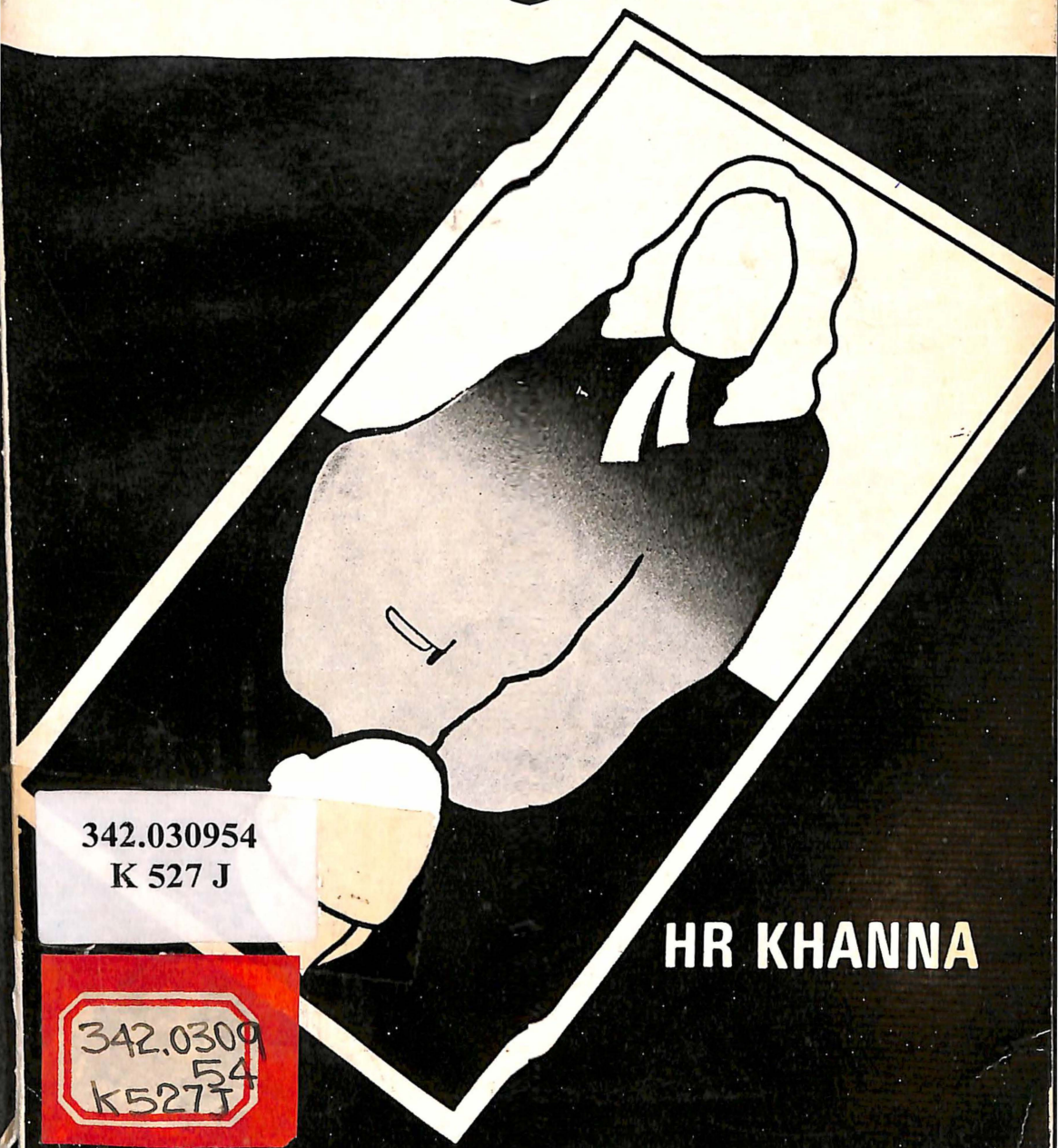
JUDICIAL REVIEW OR CONFRONTATION?



HR KHANNA

JUDICIAL REVIEW OR CONFRONTATION

Judicial Review or Confrontation ?

H R Khanna

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To
The legal fraternity

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Errata

p. 32, line 7 : Read 'statute' instead of 'status'

p. 44, line 13 from below : Read 'electoral' instead of 'electeral'

p. 45, line 3 : Read 'inapplicable to' instead of 'inapplicable io'

p. 45, line 16 : Read 'or' instead of 'of'

p. 46, line 5 from below : Read 'was' instead of 'were'

p. 47, lines 16-17 : Read 'to the extent of discovering the application of a dormant and latent law' instead of 'to the extent of a dormant and latent law'

p. 53, line 3 from below : Read 'the best guarantee against the abuse'

p. 78, line 7 : Read 'or' instead of 'of'

Introduction

The question of the power of Parliament to amend the Constitution of India was considered by a Bench of thirteen Judges of the Supreme Court—the largest Bench ever constituted-in *Kesavananda Bharati's Case* (1973) Supp. SCR 1. The judgment of the Court in that case was pronounced on April 24, 1973. The majority while upholding the twenty-fourth amendment, twenty-ninth amendment and parts of twenty-fifth amendment, held that Article 368, which deals with the amendment of the Constitution, does not enable Parliament to alter the basic structure or framework of the Constitution. The majority also held that the second part of section 3 of the Constitution (twenty-fifth amendment) Act was invalid.

During the course of discussion preceding the forty-second amendment of the Constitution, many things were said about the judiciary as also about the judgment of the Supreme Court in *Kesavananda Bharati's Case* and the concept of the basic structure of the Constitution. It is not the purpose of this book to say anything about the merits of that amendment or about the question as to whether despite the addition of the new clause in Article 368 of the Constitution (that no amendment

of the Constitution shall be called in question in any court), the validity of the forty-second amendment can still be challenged in courts. All that this book deals with is : (a) whether the denigration of the judiciary was well-deserved and (b) whether the criticism of the judgment in *Kesavananda Bharati's Case* and of the concept of the basic structure of the Constitution was well-informed.

As the judgment of the author in *Kesavananda Bharati's Case* has been considered crucial, the author has referred only to that judgment in dealing with the criticism which has been levelled against it and the concept of the basic structure of the Constitution. It would also be apposite to reproduce paragraphs from that judgment without any comments in answering some of the queries and clearing some of the doubts raised about that judgment. Comments have been avoided so that the reader may form his own view of the matter.

2

General Power of Amendment of the Constitution

The question has sometimes been posed as to whether the judgment in Kesavananda Bharati's Case *creates difficulties for the Parliament in exercising its general power of amendment of the Constitution. Reproduced below are passages from the judgment which provide an answer to this question.*

The next question which should now engage our attention is about the necessity of amending the Constitution and the reasons which weighed with the framers of the Constitution for making provision for amendment of the Constitution. A Constitution provides the broad outlines of the administration of a country and concerns itself with the problems of the Government. This is so whether the Government originates in a forcible seizure of power or comes into being as the result of a legal transfer of power. At the time of the framing of the Constitution many views, including those emanating from conflicting extremes, are presented. In most cases the Constitution is the result of a compromise between conflicting views. Those who frame a Constitution cannot be oblivious of the fact that in the working of a Constitution many difficulties

would have to be encountered and that it is beyond the wisdom of one generation to hit upon a 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 the dry bones of a Constitution so as to make it a vehicle of a nation's progress. Occasions may also arise where judicial interpretation might rob some provision of a Constitution of a part of its efficacy as was contemplated by the framers of the Constitution. If no provision were made for the amendment of the Constitution, the people would be left with no remedy or means for adapting it to the changing need of times and would per force have recourse to extra-constitutional methods of changing the Constitution. The extra-constitutional methods may sometimes be bloodless but more often they extract a heavy toll of the lives of the citizens and leave a trail of smouldering bitterness. A State without the means of some change, as was said by Burke in his *Reflections on Revolution*, is without the means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve. According to Dicey, twelve unchangeable Constitutions of France have each lasted on an average for less than ten years, and have frequently perished by violence. Louis Phillipe's monarchy was destroyed within seven years of the time when Tocqueville pointed out that no power existed legally capable of altering the articles of the Charter. On one notorious instance at least—and other examples of the same phenomenon might be produced from the annals of revolutionary France—the immutability of the Constitution was the ground or excuse for its violent subversion.

* * *

According to Finer, the amending clause is so fundamental to a Constitution that it may be called the Constitution itself (see Finer, *The Theory and Practice of Modern Government*, pp. 156-7). The amending clause, it has been said, is the most important part of a Constitution. Upon its existence and truthfulness, i.e., its correspondence with real and natural

conditions, depends the question as to whether the State shall develop with peaceable continuity or shall suffer alterations of stagnation, retrogression, and revolution. A Constitution, which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected, if only the State be truthfully organised in the Constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of the State (see Burgess, *Political Science and Comparative Constitutional Law*, Vol. I, p. 137). Burgess further expressed himself in the following words:

> It is equally true that development is as much a law of state life as existence. Prohibit the former, and the latter is the exitstence of the body after the spirit has departed. When, in a democratic political society, the well-matured, long and deliberately formed will of the undoubted majority can be persistently and successfully thwarted, in the amendment of its organic law, by the will of the minority, there is just as much danger to the state from revolution and violence as there is from the caprice of the majority, where the sovereignty of the bare majority is acknowledged. The safeguards against too radical change must not be exaggerated to the point of dethroning the real sovereign (ibid., p. 152).

Justifying the amendment of the Constitution to meet the present conditions, relations and requirements, Burgess said we must not, as Mirabeau finely expressed it, lose 'the grande morale in the petite morale'.

According to John Stuart Mill, no Constitution can expect 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 readjustments as their internal development requires, they must stagnate or retrogress.

* * *

The machinery of amendment, it has been said, should be like a safety valve, so devised as neither to operate the machine with

too great facility nor to require, in order to set it in motion, an accumulation of force sufficient to explode it. In arranging it, due consideration should be given on the one hand to the requisites of growth and on the other hand to those of conservatism. The letter of the 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 yet ought it to be made a plaything of politicians, to be tampered with and degraded to the level of an ordinary statute (see J.W. Garner, *Political Science and Government*, p. 538).

The framers of our Constitution were conscious of the desirability of reconciling the urge for change with the need of continuity. They were not oblivious of the phenomenon writ large in human history that change without continuity can be anarchy; change with continuity can mean progress; and continuity without change can mean no progress. The Constitution-makers have, therefore, kept the balance between the danger of having a non-amendable Constitution and a Constitution which is too easily amendable. It has accordingly been provided that except for some not very vital amendments which can be brought about by simple majority, other amendments can be secured only if they are passed in each House of Parliament by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of each House present and voting. Provision is further made that in respect of certain matters which affect the interest of the States, the amendment must also be ratified by the legislatures of not less than one-half of the States by resolution to that effect. It can, therefore, be said that while a provision has been made for amendment of the Constitution, the procedure for the bringing about of amendment is not so easy as may make it a plaything of politicians to be tampered with, and degraded to, the level of ordinary statutes. The fact that during the first two decades after the coming into force of the Constitution the amending Bills have been passed without much difficulty with requisite majority is a sheer accident of history and is due to the fact that one party has happened to be in absolute majority at the Centre and many of the States. This circumstance cannot obliterate the fact that in normal circumstances when there are well-balanced

parties in power and in opposition the method of amending the Constitution is not so easy.

Another circumstance which must not be lost sight of is that no generation has monopoly of wisdom nor has any generation a right to place fetters on future generations to mould the machinery of Government and the laws according to their requirements. Although guidelines for the organization and functioning of the future Government may be laid down and although norms may also be prescribed for the legislative activity, neither the guidelines should be so rigid nor the norms so inflexible and unalterable as should render them to be incapable of change, alteration and replacement even though the future generations want to change, alter, or replace them. The guidelines and norms would in such an event be looked upon as fetters and shackles upon the free exercise of the sovereign will of the people in times to come and would be done away with by methods other than constitutional. It would be nothing short of a presumptious and vain act and a myopic obsession with its own wisdom, for one generation to distrust the wisdom and good sense of the future generations, and to treat them in a way as if the generations to come would not be *sui juris*. The grant of power of amendment is based upon the assumption that as in other human affairs, so in Constitutions, there are no absolutes and that the human mind can never reconcile itself to fetters in its quest for a better order of things. Any fetter resulting from the concept of absolute and ultimate inevitably gives birth to the urge to revolt. Santayana once said: 'Why is there sometimes a right to revolution? Why is there sometimes a duty to loyalty? Because the whole transcendal philosophy, if made ultimate, is false, and nothing but a selfish perspective hypostasized, because the will is absolute neither in the individual nor in the humanity...' (see Santayana, *German Philosophy and Politics*, 1915, pp. 645-9, quoted by Frankfurter J. in *Mr. Justice Holmes*, 1931 ed., p. 117). What is true of transcendal philosophy is equally true in the mundane sphere of a constitutional provision. An unamendable Constitution, according to Mulford, is the worst tyranny of time, or rather the very tyranny of time. It makes an earthly providence of a convention which was adjourned without day. It places the sceptre over a free people in the hands of dead men, and the only office left to

the people is to build thrones out of the stones of their sepulchres (see J.W. Garner, *Political Science and Government,* pp. 537-8).

According to Woodrow Wilson, political liberty is the right of those who are governed to adjust Government to their own needs and interest. Woodrow Wilson in this context quoted Burke who had said that every generation sets before itself some favourite object which it pursues as the very substance of liberty and happiness. The ideals of liberty cannot be fixed from generation to generation; only its conception can be, the large image of what it is. Liberty fixed in unalterable law would be no liberty at all. Government is a part of life, and with life, it must change, alike in its objects and in its practices; only this principle must remain unaltered—this principle of liberty, that there must be the freest right and opportunity of adjustment. Political liberty consists in the best practicable adjustment between the power of the Government and the privilege of the individual; and the freedom to alter the adjustment is as important as the adjustment itself for the ease and progress of affairs and the contentment of the citizen (see Woodrow Wilson, *Constitutional Government in the United States,* pp. 4-6).

Each generation, according to Jefferson, should be considered as a distinct nation, with a right by the will of the majority to bind themselves but none to bind the succeeding generations, more than the inhabitant of another country. The earth belongs in usufruct to the living, the dead have neither the power nor the right over it. Jefferson even pleaded for revision or opportunity for revision of Constitution every nineteen years. Said the great American statesman:

> The idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their end, because of rights gratuitiously supposed in those employed to manage them in the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine and suppose that preceding generations held the earth more freely than we do, had a right to impose laws on us, unalterable by ourselves, and that we, in the like manner, can make laws and impose

> burdens on future generations, which they will have no right to alter; in fine that the earth belongs to the dead and not the living.

The above words were quoted during the course of the debate in the Constituent Assembly (see *Constituent Assembly Debates*, Vol. XI, p. 975).

Thomas Paine gave expression to the same view in the following words:

> There never did, there never will, and there never can, exist a parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controlling posterity to the 'end of time', or of commanding for ever how the world shall be governed, or who shall govern it; and therefore all such clauses, acts or declarations by which the makers of them attempt to do what they have neither the right nor the power to do, nor the power to execute, are in themselves null and void. Every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow.

* * *

What we are concerned with is as to whether on the true construction of Article 368, the Parliament has or has not the power to amend the Constitution so as to take away or abridge fundamental rights. So far as this question is concerned, the answer, in may opinion, should be in the affirmative, as long as the basic structure of the Constitution is retained.

3

Basic Structure of the Constitution

The concept of the basic structure of the Constitution has been the subject of considerable controversy in the context of the amendment of the Constitution. The following paragraphs from the author's judgment throw light on this concept:

We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word 'amendment'. Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in my opinion should be in the negative. I am further of the opinion that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only changes have to be made in it. The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then

is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words 'amendment of the Constitution' with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic Government into dictatorship or hereditary monarchy, nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the State according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death-wish of the Constitution or provide sanction for what may perhaps be called its lawful *harakiri*. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368.

The words 'amendment of this Constitution' and 'the Constitution shall stand amended' in Article 368 show that what is amended is the existing Constitution, though in an amended form. The language of Article 368 thus lends support to the conclusion that one cannot, while acting under that article, repeal the existing Constitution and replace it by a new Constitution.

The connotation of the amendment of the Constitution was brought out clearly by Pandit Nehru in the course of his speech in support of the First Amendment wherein he said that 'a Constitution which is responsive to the people's will, which is responsive to their ideas, in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it.' It is, therefore, plain that

what Pandit Nehru contemplated by amendment was the varying of the Constitution 'here and there' and not the elimination of its basic structure for that would necessarily result in the Constitution losing its identity.

Reference to some authorities in the United States, so far as the question is concerned as to whether the power to amend under article five of US Constitution would include within itself the power to alter the basic structure of the Constitution, are not helpful because there has been no amendment of such a character in the United States. No doubt the Constitution of the United States had in reality, though not in form, changed a good deal since the beginning of last century. But the change had been effected far less by formally enacted constitutional amendments than by the growth of customs or institutions which have modified the working without altering the articles of the Constitution (see A.V. Dicey, *The Law of the Constitution*, Tenth ed., p. 129).

It has not been disputed during the course of arguments that the power of amendment under Article 368 does not carry within itself the power to repeal the entire Constitution and replace it by a new Constitution. If the power of amendment does not comprehend the doing away of the entire Constitution but postulates retention or continuity of the existing Constitution, though in an amended form, question arises as to what is the minimum of the existing Constitution which should be left intact in order to hold that the existing Constitution has been retained in an amended form and not done away with. In my opinion, the minimum required is that which relates to the basic structure or framework of the Constitution. If the basic structure is retained, the old Constitution would be considered to continue even though other provisions have undergone change. On the contrary, if the basic structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues and survives.

Although there are some observations in 'Limitations of Amendment Procedure and the Constituent Power' by Conrad to which it is not possible to subscribe, the following observations, in my opinion, represent the position in a substantially correct manner:

> Any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority.

It has further been observed:

> The amending procedure is concerned with the statutory framework of which it forms part itself. It may effect changes in detail, remould the legal expression of underlying principles, adapt the system to the needs of changing conditions, be in the words of Calhoun 'the vis-medicatrix of the system', but should not touch its foundations.

A similar idea has been brought out in the following passage. (see Carl J. Friedrich, *Man and His Government*, 1963 p. 272.)

> A Constitution is a living system. But just as in a living organic system, such as the human body, various organs develop and decay, yet the basic structure or pattern remains the same with each of the organs having its proper function, so also in a constitutional system the basic institutional pattern remains even though the different component parts may undergo significant alterations. For it is the characteristic of a system that it perishes when one of its essential component parts is destroyed. The United States may retain some kind of constitutional government, without, say, the Congress or the federal division of powers, but it would not be the constitutional system now prevailing. This view is uncontested even by many who do not work with the precise concept of a Constitution here insisted upon.

According to *'The Construction of Statutes'* by Crawford, a law is amended when it is in whole or in part permitted to remain and something is added to or taken from it or in some way changed or altered in order to make it more complete or perfect or effective. It should be noticed, however, that an amendment is not the same as repeal, although it may operate as

a repeal to a certain degree. Sutherland in this context states that any change of the scope or effect of an existing statute whether by addition, omission, or substitution of provisions which does not wholly terminate its existence whether by an Act purporting to amend, repeal, revise or supplement or by an Act independent and original in form, is treated as amendatory.

It is, no doubt, true that the effect of the above conclusion at which I have arrived is that there would be no provision in the Constitution giving authority for drafting a new and radically different Constitution with different basic structure or framework. This fact, in my opinion, would not show that our Constitution has a lacuna and is not a perfect or a complete organic instrument, for it is not necessary that a Constitution must contain a provision for its abrogation and replacement by an entirely new and different Constitution. The people in the final analysis are the ultimate sovereign and if they decide to have an entirely new Constitution, they would not need the authority of the existing Constitution for this purpose.

Subject to the retention of the basic structure or framework of the Constitution, I have no doubt that the power of amendment is plenary and would include within itself the power to add, alter or repeal the various articles including those relating to fundamental rights. During the course of years after the Constitution comes into force, difficulties can be experienced in the working of the Constitution. It is to overcome those difficulties that the Constitution is amended. The amendment can take different forms. It may sometimes be necessary to repeal a particular provision of the Constitution without substituting another provision in its place. It may in respect of a different article become necessary to replace it by a new provision. Necessity may also be felt in respect of a third article to add some further clauses in it. The addition of the new clauses can be either after repealing some of the earlier clauses or by adding new clauses without repealing any of the existing clauses. Experience of the working of the Constitution may also make it necessary to insert some new and additional articles in the Constitution. Likewise, experience might reveal the necessity of deleting some existing articles. All these measures, in my opinion, would lie within the ambit of the power of amendment. The

denial of such a broad and comprehensive power would introduce a rigidity in the Constitution as might break the Constitution. Such a rigidity is open to serious objection in the same way as an unamendable Constitution.

The word 'amendment' in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution. No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in my opinion, should hold good when we deal with amendment relating to fundamental rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of power of amendment when it deals with fundamental right and the scope and width of that power when it deals with provisions not concerned with fundamental rights.

We have been referred to the dictionary meaning of the word 'amend', according to which, to amend is to 'free from faults, correct, rectify reform, make alteration, to repair to better and surpass'. The dictionary meaning of the word 'amend' or 'amendment', according to which power of amendment should be for purpose of bringing about an improvement, would not, in my opinion, justify a restricted construction to be placed upon those words. The sponsors of every amendment of the Constitution would necessarily take the position that the proposed amendment is to bring about an improvement on the existing Constitution. There is indeed an element of euphemism in every amendment because it proceeds upon the assumption on the part of the proposer that the amendment is an improvement. In the realities and controversies of politics, question of improvement becomes uncertain with the result that in legal parlance the word amendment when used in reference to a Constitution signifies change or alteration. Whether the amendment is in fact, an improvement or not, in my opinion, is not a justiciable matter, and in judging the validity of an amendment the courts would not go into the question as to whether the amendment has in effect brought about an improvement. It is for the special majority in each House of Parliament to decide as to whether it

constitutes an improvement; the courts would not be substituting their own opinion for that of the Parliament in this respect. Whatever may be the personal view of a judge regarding the wisdom behind or the improving quality of an amendment, he would be only concerned with the legality of the amendment, and this, in its turn, would depend upon the question as to whether the formalities prescribed in Article 368 have been complied with.

The approach while determining the validity of an amendment of the Constitution, in my opinion, has necessarily to be different from the approach to the question relating to the legality of amendment of pleadings. A Constitution is essentially different from pleadings filed in court of litigating parties. Pleadings contain claim and counter-claim of private parties engaged in litigation, while a Constitution provides for the framework of the different organs of the State, viz., the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of a people. Besides laying down the norms for the functioning of different organs, a Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is Constitution like a plaint or written statement filed in a suit between two litigants. A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration. A Constitution, it needs to be emphasized, is not a document for fastidious dialectics but the means of ordering the life of a people. It had its roots in the past, its continuity is reflected in the present and it is intended for the unknown future.

❀ ❀ ❀

Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness. The vesting of power of exclusion of judicial review in a legislature, including State legislature, contemplated by Article 31-C, in my opinion, strikes at the basic structure of the Constitution.*

*The matter is dealt with at length in Chapter 5.

4

Property Rights and Socio-Economic Measures

It is sometimes said that the judgment in Kesavananda Bharati's Case *and the concept of the basic structure of the Constitution provide a shield for property rights and stand in the way of socio-economic legislation. The following passages from the author's judgment would help us to appreciate as to whether this criticism is well-informed*:

Since the latter half of the eighteenth century when the idea of political equality of individuals gathered force and led to the formation of democratic governments, there has been a great deal of extension of the idea of equality from political to economic and social fields. Wide disparities in the standard of living of the upper strata and the lower strata as also huge concentration of wealth in the midst of abject poverty are an index of social mal-adjustment and if continued for long, they give rise to mass discontent and a desire on the part of those belonging to the lower strata to radically alter and, if necessary, blow up the social order. As those belonging to the lower strata constitute the bulk of the population, the disparities provide a fertile soil for violent upheavals. The prevention of such upheaval

is not merely necessary for the peaceful evolution of society, it is also in the interest of those who belong to the upper strata to ensure that the potential causes for violent upheaval are eliminated. Various remedies have been suggested in this connection and stress has been laid mainly upon having what is called a welfare state. The modern States have consequently to take steps with a view to ameliorate the conditions of the poor and to narrow the chasm which divides them from the affluent sections of the population. For this purpose the State has to deal with the problems of social security, economic planning and industrial and agrarian welfare. Quite often in the implementation of these policies, the State is faced with the problem of conflict between the individual rights and interests on the one side and rights and welfare of vast sections of the population on the other. The approach which is now generally advocated for the resolving of the above conflict is to look upon the rights of the individuals as conditioned by social responsibility. Harold Laski while dealing with this matter has observed (see, *Encyclopaedia of the Social Sciences*, Vol. IX, p. 445).

> The struggle for freedom is largely transferred from the plane of political to that of economic rights. Men become less interested in the abstract fragment of political power an individual can secure than in the use of massed pressure of the groups to which they belong to secure an increasing share of the social product...so long as there is inequality, it is argued, there cannot be liberty. The historic inevitability of this evolution was seen a century ago by de Tocqueville. It is interesting to compare this insistence that the democratization of political power means equality and that its absence would be regarded by the masses as oppression with the argument of Lord Acton that liberty and equality are antitheses. To the latter liberty was essentially an autocratic ideal; democracy destroyed individuality, which was the very pith of liberty, by seeking identity of conditions. The modern emphasis is rather towards the principle that material equality is growing inescapable and that the affirmation of personality must be effective upon an immaterial plane.

I may also refer to another passage. (See Harold Laski, *Grammar of Politics*, p. 99.)

> The state, therefore, which seeks to survive must continually transform itself to the demands of men who have an equal claim upon that common welfare which is its ideal purpose to promote.
>
> We are concerned here, not with the defence of anarchy, but with the conditions of its avoidance. Men must learn to subordinate their self-interest to the common welfare. The privileges of some must give way before the rights of all. Indeed, it may be urged that the interest of the few is in fact the attainment of those rights, since in no other environment is stability to be assured.

A modern State has to usher in and deal with large schemes having social and economic content. It has to undertake the challenging task of what has been called social engineering, the essential aim of which is the eradication of the poverty, uplift of the downtrodden, the raising of the standards of the vast mass of people and the narrowing of the gulf between the rich and the poor. As occasions arise quite often when the individual rights clash with the larger interests of the society, the State acquires the power to subordinate the individual rights to the larger interests of society as a step towards social justice. As observed by Roscoe Pound (see Roscoe Pound, *Jurisprudence*, Vol. 1, p. 434) under the heading 'Limitations on the Use of Property':

> Today the law is imposing social limitations—limitations regarded as involved in social life. It is endeavouring to delimit the individual interest better with respect to social interests and to confine the legal right or liberty or privilege to the bounds of the interest so delimited.

To quote the words of Friedmann (see Friedmann, *Legal Theory*, p. 406, 5th ed):

> But modern democracy looks upon the right to property as one conditioned by social responsibility by the needs of society, by the 'balancing of interests' which looms so

large in modern jurisprudence, and not as a pre-ordained and untouchable private right.

With a view to bring about economic regeneration, the State devises various methods and puts into operation certain socio-economic measures. Some of the methods devised and measures put into operation may impinge upon the property rights of individuals. The courts may sometimes be sceptical about the wisdom behind those methods and measures, but that would be an altogether extraneous consideration in determining the validity of those methods and measures. We need not dilate further upon this aspect because we are only concerned with the impact of the Preamble. In this respect I find that although it gives a prominent place to securing the objective of social, economic and political justice to the citizens, there is nothing in it which gives primacy to claims of individual right to property over the claims of social, economic and political justice. There is, as a matter of fact, no clause or indicator in the Preamble which stands in the way of abridgement of right to property for securing social, economic and political justice. Indeed, the dignity of the individual upon which also the Preamble has laid stress, can only be assured by securing the objective of social, economic and political justice.

* * *

Apart from what has been stated above, we find that both before the dawn of independence as well as during the course of debates of the Constituent Assembly stress was laid by the leaders of the nation upon the necessity of bringing about economic regeneration and thus ensuring social and economic justice. The Congress Resolution of 1929 on social and economic changes stated that 'the great poverty and misery of the Indian people are due, not only to foreign exploitation in India but also to the economic structure of society, which the alien rulers support so that their exploitation may continue. In order therefore to remove this poverty and misery and to ameliorate the condition of the Indian masses, it is essential to make revolutionary changes in the present economic and social structure of society and to remove the gross inequalities'. The resolution passed by the Congress

in 1931 recited that in order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions. The Objectives Resolution which was moved by Pandit Nehru in the Constituent Assembly on December 13, 1946 and was subsequently passed by the Constituent Assembly mentioned that there would be guaranteed to all the people of India, 'justice, social, economic, and political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality'. It would, therefore, appear that even in the Objectives Resolution the first position was given to justice—social, economic and political. Pandit Nehru in the course of one of his speeches, said:

> The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over.

Granville Austin in his book *Extracts from the Indian Constitution: Cornerstone of Nation* after quoting the above words of Pandit Nehru has stated:

> Two revolutions, the national and the social, had been running parallel in India since the end of the First World War. With independence, the national revolution would be completed, but the social revolution must go on. Freedom was not an end in itself, only 'a means to an end', Nehru had said, 'that end being the raising of the people...to higher levels and hence the general advancement of humanity'.
>
> The first task of this Assembly (Nehru told the members) is to free India through a new Constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity.
>
> K. Santhanam, a prominent southern member of the

Assembly and editor of a major newspaper, described the situation in terms of three revolutions. The political revolution would end, he wrote, with independence. The social revolution meant 'to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'. The third revolution was an economic one: The transition from primitive rural economy to scientific and planned agriculture and industry. Radhakrishnan (now President of India), believed India must have a 'socio-economic revolution' designed not only to bring about the real satisfaction of the fundamental needs of the common man', but to go much deeper and bring about 'a fundamental change in the structure of Indian society'.

On the achievement of this great social change depended India's survival. 'If we cannot solve this problem soon' Nehru warned the Assembly, 'all our paper Constitutions will become useless and purposeless...'.

* * *

'The choice for India' wrote Santhanam, '...is between rapid evolution and violent revolution...because the Indian masses cannot and will not wait for a long time to obtain the satisfaction of their minimum needs'.

* * *

What was of greatest importance to most Assembly members, however, was not that socialism be embodied in the Constitution, but that a democratic Constitution and with a socialist bias be framed so as to allow the nation in the future to become as socialist as its citizens desired or its needs demanded. Being, in general, imbued with the goals, the humanitarian bases, and some of the techniques of social democratic thought such was the type of Constitution that Constituent Assembly members created.

Dealing with the Directive Principles, Granville Austin writes:

> In the Directive Principles, however, one finds an even clearer statement of the social revolution. They aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from fulfilling their best selves.
>
> ❋ ❋ ❋
>
> By establishing these positive obligations of the State, the members of the Constituent Assembly made it the responsibility of future Indian governments to find a middle way between indidivdual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate 'the powers of all men equally for contributions to the common good'.
>
> ❋ ❋ ❋
>
> The Directive Principles were a declaration of economic independence, a declaration that the privilege of the colonial era had ended, that the Indian people (through the democratic institutions of the Constitution) had assumed economic as well as political control of the country and that Indian capitalists should not inherit the empire of British colonialists.

Pandit Nehru, in the course of his speech in support of the Constitution (First Amendment) Bill, said:

> And as I said on the last occasion the real difficulty we have to face is a conflict between the dynamic ideas contained in the Directive Principles of Policy and the static position of certain things that are called 'fundamental' whether they relate to property or whether they relate to something else. Both are important undoubtedly. How are you to get over them? A Constitution which is unchanging and static, it does not matter how good it is, how perfect

it is, is a Constitution that has past its use.

Again, in the course of his speech in support of the Constitution (Fourth Amendment) Bill, Pandit Nehru said:

> But, I say, that if that is correct, there is an inherent contradiction in the Constitution between the fundamental rights and the Directive Principles of State Policy. Therefore, again, it is up to this Parliament to remove that contradiction and make the fundamental rights subserve the Directive Principles of State Policy.

It cannot, therefore, be said that the stress in the impugned amendments to the Constitution upon changing the economic structure by narrowing the gap between the rich and poor is a recent phenomenon. On the contrary, the above material shows that this has been the objective of the national leaders since before the dawn of independence, and was one of the underlying reasons for the First and Fourth Amendments of the Constitution. The material further indicates, that the approach adopted was that there should be no reluctance to abridge or regulate the fundamental rights to property if it was felt necessary to do so for changing the economic structure and to attain the objectives contained in the Directive Principles.

So far as the question is concerned as to whether the right to property can be said to pertain to basic structure or framework of the Constitution, the answer, in my opinion, should plainly be in the negative. Basic structure or framework indicates the broad outlines of the Constitution while the right to property is a matter of detail. It is apparent from what has been discussed above that the approach of the framers of the Constitution was to subordinate the individual right to property to the social good. Property right has also been changing from time to time. As observed by Harold Laski in *Grammar of Politics*, the historical argument is fallacious if it regards the regime of private property as a simple and unchanging thing. The history of private property is, above all, the record of the most varied limitations upon the use of the power it implies. Property in slaves was valid in Greece and Rome; it is no

longer valid today. Laski in this context has quoted the following words of John Stuart Mill:

> The idea of property is not some one thing identical throughout history and incapable of alteration...at any given time it is a brief expression denoting the rights over things conferred by the law or custom of some given society at that time; but neither on this point, nor on any other, has the law and custom of a given time and place, a claim to be stereotyped for ever. A proposed reform in laws or customs is not necessarily objectionable because its adoption would imply, not the adaption of all human affairs to the existing idea of property, to the growth and improvement of human affairs.

POSTSCRIPT

Within two days of the decision of the Supreme Court on November 7, 1975 in the case of Shrimati Indira Gandhi *v.* Shri Raj Narain wherein the Court struck down clause (4) of Article 329-A of the Constitution inserted by the thirty-ninth amendment* on the ground of being violative of the basic structure of the Constitution, a 13-Judge Bench was constituted on November 10 to consider the correctness of the view that Parliament cannot by amendment alter the basic structure or framework of the Constitution. Directions for constituting such a Bench, it would appear, had been issued earlier. The hearing before the Bench lasted for two days. The Bench was dissolved after a most impassioned address by Mr. Palkhivala, counsel for the opposite party, wherein he contended that no case had been made for reconsidering the correctness of the view taken in *Kesavananda Bharati's Case* that Parliament cannot by amendment change the basic structure or framework of the Constitution. It was observed by the Court while dissolving the Bench that the specified matter be placed before the Constitution Bench which after considering the matter might if it thought necessary refer the matter to a larger Bench. During the course of those hearings before the 13-Judge Bench certain questions were put from the

*For detailed discussion, see Chapter 6.

Bench to the Attorney-General on the subject as to whether the concept of the basic structure of the Constitution had stood in the way of socio-economic legislation. The replies given by the learned Attorney-General throw a flood of light on that question. The questions and answers were reported extensively in the Press. The Press reports have been referred to by Seervai. (See Seervai, *Constitutional Law of India*, Vol. II, Second edition, p. 1532.) 'It would be worthwhile to reproduce below those questions and answers:

Mr. Justice Khanna—'Has this theory of basic structure impeded or come in the way of legislating any socio-economic measure?'

The Attorney-General—'No, that is not the only question. You don't require the power for amending non-essential parts of the Constitution.

To a similar question from **Chandrachud J.**, the Attorney-General replied that the question was how Parliament was to amend the Constitution 'to-morrow'. '(The Attorney-General) noted how a provision of the 39th Amendment had been struck down only last Friday' (the Attorney-General added), 'Socio-economic measures are not the only thing, important as they are, at the same time the very structure of government is the object of the amending power'.

5

Article 31-C and Judicial Review

The second part of Article 31-C which was inserted by the Twenty-fifth Amendment was the first constitutional amendment to be struck down by the Supreme Court in Kesavananda Bharati's Case. *Article 31-C reads as under*:

> **'31-C.** Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
>
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.'

The passages in the author's judgment incorporating reasons for striking down the second part of Article 31-C are reproduced below:

We may now deal with the second part of Article 31-C, according to which no law containing a declaration that it is for giving effect to the policy of State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be called in question in any court on the ground that it does not give effect to such policy. The effect of the second part is that once the declaration contemplated by that article is made, the validity of such a law cannot be called in question in any court on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 or 31 of the Constitution. The declaration thus gives a complete protection to the provisions of law containing the declaration from being assailed on the ground of being violative of Articles 14, 19 or 31. However tenuous the connection of a law with the objective mentioned in clause (1) and clause (c) of Article 39 may be and however violative it may be of the provisions of Articles 14, 19 and 31 of the Constitution, it cannot be assailed in a court of law on the said ground because of the insertion of the declaration in question in the law. The result is that if an Act contains 100 sections and 95 of them relate to matters not connected with the objectives mentioned in clauses (b) and (c) of Article 39, but the remaining five sections have some nexus with those objectives and a declaration is granted by the Legislature in respect of the entire Act, the 95 sections which have nothing to do with the objectives of clauses (b) and (c) of Article 39, would also get protection. It is well-known that State legislatures are quite often swayed by local and regional considerations. It is not difficult to conceive of laws being made by a State legislature which are directed against citizens of India who hail from other States on the ground that the residents of the State in question are economically backward. For example, a law might be made that as the old residents in the State are economically backward and those who have not resided in the State for more than three generations have an affluent business in the State or have acquired property in the State, they shall be deprived of their business and property

with a view to vest the same in the old residents of the State. Such a law if it contains the requisite declaration, would be protected and it would not be permissible to assail it on the ground of being violative of Articles 14, 19 and 31 of the Constitution even though such a law strikes at the integrity and unity of the country. Such a law might also provoke the legislatures of other States to make laws which may discriminate in the economic sphere against the persons hailing from the State which was the first to enact such discriminatory law. There would thus be a chain reaction of laws which in the very nature of things would have a divisive tendency from a national point of view. The second part of Article 31-C would thus provide the cover for the making of laws with a regional or local bias even though such laws imperil the oneness of the nation and contain the dangerous seeds of national disintegration. The classic words of Justice Holmes have a direct application to a situation like this. Said the great Judge:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. (Holmes, *Collected Legal Papers* (1920), pp. 295-6)

The fact that the assent of the President would have to be obtained for such a law might not provide an effective safeguard because occasions can well be visualized when the State concerned might pressurise the Centre and thus secure the assent of the President. Such occasions would be much more frequent when the party in power at the Centre has to depend upon the political support of a regional party which is responsible for the law in question passed by the State legislature.

It seems that while incorporating the part relating to declaration in Article 31-C, the sinister implications of this part were not taken into account and its repercussions on the unity of the country were not realised. In deciding the question relating to the validity of this part of Article 31-C, we should not, in my opinion, take too legalistic a view. A legalistic judgment would indeed be a poor consolation if it

affects the unity of the country. It would be apposite in this context to reproduce a passage from Story's *Commentaries on the Constitution of the United States* wherein he adopted the admonition of Burke with a slight variation as under:

> The remark of Mr. Burke may, with a very slight change of phrase be addressed as an admonition to all those who are called upon to frame, or to interpret a Constitution. Government is a practical thing made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians. The business of those, who are called to administer it, is to rule, and not to wrangle. It would be a poor compensation, that one had triumphed in a dispute, whilst we had lost an empire; that we had frittered down a power, and at the same time had destroyed the republic (para 456).

The evil consequences which would flow from the second part of Article 31-C would not, however, be determinative of the matter. I would, therefore, examine the matter from a legal angle. In this respect I find that there can be three types of constitutional amendments which may be conceived to give protection to legislative measures and make them immune from judicial scrutiny or attack in court of law.

According to the first type, after a statute has already been enacted by the legislature a constitutional amendment is made in accordance with Article 368 and the said statute is inserted in the Ninth Schedule under Article 31-B. Such a statute or any of the provisions thereof cannot be struck down in a court of law and cannot be deemed to be void or ever to have become void on the ground that the statute or any provisions thereof is inconsistent with or takes away or abridges any of the rights conferred by any provision of Part III. In such a case, the provisions of the entire statute are placed before each House of Parliament. It is open to not less than one-half of the members of each House and not less than two-thirds of the members of each House voting and present after applying their mind to either place the statute in the Ninth Schedule in its entirety, or a part thereof, or not to do so. It is

only if not less than one-half of the total members of each House of Parliament and not less then two-thirds of the members present and voting in each House decide that the provisions of a particular statute should be protected under Article 31-B either in their entirety or partly that the said provisions are inserted in the Ninth Schedule. A constitutional amendment of this type relates to an existing status of which the pro isions can be examined by the two Houses of Parliament and gives protection to the statute from being struck down on the ground of being violative of any provision of Part III of the Constitution. Such an amendment was introduced by the Constitution (First Amendment) Act, 1951 and its validity was upheld in *Sunkari Prasad's Case* (1952) SCR 89.

The second type of constitutional amendment is that where the constitutional amendment specifies the subject in respect of which a law may be made by the legislature and the amendment also provides that no law made in respect of that subject shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Part III of the Constitution. In such a case the law is protected even though it violates the provisions of Part III of the Constitution. It is, however, open in such a case to the court, on being moved by an aggrieved party, to see whether the law has been made for the purpose for which there is constitutional protection. The law is thus subject to judicial review and can be struck down if it is not for the purpose for which protection has been afforded by the constitutional amendment. To this category belong the laws made under Article 31-A of the Constitution, which has specified the subjects for which laws might be made, and gives protection to those laws. It is always open to a party to assail the validity of such a law on the ground that it does not relate to any of the subjects mentioned in Article 31-A. It is only if the court finds that the impugned law relates to a subject mentioned in Article 31-A that the protection contemplated by that article would be afforded to the impugned law and not otherwise. Article 31-A was introduced by the Constitution (First Amendment) Act, 1951 and as mentioned earlier the validity of the First Amendment was upheld in *Sankari Prasad's Case* (supra).

The third type of constitutional amendment is one

according to which a law made for specified object is protected from attack even though it violates Articles 14, 19 and 31. The constitutional amendment further provides that the question as to whether the law is made for the specified object is not justiciable and a declaration for the purpose made by the legislature is sufficient and would preclude the court from going into the question as to whether the law is made for the object prescribed by the constitutional amendment. To such category belongs that part of Twentyfifth Amendment which inserted Article 31-C when taken along with its second part. The law made under Article 31-C is not examined and approved for the purpose of protection by not less than one-half of the members of each House of Parliament and not less than two-thirds of the members present and voting in each House, as is necessary in the case of laws inserted in the Ninth Schedule of the Constitution. Nor can the law made under Article 31-C be subject to judicial review with a view to find out whether the law has, in fact, been made for an object mentioned in Article 31-C. Article 31-C thus departs from the scheme of Article 31-A, because while a judicial review is permissible under Article 31-A to find out as to whether a law has been made for any of the objects mentioned in Article 31-A, such a judicial review has been expressly prohibited under Article 31-C. The result is that even if a law made under Article 31-C can be shown in court of law to have been enacted not for the purpose mentioned in Article 31-C but for another purpose, the law would still be protected and cannot be assailed on the ground of being violative of Articles 14, 19 and 31 of the Constitution because of the declaration made by the Legislature as contemplated by second part of Article 31-C. It may also be mentioned in this context that such a law can be passed by a bare majority in a Legislature even though only the minimum number of members required by the quorum, which is generally one-tenth of the total membership of the Legislature, are present at the time the law is passed.

The effect of the above amendment is that even though a law is in substance not in furtherance of the object mentioned in Articles 39 (b) and (c) and has only a slender connection with those objects, the declaration made by the Legislature would stand in the way of a party challenging it on the ground

that it is not for the furtherance of those objects. A power is thus being conferred upon the Central and State Legislatures as a result of this provision to make a declaration in respect of any law made by them in violation of the provisions of Articles 14, 19 and 31 and thus give it protection from being assailed on that ground in a court of law. The result is that even though for the purpose of making an amendment of the Constitution an elaborate procedure is provided in Article 368, power is now given to a simple majority in a State or Central Legislature in which only the minimum number of members are present to satisfy the requirement of quorum, to make any law in contravention of the provisions of Articles 14, 19 and 31 and make it immune from attack by inserting a declaration in that law. It is natural for those who pass a law to entertain a desire that it may not be struck down. There would, therefore, be an inclination to make an Act immune from attack by inserting such a declaration even though only one or two provisions of the Act have a connection with the objects mentioned in Article 39 (b) and (c). Articles 14, 19 and 31 can thus be reduced to a dead letter, an ineffective purposeless showpiece in the Constitution.

The power of making an amendment is one of the most important powers which can be conferred under the Constitution. As mentioned earlier, according to Finer, the amending clause is so fundamental to a Constitution that it may be called the Constitution itself, while according to Burgess, the amending clause is the most important part of a Constitution. This circumstance accounts for the fact that an elaborate procedure is prescribed for the amending of the Constitution. The power of amendment being of such vital importance can neither be delegated nor can those vested with the authority to amend abdicate that power in favour of another body. Further, once such a power is granted, either directly or in effect, by a constitutional amendment to the State legislatures, it would be difficult to take away that power, because it can be done only by means of a constitutional amendment and the States would be most reluctant, having got such a power, to part with it. In empowering a State legislature to make laws violative of Articles 14, 19 and 31 of the Constitution and in further empowering the State legislature to make laws immune from attack on the ground of being violative of Articles 14, 19 and 31 by inserting

the requisite declaration, the authority vested with the power to make amendment under Article 368 (viz., the prescribed majority in each House of Parliament) has, in effect, delegated or granted the power of making amendment in important respects to a State legislature. Although the objects for which such laws may be made have been specified, the effect of the latter part of Article 31-C relating to the declaration is that the law in question may relate even to objects which have not been specified. Article 31-C taken along with the second part relating to the declaration departs from the scheme of Article 31-A because while the protection affored by Article 31-A is to laws made for specified subjects, the immunity granted under Article 31-C can be availed of even by laws which have not been made for the specified objects. The law thus made by the State legislatures would have the effect of *pro tanto* amendment of the Constitution. Such a power, as pointed out earlier, can be exercised by the State legislature by a simple majority in a House wherein the minimum number of members required by the rule of quorum are present.

In Re Initiative and Referendum Act (1919) AC 935, the Judicial Committee after referring to a previous decision wherein the Legislature of Ontraio was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to Taverns, observed on page 945:

> But it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

If it is impermissible for a legislature to create and endow with its own capacity a legislative power not created by the Act to which it owes its own existence, it should, in my opinion, be equally impermissible in the face of Article 368 in its present form under our Constitution, for the amending authority to vest its amending power in another authority like a State legislature. It has to be emphasised in this context that according to Article 368, an amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of

Parliament. The word 'only' has a significance and shows that as long as Article 368 exists in its present form, the other methods of amendment are ruled out.

* * *

The position under Article 31-C is that though judicial review has been excluded by the authority making the constitutional amendment, the law in respect of which the judical review has been excluded is one yet to be passed by the legislatures. Although the object for which such a law can be enacted has been specified in Article 31-C, the power to decide as to whether the law enacted is for the attainment of that object has been vested not in the courts but in the very legislature which passes the law. The vice of Article 31-C is that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The kind of limited judicial review which is permissible under Article 31-A for the purpose of finding as to whether the law enacted is for the purpose mentioned in Article 31-A has also been done away with under Article 31-C. The effect of the declaration mentioned in Article 31-C is to grant protection to the law enacted by a legislature from being challenged on grounds of contravention of Articles 14, 19 and 31 even though such a law can be shown in the court to have not been enacted for the objects mentioned in Article 31-C. Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness. The vesting of power of exclusion of judicial review in a legislature, including State legislature, contemplated by Article 31-C, in my opinion, strikes at the basic structure of the Constitution. The second part of Article 31-C thus goes beyond the permissible limit of what constitutes amendment under Article 368.

It has been argued on behalf of the respondents that the declaration referred to in Article 31-C would not preclude the court from finding whether a law is for giving effect to the policy of the State towards securing the principles specified in clauses (b) and (c) of Article 39 and that if an enactment is

found by the court to be not for securing the aforesaid objectives, the protection of Article 31-C would not be available for such legislation.

I find it difficult to accede to this contention in view of the language of Article 31-C pertaining to the declaration. The above contention would have certainly carried weight if the second part of the article relating to the declaration were not there. In the absence of the declaration in question, it would be open to, and indeed necessary, for the court to find whether the impugned law is for giving effect to the policy of the State towards securing the principles specified in clause (b) or (c) of Article 39 before it can uphold the validity of the impugned law under Article 31-C. Once, however, a law contains such a declaration, the declaration would stand as bar and it would not be permissible for the court to find whether the impugned law is for giving effect to the policy mentioned in Article 31-C. Article 31-C protects the law giving effect to the policy of the State towards securing the principles specified in clause (b) or (c) of Article 39 and at the same time provides that no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. It is, therefore, manifest that once a law contains the requisite declaration the court would be precluded from going into the question that the law does not give effect to the policy of the State towards securing the principles specified in clause (b) or (c) of Article 39. In view of the conclusive nature of the declaration, it would, in my opinion, be straining the language of Article 31-C to hold that a court can despite the requisite declaration go into the question that it does not give effect to the policy of the State towards securing the principles specified in clause (b) or (c) of Article 39. The result is that if a law contains the declaration contemplated by Article 31-C, it would have complete protection from being challenged on the ground of being violative of Articles 14, 19 and 31 of the Constitution, irrespective of the fact whether the law is or is not for giving effect to the policy of the State towards securing the principles specified in clause (b) or (c) of Article 39. To put it in other words, even those laws which do not give effect to the policy of the State towards securing the principles specified in clause (b) or (c) of Article 39 would also have the protection if

they contain the declaration mentioned in Article 31-C.

I am also of the view that the validity of the latter part of Article 31-C relating to declaration cannot be decided on the basis of any concession made during the course of arguments on behalf of the respondents. Such a concession if not warranted by the language of the impugned provision, cannot be of much avail. Matters relating to construction of an article of the Constitution or the constitutional validity of an impugned provision have to be decided in the light of the relevant provisions and a concession made by the State counsel or the opposite counsel would not absolve the court from determining the matter independently of the concession. A counsel may sometimes make a concession in order to secure favourable verdict on another important point; such a concession would, however, not be binding upon another counsel. It is well-settled that admission or concession made on a point of law by the counsel is not binding upon the party represented by the counsel, far less would such admission or concession preclude other parties from showing that the concession was erroneous and not justified in law. It may, therefore, be laid down as a broad proposition that constitutional matters cannot be disposed of in terms of agreement or compromise between the parties, nor can the decision in such disputes in order to be binding upon others be based upon a concession even though the concession emanates from the State counsel. The concession has to be made good and justified in the light of the relevant provisions.

* * *

In my opinion, the second part of Article 31-C is liable to be quashed on the following grounds:

1. It gives a carte blanche to the Legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the Legislature, including a State Legislature, to amend the Constitution.
2. The Legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. The vice of second part of

Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the Legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment under Article 368.

The second part of Article 31-C can be severed from the remaining part of Article 31-C and its invalidity would not affect the validity of the remaining part. I would, therefore, strike down the following words in Article 31-C:

> And no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.

6

Basic Structure and Free and Fair Elections

Clause 4 of Article 329-A which was inserted by the Thirty-ninth Amendment of the Constitution was the second constitutional amendment to be struck down by the Supreme Court in the case of Shrimati Indira Nehru Gandhi *v.* Shri Raj Narain *(1976) 2 SCR 347. Article 329-A reads as under:*

> **329-A.** Special provision as to elections to Parliament in the case of Prime Minister and Speaker.—(1) Subject to the provisions of Chapter II of Part V (Except sub-clause (e) of clause (1) of Article 102), no election
>
> (a) to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election;
>
> (b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election;
>
> shall be called in question, except before such authority (not being any such authority as is referred to in clause (b) of Article 329) or body and in such manner as may be

provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(3) Where any person is appointed as Prime Minister or, as the case may be, chosen to the office of the Speaker of the House of the People, while an election petition referred to in clause (b) of Article 329 in respect of his election to either House of Parliament or, as the case may be, to the House of the People is pending, such election petition shall abate upon such person being appointed as Prime Minister or, as the case may be, being chosen to the office of the Speaker of the House of the People, but such election may be called in question under any such law as is referred to in clause (1).

(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 as is 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 void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based 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 provisions of clause (4).

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

The reasons for striking down clause (4) of Article 329-A were given by the author in his judgment in the case cited above in the following paragraphs:

The question with which we are concerned is whether the provisions of clause (4) of Article 329-A by which the constituent authority in effect prescribed that no election law was to govern the challenge to the election of the appellant and that the same in any case was to be valid in all respects is a permissible piece of constitutional amendment or whether it is void on the ground that it affects the basic structure of the Constitution.

This Court, in *Kesavananda Bharati's Case*, (*supra*) held by majority that the power of amendment of the Constitution contained in Article 368 does not permit altering the basic structure of the Constitution. All the seven Judges who constituted the majority were also agreed that democratic set up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representatives. Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of deference to mass opinion. Free and fair elections require that the candidates and their agents should not resort to unfair means or malpractices as may impinge upon the process of free and fair elections. Even in the absence of unfair means and malpractices, sometimes the result of an election is materially affected because of the improper rejection of ballot papers. Likewise, the result of an election may be materially affected on account of the improper rejection of a nomination paper. Disputes, therefore, arise with regard to the validity of elections. For the resolving of those disputes, the different democratic countries of the world have made

provisions prescribing the law and the forum for the resolving of those disputes. To give a few examples, we may refer to the United Kingdom where a parliamentary election petition is tried by two judges on the rota for the trial of parliamentary election petitions in accordance with the Representation of the People Act, 1949. Section 5 of Article 1 of the US Constitutions povides that each House (Senate and the House of Representatives) shall be the judge of the elections, returns and qualifications of its own members. Section 47 of the Australian Constitution provides that until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises. Article 55 of the Japanese Constitution states that each House shall judge disputes related to qualification of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present. Article 46 of the Iceland Constitution provides that the Althing itself decides whether its its members are legally elected and also whether a member is disqualified. Article 64 of the Norwegian Constitution states that the representatives elected shall be furnished with certificates, the validity of which shall be submitted to the judgment of the Storting. Article 59 of the French Constitution provides that the Constitutional Council shall rule, in the case of disagreement, on the regularity of the election of deputies and senators. Article 41 of the German Federal Republic Constitution states that the scrutiny of elections shall be the responsibility of the Bundestag. It shall also decide whether a deputy has lost his seat in the Bundestag. Against the decision of the Bundestag an appeal shall lie to the Federal Constitutional Court. Details shall be regulated by a federal law. According to Article 66 of the Italian Constitution, each Chamber decides as to the validity of the admission of its own Members and as to cases subsequently arising concering ineligibility and incompatability. In Turkey Article 75 provides *inter alia* that it shall be the function of Supreme Election Board to review and pass final judgment on all irregularities, complaints and objections regarding election matters during and and after elections. The

function and powers of the Supreme Election Board shall be regulated by law. Article 53 of the Malaysian Constitution provides that if any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final.

Not much argument is needed to show that unless there be a machinery for resolving an election dispute and for going into the allegations that elections were not free and fair being vitiated by malpractices, the provision that a candidate should not resort to malpractices would be in the nature of a mere pious wish without any legal sanction. It is further plain that if the validity of the election of a candidate is challenged on some grounds, the said election can be declared to be valid only if we provide a forum for going into those grounds and prescribe a law for adjudicating upon those grounds. If the said forum finds that the grounds advanced to challenge the election are not well-founded or are not sufficient to invalidate the election in accordance with the prescribed law or dismisses the petition to challenge the election on some other ground, in such an event it can be said that the election of the returned candidate is valid.

Besides other things, election laws lay down a code of conduct in election matters and prescribe, what may be called, rules of electoral morality. Election laws also contain a provision for resolving disputes and determination of controversies which must inevitably arise in election matters as they arise in other spheres of human activity. The object of such a provision is to enforce rules of electeral morality and to punish deviance from the prescribed code of conduct in election matters. It is manifest that but for such a provision, there would be no sanction for the above code of conduct and rules of electoral morality. It is also plain that nothing would bring the code of conduct into greater contempt and make a greater mockery of it than the absence of a provision to punish its violation. The position would become all the more glaring that even though a provision exist on the statute book for punishing violation of the code of conduct in election matters, a particular election is made immune and granted exemption from the operation of such a provision.

The vice of clause (4) of Article 329-A is not merely

that it makes the previous law contained in the Representation of the People Act as amended by Acts 58 of 1974 and 40 of 1975 inapplicable io the challenge to the election of the appellant, it also makes no other election law applicable for resolving that dispute. The further vice from which the said clause suffers is that it not merely divests the previous authority, namely, the High Court of its jurisdiction to decide the dispute relating to the election of the appellant, it confers no jurisdiction on some other authority to decide that dispute. Without even prescribing a law and providing a forum for adjudicating upon the grounds advanced by the respondent to challenge the election of the appellant, the constituent authority has declared the election of the appellant to be valid.

To confer an absolute validity upon the election of one particular candidate and to prescribe that the validity of that election shall not be questioned before any forum of under any law would necessarily have the effect of saying that howsoever gross may be the improprieties which might have vitiated that election, howsoever flagrant may be the malpractices which might have been committed on behalf of the returned candidate during the course of the election and howsoever foul and violalative of the principles of free and fair elections may be the means which might have been employed for securing success in that election, the said election would be nonetheless valid and it would not be permissible to complain of those improprieties, malpractices and unfair means before any forum or under any law with a view to assail the validity of that election. Not much argument is needed to show that any provision which brings about that result is subversive of the principle of free and fair election in a democracy. The fact that the candidate concerned is the Prime Minister of the country or the Speaker of the lower House of Parliament would, if anything, add force to the above conclusion because both these offices represent the acme of the democratic process in a country. That in fact the elections of the incumbents of the two offices were not vitiated by any impropriety, malpractice or unfair means is not relevant or germane to the question with which we are concerned, namely, as to what is the effect of clause 4 of Article 329-A.

The vice of declaration contained in part (iii) of clause 4 regarding the validity of the election of the appellant is

aggravated by the fact that such a declaration is made after the High Court which was than seized of jurisdiction had found substance in some of the grounds advanced by the respondent and has consequently declared the election of the appellant to be void. To put a stamp of validity on the election of a candidate by saying that the challenge to such an election would not be governed by any election law and that the said election in any case would be valid and immune from any challenge runs counter to accepted norms of free and fair elections in all democratic countries. In *Marbury* v. *Madison* (1 Cr.137, 163(1803), Marshall CJ. said that 'the government of the United States has been emphatically termed a government of laws and not of men.' In *United States* v. *Lee* (106 US 196, 220), Samual Miller J. observed that 'no man is so high that he is above the law.... All...officers are creatures of the law and are bound to obey it.' Although the above observations were made in the context of the US Constitution, they, in may opinion, hold equally good in the context of our Constitution.

It has been argued on behalf of the appellant that the grounds on account of which the election of the appellant had been held to be void by the High Court were of a technical nature. I need not express any opinion about this aspect of the matter at this stage but, assuming it to be so, I find that clause 4 of Article 329-A is so worded that however serious may be the malpractices vitiating the election of Speaker or the Prime Minister, the effect of clause 4 is that the said election would have te be treated as valid. I cannot accede to the submission that in construing clause 4 we should take into account the facts of the appellant's case. This is contrary to all accepted norms of construction. If a clause of a Constitution or statutory provision is widely worded, the width of its ambit cannot be circumscribed by taking into account the facts of an individual case to which it applies. As already mentioned, clause 4 deals with the past election not merely of the Prime Minister but also of the Speaker. So far as the election of the Speaker is concerned, we do not know as to whether the same were ever challenged and, if so, on what grounds, and whether such a dispute is still pending.

Another argument advanced in support of validity of the amendment is that we should take it that the constituent

authority constituted itself to be the forum for deciding the dispute relating to the validity of the election of the appellant, and after considering the facts of the case, declared the election of the appellant to be valid. There is, however, nothing before us as to indicate that the constituent authority went into the material which had been adduced before the High Court relating to the validity of the election of the appellant and after considering that material held the election to be valid. Indeed, the statement of Objects and Reasons appended to the Constitution (Thirty-ninth Amendment) Bill makes no mention of this thing. In any case, the vice of clause 4 would still lie in the fact that the election of the appellant was declared to be valid on the basis that it was not to be governed by any law for settlement of election disputes. Although the provisions of a constitutional amendment should be construed in a fair and liberal spirit, such liberal spirit should not be carried by the court to the extent of a dormant and latent law in the declaration of the validity of an election even though there is not even a remote indication of such a law in the impugned provision. Rule of law postulates that the decisions should be made by the application of known principles and rules and in general such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is not predictable and such decision is the antithesis of a decision taken in accordance with the rule of law.

The matter can also be looked at from another angle. The effect of impugned clause 4 is to take away both the right and the remedy to challenge the election of the appellant. Such extinguishment of the right and remedy to challenge the validity of the election, in my opinion, is incompatible with the process of free and fair elections. Free and fair elections necessarily postulate that if the success of a candidate is secured in elections by means which violate the principle of free and fair elections, the election should on that account be liable to be set aside and be declared to be void. To extinguish the right and the remedy to challenge the validity of an election would necessarily be tantamount to laying down that even if the election of a candidate is vitiated by the fact that it was secured by flagrant violation of the principles of free and fair election, the same would still enjoy immunity from challenge and would be

none-the-less valid. Clause 4 of Article 329-A can, therefore, be held to strike at the basis of free and fair elections.

I agree that it is not necessary in a democratic set up that disputes relating to the validity of the elections must be settled by courts of law. There are many countries like France, Japan and the United States of America where consistently with the democratic set up the determination of such controversies is by legislatures or by authorities other than the courts. The question with which we are concerned, however, is whether it is permissible in a democratic set up that a dispute with regard to the validity of a particular election shall not be raised before any forum and shall not be governed by law and whether such an election can be declared, despite the existence of a dispute relating to its validity, to be valid by making the existing law relating to election disputes not applicable to it and also not applying any other election law to such a dispute. The answer to such a question, for the reasons given earlier by me, should be in the negative.

Reference to the election of the US President made by Mr. Sen is also not helpful to him. It is clear from observations on pages 47–50 the American Commonwealth by Bryce 1912 ed. and sections 5, 6 and 15 of the United States Code (1970 ed.) that there is ample provision for the determination of such disputes after the poll. The fact that such determination of the dispute is before the declaration of the result would not detract from the proposition that it is essential for free and fair elections that there should be a forum and law for the settlement of such disputes relating to the validity of the election.

The argument has also been advanced that the offices of the Prime Minister and Speaker are of great importance and as such they constitute a class by themselves. This argument, in my opinion, would have relevance if instead of the law governing disputes relating to the election of other persons, another law had been prescribed to govern the dispute relating to the election of a person who holds the office of the Prime Minister or Speaker. As it is, what we find is that so far as the dispute relating to the election of the appellant is concerned, neither the previous law governing the election of persons holding the office of Prime Minister is to apply to it nor the future law to be framed under clause I of Article 329-A governing the election of persons holding the office of Prime Minister is to apply to this

dispute. Likewise, the previous forum for adjudicating upon the election disputes which went into the matter, has been divested of its jurisdiction with retrospective effect and, at the same time, no jurisdiction has been vested in any other forum to go into the matter. The present is not a case of change of forum. It is, on the contrary, one of abolition of the forum. As such, the question as to whether the office of Prime Minister constitutes a class by itself loses much of its significance in the context of the controversy with which we are concerned.

It has been argued in support of the constitutional validity of clause 4 that as a result of this amendment, the validity of one election has been preserved. Since the basic structure of the Constitution, according to the submission, continues to be the same, clause 4 cannot be said to be an impermissible piece of constitutional amendment. The argument has a seeming plausibility about it, but a deeper reflection would show that it is vitiated by a basic fallacy. Law normally connotes a rule or norm which is of general application'. It may apply to all the persons or class of persons or even individuals of a particular description. Law prescribes the abstract principles by the application of which individual cases are decided. Law, however, is not what Blackstone called 'a sentence'. According to Roscoe Pound, law, as distinguished from laws, is the system of authoritative materials for grounding or guiding judicial and administrative action recognized or established in a politically organized society (see Roscoe Pound, *Jurisprudence*, Vol. III, p.106). Law is not the same as judgment. Law lays down the norm in abstract terms with a coercive power and sanction against those guilty of violating the norm, while judgment represents the decision arrived at by the application of law to the concrete facts of a case. Constitutional law relates to the various organs of a state; it deals with the structure of the government, the extent of distribution of its powers and the modes and principles of its operation. The Constitution of India is so detailed that some of the matters which in a brief Constitution like that of the United States of America are dealt with by statutes form the subject-matter of various articles of our Constitution. There is, however, in a constitutional law, as there is in the very idea of law, some element of generality or general application. It also carries with it a concept of its applicability in future to situations which

may arise in that context. If there is amendment of some provision of the Constitution and the amendment deals with matters which constitute constitutional law in the normally accepted sense, the court while deciding the question of the validity of the amendment would have to find out, in view of the majority opinion in *Kesavananda Bharati's Case* (supra), as to whether the amendment affects the basic structure of the Constitution. The constitutional amendment contained in clause 4 with which we are concerned in the present case is, however, of an altogether different nature. Its avowed object is to confer validity on the election of the appellant to the Lok Sabha in 1971 after that election had been declared to be void by the High Court and an appeal against the judgment of the High Court was pending in this Court. In spite of our query, we were not referred to any precedent of a similar amendment of any Constitution of the world. The uniqueness of the impugned constitutional amendment would not, however, affect its validity. If the constituent authority in its wisdom has chosen the validity of a disputed election as the subject-matter of a constitutional amendment, this Court cannot go behind that wisdom. All that this Court is concerned with is the validity of the amendment. I need not go into the question as to whether such a matter, in view of the normal concept of constitutional law, can strictly be the subject of a constitutional amendment. I shall for the purpose of this case assume that such a matter can validly be the subject-matter of a constitutional amendment. The question to be decided is that if the impugned amendment of the Constitution violates a principle which is part of the basic structure of the Constitution, can it enjoy immunity from an attack on its validity because of the fact that for the future, the basic structure of the Constitution remains unaffected. The answer to the above question, in my opinion, should be in the negative. What has to be seen in such a matter is whether the amendment contravenes or runs counter to an imperative rule or postulate which is an integral part of the basic structure of the Constitution. If so, it would be an impermissible amendment and it would make no difference whether it relates to one case or a large number of cases. if an amendment striking at the basic structure of the Constitution is not permissible, it would not acquire validity by being related only to one case. To accede to the argument advanced in support

of the validity of the amendment would be tantamount to holding that even though it is not permissible to change the basic structure of the Constitution, whenever the authority concerned deems it proper to make such an amendment, it can do so and circumvent the bar to the making of such an amendment by confining it to one case. What is prohibited cannot become permissible because of its being confined to one matter.

Lastly, the question arises whether we should strike down clause 4 in its entirety or in part. So far as this aspect is concerned, I am of the view that the different parts of clause 4 are so integrally connected and linked with each other that it is not possible to sever them and uphold the validity of part of it after striking down the rest of it. It would indeed be unfair to the appellant if we were to uphold the first part of clause 4 and strike down other parts or even part (iii). As would be apparent from what follows hereafter, the election of the appellant is being upheld by applying the provisions of the Representation of the People Act as amended by Act 40 of 1975. Such a course would not be permissible if we were to uphold the validity of the first part of clause 4 and strike down the other parts. We would also in that event be creating a vacuum which is the very vice for which we are striking down clause 4. I am, therefore, of the view that clause 4 should be struck down in its entirety.

7

Danger Points in the Constitution

The following passages from the author's judgment in Kesavanand Bharati's Case, *after referring to the fate of the Constitution of the Weimar Republic at the hands of Hitler, draw attention to some dangerous features of our Constitution. It may be mentioned that that judgment was delivered in 1973:*

Following military reversals when the Kaiser fled to Holland in 1918 his mutinous subjects proclaimed a republic in Germany. There was thus a break in the continuity of the authority and the Weimar Republic had to face staggering political problems. It had to bear the burden of concluding a humiliating peace. It was later falsely blamed for the defeat itself by some of the politicians who were themselves responsible for the collapse and capitulation of 1918. The Republic had to wrestle, within a decade and a half, with two economic crises of catastrophic proportions which ruined and made desparate the ordinary stable elements of society. The chaos with political party divisions in the country was reflected in Reichstag where no party obtained a clear majority. There were twenty-one cabinets in fourteen years. It was in those conditions that Hitler emerged on the

scene. He made use of Article 48 of the Weimar Constitution which dealt with emergency powers. Under Article 48 of the Constitution, the President was empowered to issue decrees suspending the rights guaranteed by the basic law and to make direct use of the army and navy should emergency conditions so require. The purpose of the provisions was, of course, to provide the executive with means to act in the event of some grave national emergency where the immediate and concentrated use of the power of the State might become suddenly necessary. But what happened was that almost from its beginning the government found itself in one emergency after another, so that rule by executive decrees issued under the authority provided for by Article 48 supplanted the normal functioning of the legislative branch of government. The increasing division among the political parties, the staggering economic problem and the apparent failure of the parliamentary government to function, were accompanied by the steady growth in power of the National Socialists under Hitler. In less than two years, the Weimar Republic was transformed into a totalitarian dictatorship. The Enabling Act of March 23, 1933, pushed through the Reichstag by a narrow Nazi majority, provided Government by decree without regard to constitutional guarantees. The Act empowered the Government to enact the statutes without the sanction of the Parliament. Hitler made a show of following the Constitution, but the acts of his party in and out of the government in practice violated the basic law. The few limitations imposed upon the government were ignored and Hitler's Third Reich was launched (see R. P. Moore, *Modern Constitutions*, pp. 86-7 and E. A. Goerner, *The Constitutions of Europe*, pp. 99-100). It would thus appear that it was not by use of the power of amending the Constitution but by acting under the cover of Article 48 of the Constitution dealing with emergency powers that Hitler brought about the Nazi dictatorship. He thus became what has been described as '...the supreme political leader of the people, supreme leader and highest superior of the administration, supreme judge of the people, supreme commander of the armed forces and the source of all law.'

Apart from the fact that the best against the abuse of power of amendment is good sense of the majority of the Members of Parliament and not the unamendability of Part III

of the Constitution, there is one other aspect of the matter. Even if Part III may be left intact, a mockery of the entire Parliamentary system can be made by amending Articles 83 and 172 which are not in Part III and according to which, the life of the Lok Sabha and Vidhan Sabhas of the States, unless sooner dissolved, would be five years, and by providing that the life of existing Lok Sabha and Vidhan Sabhas shall be fifty years. This would be a flagrant abuse of the power of amendment and I refuse to believe that public opinion in our country would reach such abysmal depths and the standard of political and constitutional morality would sink so low that such an amendment would ever be passed. I need express no opinion for the purpose of this case as to whether this Court would also not quash such an amendment. In any case such an amendment would be an open invitation for and be a precursor of revolution.

Even without amending any article, the emergency provisions of the Constitution contained in Article 358 and 359 can theoretically be used in such a manner as may make a farce of the democratic set up by prolonging the rule of the party in power beyond the period of five years since the last general election after the party in power has lost public support. A Proclamation of Emergency under Article 352 can be issued by the President if he is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or even by internal disturbance. Such a Proclamation has to be laid before each House of Parliament. A resolution approving the Proclamation has thereafter to be passed by the Houses of Parliament. According to Article 83, the House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate. As the Government and Parliament play a vital part in the Proclamation and continuation of emergency, the emergency provisions can theoretically be used for avoiding the election and continuing a

party in power even though it has lost popular support by extending the life of the House of the People in accordance with Article 83(2). The effective check against such unabashed abuse of power is the sense of political responsibility, the pressure of public opinion, and the fear of popular uprising. We need not go into the question as to whether the court would also intervene in such an event. It is, in my opinion, inconceivable that a party would dare to so abuse the powers granted by the emergency provisions. The grant of the above power under Article 83(2) is necessarily on the assumption that such a power would not be abused.

The argument has then been advanced on behalf of the Petitioners that the power of amendment might well be used in such a manner as might result in doing away with the power of amendment under Article 368 or in any case so amending that article as might make it impossible to amend the Constitution. It is, in my opinion, difficult to think that majority of members of future Parliament would attempt at any time to do away with the power of amendment in spite of the knowledge as to what was the fate of unamendable Constitutions in other countries like France. Assuming that at any time such an amendment to abolish all amendments of Constitution is passed and made a part of the Constitution, it would be nothing short of laying the seeds of a future revolution or other extra-constitutional methods to do away with an unamendable Constitution. It is not necessary for the purpose of this case to go into the question of the constitutional validity of such an amendment.

8

Judicial Review or Confrontation ?

The criticism is sometimes levelled that in exercising the power of judicial review, the courts encroach upon the sphere of the Legislature, and thus create a situation of confrontation. The following paragraphs from the author's judgment in Kesavananda Bharati's Case *may help us in determining whether the above criticism is well-founded*:

In a federal system where the spheres of legislative powers are distributed between the Central Legislature and the State legislatures, there has to be provided a machinery to decide in case of a dispute as to whether the law made by the State legislatures encroaches upon the field earmarked for the Central Legislature as also a dispute whether a law made by the Central Legislature deals with a subject which can be exclusively dealt with by the State legislatures. This is true not only of a federal system but also in a constitutional set up like ours wherein the Constitution-makers, though not strictly adopting the federal system, have imbibed the features of a federal system by distributing and setting apart the spheres of legislation between the Central Legislature and the State legislatures. The machinery

for the resolving of disputes as to whether the Central Legislature has trespassed upon the legislative field of the State legislatures or whether the State legislatures have encroached upon the legislative domain of the Central Legislature is furnished by the courts and they are vested with the powers of judicial review to determine the validity of the Acts passed by the Legislatures. The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or State legislatures have acted within the four corners of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution. Our Constitution-makers have provided for fundamental rights in Part III and made them justiciable. As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened. Dealing with draft Article 25 (corresponding to present Article 32 of the Constitution) by which a right is given to move the Supreme Court for enforcement of the fundamental rights, Dr. Ambedkar speaking in the Constituent Assembly on December 9, 1948 observed:

> If I was asked to name any particular article in this Constitution as the most important an article without which this Constitution would be a nullity, I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance. (*Constituent Assembly Debates*, Vol. VII, p. 953)

Judicial review has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of provisions of statutes. If the provisions of the statute are found to be violative of any article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions.

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In exercising the power of judicial review, it may be mentioned that the courts do not and cannot go into the question of wisdom behind a legislative measure. The policy decisions have essentially to be those of the legislatures. It is for the legislatures to decide as to what laws they should enact and bring on the statute book. The task of the courts is to interpret the laws and to adjudicate about their validity, they neither approve nor disapproved legislative policy. The office of the courts is to ascertain and declare whether the impugned legislation is in consonance with or in violation of the provisions of the Constitution. Once the courts have done that, their duty ends. The courts do not act as superlegislatures to suppress what they deem to be unwise legislation for if they were to do so the courts will divert criticism from the legislative door where it belongs and will thus dilute the responsibility of the elected representatives of the people. As was observed by Shri Alladi Krishnaswamy Iyer in a speech in the Constituent Assembly on September 12, 1949 'The Legislature may act wisely or unwisely. The principles formulated by the Legislature may commend themselves to a Court or they may not. The province of the Court is normally to administer the law as enacted by the Legislature within the limits of its power.'

In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed for vindicating reasonable belief by experience. Judicial review is not intended to create what is sometimes called Judicial Oligarchy, the Aristocracy of the Robe, Covert Legislation, or Judge-made law. The proper forum to fight for the wise use of the legislative authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena. That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the

Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision. The sobering reflection has always to be there that the Constitution is meant not merely for people of their way of thinking but for people of fundamentally differing views.

9

An American Attempt

In the context of the amendment of our Constitution, it may be of interest to refer to an American attempt which might have resulted in wholesale amendment of the US Constitution. The attempt which failed was made following the decision of US Supreme Court in the case of *Baker* v. *Carr* 369 US 186 (1962).

The decision in *Baker's Case* is considered to be a landmark in the history of American constitutional law. Many observers consider it to be the US Supreme Court's most important decision since *Marbury* v. *Madison*. The relevant facts of that case are as follows. The General Assembly of Tennessee consists of a Senate of thirty-three members and a House of Representatives of ninety-nine members. The Constitution of Tennessee provides that representation in the legislature shall be based on the number of qualified voters residing in each country. It also provides for an apportionment of the legislators every ten years to be determined according to the federal census. In 1901, the State legislature reapportioned representation on the basis of the 1900 federal census, but despite the constitutional requirement no subsequent reapportionment was made up to the

time of the decision in *Baker* v. *Carr*. In the meantime, the population of Tennessee increased by seventy-five per cent, and many people moved from rural to urban areas. These changes resulted in extreme disparities in the number of voters in each district. Thus, Moore County, with 2,340 voters, elected one representative, whereas Shelby County, with 312,245 voters, elected only seven. In some senatorial districts there were only 30,000 voters, whereas others had as many as 130,000. As a result of much disparities, voters in districts having only forty per cent of the voting population could elect sixty-three of the ninety-nine representatives, and thirty-seven per cent of the voters could elect twenty of the thirty-three members of the Senate. All attempts to reapportion in accordance with the state constitution failed. In 1959, Baker and other qualified voters of Tennessee brought a suit against Carr, the Tennessee Secretary of State, and other public officials, alleging deprivation of federal constitutional rights. The plaintiffs argued that the State's system of apportionment was utterly 'arbitrary', denying them equal protection of the laws under the Fourteenth Amendment 'by virtue of debasement of their votes'. A federal district court dismissed the complaint. The case then went to the US Supreme Court. On appeal the Supreme Court by majority held that the plaintiffs allegation of a denial of equal protection presented a justiciable constitutional cause of action upon which they were entitled to a trial and a decision. It was further held that the right asserted by the plaintiffs was within the reach of equal protection under the Fourteenth Amendment. Baker's case was followed by three other decisions, *Gray* v. *Sanders*, 372 US 368 (1963), *Reynolds* v. *Sims*, 377 US 533 (1964) and *Lucas* v. *Fortyfourth General Assembly of Colorado*, 377 US 713 (1964) which affirmed the principle laid down in that case of 'One Person, One Vote'. There was tremendous political reaction to the above decisions. The House of Representatives passed on August 19, 1964 by 218 to 175 votes, a Bill which would have ended the federal courts' jurisdiction over State legislative apportionment cases. The Bill, however, did not pass in the Senate. Senator Everett M. Dirksen then attempted to get a moratorium on all apportionment litigation until January 1, 1966. This attempt having failed, the Senator tried a constitutional amendment. His amendment would have made it possible for State

legislatures to continue to have one house represented on a basis other than population. The Senate Judiciary Committee declined to accept this proposal. Senator Dirksen then moved an amendment in the Senate which failed by seven votes of the necessary two-thirds. By 1966, almost four-fifths of the State legislatures had been reapportioned according to population. In 1967 the Supreme Court reporter for the New York Times uncovered a dramatic story and published it on March 18, 1967. According to Article V of the US Constitution, the Congress, whenever two-thirds of both Houses deem it necessary, shall propose Amendments to the Constitution, or, on the application of the Legislature of two-thirds of the several States, shall call a Convention for proposing Amendment, which, in either case, shall be valid, as part of the Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. There follows a proviso but we are not concerned with that. The reporter's investigation revealed that there was a campaign to call a constitutional convention by majority vote of three fourths of the State legislatures. The investigation further revealed that thirty-two of the necessary thirty-four State legislatures had passed resolutions requesting Congress to convene such a convention. It was also mentioned that Senator Dirksen had worked quietly and affectively for this alternative amendment method. The reporter's investigation also brought out that the United States was on the verge of its first constitutional convention since 1787. The publicity checked the movement and the necessary thirty-four State resolutions were not passed. It may be pertinent in the above context to refer to an article under the caption 'The Quiet Campaign to Rewrite the Constitution' by Theodore C. Sorensen, White House domestic adviser to President Kennedy. It was published in the Saturday Review of July 15, 1967. Highlighting the grave potentialities of the move, the writer observed: 'This nation is nearing... a *constitutional* crisis, potentially the most serious since our Civil War. Already thirty-two State legislatures have called for a new Federal Constitutional Convention, presumably to reverse the Supreme Court's "one-man, one-vote" doctrine on reapportionment. If only two more State legislatures so petition the Congress, it will be faced for the first time in

history with implementing the provision in Article V of the Constitution specifying that it call such a convention upon application of two-thirds of the States.

Then whatever follows is likely to be a constitutional nightmare.

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. . . In most State legislatures it is not difficult to petition the Congress for anything, including a Federal Constitutional Convention. A joint resolution, regarded as no more than a passing opinion, can—unlike an amendment to a State law or particularly a State constitution—be brushed through both houses in a matter of minutes.

❀ ❀ ❀

Then Pandora's Box will be opened wide. For no matter how these State application are worded, no matter what limitations are given by the Congress on its convention call, there is no possible way by which such a convention can be required to confine itself to reapportionment or any other issue. A national Constitutional Convention, by definition, would represent the higher power in our system. Like its single predecessor in 1787, which had in its day been specifically told by a cautious Congress to confine itself to the "sole and express purpose of revising the Articles of Confederation," this new convention could ignore any instruction, tackle any subject, and propose any amendments of revisions that it sees fit.

If it wishes to tinker with the Bill of Rights, to halt supposed pampering of the criminally accused, to stop so-called abuses of the Fifth Amendment, to limit free speech for the disloyal, to reopen the wars between Church and State, to limit the Supreme Court's jurisdiction or the President's veto power or the Congress's war-making authority, it would be free to do so.

❀ ❀ ❀

Whatever one's view of 'one-man, one-vote', no thoughtful

citizen can look forward with equanimity to this kind of wide-open, unpredictable dabbling with our historic charter....'

❋ ❋ ❋

The American example shows as to how light heartedly can a move, which might result in the wholesale amendment of a historic charter like the Constitution of the country, almost succeed, even in a politically advanced country, unless the people are vigilant.

10

Epilogue

Before concluding it may be apposite to reproduce the words of Joseph Story in the context of the US Constitution which hold equally good for our Constitution and were referred to by the Provisional Chairman of the Constituent Assembly:

> The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers, THE PEOPLE. Republics are created—these are the words which I commend to you for your consideration—by the virtue, public spirit, and intelligence of the citizens. They fall, when the wise are banished from the public councils, because they dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them.

And finally the words of Learned Hand quoted by the author in his judgment in *Kesavananda Bharati's Case*:

> Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law, no court can save it, no Constitution, no law, no court can even do much to help it. While it lies there it needs no Constitution, no law no court to save it.

Appendix I

RELEVANT PROVISIONS OF THE CONSTITUTION REFERRED TO IN THE BOOK AS THEY EXISTED AT THE TIME OE THE DECISION OF KESAVANANDA BHARATI'S CASE

Preamble

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Article 13

Laws inconsistent with or in derogation of fundamental rights

1. All laws in force in the territory of India immediately

before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.

2. The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, by void.

3. In this article, unless the context otherwise requires—

a. 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

b. 'Laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

4. Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

Article 14

Equality before law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 19

Protection of certain rights regarding freedom of speech, etc.

1. All citizens shall have the right—

a. to freedom of speech and expression;

b. to assemble peaceably and without arms;

c. to form associations or unions;
d. to move freely throughout the territory of India;
e. to reside and settle in any part of the territory of India;
f. to acquire, hold and dispose of property; and
g. to practise any profession, or to carry on any occupation, trade or business.

2. Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

3. Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

4. Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

5. Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

6. Nothing in the sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in

perticular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to—

i. the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
ii. the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Articles 31, 31A, 31B

RIGHT TO PROPERTY

Compulsory acquisition of property—

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

2. No property shall be compulsorily acquired or requistioned save for a public purpose and save by authority of a law which provides for acquisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash.

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority referred to in clause (1) of Article 30, the State shall ensure that the amount fixed or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

2A. Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not

be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

2B. Nothing in sub-clause (f) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2).

3. No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

4. If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in the Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

5. Nothing in clause (2) shall affect—

a. the provisions of any provisions of clause (6) apply, or,

b. the provisions of any law which the State may hereafter make—

i. for the purpose of imposing or levying any tax or penalty, or

ii. for the promotion of public health or the prevention of danger to life or property, or

iii. in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

6. Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

31A. Savings of laws providing for acquisition of estates, etc.

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

a. the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

b. the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

c. the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

d. the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

e. the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil or the premature termination or cancellation of any such agreement, lease or licence,

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

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent—

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

2. In this article—

a. the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

i. any *jagir, inam* or *muafi* or other similar grant and in the States of Tamil Nadu and Kerala any *janmam* right;

ii. any land held under ryotwari settlement;

iii. any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;

b. the expression 'rights', in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

31B. Validation of certain acts and regulations

Witout prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power any competent Legislature to repeal or amend it, continue in force.

Article 39

The State shall, in particular, direct its policy towards securing—

a. that the citizens, men and women equally, have the right to an adequate means of livelihood;
b. that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
c. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
d. that there is equal pay for equal work for both men and women;
e. that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
f. that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 83

Duration of Houses of Parliament

(1) The Council of States shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

(2) The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House—

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the proclamation has ceased to operate.

Article 172

Duration of State legislatures

(1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly—

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

Article 352

Proclamation of emergency

1. If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.

2. A Proclamation issued under clause (1)—

a. may be revoked by a subsequent Proclamation;
b. shall be laid before each House of Parliament;
c. shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament;

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the

period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

3. A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

Article 358

Suspension of provisions of Article 19 during emergencies

While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

Article 359

Suspension of the enforcement of the rights conferred by Part III during emergencies

1. Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending

in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

2. An order made as aforesaid may extend to the whole or any part of the territory of India.

3. Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

Article 368

1. Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

2. An amendment of 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 the total membership of that House and by majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill—

Provided that if such amendment seeks to make any change in—

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 XI, or
c. any of the Lists in the Seventh Schedule, or
d. the representation of States in Parliament, or
e. the provisions of this article,

the amendment 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 provision for such amendment is presented to the President for his assent.

3. Nothing in Article 13 shall apply to any amendment made under this article.

Appendix II

ORIGIN OF JUDICIAL REVIEW

The decision of US Supreme Court in Marbury *v.* Madison *I Cranch 137 (1803) is supposed to have laid the foundation of judicial review. It would be useful to reproduce material passages from the opinion of Chief Justice Marshall who spoke for the Court in that case*:

The powers of the legislature are defined and limited, and that those limits may not be mistaken, of forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives, there is no middle ground. The Constitution is either a superior paramount law, unchangeable

by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such Government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written Constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case, conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case; this is of the very essence of judicial duty. If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the

Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

Does the Supreme Court judgment in the *Kesavananda Bharati Case* (1973) and the concept of the basic structure of the Constitution, create a confrontation between the courts and the legislature? Does that judgment stand in the way of progressive socio-economic legislation?

In this significant and timely book, the author reproduces relevant sections of his judgments in the *Habeas Corpus Case* (1975) and the *Kesavananda Bharati Case* (1973) which answer these oft-asked and important questions. It puts into proper perspective the burning controversy regarding the judiciary and its power of review. Excerpts from the judgments are supported by Mr Khanna's commentary, so as to provide a comprehensive picture of the whole controversy.

The book's organisation allows the reader to refer to specific aspects of the judgments, without having to wade through the entire texts. It will serve as an excellent reference book for lawyers and students of the Indian Constitution. The highly topical nature of its contents will make it a *must* for anyone interested in current affairs and the role of the judiciary in a democratic political system.

Mr H R Khanna has had a long and distinguished career. He received his law degree in 1934, after which he practised at Amritsar until 1952. He has held appointments as District and Sessions Judge, Amritsar; District and Sessions Judge, Delhi (until 1962); Judge, Punjab High Court, and Chief Justice of the Delhi High Court 1969-71. In 1971 he was appointed Justice of the Supreme Court from which position he resigned in March 1977.
Mr Khanna's dissenting judgment in the *Habeas Corpus Case* (1975) was an epoch-making one and attracted world-wide attention. The *New York Tin* to say: 'If India ever finds its way back democracy, that proud hallmark of its fi someone will surely erect a monument to H R Khanna of the Supreme Court.'

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