Chapter - IV

PARLIAMENT AND THE SUPREME COURT

The Constitution of India, in its opening words “We, the People” proclaims that our system of government derives its legitimacy from the people. The sovereign power of the people, however, finds expression and becomes exercisable only through the institution of Parliament…. Parliament, therefore, has been accorded a place of primacy in our democratic polity.¹

The Indian Constitution as originally adopted, constituted the country into a Sovereign Democratic Republic. It is sovereign in the sense that it is blessed with internal supremacy as well as external independence. It is democratic because the sovereign will of the people is expressed through their votes. It has a parliamentary form of executive which is responsible to an elected legislature. It is republic since the head of the state is not a hereditary monarch but an elected functionary. The Constitution of India is the most comprehensive document in the world providing for three main pillars of Indian parliamentary democracy, namely the legislature, the Executive and the judiciary.²

Parliament in India is not a sovereign body – uncontrolled and with unlimited powers in the same sense as the British Parliament is. It functions within the bounds of a written Constitution. Its legislative authority is hedged

in by limitations in a two fold way; by the distribution of powers between the Union and the States and by the incorporation of code of justiciable fundamental rights in the constitution, and provision for Judicial Review which means that all laws passed by Parliament must be in conformity with the provisions of the constitution and liable to be tested for constitutionality by an independent judiciary. All these limitations tend to qualify the nature and extent of the authority and jurisdiction of Parliament.³

Nevertheless, Parliament occupies a pivotal position in the present day Indian polity and constitutional limitations on its sovereign authority are themselves to be understood with important qualifications such powers as Parliament possess under the Constitution are immense and it fulfills the role which a sovereign legislature does in any other independent country. The abundance of its powers at once becomes evident on an analysis of the extent of jurisdiction of Parliament under the scheme of distribution of powers, the constituent powers it possesses, its role in emergencies and its relationship vis-à-vis the judiciary, Executive the state Legislatures and other authorities under the constitution.⁴

The constitution accords an important place to the judiciary with the Supreme Court at the apex of the judicial system.

The judiciary is the protector of the constitution and, as such, it may have to strike down executive, administrative and legislative acts of the Centre and the States. Being the highest court in the land, it is very necessary that the Supreme Court is allowed to work in an atmosphere of independence of action

⁴ Ibid., pp. 1-2.
and judgement and is insulated from all kinds of pressures, political or otherwise. The members of the Constituent Assembly were very much concerned with the independence of judiciary and made several provisions to ensure this end.\(^5\)

1. RELATION BETWEEN PARLIAMENT AND SUPREME COURT

The Constitution has not recognized the doctrine of separation of powers in its absolute rigidity, the functions of the three organs of state viz., the legislature, the judiciary and the executive have been sufficiently demarcated. As observed by Raghava Rao J.\(^6\)

The Powers of each one of three organs have to be exercised as fundamentally subject to the provisions of the Constitution relating to that organ individually as well as to the provisions relating to other organs. It’s the respect that is accorded by one organ of the state to the others that ensures that healthy working of the Constitution which is the acid test of its merits whatever the paper value of its provision.

Both Parliament and State Legislatures are sovereign within the limits assigned to them by the Constitution. The supremacy of the legislature under a written Constitution as observed by the Supreme Court, is only within what is in its power but what is within its power and what is not, when any specific act is challenged, it is for the courts to say.\(^7\)

As regard the relationship between Parliament and the Supreme Court, the basic pattern of the court, its composition, powers, jurisdiction etc., the Constitution makes detailed provisions which cannot be touched by ordinary legislative process. But within the constitutional framework, Parliament has

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\(^6\) Kashyap Subhash C., op. cit. pp. 943-944

\(^7\) Ibid., p. 944.
some powers *vis-à-vis* the court. The minimum number of its judges is fixed by the Constitution but Parliament has authority to increase, not to decrease, this number. The Constitution confers a security of tenure on the judges subject to Parliament moving an address for removal of a judge. The power thus vested in Parliament can not be misused owing to several safeguards, *viz.* charges of misbehavior and incapacity against the judge concerned have to be enquired and proved and special majority is required in the two Houses for the motion to be carried. The salaries of the judges are fixed by the constitution. Parliament may prescribe the privileges, allowances, leave and pension of a judges, subject to the safeguard that these cannot be varied during the course of tenure of a judge to his disadvantage. In the area of the court’s jurisdiction, Parliament may provide that an appeal may lie to the Supreme Court in civil matters from the judgement, decree or final order of a single judge of a High Courts; enhance the appellate criminal jurisdiction of the Supreme Court by enabling it to entertain and hear appeal from any judgement, final order or sentence in a criminal proceeding in a High Court over and above those cases in which the court can already hear appeals under Art. 134. It provide that the Supreme Court shall not have jurisdiction and powers of the Federal Court beyond what it already has under Arts. 133 and 134. It also regulate the Supreme Court’s power to review its own decisions and orders; confer further jurisdiction (quantitatively or qualitatively) on the Supreme Court regarding any matter in the Union or concurrent list and; provide that the Supreme Court shall have jurisdiction and powers with respect to any matter as the Government of India and the Government of a State may be by special agreement seek to confer on it; confer on the Supreme Court Power to issue
directions, orders or writs for any purpose other than those mentioned in Art. 32 confer supplementary powers on the Supreme Court so as to enable it to exercise its jurisdiction more effectively. It is clear from these provisions that what Parliament can do is to expand the jurisdiction and powers of the Supreme Court in several respects over and above what the Constitution confers.  

The rule making power of the Supreme Court is subject to any law made by Parliament. Parliament may regulate and prescribe the conditions of service of officers and servants of the Supreme Court. It may prescribe the manner in which a decree or order passed by the Supreme Court and enforced. It also pass a law to regulate the courts power to make an order for securing the attendance of a person, discovery and production of documents or investigation or punishment of contempt of itself. These are, however, procedural matters and do not affect the Supreme Court in any substantive manner.

The Indian Parliament is the creator of the Constitution. Therefore a parliamentary law to be valid must conform in all respects with the Constitution.

All legislations, whether union, state or delegated, is subject to the doctrine of *ultra vires* and liable to Judicial Review. The scope of review is limited to see whether the legislation impugned falls within the periphery of the power conferred and whether it contravene any of the Articles of the Constitution. The courts are concerned only with interpreting the law and are not to enter upon a discussion as to what the law should be. The legislature can

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9 Ibid., p. 153.
amend laws to meet the lacuna or defects pointed out therein by the courts, or legislate a fresh to give effect to their original intentions and such amendments etc., are accepted by the courts as valid law.\textsuperscript{10}

Parliament which is vested also with the constituent power, can amend any of the provisions of the Constitution to override the effect of a judicial decision, but without altering the basic structure or framework of the Constitution.\textsuperscript{11}

\textbf{Courts not to inquire into proceedings of Parliament}

Parliament and the State Legislatures can regulate their own procedure. The validity of any proceedings in either House of Parliament or a State Legislature cannot be questioned before a court of law on the ground of any alleged irregularity of procedure. The presiding officer of each House or any other officer or member of Parliament or State Legislature who is for the time being vested with the powers to regulate procedure or the conduct of business or to maintain order in, or to enforce or carryout the decision of, either house of Parliament or the State Legislature, as the case may be, is not subject to the jurisdiction of the courts in exercise of those powers.\textsuperscript{12} The Courts have no jurisdiction to issue a writ, direction or order relating to a matter in respect of what is done in the house or which affects the internal affairs of the House. Similarly, the presiding officer is also not subject to the jurisdiction, of any court for failure to exercise his power to regulate the proceedings of the House. The Constitution guarantees immunity from proceedings in any court in respect

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\item \textsuperscript{10} Kashyap, Subhash C., op. cit., p. 944
\item \textsuperscript{11} Ibid., p. 944.
\item \textsuperscript{12} Ibid., pp. 944-945.
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of “anything” said in the House or any committee thereof, and “anything” has been held to be equivalent to “everything”.\(^\text{13}\)

**Restriction on Question and Discussion on conduct of Judges in Parliament**

The Independence of the judges is secured both from the executive and from the legislature. Specific provisions have been made in the Constitution to provide that the conduct of a judge of the Supreme Court or a High Court ‘in the discharge of his duties’ cannot be discussed in Parliament except upon a substantive motion for presenting an address to the President for removal of a judge. Thus, judicial conduct of a judge of the Supreme court or of a High Court cannot be discussed on the floor of the House in any debate or commented upon collaterally, by way of a motion for adjournment or question etc. The only mode of discussing the conduct of a judge in the discharge of his duties is upon a motion for his removal and that too when the motion is tabled under the specified provisions and the procedure prescribed therein is followed.\(^\text{14}\)

**Courts Approach in Testing Legislation**

The Courts exercise their power to hold legislation *ultra vires* with unfailing restraint, and will not sit in judgement on the wisdom of the legislature in enacting the law. If the principle underlying the law is constitutional, the court will not question the policy behind it. It does not exercise a power of veto on legislation.\(^\text{15}\)

\(^\text{13}\) Ibid., p. 945.
\(^\text{14}\) Ibid., p. 945
Words in a constitutional enactment conferring legislative powers would be construed by the courts most liberally and in their widest amplitude. The omnipotence of the sovereign legislative power will not be united by judicial interpretation except so far as the express words of the Constitution give that authority. But in order to decide whether a particular legislation offends the provisions of the and is therefore unconstitutional, the court will examine with some strictness of legislation for determining what the Legislature has really done.\textsuperscript{16}

\textbf{Colourable Legislation}

The Legislature cannot disobey the prohibitions contained in the Constitution by employing any indirect drafting or other devices. What is called “the doctrine of colorable legislation” is based on the maxim that one cannot do indirectly what one cannot do directly.\textsuperscript{17}

\textbf{Courts do not Act as Grammarians}

If the language of the statute is clear and unambiguous and if two interpretations are not reasonably possible it would be wrong to discard the plain meaning of the words used in order to meet a possible injustice. In case of difficulties in construing a provision of a statutes the courts must not proceeds as mere grammarians of the written law, but must search for the true intention of the Legislature. But the intention of a Legislature is not to be judge by what is in its mind but by its expression of that mind in the relevant statute itself.\textsuperscript{18}

\textsuperscript{16} Ibid., p. 117
\textsuperscript{17} Ibid., p. 118
\textsuperscript{18} Ibid., p. 119
Though the courts endeavour to ascertain the intention of the Legislature, they are careful lest the search for that intention should lead them into importing provisions into an Act which were not placed there by the Legislature.\(^\text{19}\)

**Harmonious Construction**

Where two provisions in a statute conflict with each other, courts will try their best to read the two harmoniously and will reject either of them as useless only in the last resort. If two constructions are possible, one leading to sense and the other to absurdity, the courts will adopt the former. The Courts will always do their best to find a reasonable interpretation of the Act and help the draftsman. They will not regard any part of a statute as superfluous or nugatory.\(^\text{20}\)

**Exposition of Parliamentary Supremacy in United Kingdom**

The principle of parliamentary supremacy is popularly associated with the British Constitutionalism. The dominant characteristic of the British Constitution, as pointed out by Dicey, is the supremacy or sovereignty of Parliament.\(^\text{21}\)

The sovereignty of Parliament generally means the absence of any legal restraint upon the legislative power of Parliament as in England. The absence of legal restraint has two aspects – the positive and the negative. The positive aspect indicates that Parliament is competent to legislate upon any subject

\(^{19}\) Ibid., p. 119
\(^{20}\) Ibid., p. 120
matter. The negative aspect implies that once Parliament has legislated no court or other body can pass upon the validity of the legislation.22

2. APPROACHES TOWARDS PARLIAMENTARY SUPREMACY IN INDIA

The Parliament possess the plenary power to enact laws in respect of all matters allotted to it. There is no separation between the executive and the legislature as regards personnel. The executive plays a vital role in making laws.23

There have been two divergent approaches in respect of the plea for parliamentary supremacy in India. The first approaches is headed by persons who wish to establish parliamentary supremacy over the judiciary. This view is headed by the Congress party. On February 13, 1976, the communist party of India expressed its view that, “the judiciary including the Supreme Court, should have no power or jurisdiction to interpret the Constitution or decide any question of constitutional validity of law.”24 Instead, it suggested that there should be a constitutional committee, appointed by Parliament, vested with such power. The assertion of parliamentary supremacy over the judiciary may be divided into ways. (i) immunity of ordinary legislation from the Judicial Review in general and (ii) putting the constitutional amendments beyond the reach of the judiciary in particular. The Swaran Singh Committee Report did not immunize ordinary legislation from Judicial Review. It suggested some procedure for the declaration of the invalidity of laws, i.e. the Supreme Court

22  Ibid., p. 469
Bench to consist of not less than seven judges and High Court not less than five judges. The declaration of invalidity will require two third majority support Mr. D.K. Barooha, Congress President, pleading for “elastic and dynamic” Constitution asserted the need of constitutional amendments pointing out that –

“The Constitution did envisage courts sitting in judgement over parliamentary enactments. The idea was that courts should bring to the notice of the Parliament the unconstitutionality of any of its laws. But the courts were not envisaged as the third chamber.”

The force of the plea for making ordinary law immune from Judicial Review has been exhausted, but there is strong and consistent plea for putting the constituent power beyond the judicial purview. The Union Law Minister, H.R. Gokhle asserted in Lok Sabha on April 2, 1976 that “Parliament’s constituent power to make laws and amend the Constitution was supreme and that it would not tolerate any erosion of its supremacy.”

Dr. Gajendra Gadkar, the Chairman of Law Commission while delivering the first Motilal Nehru Memorial Lecture on “Lawyers and social change”, expressed the opinion that, “no limitation can be directed in the provisions of Art 368 on the ground of basic features of the Constitution”. Accordingly, the constitutional amendments should not be reviewed by the judiciary. The opposite camp pleads that the concept of the supremacy of parliament is a “perennial fallacy”.

According to N.A. Palkhivala, an eminent constitutional layer, the abrogation or abridgement of the right of Judicial Review would be tantamount to

25 Ibid., June 12, 1976, p. 4.
banishing the rule of law in the country.\textsuperscript{28} Hon’ble Mr. Justice K.K. Mathew, delivering the first Tej Bahadur Sapru Memorial lecture on March 26 on “Democracy and Judicial Review”, remarked that, “it is over simplification to contend that no society can be democratic unless the Legislature has sovereign power.” Mr. Justice V.R. Krishna Iyer of the Supreme Court pointed out that the Constitution amending process should not do away with “lasting constitutional values.” The learned judge favoured the retention of “supremacy of court in the assigned sphere.”\textsuperscript{29}

**Basis for the Plea of Parliamentary Supremacy in India**

The plea of the omnipotence of Parliament is based on the presumption that in parliamentary democracy, all powers spring from the people. The will of the people is expressed by votes. The Parliament is supreme. This reasoning was the basis for the second All India State Bar Council convention. On March 28, 1976, where –

“the preponderance of opinion was that the Constitution should always be in accordance with the will of the people and Parliament as representing the will of the people should have the final say as to what the Constitution had to achieve.”\textsuperscript{30}

The modern constitutionalism provides two approaches in this respect. The British pattern has peculiar faith in parliamentary supremacy. However, the secrecy of the well functioning of British Government lies in awakened public opinion. Furthermore, British system of Government has been uniquely stable because it has been able to combine strong government and strong

\textsuperscript{28} Speech by Palkhivala, N.A. on “The Constitution and its Amendments, The Times of India, April 8, 1976, p. 4.
\textsuperscript{29} The Times of India, January 5, 1976, p.1.
\textsuperscript{30} Ibid., March 30, 1976, p. 7.
opposition. In India, the situation is adverse. Whatever pleases the executive, the legislation to that effect may be enacted. Even the constitutional amendments may be made without providing the sufficient time for due deliberation.\textsuperscript{31}

**Due Process of law Versus Procedure Established by law**

The due process clause found in the Fifth and Fourteenth amendments of the Constitution of the United States was purposely avoided and another phrase, ‘procedure established by law’ was preferred by the Constitution makers in Article 21, which guarantees that no one shall be deprived of his life and personal liberty.

The meaning of the expression ‘due process of law’ was explained by Dr. Ambedkar in the Constituent Assembly, he said that the question of due process raises the relationship between the Legislature and the judiciary. The due process clause’ would give the judiciary the power to question the law made by the Legislature. In other words the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the Legislature, but also on the ground whether the law was good law, apart from the question of the powers of the Legislature making the law. The question now raised by the introduction of the phrase ‘due process; is whether the judiciary should be given the additional power to question the laws made by the state on the ground that they violate certain fundamental principles.\textsuperscript{32}

\textsuperscript{31} Prasad, Anirudh, op. cit., p. 472.
\textsuperscript{32} Sathe, S.P., *Judicial Activism In India*, Oxford University Press, Delhi, 2002, p. 38.
Although Dr. Ambedkar speech reflect the dilemma of the makers of the Constitution regarding the scope of Judicial Review, the opinion have been divided between those who preferred supremacy of Parliament and those who wanted Parliament’s laws to be subject to Judicial Review. Nehru opted for a restricted scope for Judicial Review, Ambedkar was not free from doubts about the wisdom of giving to Parliament freedom to lay down any procedure and any law restricting liberty. He was therefore found to be skeptical of legislative supremacy and wanted a counter majoritarian safeguard such as Judicial Review.33

3. INDIAN CONSTITUTIONALISM AND PARLIAMENTARY SUPREMACY

The emerging pattern of constitutionalism in 20th century is marked by the growth of written Constitution. In countries following the American pattern, like India the concept of the limited government has come no mean that unlimited power should not be reposed in any body of men, not even in representative body.

The concept of limited government replaces the supremacy of the Constitution in the place of the sovereignty of Parliament. The Indian constitutionalism puts the following limitations on the idea of parliamentary supremacy.

(a) Written Constitution

The written Constitution of India represents the most elaborate and comprehensive document in the world. It is the supreme law of the land. All

33 Ibid., p. 39
organs of the government derive their power from and are subject to the Constitution.

It has been very aptly pointed out by chief justice Gajendragadkar, in relation to parliamentary supremacy under a written Constitution.

“Our legislature have undoubtedly plenary powers, but these powers are controlled by the basic concepts of the written constitution itself and can be exercised by three lists under the Seventh Schedule beyond the lists legislature cannot travel.”

(b) Federal Structure

Federalism represents the negation of the idea of parliamentary supremacy in British sense. India is a federation having distribution of powers between the Centre and the States. The essential characteristics of federation is “the distribution of limited executive, legislature and judicial authority among bodies which are co-ordinate with and independent of each other. Thus, it is clear that Parliament cannot transgress the limits by the federal set up

(c) Judicial Review

The power of Judicial Review is generally regarded as corollary of the written Constitution with federal set-up. The special significance of the Judicial Review lies in fact that it has to keep the poise between apparently contradictory forces possibly strengthen the position at the Centre while championing provincial autonomy. In Indian federation, parliamentary supremacy is circumscribed in two ways (i) It cannot make any law which is prohibited by the Constitution. In both cases the power of Judicial Review extends to declare contrary enactments as unconstitutional.
(d) Fundamental Rights

The Constitution of India possesses a specific enumeration of fundamental rights which mark a limitation upon the principle of parliamentary supremacy. It specifically prohibits state from taking away or abridging any of rights enumerated in part III of the Constitution.

(e) Implied limitations

The protagonists of the principle of parliamentary supremacy asserts that the principle of limitations cannot be imported from outside and so if the procedure of Art. 368 is adopted, the constitutional amendment should be deemed beyond the ambit of Judicial Review.

In India the Constitution is supreme and Parliament as well as State Legislature must act not only within the limits of their respective spheres as demarcated in three legislative list occurring in Seventh Schedule to the Constitution but they must also observe all other limitations on their powers such as the Fundamental Rights which they can on no account transgress. A statute law to be valid must in all cases, be in conformity with the constitutional requirements.

The courts being supreme all the organs and bodies owe their existence to it. None can claim superiority over the other peach one of them has to function within the four corners of the constitutional provisions. All the functionaries, be they legislators, members of the executive on the judiciary, take oath of allegiance to the Constitution and derive their authority jurisdictions from its provisions.
The Constitution of India is the most comprehensive document in the world providing for three main pillars of parliamentary democracy, namely, the Legislature, the Executive and the Judiciary. The Constitution like a living organism has to fulfill all the emerging needs and future eventualities. It has been amended many times since the date of its commencement. All the constitutional amendments and enactments of ordinary laws are carried out in order to secure justice social, economic and political. The very nature of the duty entrusted to Parliament requires formulation of legislative policy and enacting it into a finding rule of conduct. On the other hand, the constitutional duty of the court arising from judiciary is to anul all those legislative enactments which are either inconsistent with provisions of the Constitution or are beyond the legislative competence. This had led to some controversy between the legislature and the judiciary involving questions of relative supremacy of these organs.\textsuperscript{34}

In the field of constitutional amendments, the Supreme Court had four important and historic occasions to deal with the matter concerning parliamentary supremacy. The main disagreement between Parliament and Supreme Court was socialism and conservatism. In the 1950s the Congress Party, and especially Jawahar Lal Nehru’s government, wanted to bring about land reform. The Supreme Court stood in the way, upholding the rights of property owners under Part III of the Constitution: Fundamental Rights.\textsuperscript{35}

The Government of Bihar, Madhya Pradesh and Uttar Pradesh had enacted certain legislation which was compendiously described as Zamindari Abolition Acts. These measures were adopted in pursuance of the Congress Agrarian Reforms Committee Report (1949) which had declared itself in favour of the elimination of all intermediaries between the state and the tiller of the soil, and imposition of prohibition against subletting. As the Constitution of India came into force, it was found that these Acts conformed to the Directive Principles of state policy embodied in Article 39(b) and (c), but their validity was challenged on behalf of the landlords affected by them in some High Courts, on the ground that they contravened the Fundamentals enshrined in the Constitution with a view to overcoming difficulties arising from these cases and in order to forestall further difficulties likely to arise in the matter of land reforms and other progressive measures the provisional Parliament proceeded to enact the Constitution (First Amendment) Act, 1951 which inter alia purported to place the laws abolishing Zamindari system in different states beyond challenge in the courts of law. The validity of this amendment was upheld by the Supreme Court in Shankari Prasad V. Union of India.

The petitioner challenged the amendment mainly on the following grounds. First the power of amending the Constitution provided for under Art. 368 was conferred not on Parliament but on the two houses of Parliament as a designated body and therefore the Provisional Parliament was not competent to exercise that power under Art. 379.

37 AIR, 1951 SC 458
Secondly, so far as the Constitution (Removal of Difficulties) order number 2 made by President, purports to adopt Art. 368 by omitting “either House” and “in each House” is beyond the powers conferred on him by Art. 392, as “any difficulties” sought to be removed by adoption under that Article must be difficulties in the actual working of the Constitution during the transitional period and whose removal is necessary for carrying on the Government.

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

Fourthly, the Amendment Act, in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution, falls within the prohibition of Art. 13(2).

Lastly, as the newly inserted Art. 31A and 31B seek to make changes in Art. 132 & 136 in chapter 4 of Part V and Art. 226 in chapter 5 of Part VI, they require ratification under Cl.(b) of the provision to Art. 368 and not having been so ratified they are void and unconstitutional.

On the first point, it was submitted that whenever the Constitution sought to confer a power upon Parliament, it specifically mentioned “Parliament” as the donee of the power as in Arts. 2, 3, 33, 34 and numerous other Articles, but it deliberately avoided the use of that expression in Art.
Realizing that the Constitution, as the fundamental law of the country, should not be liable to frequent changes according to the whim of party majorities, the framers placed special difficulties in the way of amending the Constitution and it was a part of that scheme to confer the power of amendment on a body other than the ordinary Legislature as was done by Art. V of the American Constitution. The Constitution provides for three classes of amendments of its provisions. First, those can be effected by a bare majority such as that required for the passing of any ordinary law. The amendments contemplated in Arts. 4, 169 and 240 fall within this class, and they are specifically excluded from the purview of Art. 368. Secondly, those that can be effected by a special majority as laid down in Art. 368. All constitutional amendments other than those referred to above come within this category and must be effected by a majority of not less than two thirds of the members of that house present and voting; and thirdly, those that require in addition to the special majority above mentioned ratification by resolutions passed by not less than one half of the state specified in Schedule A & B of the First Schedule. This class comprises amendments which seek to make any change in the provisions referred to in the proviso to Art. 368. Thus, the power of effecting the first class of amendments is explicitly conferred on “Parliament” that is to say, the two houses of Parliament and the President (Art. 79). But the fact that a different majority in the same body is required in Art. 368 for effecting the second and third categories of amendments cannot make the amending agency a different body. There is no force, therefore, in the suggestion that Parliament would have been referred to specifically if that body was intended to exercise the power having mentioned each House of Parliament and the President.
separately and assigned to each its appropriate part in bringing about constitutional changes, the makers of the Constitution presumably did think it necessary to refer to the collective designation of the three unit.

It is not correct to say that Art. 368 is a “complete code” in respect of the procedure provided by it. There are gaps in the procedure as to how and after what notice a Bill is to be introduced, how it is to be passed by each house and how the President’s assent is to be obtained. Having provided for the Constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House under (Art. 118) for regulating its procedure were intended, so far as may be, to be applicable.

To make a law which contravenes the Constitution. Constitutionally valid is a matter of constitutional amendments, and as such falls within the power conferred under Art. 368, and not under Art. 246, and as such within the exclusive constituent power of Parliament.

The Court in the Shankari Prasad a mechanical appreciation of Art. 368. It disclosed no theory of any organic fundamental higher law. The unqualified opening words, “An Amendment of this Constitution”, it held, made the given amending procedure applicable to all parts of the Constitution including Part III. For purposes of the Article, every provision of the Constitution carried equal weight. The provisions of Part III were not any more fundamental than those of Part IV. The provisions of each of these parts could be amended similarly Part III was not out of the reach of the amending procedure. No implied, or inherent exception to the given amending procedure could be read
in the course of judicial interpretation of the Article. The adjectival description of the Part III Rights by the word “Fundamental” did not confer any immunity from the amending power of Parliament. Indeed, while acting in accordance with the prescribed amending procedure Parliament did not act as a legislature simpliciter. In certain respects it was transformed into a temporary Constituent Assembly, and could make any change it liked to make in the Constitution. Subject to the proviso provisions, it could amend all provisions unilaterally. Having amended the Constitution itself it became bound by it as a legislature simpliciter as also other constituted authorities while acting under Art. 368, it did not legislate, in the normal sense, it enacted organic higher law.

A constitutional amendment Act was not a legislative enactment, The definition of ‘law’ given out in Art. 13(3) did not embrace it, and Article 13(2) was not attracted to it, It was not a law which the court could judicially review, and declare unconstitutional on the ground of inconsistency with the provision it sought to amend. A declaration of unconstitutionality could not be made for it. Indeed, the court should read the Constitution as it stood “amended in accordance with the terms of the Bill.”

The Court, thus disagreed with the view that the Fundamental Rights are inviolable and beyond the reach of the process of constitutional amendment. The Court, thus ruled that Art 13 refers to ‘legislative’ law; i.e. an ordinary law made by legislature, but not to a constituent’ law, i.e. a law made to amend the Constitution. The Courts thus held that Parliament could by following the ‘procedure’ laid down in Art. 368 amend any fundamental right.
In *Sajjan Singh Vs. State of Rajasthan*\(^{38}\), decided on 30\(^{th}\) October, 1964, the correctness of the view taken in *Shankari Prasad’s case* was challenged where the Constitution (Seventeenth Amendment) Act was challenged. Gajendragadkar, C.J. held that the Supreme Court can no doubt review its earlier decisions in the interests of public good when there exist considerations of substantial and compelling nature and said that “If one view has been taken by this court after mature deliberation, the fact that another Bench is inclined to take a different view may not justify the court in reconsidering the earlier decisions or in departing from it. The Constitution is an organic document and…. In a progressive and dynamic society the shape and appearances of these problems are bound to change and with inevitable consequences that the relevant words used in the Constitution may also change their meaning and significance. Even, so the court should be reluctant to accede to the suggestion that its earlier decisions should be light heartedly reviewed and departed from…” Yet the court considered the petition in *Sajjan Singh’s case* on merits. All the judges agreed with the proposed order to dismiss the petition Hidayat Ullah and Mudholkar J.J. expressed some reservations in their separate judgements. The Chief Justice gave the judgement on his behalf and on behalf of Wanchoo, Raghubar, and Dayal, JJ

The following are some of the main problems arising from the decision:

1. Whether an amendment under Art. 368 to a fundamental right is a “law” within the meaning of Art. 13(2)?

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38 A.I.R. 1964, SC 845.
2. Can Parliament at all make an amendment under Art. 368 of a fundamental right in part III of the Constitution?

3. Does an amendment under Art. 368 to a fundamental right curtail the jurisdiction of the High Courts under Art. 226?

4. Whether Art. 368 besides laying down the procedure of constitutional amendment also confers on Parliament a specific power to amend the Constitution?

5. Is it desirable for the court to discuss an issue which has not been raised before it?

The controversy whether an amendment under Art. 368 is a “law” within the meaning of Art. 13(2) of the Constitution may be taken up first. Majority judgement in Sajjan Singh agreed with the view taken by Palanjali Shastri, J. in Shankari Prasad, that a distinction had to be drawn between all ordinary law enacted in exercise of its legislative power and a constitutional law, made in exercise of its legislative power and a constitutional law, made in exercise of the constitutional power, because an amendment under Art. 368 was not made by Parliament in the exercise of its legislative power, and a constitutional law, made in the exercise of the constitutional power, because an amendment under Art., 368 was not made by Parliament in the exercise of its legislative power, it could not be termed as “law” so as to fall within Art. 13(2). Art. 368 was plain and unambiguous under which the power of amending the Constitution could be exercised over all the provisions of the Constitution.

Justice Hidayatullah observed that the definition of the word “law” in Art. 13(2) did not seek to exclude constitutional amendments. Otherwise there
would have been added a clause that “law under this Article shall not include an amendment of the Constitution.” Madholkar J. also held that a legislative action of a legislature could not often be other than “law” and that Art. 368 nowhere said that Parliament while making all amendment to the Constitution assumed a different capacity viz. that of a constituent body. Infact both Hidayatullah and Madholkar, JJ. did not express their final opinion on this point.

2. The next problem whether, Parliament can at all make an amendment under Art. 368 to a fundamental right in part III of the Constitution. It would be erroneous to think that Parliament does not have any such power. According to the majority view the Constitution makers could have hardly thought of making fundamental rights completely immutable. The fundamental rights guaranteed by Art. 19, for instance, are not absolute. The scheme of this Article indicates that the fundamental rights guaranteed by sub-clauses (a) to (g) of clause (1) can be validly regulated in the light of the provisions contained in clauses (2) to (6) of Art. 19. The fundamental rights of the citizens are of paramount importance but even the said fundamental rights can be regulated to save the interests of the general public or other objects mentioned respectively in clause (2) to (6) and that means that for specific purposes indicated in these clauses, even the paramountcy of fundamental rights has to yield some regulations as contemplated by the said clauses. The Constitution makers anticipated that in dealing with socio-economic problems which the legislature may have to force from time to time, the concepts of public interest and other important considerations which are the base of clause (2) to (6) may change and may even expand and so, its legitimate to assume that the
Constitution makers know that, Parliament should be competent to make amendments to these rights so as to meet the socio-economic progress and development of the country. Therefore, it would not be reasonable to proceed on the basis that the fundamental rights enshrined in part III were intended to be finally and immutably settled and determined once for all and beyond the reach of any amendment.

Mr. Justice Hidayatullah expressed his disapproval of the earlier holding of the court in Shankari Prasad case thus: “I would require stronger reasons than those given in Shankari Prasad’s case. To make me accept the view that fundamental rights were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of the state.”

Hidayatullah, J., seems to have learned in favour of the inviolable character of fundamental rights. His view was that Art. 368 did not empower the Parliament to amend any provision of the Constitution “where ever found its language and spirit”. The Article simply laid down the manner of amendment and the necessary conditions for the effectiveness of the amendment.

Madholkar, J., was also of the view that though the Constitution did not directly prohibit the amendment of part III it would be strange that rights which were considered to be fundamental, including the remedies guaranteed under Art. 32 should capable of being abridge or restricted easily than any of the matters contained in the proviso to Art. 368. Some of which were less vital than fundamental rights.
It is submitted that the fundamental rights cannot be said to be too rigid and inevitable. So long as Parliament by an amendment under Art. 368 could restrict them keeping in view the Preamble of the Constitution that characterizes India as a Sovereign Democratic Republic, its not doing anything unjustified. The 17th Amendment Act was needed to implement the governmental policy of agrarian reforms in public interest.

Another important point raised by the majority and also by the other two judges, relates to the importance of Art. 32. It appeared rather anomaly that any amendment of Art. 226 was subjected to proviso (b) of Art. 368 but not an amendment of Art. 32 which itself was a guaranteed fundamental right enabling a citizen to move the Supreme Court for similar writs available under Art. 226. Such an anomaly being apparent, Art. 368 needs to be so amended so as to render the process of amending a fundamental right more difficult.

In Sajjan Singh’s case the unanimous opinion of the court was that the amendment did not affect or change the powers of the High court under Art. 226. Gajendragadkar, C.J., observed that although the area over which the powers of the High Courts under Art. 226 operated would be reduced as a result of the amendment, that alone would not justify to bring the case under the proviso. If the direct effect of the amendment could be such as to substantially curtail the powers of the High Court, the proviso was attracted, but if its effect was incidental and indirect, it did not apply.

4. A doubt has been raised in their separate opinions by Hidayatullah and Mudholkar, J.J., whether Art. 368 (which is simply a procedural provision for constitutional amendment) confers a specific power on Parliament to amend
the Constitution. Mudholkar, J., observed that it was quite possible that Art. 368 merely laid down the procedure to be followed for amending the Constitution and did not confer a power on Parliament to amend it which would be ascertained from the provision sought to be amended or other relevant provisions or the Preamble.

Under Art. 368 for some purposes Parliament has the exclusive power to pass an amendment to the Constitution, whereas for some other purposes, it has to exercise that power in consultation with State legislature.

Justice Hidayatullah viewed the fundamental rights as inviolable and eternal because he failed to distinguish between an ordinary law and a constitutional law. He disagreed with the view taken in Shankari Prasad’s case that had it been intended to save the fundamental rights from the operation of Art. 368. He negatively argued that the earliest way was to say that the word “law” in Art. 13 did not include an amendment of the Constitution. Since no such provision was there, it meant for him that there was no substantive difference between an ordinary law and amendment of the Constitution for purposes of Judicial Review.

In *Sajjan, Singh’s case*, the petitioners did not challenge Parliament’s power to amend fundamental rights; the basis of their challenge to the 17th Amendment was that the requirement of the proviso to Art. 368 had not been complied with. However, Gajendragadkar C.J., Wanchoo and Raghubir Dayal, JJ, held that on Art. 13(2) Shankari Prasad’s case was rightly decided and they described the power given by Art. 368 to Parliament as a “comprehensive power”.
Until 1967, the highest judiciary of the land held that the Amendment Acts were not ordinary laws, and could not be struck down by the application of Art. 13(2). This implied that the Fundamental Rights could be altered, modified and even repealed by special majority be the legislature required under Art. 368. It was only in the Golak Nath case that the Supreme Court reversed its earlier decisions, declaring that the word “law” in clause (2) of Art. 13 included amendments to the Constitution and that the Parliament was not competent to abridge or take away the Fundamental Rights spelled out in part III of the Constitution.

A contrary view has been given by the court in Golak Nath V. State of Punjab39 (1967) In Gokal Nath’s case the petitions were filed challenging the validity of Punjab security of Land Tenure Act, 1953 which contravenes the provisions of Art. 14, 19(1)(f) and (g). The injured parties were also barred from any remedy because placing the impugned Act together with some other state Acts, Rules and Regulations in the Ninth Schedule of the Constitution by the First Constitution Act of 1951, the Fourth Constitution Act of 1955 and the Seventeenth Constitution Act of 1964 and therefore, validated in terms of Article 31B, although it was a ‘law’ in contravention of Art. 13(2), and hence, void. The petitioner contended that the Amendment Act which brought about this effect was itself a ‘law’ in contravention of Art. 13(2). He urged that power to amend exercised by Parliament in accordance with the procedure prescribed by Art. 368 did not include power to amend the provisions of part III of the Constitution. Eleven judges participated in the decision and they divided 6 to 5. The majority now held the fundamental rights were non-

39 A.I.R. 1967, SC 1643
amendable under Art. 368, while the minority upheld the line of reasoning adopted by the court in the two earlier cases. The majority was worried at the numerous amendments of the fundamental rights which had taken place since 1950. It apprehended that if the courts were to hold that the Parliament had power to take away or abridge fundamental rights, a time might come when these rights are completely eroded and India would gradually and imperceptibly pass under a totalitarian regime. This fear coloured and conditioned the approach of the majority to the question of amendability of the fundamental rights. The majority thus sought to make the fundamental rights inviolable by constitutional amendment. Subba Rao, C.J., speaking on behalf of himself and four other judges, equalled fundamental rights with natural rights and characterized them as “the primordial rights necessary for the development of human personality”. He then raised the poser that when Parliament could not affect fundamental rights by enacting a bill in its ordinary legislative process even unanimously, how could it then abrogate a fundamental right with only a two third majority? The Chief Justice developed the following line of argumentation to reach the conclusion that the fundamental rights could not be amended. Art. 368 merely laid down the procedure for constitutional amendment and did not by itself confer a substantive power to amend. For this argument, the Chief Justice referred to the marginal heading of Art. 368. The power to amend the Constitution was to be found in the residuary legislative power of Parliament contained in Art. 248, because such a power is not expressly conferred by any Article or any legislative entry in the Constitution. Accordingly, amendment to the Constitution was a ‘law’. The term ‘law’ in a comprehensive sense would
include constitutional law as well. Art. 13(2) gave an inclusive definition of ‘law’ which would take in even constitutional law. Under Art. 368, a Constitutional amendment was to be enacted by following a procedure which was very similar to the procedure for making laws. The fact that a larger majority, and in case of amendment of some Articles even ratification by State legislatures, were provided for, would not make the constitutional amendment any less a ‘law’. Therefore, the amendment made under Art. 368 was ‘law’ and was subject to Art. 13. The Constitution Amendment Act in question was thus held void in as much as it abridged the fundamental right. At this stage, the five judges took recourse to the doctrine of ‘prospective overruling’ because of two reasons. First, the power of Parliament to amend the fundamental rights and the First and the Seventeenth Amendments specifically, had been upheld previously by the Supreme Court in Shankari Prasad and Sajjan Singh. Secondly, during 1950 to 1967, a large body of legislation had been enacted bringing about an agrarian revolution in India. This legislation was based on the premise that Parliament had authority to amend fundamental rights. If the Supreme Court were now to give effect to its view of non-amendability of fundamental rights with retrospective effect and were to hold the Seventeenth Amendment void, it would effect the constitutional validity of this legislation, introduce chaos and unsettle conditions in the country. Therefore, the present decision was not to invalidate the amendments made so far to the fundamental rights. But, in future, Parliament would have no power to take away or abridge any of the fundamental rights. Hidayatullah J., in a separate judgement, held that because of Art.13, there was no power to amend fundamental rights as there was no difference between legislative and amending processes. He
refused to disturb the past amendments because they had stood for long and people had acquiesced in them.

To make fundamental rights non-amendable the majority refused to accept the thesis that there was any distinction between ‘legislative’ and ‘constituent’ process. It went even further and asserted that the amending process in Art. 368 was merely ‘legislative’ and not constituent’ in nature. This was the crux of whole argument. If a Constitution Amendment Act could be regarded as just an ordinary law then it could be caught by Art.13. To bolster this position the majority went to the extent of saying that Art. 368 did not confer any amending power but merely laid down the procedure. If found amending power in Art. 248 which only grants legislative power only to annihilate the distinction between ‘legislative’ and ‘constituent’ power’. The majority found countenance for its argument from one anomalous feature of Art. 368, viz., that the procedure laid down therein was very similar to the ordinary legislative process. The provision for Presidential assent was similar to that of ordinary legislative process.

The minority judges delivered three separate opinions, and upheld the power of Parliament to amend fundamental rights. Then fear was that the Constitution would become static if no such power were conceded to Parliament. The formalistic arguments adopted by these judges were as follows: Art. 368 itself contained the power to amend the Constitution; such a power was not to be found in Art. 248 which conferred only legislative power and that, too, ‘subject to the provisions of the Constitution’; the Constitution being the fundamental law, no law passed under the legislative power could
affect a change in the Constitution was an exercise of constituent power, while passing of an ordinary law constituted an exercise of ordinary legislative power which was different from constituent power. Although the procedure laid down in Art. 368 did very much correspond with legislative process, yet the quality and nature of what was done under Art. 368 was very much different from ordinary legislation what was done under Art. 368 was amending the Constitution and not the passage of an ordinary law. What Parliament did under Art. 368 was not subject to Art. 13(2); Art. 13 placed no limitation on the amending power and, accordingly, any provision of the Constitution, even a fundamental right, could be amended under Art. 368. The word ‘law’ in Art. 13 did not include an amendment of the Constitution. Art. 368 did not use the word ‘law at all; it studiously avoided the use of the word ‘law’. The power of amendment was not subject to any express or implied restrictions. If the Constitution makers had wanted to make the fundamental rights unamendable, they could have easily made an express provision in the Constitution to that effect. These judges also refused to accept the doctrine of ‘prospective overruling’.

40 This doctrine explains that any amendment made to the fundamental rights till Golakhnath were to remain effective, therefore Parliament was not to be competent to modify fundamental rights.

The majority opinion in Golak Nath emanated from the premise that fundamental rights were ‘fundamental’ and needed to be protected. The majority was afraid of a possible erosion of fundamental rights if the process of amendment of these rights was not halted. The majority set up the major premise that these rights were transcendental and must not therefore be allowed to be destroyed by Parliament. It is true that far reaching amendments
had been made to some of these rights, and, at times, in a hurry and not always after a cool and mature consideration, and so the majority genuinely apprehended that these rights might be completely eroded in future. Nevertheless, what the court laid down in Golak Nath was unprecedented, and its logic could not stand a close scrutiny. An amending process is a recognized part of every written Constitution, in no Constitution any of its parts is regarded as non-amendable. Even in the U.S.A., it has not been argued that the guaranteed civil rights are beyond the reach of the amending process. In fact they were added to the Constitution through such a process. It is difficult to imagine that the Constitution makers were not cognizant of the need to amend the Constitution in course of time therefore, it is inconceivable that they would have left the power to amend the Constitution to be inferred from the residuary power of Parliament under Art. 248, and not directly from the specific and direct provision like Art. 368. Infact, the historical evidence establishes that the members of the Constituent Assembly wanted neither a too flexible nor a too rigid Constitution. It is also difficult to believe that the Constitution makers would have left such a significant point as the non amendability of the fundamental rights to be inferred by a circuitous process of argumentation. They taking into consideration the totality of the constitutional process, many other portions of the Constitution like adult suffrage parliamentary form of government etc., are in no way less significant than the fundamental rights, but these parts have not been held to be non-amendable in Golak Nath. The fear entertained by the judges regarding introduction of a totalitarian regime could materialize, to some extent, by abolishing Art. 226, or doing away with adult suffrage, etc.
Therefore, if the argument of fear were to be taken to its logical end, then not only the fundamental rights but many other provisions of the Constitution would have to be declared to be non-amendable. But the majority opinion in Golak Nath was an example of policy oriented approach by the judges – the judicial policy being to make fundamental rights inviolable.

It is true that Art. 368 suffers from an anomaly while for amending certain provisions characterized as the ‘entrenched clause’, consent of at least half of the State legislatures is stipulated in addition to the special majority in Parliament, it is not so with respect to the fundamental rights. The majority did not assert that these rights were beyond the reach of any amending process whatsoever. It was said that such a result could not be achieved by following the procedure under Art. 368. It suggested the setting up of a Constituent Assembly to reach that result. Parliament could use its residuary power to convene a Constituent Assembly to make a new Constitution or radically changing it.

In Golak Nath case an important question was raised on the depth and pervasiveness of Art. 368. It uses the word ‘amendment’ can this word be stretched to the point of abrogation of the Constitution, its complete rewriting, or even drastically changing some of its basic tenets like the parliamentary executive, federalism, democratic process, etc.? The majority said that there was considerable force in the argument that Art. 368 did not confer such a drastic power. Even the minority cast doubts whether such a drastic power as the power of abrogating the Constitution and substituting it by a new one could be read in Art. 368. Short of that, it had no doubt that the amending power
would include the power to add, alter, substituting, or delete any provision in the Constitution without any limitation.

Golak Nath raised an acute controversy in the country. One school of thought applauded the majority decision as a vindication of the fundamental rights, while other school criticized it as creating hindrances in the way of enactment of socio-economic legislation required to meet the needs of a developing society. Golak Nath threw a great responsibility on the courts for, if the fundamental rights were to be unamendable in a former manner, then it would be for the courts to so interpret the relevant constitutional provisions as to cause minimum hindrances in the way of enactment of legislation designed to ameliorate the condition of the poor masses.

To, neutralize the effect of Golak Nath, Nath Pai introduced a private member’s bill in the Lok Sabha on April 7, 1967, for amending Art. 368 so as to make it explicit that any constitutional provision could be amended by following the procedure contained in Art. 368. The proposed bill was justified as an assertion of “Supremacy of Parliament” which principle implied “the right and authority of Parliament to amend even the fundamental rights”. Nath Pai’s bill did not however make much headway in Parliament it was criticized as “an affront to the dignity of the Supreme Court” and as placing the fundamental rights at the “mercy of a transient majority in Parliament”. There was also a feeling that the bill when enacted would itself be subject to a challenge in the courts and could be declared unconstitutional if the Supreme Court were to reiterate its Golak Nath ruling. In the 1971 election, the Congress party was returned with a huge majority in the Lok Sabha. In 1971,
Parliament enacted the Constitution (Twenty Fourth) Amendment Act introducing certain modifications in Art. 13 and 368 to get over the Golak Nath ruling and to assert the power of Parliament, denied to it in Golak Nath, to amend fundamental rights.

The rationale underlying the various clauses enacted by the Twenty fourth Amendment was as follows. The majority in Golak Nath had taken the view that the word “law” in Art. 13 included a constitutional amendment as well, and, therefore, a fundamental right could not be curtailed or diluted. To undo the effect of this pronouncement it was now clarified that Art. 13 would not stand in the way of any constitutional amendment made under Art., 368. This was sought to be achieved by adding a clause to Art. 13 declaring that Art. 13 shall not apply to any constitutional amendment made under Art. 368. As a matter of abundant caution, a clause was added to Art. 368 declaring that Art. 13 shall not apply to any constitutional amendment made under Art. 368. The marginal note Art. 368 was changed from “procedure for amendment of the Constitution” to “power of Parliament to amend the Constitution and procedure therefore.” The majority in Golak Nath had asserted by reference to the phraseology of the marginal note to Art. 368, that Art. 368 provided only the procedure for constitutional amendment and did not confer the power therefore. The change in the marginal note was now made to clarify that Art. 368 confers the power of constitutional amendment and does not lay down merely the procedure therefore. A clause was added to Art. 368 saying that “Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in
this Article.” The addition of the clause was designed to make an express grand of power to Parliament to amend any part of the Constitution including fundamental rights. It had been argued by Chief Justice Subba Rao in Golak Nath that since Art. 368 did not expressly authorize the curtailment of fundamental rights such curtailment must be out of reach of the amending process.

A view had been expressed in Golak Nath that there was no difference between an ordinary law made under legislative process and constitutional amendment made under constituent power. To prove this point, it had been pointed out that the presidential power to assent, or not assent, was similar in both cases an ordinary law as well as a law passed under Art. 368. To meet this argument, it was now clarified that once a Constitution Amendment Bill is passed by both Houses of Parliament by the requisite majority in accordance with the procedure laid down in Art. 368. The President would have no option but to give his assent to it. In case of an ordinary law, the President does enjoy a choice either to give or refuse to give his assent, or to refer it back to Parliament for reconsideration. In case of a bill amending the Constitution, it would be obligatory on him to give his assent thereto. Thus a differentiation was now made between an ordinary law and a law to amend Constitution.

The judgement in the Golak Nath case and the amendment which sought to nullify its effects were scrutinized by the Supreme Court in Keshavananda Bharti Vs. the state of Kerela.

The Twenty fourth, Twenty fifth and Twenty ninth Amendments altered the relationship between Parliament and the judiciary within the constitutional
framework of the country. The amendments were challenged in *Keshavananda Bharti Vs. State of Kerala*\(^{41}\) in the Supreme Court and the case was popularly known as the “fundamental rights” case.

The petitioner contended that there were certain basic freedoms meant to be permanent: that there were other basic features besides fundamental rights like sovereignty and integrity of India, the people’s right to vote and elect their representatives, the independent judiciary, the secular state, the republicans form of government the dual structure of the Union and the separation of executive, legislative, judicial powers, that the power of parliament to amend the Constitution under Art. 368 was of limited nature and there were implied limitations on it the petitioner challenged the power of Parliament to change these basic features as the Parliament itself happens to be a constituted authority.

On the other hand, the respondents claimed an unlimited power for the amending body and contended that (i) the power to amend under Art. 368 of the Constitution was unlimited, provided the conditions laid down in Art. 368 were satisfied; (ii) the power extended to abrogating or taking away the rights of freedom guaranteed in part III of the Constitution; (iii) Article 32 of the Constitution could be repeated and abrogated; (iii) Directive Principles in part IV could be altered drastically or even abrogated; and (iv) the form of the Government could be wholly changed and the power of Judicial Review could be taken away. Thus, short of total abrogation or repeal of the Constitution, the amending body was omnipotent under Art. 368 and the Constitution could be

\(^{41}\) A.I.R. 1973, SC 1461
amended by way of variation, addition or repeal so long as no vacuum is left in the governance of the country.

The matter was heard by a bench consisting of all the 13 judges of the court wide ranging arguments were advanced before the court for over 60 days both for and against the validity of the amendments, and eleven opinions were delivered by the judges on April 24, 1973. The Court held that the power to amend the Constitution was to be found in Art. 368 itself. It was emphasized that the ‘provisions relating to the amendment of the Constitution are some of the most important features of any modern Constitution”. Hedge and Mukhjerjea, J.J., found it difficult to believe that the Constitution – makers left the important power to amend the Constitution hidden in Parliaments residuary power. On this point, therefore the views expressed in Golakh Nath that the power to amend the Constitution was not to be found in Art. 368 was overruled. Further, the court recognized that there was a distinction between an ordinary law and a constitutional law. As Hedge and Mukherjea, J.J., stated; “An examination of the various provisions of the Constitution shows that it has made a distinction between ‘the Constitution’ and ‘the laws’, it was stated that the Constitution makers did not use the expression “Law” in Art. 13 as including “Constitutional’ law”. This would thus mean that Art. 368 confers power to even abridge a fundamental right. To this extent, therefore, Golakh Nath was now overruled. But Bharti did not concede an unlimited amending power to Parliament under Art. 368. The amending power was now subjected to one qualification, viz., that the amending power cannot be exercised in such a manner as to destroy or emasculate the fundamental features of the Constitution some of the features regarded by the court as fundamental and
thus non amendable are (i) Supremacy of the Constitution (ii) Republicans and
democratic form of government; (iii) the secular character of the Constitutions;
(iv) separation of powers between legislative, executive and the judiciary (v)
Federal character of the Constitution. This, therefore means that while
Parliament can amend any constitutional provision by virtue of Art. 368, such a
power is not absolute and unlimited and the courts can still go into the question
whether or not an amendment destroys a fundamental or basic feature of the
Constitution. If an amendment does so, it will be constitutionally invalid when
question arises whether a particular amendment of the Constitution affects any
‘basic’ or “fundamental feature of the Constitution or not its for the court to
decide the matter. The question of basic feature has to be considered in each
case in the context of concrete problem. The justification for this judicial view
was that the expression ‘amend’ in Art. 368 has a restrictive connotation and
could not comprise a fundamental change in the Constitution. The words
“amendment of the Constitution in Art. 368 could not have the effect of
destroying or abrogating the basic structure of the Constitution”’. The 2/3
majority in Parliament may not represent majority of the votes of the people in
the country.

Keshav Nanda Bharti ruling can be regarded to be an improvement over
the formulation in Golak Nath, in at least two significant respects: (i) there are
several other parts of the Constitution which are as important, if not more, as
the fundamental rights, but Golak Nath formulation did not cover these parts.
This gap has been filled by Bharti by holding that all ‘basic’ feature of the
Constitution are non-amendable (ii) Golak Nath made all fundamental rights as
non-amendable. This was too rigid a formulation. Bharti introduces some
flexibility in this respect. Not all fundamental rights are now to be non-amendable but only such of them as may be characterized as constituting the basic” features the Constitution. Theoretically, Kesavananda is therefore a more satisfactory formulation as regards the amendability of the Constitution than Golak Nath which gave primacy to only one part, and not to other parts, of the Constitution. Bharti also answers the question left unanswered in Golak Nath, namely, can Parliament, under Art. 368, rewrite the entire Constitution and bring in a new Constitution? The answer is that Parliament can only do that which does not modify the basic features of the Constitution and not go beyond that.

The immediate application of the Bharati principle as regards the amendability of the Constitution was made to assess the constitutional validity of the Twenty fourth and Twenty fifth amendments. The entire Twenty fourth amendment was held valid from one point of view, overruling of Golak Nath restored the status quo ante making the amendment unnecessary and restoring the power of amending the fundamental rights to the constituent body. Some of the judges pointed out, the twenty fourth amendment made explicit what was already implicit in the unamended Art. 368. Parliament could amend a fundamental right subject however to the over all restriction of non amendability of a basic feature of the Constitution.

As regards the Twenty fifth amendment it was upheld subject to some qualification First, although ‘amount’, was not the same concept as ‘compensation’, and while the courts could not go into the question of adequacy of ‘amount’ payable for property acquired or requisitioned yet the
‘amount’ could not be ‘illusory’ or ‘arbitrary’. The ‘amount’ need not be the market value of the property acquired, but it should still have some reasonable relationship with the value of the property in question. Thus, a limited Judicial Review of the amount payable for property acquired was still possible, secondly, the non-application of Art. 19(1)(f) to a law enacted under Art. 31(2) was held to be constitutionally valid. In a way, the amendment only restored the status quo ante before Golak Nath when the Supreme Court had regarded Arts. 31(2) and 19(1)(f) as mutually exclusive. Thirdly the first part of Art. 31C was upheld chiefly on the basis that it identified a limited class of legislation and exempted it from the operation of Art. 14, 19, 31. Hence no delegation of amending power was required. But the second part of Art. 31C was held to be invalid. The purport of this ruling is that while a law enacted to implement Arts. 39(b) and 39(c) may not be challenged under ‘Art. 14 19 & 31., nevertheless, the courts shall have the power to go into the question whether the impugned law does in fact achieve the objectives inherent in Arts. 39(b) and (c) or not. A legislative declaration to this effect cannot be conclusive. No legislature by its own declaration can make a law challenged proof. When a law is challenged, the courts will have the power to consider whether the law in question can reasonably be described as one to give effect to the policy of the state towards the said objectives.

In spite of the fact that it is possible to find some conundrums on an analysis of the arguments adopted in the various opinions delivered in Bharati, the result of the case on the whole was satisfactory, balanced and reasonable. Parliament was now conceded power to amend any part of the ‘Constitution subject to the ultimate restriction that the fundamental features of the
Constitution should not be abrogated. This formulation gives a lot of leeway to Parliament to make necessary adjustments in the Constitution from time to time in furtherance of the country’s socio-economic programme. The restriction on Parliament that it should not subvert the fundamental features of Constitution is more notional than real for no Parliament would seek to do that, and the courts, will have enough manoeuvrability to decide whether any fundamental feature of the Constitution has been abrogated or not by a particular amendment. The two phrases ‘fundamental features’ and ‘abrogation’ are quite vague furnishing a good deal of scope of interpretation to the courts. By upholding the first limb of Art. 31C, legislatures in the country have been given power to implement the socialist socio-economic programme. This avoided the possibility of the State legislatures immunizing all sorts of laws from judicial scrutiny. To permit each and every state to enact review proof legislation in the name of Arts. 39(b) and 39(c), could have led to socio-economic chaos in the country. Keshavananda illustrates judicial creativity and policy making of a very high order. The majority judges caught to protect and preserve the basic features of the Constitution against the onslaught of transient majorities in the legislature. An unqualified amending power could mean that a political party with a two-third majority in Parliament, for a few years could make any changes in the Constitution, even to the extent of establishing a totalitarian state.

Minerva Mills Ltd. V. Union of India.\textsuperscript{42}

After the decision in Keshavananda case, there was no doubt at all that amendatory power of Parliament was limited and it was not competent to alter

\textsuperscript{42} A.I.R. 1980 SC 1789
the basic structure of the Constitution. The Parliament, however, in order to reassert its supremacy in the field of amending power, passed the Constitution (42nd Amendment) Acts, 1976. The 42nd Amendment Act made significant changes in the structure of Art. 368 by inserting two new clauses viz., clause 4 & 5. This section was held to be beyond the amending power of the Parliament and void since it sought to remove all limitations on the power of Parliament to amend the Constitution and confer a power on Parliament to amend the Constitution so as to damage or destroy its basic or essential features or its basic structures. The true object of these clauses was to remove the limitations imposed on Parliaments’ power to amend the Constitution through the Kesavananda case. The newly introduced clause 4 in Art. 368 sought to deprive the courts of their power to call in question any amendment of the constitution. The court stated in this connection:

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

Depriving the court of the power of Judicial Review will mean making fundamental rights “a mere adornment” as they will be rights without remedies. A ‘controlled’ Constitution will become ‘uncontrolled’. The newly added Cl.5 of Art. 368 demolishes the very pillars on which the Preamble rests by empowering the Parliament to exercise its constituent power without any limitation. This clause even empowered Parliament to “repeal the provisions of the Constitution”. Parliament can thus abrogate democracy and substitute for it a totally antithetical form of government that can most effectively be achieved. Without calling a democracy by any other name, by a total denial of social,
economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. “The power to destroy is not a power to amend.” The Constitution confers only a limited power on Parliament to amend the Constitution; Parliament cannot therefore by exercising that limited power enlarge that very power into an absolute power. “The donee of a limited power cannot by the exercise of that power covert the limited power into an unlimited one.” A limited amending power is indeed one of the basic features of the Constitution and therefore, the limitations on that power cannot to destroyed. In other words, Parliament cannot, under Art. 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features.

The Forty second Amendment also amended the Preamble. No exception could be taken to this amendment, as it furnishes “the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution”. This amendment offers “promise of more”, it does not “scuttle a precious heritage”.

S.4 of the Forty second Amendment amended Art.31C as well. The unamended Art. 31C was upheld in Keshavananda up to an extent. To that extent, Art. 31C would remain valid, but the new amendment vastly expanded the scope of Art. 31C, and this extension was now declared to be invalid as being it destroyed the basic or essential features of the Constitution, in so far as it totally excluded a challenge in a court to any law on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Art.
14 or 19, if the law was for effectuating any of the directive principles. The majority judges insisted that fundamental rights occupy a unique place in the lives, of civilized societies; they constitute the ‘ark’ of the Constitution, “…. The Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution.” The court pointed out that the goals set out in part IV of the Constitution must be achieved without the abrogation of the means provided for by Part III. In this sense, Parts III and IV together constitute the core of the Indian Constitution and combine to form its conscience. “Anything that destroy the balance between the two parts will ipsofacto destroy an essential element of the basic structure of the Constitution.”

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

Bhagwati, J., expressed a minority view, He agreed with the majority in holding amendments to Art. 368 as invalid and unconstitutional on the ground of damaging the basic structure of the Constitution. But amendment to Art. 31C was held valid by him subject to the gloss put by him thereon. He argued that where protection was claimed for a statute under the amended Art. 31C, the court would first determine whether there was a “real and substantial connection” between the law and a Directive Principle and that the predominant object of the law was to give effect to such Directive Principles. If it is, then the court would consider which provisions of the law were basically and essentially necessary for effectuating the Directive Principle and only those provision will be protected under Art. 31C, if the court found that a particular provision was not essentially connected with the implementation of the Directive Principles or was of such a nature that, its dominant objective was to achieve an unauthorized purpose, it would not be protected under Art. 31C.

A Constitution must conform to the aspirations of the people. The doctrine of amendability of a Constitution is based on the doctrine of the sovereignty of the people. A Constitution which does not provide a procedure for change, cannot live long. In other words, an unamendable Constitution is a contradiction in itself. Thomas Paine writing in 1791 on Rights to Man, observed:\footnote{Singh Dalip, op.cit., p. 228.}

There never did, there never will, and there never can, exist a Parliament or any description of men or any government of men,
in any country, possessed of right or power of binding and controlling posterity to the end of time or of commanding former 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 or what they have neither the right nor the power to do.

Besides, the amending procedure in the Constitution operates as a “safety valve” and allows the Constitution to adjust itself to the changing requirements of the society. In other words, it provides a mechanism for transformation of the society with the changing times and avoids the danger of the revolution for bringing about necessary changes according to the wishes of the people.

No one denies that Parliament should have the power to amend or modify the Constitution according to the aspirations of the people. The people wants some fundamental liberties without which they cannot enjoy civilized life.

The Legislature and the judiciary are both supreme within their respective sphere. Thus, the existence of a fearless and independent judiciary can be said to be the very basic foundation of the constitutional structure in India. It has a written and controlled Constitution. The doctrine of the parliamentary supremacy as understood in England does not prevail in India except to the extent provided by the Constitution. The plea of the parliamentary supremacy is based on fallacious and misconceived assumption that Parliament as representative of the people can enact any law. The people of India in exercise of their sovereign power have distributed powers amongst all the three organs of government, the legislature, the executive and the judiciary. The special bench of the Calcutta High Court in Sunil Kumar Bose V. The Chief
Secretary of Government of W.B.\textsuperscript{44} pointed out that “the people of India have given us (judges) the power of interpreting the Constitution of India and of deciding whether any piece of legislation is or is not consistent with the provisions laid down in the Constitution of India”. The power of Judicial Review is exercised by the judges on behalf of the people of India. Mr. Justice V.R. Krishna Iyer has very aptly remarked that\textsuperscript{45}:

“The judicial power is exercised by courts on behalf of the people of India, so long as “we the people have appointed them to exercise such power”.

The utmost need of the age is not the supremacy of any one organ over the other but a proper understanding, confidence and mutual difference between all the governmental organs. The judiciary does not declare a law unconstitutional enthusiastically or willingly. The principle underlying the exercise of the power of Judicial Review was laid down by the Supreme Court as early as 1952. In State of Madras V. Rao\textsuperscript{46} the Supreme Court laid down the guidelines as follows:

“If then the courts in the country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader’s spirit, but in discharge of a duty plainly laid upon them by the Constitution.”

The Legislature should also follow the same path. It is submitted however, that unfortunately the judicial pronouncements, have not been always hailed in good spirit. The important pronouncement have been nullified by hasty legislation or Ordinance. The condition of tension and claim of supremacy by one organ over the other organs of the government is not appreciable. The seven

\begin{thebibliography}{9}
\bibitem{44} AIR 1950 Calcutta 274.
\bibitem{45} Prasad Anirudh, op.cit., p. 482.
\bibitem{46} AIR 1952 SC 196.
\end{thebibliography}
judges bench of the Supreme Court pointed out in *U.P. Controversy case*\(^{47}\), the necessity of the amicable relations among all organs of the government:

> “These two august bodies (the judiciary and the legislature) as well as the executive which is another important constituent of a democratic state, must function not in a spirit of hostility, but rationally harmoniously and in a spirit of understanding”.

The assumption that legislation is remedy of all evils is ill founded thus the need of the time is the earnest implementation of laws and not domineering will of the parliamentary supremacy over judiciary. The Constitution is well balanced. The balance should not be imperiled. The executive dominates over legislature. If the independent judiciary is also shaken the young democracy will be endangered.

The controversy between the Supreme Court and Parliament is a futile battle. They should be complementary to each other. The purpose of both the institution is to uphold democracy equality, liberty and fraternity judiciary is not to create stumbling block in the way of the progress of democracy. Legislatures seems to be over conscious of their power in bringing out legislation and the courts are paralyzing their efforts by declaring them null and void. This is followed by parliamentary action in the form of constitutional amendments and reversing the decisions of the courts. It appears that Parliament has not paid due attention to the other in some ways. It is necessary that the Parliament should show due regard to the judiciary and the judiciary on the other hand should broaden its outlook. Each branch should operate within democratic forms and should develop better awareness of social goals and objectives and respect for human rights and freedoms.

\(^{47}\) AIR 1965 SC 745.
The Supreme Court may interpret the provisions of the Constitution in such a manner as to accommodate individual interest to social good. The courts show more social awareness of declared policy objectives and may successfully protect the liberties of the citizens in consonance with the well being of the community.