and Chandrachud, JJ., held that Article 329 A (4) was void. Each of the justices proceeded to deal with the validity of clause (4) of article 329 A individually. The

amendment is held clearly invalid by three justices (Justice Khanna, Mathew and Chandrachud). Chief Justice ray discovers "infirmities' in the impugned clause; but in substance he too holds Amendment to be invalid. Justice Beg does not strike down clause (40 but construes it as not ousting judicial review on the merits of appeal and cross-appeal under the unamended representation of People's act, 1951.

Basic Features of the Constitution according to the Election case verdict

Again, each judge expressed views about what amounts to the basic structure of the Constitution:
According to Justice H.R. Khanna, democracy is a basic feature of the Constitution and includes free and fair elections.
Justice K.K. Thomas held that the power of judicial review is an essential feature.

Justice Y.V. Chandrachud listed four basic features, which he considered unamendable:

- Sovereign democratic republic status
- Equality of status and opportunity of an individual
- Secularism and freedom of conscience and religion
- 'Government of laws and not of men' *i.e.* the rule of law

According to Chief Justice A.N. Ray, the constituent power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature

but not free and fair elections. Ray, C.J. held that ordinary legislation was not within the scope of basic features.

Justice K.K. Mathew agreed with Ray, C.J. that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary.

Justice M.H. Beg disagreed with Ray, C.J. on the grounds that it would be unnecessary to have a Constitution if Parliament's constituent power were said to be above it.20 judicial powers were vested in the Supreme Court and the High Courts and Parliament could not perform them. He contended that supremacy of the Constitution and separation of powers was basic features as understood by the majority in the *Keshavananda Bharati* case. Beg, J. emphasized that the doctrine of basic structure included within its scope ordinary legislation also.

Despite the disagreement between the judges on what constituted the basic structure of the Constitution, the idea that the Constitution had a core content, which was sacrosanct, was upheld by the majority view.

The Supreme Court struck down Section 4 of the Thirty-ninth amendment Act, *i.e.* Article 329A of the Constitution, as it existed in 1975.

Significant conclusion, which emerged from the election case, is that Parliament cannot, while acting in its constituent capacity under art. 368, exercise judicial power directly for, what results from the

exercise of the constituent power is an amendment having the well-attested features of "law" as normally understood and this cannot be rationally predicted of a judicial sentence or a legislative judgment. Since Art. 329 A (40 was in substance a legislative judgment, it was struck down on this ground as an impermissible exercise of the amendment power.

Chief merit of Election case is that it placed the rationale of majority decision in *Keshavananda case* beyond doubt by asserting that amendment power did not extend to the destruction, damage or emasculation of the Basic structure of the Constitution. Yet another point of seminal significance is that the election case shed a new light on the concept of constituent power by subordinating it to the supremacy of the Constitution.

In *Charan Lal Sahu v. Neelam Sanjeev Reddy*[482], the petitioner contended that clause (3) of article 71 which was inserted by 39th Amendment Act was violative of Basic structure of the Constitution and that the Supreme court has invalidated the similar Amendment of the Constitution in *Indira Gandhi's case.* However the Supreme Court upheld Art. 71 (3) as introduced by the 39th amendment Act which took out disputes regarding election to the office of the President and Vice President from the purview of the Courts and allowed the Parliament to set-up a separate machinery for the Adjudication of such disputes by law as being not violative of the Basic Structure. Even in Indira Gandhi's case the court's objection was not to the separate machinery for setting disputes regarding election to the high offices but to the use of constituent power to settle pending individual disputes by legislative process or by

[482] AIR 1978 SC 499

making legislative judgement which is held to be violative of the Basic Structure doctrine.

6.3.8 The (constitution Fortieth Amendment) Act, 1976

In *Bennett Coleman v. Union of India*[483], the Bombay High Court held that the 40th Amendment that included the Monopolies and Restrictive Trade Practices Act, 1969 as entry 91 in the Ninth Schedule, was violative of the Basic Structure of the Constitution in so far as section 21 and 22 applied to newspaper industry.

In *Waman Rao v. Union of India*[484], the validity of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act 1961 was challenged The ceiling fixed by that Act was lowered down certain other amendments were made to that Act in 1975 and 1976. The validity of these amendment acts were also challenged These Acts were placed in the ninth schedule by the Constitution (Seventeenth Amendment) Act, 1964 and the Constitution (Fortieth Amendment) Act, 1976. The validity of Article 31 A, 31 B and 31 c was also challenged on the ground that they damaged the basic structure of the Constitution. The Court held that the Constitution First Amendment) Act, 1951 which introduced Article 31 A in the Constitution did not damage or destroy the basic structure of the constitution. As regards the validity of Article 31 b read with the ninth Schedule, the majority decision was that all Acts and Regulations included in the ninth Schedule prior to April 24, 1973 would not be open to challenge. All Amendments to the constitution made before April 24, 1973 by which the Ninth Schedule of the constitution was amended from time to time were declare valid and

[483] AIR 1986 SC 956
[484] AIR 1981 SC 271

constitutional. As regards the amendments made in the Ninth Schedule on or after April 24, 1973, Chandrachud C.J. concluded on behalf of the majority as Under:

> "Acts and regulations, which are or which will be included in the ninth Schedule on or after April 24, 1973 will not receive the protection of Article 31 B for the plain reason that in the face of judgement in *Keshavananda Bharati,* there was no justification for making additions to the Ninth schedule with a view to conferring blanket protection on the laws included therein. The various constitutional amendments, by which additions are made to the Ninth Schedule on or after April 24, 1973, will be valid only if they do not damage or destroy the basic structure of the Constitution."

6.3.9 The Constitution (Forty-second Amendment Act), 1976

After the decisions in *Keshavananda and Indira Gandhi case,* there was no doubt at all that amendatory power of Parliament was limited and it was not competent to alter the Basic Structure of the Constitution. The Parliament however, in order to reassert its supremacy in the field of amending power, passed the Constitution (42nd Amendment) Act, 1976. The 42nd Amendment Act made significant changes in the structure of article 368 by inserting two new clauses viz. clause 4 and 5:

1. Clause (4) of Article 368 provided that no constitutional amendment could be challenged in any court, as it is an exercise of constituent power of the Parliament.
2. Clause (5) provided that the power of amendment would not be subject to any limitation whatsoever.

The amendment provided that no law giving effect to the policy of the State towards "all or any principles laid down in Part IV" could be assailed before any Court on the ground that it violates Arts. 14, 19 and 31. In effect the 42nd Amendment made the directive principles of state policy superior to fundamental rights. It was declared that there shall be no limitation whatsoever on the constituent power of the Parliament to amend by way of addition, variation or repeal the provisions of this constitution under this Article and by the same strain ousting the jurisdiction of the Courts in respect to constitutional amendment.

In *Minerva Mills v. Union of India*[485], the petitioner challenged the validity of clauses (4) and (5) of Article 368, as introduced by Sec. 55 of the Constitution 42nd Amendment Act on the ground that the said clauses were beyond the competence of the amending power since they offended the Basic Structure of the Constitution in two vital respects by the exclusion of judicial review of constitutional amendments and by making amendment power absolute and unlimited in defiance of the constitutional ban on such an enlargement of the amendment power. In this case[486], petitioner also challenged Sec. 4 of the 42nd Amendment, which amended Art. 31 C by substituting the words "all or any of the principles laid down in Part IV" for the words "The principles specified in cl. (b) r cl. 9c) of Art. 39."

A Constitution bench of five judges was constituted. Chandrachud C.J. and Gupta, Untwalia and Kailasam JJ held that Sec. 4 of the Constitution (Forty-second Amendment) Act was beyond amending

---

[485] AIR 1980 SC
[486] *ibid*

power of the Parliament and was void, since it damaged the basic structure by a total exclusion of challenge to any law on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Art. 14 and 19 of the Constitution. Also the Court held that the Constitution had had conferred limited amending power on the Parliament, and the Parliament cannot under the exercise of that limited amending power enlarge that very power into an absolute power. It was, therefore, held that Sections 4 and 55 were void as they destroyed the basic structure of the Constitution. Justice Bhagwati concluded that it had damaged the two essential features of the basic structure of the Constitution, namely,

(I) The limited amending power of Parliament

(II) The power of judicial review with a view to examining whether any authority under the Constitution, has exceeded their limits of its power.

He also held that clause (5) of Article 368 was unconstitutional and void as it sought to remove the limitation on the amending power of the Parliament. He further said: "If there is one feature of our Constitution which more than any other is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, the main part of the basic structure of the Constitution."[487]

6.3.10 The Constitution Fifty-second Amendment Act

Clause (2) of Article 102 was added by the Fifty-second Amendment to the Constitution in 1985, which disqualifies a member of either

---

[487] *ibid*

House of Parliament on grounds of defection laid down in the tenth schedule to the Constitution. Similar provision has been made in clause (2) of Article 191 for disqualifying the members of the sate Legislature. Para 7 of the tenth Schedule provided for the bar of jurisdiction of courts as under:

> "Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the qualification of a member of a house under this Schedule."

The validity of the Tenth Schedule was challenged before the Supreme Court in *Kihota Hollohan v. Zachilhu.*[488] The Supreme Court unanimously held that Para 7 of the tenth Schedule was invalid in so far as it affected their jurisdiction of the Supreme Court and high courts without ratification from at least half of the state Legislatures as required by provision to Article 368 (2). The court further said that the speaker while acting under the tenth Schedule functioned as a judicial tribunal and thus was amenable to judicial review. The finality clause did not oust the judicial control under Article 136, 226 and 227 of the Constitution.

In *Prakash Singh Badal v. Union of India*[489], the Punjab and Haryana High Court held Para 7 of the Tenth Schedule of the Constitution inserted by the constitution (Fifty-second Amendment) Act, 1985 to be invalid on the ground that since ratification of not less than half the State Legislatures had not been obtained for an amendment affecting the jurisdiction of the courts under Articles 226 and 136, the provisions of clause (2) of Article 368 had been violated. The impugned legislation could also have been struck down on the

[488] AIR 1993 SC 412
[489] AIR 1987 P & H 263

ground of violation of Basic structure because it bars the courts from entertaining any matter in respect of disqualification of a member of a house on the ground of defection.

However, it is almost impossible to defend the doctrine of Basic Structure in modern times. Nevertheless, in India the Supreme Court since its decision in *Keshavananda Bharati* case has not altered its stand. In the *Election case* and the *Minerva mills case*, the Court followed the basic structure doctrine. However, the Parliament reiterated its stand and reasserted its claim of absolute power to amend the Constitution through sec. 55 of the comprehensive Forty-Second Amendment Act.

It may be said that the Supreme Court- has not pronounced the final word on the issue of the basic structure of the Constitution a scenario that is unlikely to change in the near future. While the idea that there is such a thing as a basic structure to the Constitution is well established its contents cannot be completely determined with any measure of finality until a judgment of the Supreme Court spells it out. Nevertheless the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. are some of the essential features of the Constitution that have appeared time and again in the apex court's pronouncements. One certainty that emerged out of this tussle between Parliament and the judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the Supreme Court. In essence Parliament's power to amend the Constitution is not absolute and the

Supreme Court is the final arbiter over and interpreter of all constitutional amendments.

6.4 Justification Of The Judicial Review Of Constitutional Amendments

Based on the above discussions, the justification for the judicial review of the constitutional amendments may be narrated as under:

i. The parliament and the State Legislature have limited amending power. The limited amending power is itself a basic feature of the Constitution and it cannot be enlarged into an absolute power.

ii. It is a cardinal; principle of the Constitution that no one can claim to be sole judge of its power under the Constitution. It is the judiciary only which can decide about any violation of this principle.

iii. All the three organs of the Constitution have to remain within the limits determined by the Constitution. Any transgression of such limit would be against the rule of law and maintenance of democracy. Any amendment in the Constitution destroying this feature would be unconstitutional, as it would amount to a damage of the basic structure of the Constitution.

iv. Limited judicial review is a part of the basic structure of the Constitution and any exclusion of this power by constitutional amendment would be against the basic structure of the Constitution.

v. The power of amendment of the Constitution should be co-extensive with the judiciary's power of invalidation of laws madder by Parliament. Therefore, if the court declares any statute or part of such statute as invalid, the constituent body must have power to invalidate the effect of the decision of the judiciary. The judiciary has no power to invalidate to the constitutional amendment, but if such amendment is against the basic structure of the Constitution, the judiciary can declare such amendment as unconstitutional under its power of limited judicial review. It would not amount to judicial supremacy. It would also not amount to robbing the power of Parliament as the Parliament or the constituent body has limited power of amendment.

vi. All legislative powers are subject to inherent and implied limitations. The Constituent power is also subject to inherent and implied limitations. The inherent limitation is one, which inheres in the structure of the Parliament. The parliament cannot make any amendment, which may do away with its structure because its structure limits its amending potency. The implied limitation is one, which is implicit in the scheme of various provisions of the Constitution.

vii. Article 368 of the Constitution can not be used to abrogate the basic structure or framework of the Constitution or to damage or destroy the essential feature of the basic structure of the constitution.

viii. The unlimited legal sovereignty resides in the people. The power to amend the Constitution is an application of the legal sovereignty. The concept of inherent and implied limitations teems from this basic feature.

ix. If there are no limitations upon the amending power of the Parliament, the consequences will be far reaching. It will be open to the Parliament to

- Prolong the period of its existence,
- Make India a satellite of a foreign country,
- To do away with the Supreme Court and High court,
- Make the exercise of their power of amendment so difficult that no amendment would be possible.

x. The limited power of judicial review is an integral part of our Constitutional system and without it, there will be no government of laws and the rule of law become a teasing illusion and a promise of unreality.

The doctrine of basic structure has taken birth only because the Supreme Court has presumed that the power of amendment is limited whereas the power of judicial review is unlimited. According to the court its power is not confined to the judicial review of legislative acts but also extends to the constitutional amendments. Indian Supreme Court is the only Court in the world to have acquired the power of judicial review of constitutional amendments on the ground of inherent and implied limitation. Researches have shown that the U.S. Supreme Court, which innovated the doctrine of judicial review in *Marbury v. Madison,*[490] has also restrained itself from declaring the constitutional amendments as unconstitutional, on the ground of implied and inherent limitation.

[490] (1803) 1 Cranch 137; 2 L.ed; 60

The validity of 18th Amendment of the U.S. Constitution was challenged in National Prohibition case.[491] In this The Supreme Court of U.S. brushed aside the argument that there were implied limitations on the power of amendment. The view taken in this respect, was that there are no implied limitations whatever on the power of amendment and that the framers of the Constitution did not intend to make an unalterable framework of government in which only the minor details could be changed by amendment.[492] But the Supreme Court of India has gone to the extent of applying it to the Constitutional amendment. Amendment in the Constitution is essentially a policy matter; which the Parliament alone is competent to decide. Again, the amendment is essentially a political question, which cannot be subject matter of value judgment by the Court.

6.5 Judicial Review Of Constitutional Amendments In U.S.A.

There were two occasions in the history of the U.S. Constitution, when amendments in the Constitution were made merely to override the erroneous decisions of the Supreme Court. The judiciary has the power of judicial review of the statute and to declare the statute as invalid if the statute is found to be unconstitutional. On the other hand the Congress has the power to override the erroneous decision of the Supreme Court if the decision is against the basic norms of the Constitution. The two occasions, when the Congress took such decisions were as follows:

---

[491] Rhode Island v. Palmer (1920) 253, U.S. 350 As discussed under constitutional Cases by Shelly

[492] Willis, Constitutional Law, (1936) p. 123

(a) In *Chisholm v. Georgia*[493] the Supreme Court allowed the federal Courts to accept jurisdiction of a suit against a state by a citizen of another state. In this case the Supreme Court asserted that citizens of other States could sue states in Federal court. The State of Georgia refused the permit the decree of the court to be enforced. This point was bitterly resented by the States. As a result whereof the Eleventh Amendment to the Constitution was quickly adopted to nullify the effect of above decision. The purpose of Eleventh Amendment adopted in 1765 was to override the Supreme Court's decision in *Chisholm v. Georgia.* Later in *Hans v. Louisiana*[494] the Supreme Court itself admitted that the Chisholm was an erroneous decision. But if the State officials were working in excess of their authority or under an unconstitutional statute suits were maintainable.[495] The federal Legislation can create rights enforceable against states or state officials, in spite of the eleventh Amendment. In *Scheuer v. Rhodes*[496], the Supreme Court held that the parents or students killed by the Ohio National Guard on the Kent State Campus in 1970 could bring suit for damages against the governor of Ohio and other officials under the civil rights Act of 1871 for depriving their children of a federal right under colour of state law. If a plaintiff sues citizens of another state, a state may act to protect its own legal rights, as parent partie concept will justify suits brought to protect

---

493 vide Renu Bahndari, "Judicial control of Legislation in India & U.S.A." 2 Dall 419 (1973)

494 vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." 134 US 1, (1980)

495 vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." Osborn v. Bank of United States 9 Wheat 728 (1824)

496 vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." 416 US 232 (1974)

the welfare of the people as a whole but not to protect the private interests of individual citizens, thought this distinction is often difficult to make. The power of states under this concept is limited to the civil proceedings. It cannot be enforced in the criminal proceedings against citizens of other state in the federal courts.[497]

(b) In *Pollock v. Farmers Loan and Trust Co.*[498] the Supreme Court authorized the Federal government to levy taxes on income. The Supreme Court held that tax on real estate was direct, and went on to hold in another case of same parties that the entire tax was invalid. To reverse the Supreme Court's decision in the above case, the Sixteenth Amendment was made in the constitution. The Congress quickly took advantage of this Constitutional Amendment by enacting an Income Tax Law, which now provides the principal revenue source for the federal government.

Researches have shown that the Constitutional Amendment to invalidate the Supreme Court decisions were never declared unconstitutional by the U.S. Supreme court of India has invalidated many such constitutional Amendments. A question arises as to what is the justification for adopting a different line of thinking by the Supreme Court. The following justifications have come to light after examining the relevant decisions:

i. The Constitution is Supreme over the people of United States, aggregately and in their separate sovereignties because they have excluded themselves from any direct or immediate agency

[497] vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." Wisconsin v. Pelican Insurance Company 127 US 265 (1888)

[498] vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." 57 US 429, 158 US 601 (1895)

in making amendment to it, and have directed that amendments should be made representatively for them.[499]

ii. There is no implied limitation on the amending power under the U.S. constitution. The Supreme Court of the United States has not specifically pronounced on this question, although the implied limitation theory was rejected by the U.S. Supreme Court in the national prohibition case.[500]

iii. The U.S. Supreme court has rejected the implied limitation based on natural law, law of god, and spirit of Constitution or fear of abuse of unlimited power. In *Schneiderman v. United States*,[501], Murphy J. said, "The Constitutional father, fresh from a revolution, did not forge a political strait jacket for the generations to come. Instead they write Article V and the first Amendment, guaranteeing freedom of thought, soon followed. Article V contains procedural provisions for constitutional change by amendment without any present limitation whatsoever, except that no state may b deprived of equal representation in the Senate without its consent."

So, unlike India, the Supreme Court of U.S.A. never declared the Constitution Amendment unconstitutional just to establish supremacy over the Congress.

However, the power of judicial review of constitutional amendment cannot be justified on the following grounds:

- Judicial review of constitutional amendment would mean exercise of judicial veto over the will of the people manifesting itself through the Parliament. This would

---

499 vide Renu Bhandari, "Judicial control of Legislation in India & U.S.A." (1854-57) 18 H.O.W. 331

500 253 U.S. 352 (1920)

501 87 L Ed. 1796

amount to suppression of democracy, which according to the Supreme Court itself is part of the basic structure.

- The Separation of powers declared by the Supreme Court as part of the basic structure means each organ works within its assigned field without encroaching upon the power of others. The Parliament has been assigned to make changes in the Constitution, whereas, the Supreme Court has been assigned the role to interpret the Constitution. The Supreme Court in the garb of this power of interpretation cannot check the Parliament from amending the Constitution. Rajeev Dhavan, therefore, rightly said:

> "If the Indian Constitution has to run on the doctrine of separation of power, the *Keshavananda* Limitations will go first."[502]

- Supreme Court has declared, "Supremacy of the Constitution as a part of basic structure. The Constitution stands at the bedrock of the Basic Structure-which are so basic and fundamental, that any violation of the said structure will lead to a collapse of the Constitution. Hence, the basic Structure is the meaning of meanings of the Constitution. This theory cannot exist alone. It is pegged to another theory i.e., the Theory of Implied Limitations or inherent Limitations on the amending power. Theses the theories are born together and die together. The theory of Basic Structure was born in Keshavananda echoed in Indira Gandhi and reechoed in Minerva Mills. This Basic

[502] Rajeev Dhavan, "The Basic structure doctrine-A Footnote Comment", in 'Indian Constitution: Trends and Issues', p. 178

> Structure is not a provision of the Constitution but a judicial innovation necessary for the protection of the entire Constitution. It has become an integral part of Indian constitutional law by judicial process and by subsequent legitimization both by the Parliament and the Supreme Court.

In a written Constitution like ours these shall be not only basic principles of functioning of different organs of the State but also fundamental rights of the citizens, principles, governing the relationship between the citizens and the state. Democracy, liberty, Equality, Fraternity, Secularism, Justice, rule of Law, Separation of Powers, etc. form the base of the Constitution. These basic principles are absolute and eternal permeating the Constitution. Constitutional law is fundamental law and basic and ordinary law must conform to the Constitution. Any the ordinary law is tested on the touchstone of the Constitution and since Keshavananda, constitutional amendment that forms the part of the Constitution, is tested on the touchstone of the Constitution.

The Indian Supreme Court's judicial craftsmanship manifested through Basic Structure Doctrine constituted a legal theory of concealed multiple reference and was used by the Supreme Court in striking down constitutional amendments in subsequent years demonsratably to uphold the rule of law and democracy.

Critics who invoke the traditional separation of powers rationale as the assured constitutional basis for keeping the constituent function of Parliament as sacrosanct and beyond the bounds of

judicial process are not reconciled to the extension by the Supreme Court of its jurisdiction to matters which engage the amendatory process under Article 368 of the Constitution. They consider *Keshavananda* as a usurpation of the constituent power of Parliament by majority judges of the Supreme Court. But the fact remains that the Indian Supreme Court has not set for itself the role of the ultimate arbiter of disputes in which constitutional validity of constitutional amendments to the Constitution is contested. It has brushed aside objections and institutional considerations rooted in the "political question rationale" as not determinative of its contested authority to go into the question of justiciability of the amending power.

6.6 Doctrine Of Political Question And Judicial Review

Doctrine of political question, which was evolved by Chief Justice Marshall in *Marbury v. Madison,* has been used both by the Supreme Court of U.S. and the dissenting judges of the Supreme Court in *Golaknath and Keshavananda* as the overriding consideration for keeping the judicial branch out of the arena of the amendment power. Justice Marshall observed:

> "The province of the Court is, solely, to decide on the rights of individuals, not to inquire hoe the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this Court".[503]

[503] 2 L Ed. 60 (1803)

Problems that come before the Court, particularly in constitutional matters, cannot be purely legal. The Constitution provides an instrument for the governance of a country. Hence some problems are bound to have political overtones. Should the court undertake the onerous task of giving its opinion on political questions? The U.S. Supreme Court laid down that "the Court can never with propriety be called on officially to be the umpire in questions merely political"[504] In the United states, the question of satisfaction of the President came before the supreme court. The Court laid down that such a question may be considered as a "political question' and hence not subject to judicial scrutiny.[505] Thus, the American Supreme Court has adopted the doctrine of political question and refused to decide the cases involving political questions because the American Constitution is based on the principle of separation of powers. The Supreme Court of India was confronted with a political question in *state of Rajasthan v. Union of India*[506]. The Home Minister to the Government of India in 1977 wrote to Chief Ministers of nine states to advise the respective Governors to dissolve the State Assemblies, even when the respective ministries had majority in the Legislative Assemblies. On behalf of these nine states Original suits were filed under Art. 131. Various pleas were raised in this case and the majority of them were purely political in nature. Thus it was purely a political question and it was urged that the Supreme Court should not express any opinion on purely political questions. However, Bhagwati J. observed:

---

[504] Luther v. Borden, 12 L. Ed. 581 (1849)
[505] Martin v. Mott, 6 L. Ed. 581 (1849)
[506] AIR 1977 SC 1361

"It will therefore be seen that merely because a question has a political colour, the court cannot hold its hands in despair and declare 'judicial hands off'. So long as the question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so."

Thus, it appears that the Supreme Court will decide political questions if such a decision is necessary for deciding the validity or otherwise of an act of an authority purporting to exercise power under the Constitution. Beg C.J. observed that questions of political wisdom or executive policy could not be subjected to judicial control.[507] Fazal Ali J. observed that the Court does not possess the resources which are in the hands of the government to find out the political needs that they seek to subserve and the feelings or the aspirations of the nation that require a particular action to be taken at a particular time.[508]

Of late there has been a vigorous debate in U.K. over the issue of entrenching the bill of rights as part of the written Constitution. It is felt that such an act of confirming bill of rights and thereby secure judicial protection to the rights would be to take vital issues out of the main stream politics which dominates official decision-making at the purely political or policy levels. Obviously the government of U.K. is unwilling to forgo the jurisdiction they have in this area and in favour of a non-elected judiciary. It is obvious that the executive and the legislative wings of the

[507] *ibid* at p. 1377
[508] *ibid* at p. 1420

government are unwilling to share power with the judiciary in matters of collective welfare, and sensitive social and public issues which politicians normally cannot afford to forgo.

On the other hand, the entrenchment bill of rights in U.S.A. and in India as a part of the written Constitution has empowered the judiciary to properly discharge the legitimate function of enforcing the Constitution without adopting a confrontnist attitude towards the political thicket. Cox's analysis of the "political thicket: is a brilliant illumination as regards the role of U.S. Supreme Court in constitutional interpretation of questions which go beyond the traditional limits to judicial review and involve the issue of the separation of powers rationale."[509]

Doctrine of political question originates from an awareness of institutional and functional limitations of the judicial process. In the ultimate analysis, political questions are those which judges choose not to decide and the question becomes political by the judges refusal to decide it.[510]

The most convincing reasons advanced for the avoidance of political questions by the court is based on democracy and separation of powers. It has been observed:[511]

> "In a democratic society, the basic political questions are for people to decide, acting directly or representative's responsible to them. To vest the authorities to decide these basic questions of the organizations and distribution of

[509] Cox, The Court and the Constitution, p. 292, 1978
[510] Jack Peltason, "Federal Courts in the political process", p. 9 , 1952
[511] Earl Latham, "The Supreme Court as apolitical institution", 31 Minnesota Law Review 205, 1947, vide N. K. Jayajumar, Judicial Process in India, p. 259

political powers in other officials than those who owe an immediate responsibility to an electorate, is to take out popular control, the making of important political decisions."

After analyzing the doctrine of political question in the U.S. context and enumerating the difference between the U.S. and the Indian Constitutional system, H. M. Seervai, concludes that apart from the exclusion of the jurisdiction of a court by the Constitution or by a valid law, there is no "prohibited field" for the judiciary in India.[512] There is a view that if the question raised is of sufficient objectivity and clearness foe adjudication by a court of law, it cannot be viewed as a political question.

6.7 Whether The Indian Supreme Court Works As A Political Institution In Exercising Judicial Review Power?

The power of judicial review has contributed a lot to judiciary in assuming the role of political institution. The Supreme Court is a politically important institution, not just an important institution. The reason is, the Court is very much involved in national affairs; it plays an important role in the political system of India. In India, there is not a distinct legal domain headed by the Supreme Court that is somehow wholly separated from a distinct political domain headed by the Executive and Parliament. The Court and its judgments much affect politics and political life. The Court is certainly not peripheral to Indian politics.

---

[512] H. M. Seervai, "Constitutional law of India", p. 1803, 2nd edition, Vol. III

The Supreme Court is a major actor in the political process of India, which means that judges are among the elite that participate in governing India.[513]

If we analyze the decision of the past fifty years[514], one of the prominent features of the Indian politics is the conflict between the Court and the Parliament-executive. Each of thee decisions sought to set limits on the exercise of political power, and each resulted into the conflict between the Court and the government. Any institution which, as a result of actions it takes, can thwart a Government which has at its command majority support in Parliament is an important political institution.[515] The more the court deals with important political issues, the more the court can be perceived as an important political institution. This is possible only because the weapon of judicial review power-the power to overturn or annul decisions of the Cabinet and Parliament. Judicial review places the Court in the middle of political process. The whole idea of judicial review, its raison d'etre, is that the court should act as brake-representing a permanent law, restraining the whims of sitting legislators, if necessary "fighting" the outputs of political process, in the name of a higher law.[516] So, judicial review enables the Court to set limits to executive and legislative power, and, it can set these limits more powerful than the people of this country set for them.

---

[513] Vide George Gadbois, "The Supreme Court of India as a political institution", in Judges and Judicial power edited by Rajeev Dhavan and R. Sudarshan, Prof. Walter F. Murphy, Pritchett's Courts, Judges, and Politics: An Introduction to the judicial process

[514] Golaknath v. State of Punjab; R. C. Cooper v. Union of India; Privy Purse case, Keshavananad Bhararti v. State of Kerala; Minerva Mills v. Union of India.

[515] Rajeev Dhavan, The Supreme Court of India and Parliamentary Sovereignty, 1976

[516] Vide George Gadbois, "The Supreme Court of India as a political institution", in Judges and Judicial power, p. 252, edited by Rajeev Dhavan and R. Sudarshan,

In this context the Court has claimed and exercised the power of judicial review not only to reject legislation but since *Golaknath* and *Keshavananda,* the Court has extended its power than any other constitutional court in the world and invalidated constitutional amendment. And, this claim of the Court, in exercise of its judicial review power to decide the validity of constitutional amendments, and that too which have been motivated by what the dominant political elite has regarded as errant, has been subject of much controversy.

The result is this, in many cases, the Government's response to an adverse decision has been a revision of the legislation found wanting by the Court, along lines suggested by the court. But the 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 power.[517]

So, 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 Court says it is, and even claims the power to determine the validity of constitutional amendments. The reality, however, is that the Parliament-executive

[517] Vide 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,

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 party interests move to the Court, and claim that statute infringes their constitutionally guaranteed rights, the Court agrees and declares the law invalid in part or its entirety, Parliament responds either by passing a revised version of the measure with the intent of either meeting the judge's criticism or making their intent more clear, or takes the stronger step of enacting a constitutional amendment designed to eliminate the court's review powers in effort to eliminate further judicial roadblocks in the subject matter area, the aggrieved party then returns to the courts with the argument that this legislative response is also constitutionally wanting in some way. At this juncture, the judges either confer their blessings on the statute or amendment, or find it constitutionally wanting again, and thereby, provoking another legislative response, more litigation, another ruling by the Court, al most ad infinitum. These chains of events-and there have been several replays of this scenario involving complicated and emotional property rights-land reform compensation issue. So, neither court decision nor parliamentary responses are the final word, which constitute the act of lengthy and complex political drama, and that winners are often difficult to identify.

Another dimension of the Court's political power is that of stigmatizing the behaviour of the political elite and its activities the example of this can be given the *Indira Gandhi Election case.* Another dimension of judicial review is that to the extent that the court is policy-making institution, it is a political institution. It is patently clear that the court decisions have affected public policy, but does the also make policy? The answer may be yes. First in

Golaknath, reiterated in *Keshavananda*, *Indira Gandhi* and *Minerva Mills*, the court first devised, and then implemented the policy that regardless of what the Constitution appears to say, or what others might think, Parliament's power to amend the Constitution is not plenary.

In *Bank Nationalization case* and *Privy Purses*, the government had made policies that were rejected by the court, so the court's policy-making in these instances was of a relative nature, i.e. the government proposed and the court disposed. A generation ago, when in *Bela Benerjee* the Court rejected the government's definition of compensation, it stated that compensation had to mean at "just equivalent", which the court said meant the full market value of the property taken. So the Court sought to substitute a court devised policy for a government devised policy.

Apart from these, there are other issue areas and decisions, wherein the Court has initiated policy changes or new policy directions.[518] This can only happen because of the assigned power of judicial review. That the Court would have an important role to play in Indian Political system was both understood and in large part predetermined by the members of the Constituent Assembly, for the framers discussed, debated, and ultimately made provision of judicial review.[519] Thus, judicial review is an explicitly assigned political role, and for the provision for judicial review, court's involvement is sanctioned in the on-going political process.[520]

---

[518] New Criminal jurisprudence, Prison Jurisprudence, Human Rights approach
[519] Vide George Gadbois, "The Supreme Court of India as a political institution", in Judges and Judicial power, p. 256, edited by Rajeev Dhavan and R. Sudarshan.
[520] *ibid*

From the for going discussion one can observe that in India the judiciary has extensively used it power of judicial review in every area, be it legislation, executive action or the constitutional Amendment passed by the Parliament. However in the functioning of this doctrine of judicial review in India, certain procedural, constitutional, implied and self-imposed limitations were also became operative which restrained the judiciary from over-activism, which is discussed in the next chapter of this study.