PART III

THE DOCTRINE OF BASIC STRUCTURE
CHAPTER - VI

BASIC STRUCTURE: ORIGIN OF THE DOCTRINE

Legal system is a system of laws. It means every law necessarily belongs to the legal system. It is important that legal system shall have unity\(^1\) and coherence. They can be achieved only if the system maintains a hierarchical order or a 'genetic structure' as it is called.\(^2\)

Legal systems are subject to changes with elapse of time and concomitant to the changes in the social, economic and political spheres. Such changes may pose serious threats to the legal system if they go to the extent of destroying the identity of the legal system. It is not desirable that the essential features or elements of the legal system are swept away by such changes. Hence a major problem which legal systems face is one of balancing itself between demands of continuity and stability on the one hand and change and flexibility on the other.\(^3\) A legal system has to adjust to the required changes without losing its identity. Success of the legal system depends upon maintaining its identity while offering solutions to the problems that arise.

\(^2\) "The fundamental relation of the genetic structure is the genetic relation namely the relation between a law and another law authorising its existing." Joseph Raz, The Concept of a Legal System (1980), p. 184
Legal system is often characterized as a hierarchical normative order. Each norm in such a structure derives its authority from a higher norm. In such a legal system, Constitution is of highest importance since it contains the norm of high authority. A constitution, written or unwritten, is therefore the highest level of national law in a normative order. It is the basis from which individual norms develop. The constitution draws its nature, character and content from the basic norm of the legal system, as it lives closest to the basic norm. However, being part of the legal system it also is subject to changes. It cannot be expected that constitution would offer permanent solutions to the problems of all times. In the case of an unwritten constitution such changes occur involuntarily while constitutions framed through deliberate action are subject to changes through deliberation. Such willful changes of the written constitutions are known as amendments. Amendment is the most important method of changing constitutions. Amendability of the constitution is a sine qua non, for, absence of possibility to make changes through amendments may lead to its changes through

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5 "'Norm' is the meaning of an act by which a certain behaviour is commanded, permitted, or authorised." Kelsen, *Pure Theory of Law* (1970), p.5.
6 Constitution may be defined as the "organic and fundamental law of a nation or state, which may be written or unwritten establishing the character and conception of its government laying down the basic principles to which its internal life is to be conformed." See Black's Law Dictionary (1990).
7 "The organization of the modern state is... divisible into two distinct parts....The first, essential and basic portion is known as the constitution of the State... The more important, fundamental and far reaching any principle or practice is, the more likely is to be classed as constitution" See, Fitzgerald (Ed) Salmond on Jurisprudence (1966), p. 83.
8 *Supra, n. 5 at p.124.*
9 See, *supra,* n.1. at p.796.
10 But there are other modes of altering constitutions such as legislative measures, evolving customs and conventions and judicial interpretation. See, William S. Livingston, *Federalism and Constitutional Change* (1956), pp-11-15.
extra constitutional methods including revolution. Moreover, non-amendability of the fundamental law implies monopoly of a generation over the future, which is an unacceptable proposition. An unamendable constitution is therefore characterised as 'the worst tyranny of time or rather the very tyranny of time'. The amendability of the constitution is therefore an accepted norm. In short, to live upto the needs of the changing times as well as to assume self-existence a constitution should be capable of adjusting to changes; at the same time it should protect itself against self eradication or the very sweeping of the self. In the absence of appropriate provisions for schematic amendment the changes in the constitution may run riot, and leave the very existence of the constitution doubtful. Therefore provision for amendment to bring about an orderly change is usually incorporated in constitutions. Written constitutions contain provisions for their amendment. They contain the procedure for amending the constitutions as well as the limitations if any, on amendments. Article 368 of the Constitution of India

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11 H.R. Khanna, "Power to Amend the Constitution", (1983) 2 S.C.C.1. At the time of framing our Constitution M.V. Thyagi observed that in the absence of an amendment procedure the constitution would be a brittle one. C.A.D. Vol. IX. p. 1657.

12 See, Paras Diwan, op. cit. at pp. 11, 14.


14 "It is the function of a constitution to provide resistance to change nearly as such. If that were not so, a constitution would be an incitement to revolutions rather than a means of avoiding them. On the other hand a constitution which left the door open to every kind of change could not perform its functions, since the function of a Constitution is to ensure stable progress, and certain types of changes are incompatible with progress." Per Dickinson as quoted in Paras Diwan, op. cit., at p. 11.

15 Palekar J observed in Kesavananda Bharathi v State of Kerala, (1973) 4 S.C.C.225 at p. 679. "The raison de'être for making provisions for the amendment of the constitution is the need for orderly change."


17 The original Article was amended subsequently. Article 368 (1) and (2) as they stand.
Amendment of the Constitution is different from its enactment. The former is a modification while the latter is the creation of the Constitution. Nevertheless, both emerge from the exercise of the constituent power. A reflection on amendment of the constitution would necessarily involve examination of questions like the meaning of the term amendment, the nature of the power to amend, the source of such a power, the extent of amendability and the scope of judicial review of amendment. These aspects in relation to written constitutions now read as follows: "(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 a 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 required 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 assent."

The Constitution of India contains three procedures for amending it. Some Articles can be amended by a simple majority; for instance Articles 4, 169 and 239 A. These Articles contain specific provisions to the effect that such changes shall not be deemed to be constitutional amendments under Article 368 of the Constitution. Some provisions can be amended only by a special majority of two-thirds of the members present and voting. Article 368(2) specifies such a special procedure. Some other provisions can be amended by a special procedure of such special majority coupled with ratification by a half of the States by a resolution to that effect. Articles 55, 73, 162, 245, 124 to 147, 214 to 232, 245 to 255, Schedule 7, and amendment of Article 368 itself fall under this category.
have claimed the attention of courts abroad. In our country, the Supreme Court had to examine these matters in their diverse aspects during the short span of half a century since independence and it resulted in the emergence of the doctrine of basic structure.

What is the source and nature of the power to amend the Constitution? There is a view that a constitution and the process of its amendment are one and the same. The expression 'constituent power' involves some ambiguity. It has been used to denote the amending power and the power to make, remake and unmake the constitution. Such a power seems to have been recognised by the Supreme Court in Shankari Prasad v Union of India when the court distinguished the power to amend the Constitution from the concept of "law" under Article 13(2). This view was approved by some of the Judges in Golaknath v State of Punjab also. The decision implies that the power to amend the constitution, unlike the power to legislate, is not placed within the constitution but outside it. It means that the power behind the making of the constitution and its amendment is one and the same. In other words power to amend the constitution is also constituent in nature. But there is a strong contrary view on

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19 The expression 'constituent power' denotes the ability to frame or alter a political constitution. Seervai, Constitutional Law of India Vol. III (1996), p. 3119.
20 "We might define a constitution as its process of amendment." Herman Finer, The Theory and Practice of Modern Government (1961), at p. 127.
22 A.I.R. 1951 S.C. 458
23 Id. at p. 463.
24 A.I.R. 1967 S.C 1643
this issue. The view emphasizes that the power to amend the constitution is not supreme and independent as one to make a constitution. The latter, like a plenary legislative power, is unfettered by any external restrictions while the former is subject to some limitations. The power to frame a constitution is primary in nature whereas the other is derivative — derived from the constitution. In short, according to this view, the power to amend a constitution, though a power higher than the legislative power, is within and not outside the constitution. In other words, the power to amend a constitution is not all-comprehensive as the power to enact a constitution. The power to enact the constitution and the validity of the constitution so enacted are beyond the scope of any examination. The power to amend being one derived from the constitution, cannot transgress the limits constitutionally created. Thus like legislation, an amendment of the constitution is likely to be ultra vires. In such cases the constitution is the touch-stone of the validity of all powers conferred by it.

What is the meaning of the expression ‘to amend’? Is it wide enough to include changes to the constitution even to the level of its abrogation? The expression means, to improve, change for the better by removing defects or faults by modification, deletion or addition. In other words, an amendment does not

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25 Seervai, op. cit. at p. 3119. Such limitations may be substantive or procedural in nature.
26 Ibid.
27 Baxi, supra, n. 24. at p. 123. He observed, “The amending power is a power given by the Constitution to the Parliament. It is a higher power than other power given to Parliament, but nevertheless it is a power within and not outside of, the Constitution. (Emphasis original).
encompass substantial alteration or modification of a constitution. In general, people think of amendments as rather minor changes while overhauling and adoption of a completely new constitution is implied by the term revision. A question emerges here. What are the features of the Constitution, which can be so altered in exercise of the power to amend and what features are beyond its scope? When such a question was posed before the Supreme Court of India, attempts were made to recognize and harmonize such unamendable features with the amendable ones. The doctrine of basic structure of the Constitution was evolved by the Court in such a context.

A constitutional bench of the Supreme Court, consisting of thirteen Judges held in *Kesavananda Bharathi v State of Kerala* (Kesavananda, for short), popularly called the *Fundamental Rights Case* that the power to amend the Constitution emanates from Article 368 of the Constitution. It means that unlike the power to make the constitution, the power to amend it is derivative in nature.

29 However there is strong juristic view that the expression is wide enough to include sweeping changes including repeal and abrogation. See, for instance, William Anderson, *Fundamentals of American Government* (1940), p. 31.

30 (1973) 4 S.C.C 225. The petitioner approached the Supreme Court under Article 32 for enforcement of his fundamental rights under Articles 25,26,14,19(1)(f) and 31 of the Constitution. He challenged the validity of the Kerala Land Reforms Act, 1963 as amended by the Kerala Land Reforms (Amendment) Act 1969. During the pendency of the petition the Constitution (Twenty fourth Amendment) Act 1971, the Constitution (Twenty fifth Amendment )Act 1972 and the Constitution (Twenty ninth Amendment) Act 1972 came into force. As a result of the 29th amendment act the Kerala Land Reforms Act as amended was inserted in Schedule IX to the Constitution. Incorporation of statutes in Schedule IX immunizes them from being challenged as unconstitutional. The petitioner therefore challenged also the validity of those amendments to the Constitution.

The Judges however assigned different but related reasons for the conclusion.\(^{32}\)

The Court further held that the expression ‘to amend’ was one of wide import even to include the power to repeal or abrogate a legal document.\(^{33}\) However, the Court by majority held that in Article 368 the expression was used in a narrow and constricted sense.\(^{34}\) The Judges agreed that the power under Article 368 would

\(^{32}\) Chief Justice Sikri (at pp. 386-387) and Mathew (at p. 833) Shalet and Grover JJ. (at p. 412) held so on the ground that the petitioner conceded that the power was incorporated in Article 368. Hegde and Mukherjee JJ held that the power to amend the Constitution is impliedly contained in Article 368. (at p. 469). Moreover the power cannot be located in Articles 245, 246 and 248 as they provide for exercise of legislative power subject to the Constitution while the amendment power has to over ride the Constitution. (at p. 468). Reddy J. held so on the ground that the decision in \textit{Golaknath} to that effect was correct (at p. 609). Palekar J observed that all controlled Constitutions confer on the legislature a special function of constituent power to amend the Constitution in accordance with a special procedure. Article 368 is not entirely procedural in nature. There is a mandate in it that the proposed amendment shall become part of the Constitution. That is a substantive provision. Moreover the makers of the Constitution could have incorporated a provision in the entries of legislative power if they had treated amendment as legislative in nature. He further held that legislation should be subject to the Constitution while amendment should over ride it (at pp. 672-675). Khanna J said that the words in Article 368 explained that it contains the power also and not procedure alone. The distinction between amendment and legislation is further clarified by the difference in legislative and constitutional procedures (at pp. 737-738). Dwivedi J. justified the conclusion on the ground that amending power and legislative power are contained in two different parts of the Constitution and hence the former could not reasonably be located in the residuary legislative power (at pp 925-926). Chandrachud J. held that the history of residuary power since 1935 Act and the scheme of distribution of power show that power to amend is located in Article 368 (at p. 977).

\(^{33}\) Id. per Hegde (for himself and Mukherjee JJ). at p. 475. “The power to amend a Constitution in certain contexts may include a power to abrogate or repeal that Constitution.” Ray J at p. 537, Mathew J at p. 863; Dwivedi J at p. 944 and Chandrachud J at p. 980.

\(^{34}\) Id. “... the expression ‘Amendment of this Constitution’ does not include a revision of the whole Constitution ... In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble” \textit{per Sikri J} (at p. 346); “The meaning of the words ‘amendment of this Constitution’ as used in Article 368 must be such which accords with the true intention of the Constitution-makers as ascertainable from the historical background,...” per Shelat J. (for himself and Gover J). (at p. 435); “It does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution.” Hegde J (for himself and Mukherjee J) (at p. 512); “None the less it is apparent that the word ‘amendment’ as used in Article 368 does not connote a plenitude of power” Jagmohan Reddy J (at p. 632) and “It also appears that the whole text of a law cannot be repealed or abrogated in one step, some part of it must remain while the other is repealed” Dwivedi J (at p. 929).
reach each and every provision of the Constitution. But that did not imply that Parliament could alter any and every aspect of the Constitution. In fact there were certain matters which do not come under the scope and ambit of the power of Parliament to amend. Thus the power does not encompass the one to destroy,\(^{35}\) repeal,\(^{36}\) or abrogate\(^{37}\) the Constitution or to frame a new one\(^ {38}\). In other words the power cannot be exercised to destroy the identity of the Constitution\(^ {39}\). It cannot, in short be used as a prelude to enactment of a fresh Constitution. Over and above that, there are certain features of the Constitution, which cannot be altered in exercise of the amending power. The Judges named them as the basic structure\(^ {40}\), basic elements\(^ {41}\) or fundamental features\(^ {42}\), or the essential features of the Constitution. In other words Parliament cannot exercise its plenary power to amend the Constitution so as to weaken the basic structure or principle underlying the Constitution.\(^ {33}\) Such amendments, the Court held, would be unconstitutional. Even though such a restriction is not contained in any of the specific provisions of

\(^{35}\) Id. per Hegde J (for himself and Mukharjee J) (at p. 481). He said, “In other words, one cannot legally use the Constitution to destroy itself.”

\(^{36}\) Id., per Sikri C.J. (at p. 320); Palekar J. (at p. 680). See also William L. Marbury, “The Limitations Upon the Amending Power,” 33 H.L.R. 223 (1919-20). He observes, “It may be safely presumed that the power to “amend” the Constitution was not intended to include the power to destroy it.” (at p. 225).

\(^{37}\) Id. per Khanna J, (at p. 767), Ray J. (at p. 632) and Mathew J. (at p. 897).

\(^{38}\) Id. per Shelat and Grover JJ. (at p. 432).

\(^{39}\) Id. per Khanna J. (at p. 767).

\(^{40}\) Id. per Sikri C.J. at p. 366; Shelat and Grover JJ. at p. 454; Jagmohan Reddy at p. 637;

\(^{41}\) Id. per Shelat and Grover JJ. (at p. 454) and Hegde and Mukharjea JJ. (at p. 486).

\(^{42}\) Id. per Shelat and Grover JJ. at p. 472.

\(^{43}\) Rajeev Dhavan, “The Basic Structure Doctrine-A Footnote Comment”, in Rajeev Dhavan and Alice Jacob op. cit. at p.160.
the Constitution, the doctrine restricts even the plenary legislative body to amend the Constitution in any manner it likes. This doctrine evolved by the judiciary therefore is a clear instance of the judicial creativity.

For evolving the doctrine, the judges relied on different reasonings. Chief Justice Sikri, and Justices Shelat, Hegde introduced the principle of implied limitations on the power of the Parliament to amend the Constitution to reach the conclusion that there was an unamendable structure to the Constitution. The principle of implied limitations emphasises that apart from the express procedural limitations contained in the Article 368, there are some substantive limitations on the power to amend the Constitution. Justice Jagmohan Reddy reached the conclusion on the ground that destruction of the essential features of the Constitution would amount to its abrogation. Justice Khanna upheld the basic

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44 Supra, n. 30. Sikri J observed, “The above foundation and the above basic features are easily discernibly not only from the preamble but the whole scheme of the Constitution, ...” (at p.366).


46 Id. at p. 346. He said, “In a written constitution it is rarely that everything is said expressly. Powers and limitations are implied from necessity or the scheme of the Constitution.”

47 Id. at p. 453. (For himself and Grover J.) He said, “We are equally unable to hold that in the light of the Preamble, the entire scheme of the Constitution, the relevant provisions thereof and the context in which the material expressions are used in Article 368 no implied limitations arise to the exercise of the power of amendment.”

48 Id. at p. 483. (For himself and Mukharjea J.) He observed, “From what has been said above, it is clear that the amending power under Article 368 is also subject to implied limitations.”

49 Id. at p. 633. He held, “If the entire Constitution cannot be abrogated, can all the provisions of the Constitution leaving the Preamble, or one article, or a few articles of the original Constitution be repealed... and the fundamental features substituted therefor? In my view, such an attempt would equally amount to abrogation of the Constitution,...”

50 Id. at p. 767. He said, “The word ‘amendment’ postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has
structure on a similar principle that the power to amend does not imply a power to destroy the Constitution and, therefore even after amendments the identity of the Constitution should remain unchanged. The Judges expressed the view that an unlimited power to amend the Constitution might lead to undesirable consequences. Parliament would be able to convert the democratic system of government to one of dictatorship or hereditary monarchy or make the Constitution extremely rigid. The creative judicial approach in this regard has been succinctly explained by a jurist in the following words,

"In other words, the need and power to make changes in the Constitution has been conceded to Parliament... but the power thus conceded is the power to make changes in, and not of, the Constitution. Changes in the Constitution, singly and cumulatively, should not amount to a change of the Indian Constitution. The constituent power is no longer the power to make and unmake the Constitution, it is no longer to repeal and replace the Constitution. The constituent power is the power to make changes in the Constitution, a power that can be exercised within the framework of the Constitution. And if the Parliament and the Supreme Executive are unable to understand fully, in the wielding of the constituent power, the basic framework of the Indian Constitution, the Supreme Court offers itself as a

been subjected to alterations... It means the retention of the basic structure or framework of the old Constitution."

51 Id. per Khanna J (at p. 767).

52 Id. per Sikri C.J. (at p. 365). He said, "Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-thirds majority in Parliament for a four years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid." Shelat J. observes, "The effect of limitless amending power in relation to amendment of Article 368 cannot be conducive to the survival of the Constitution because, the amending power can itself be taken away and the Constitution can be made literally unamendable or virtually unamendable by providing for an impossible majority." (at p. 431).
pedagogue, explaining to all concerned the meaning of a State based on freedom and Justice".53

(a) Basic Structure: Ingredients

Though the Court held that the power of Parliament to amend the Constitution was impliedly limited by the doctrine of basic structure, what constituted the basic structure was not clearly defined and explained by the Judges Chief Justice Sikri suggested that supremacy of the Constitution, republican and democratic form of government, secular characteristic of the Constitution, separation of powers and federal character of the Constitution were its ingredients. He opined that the structure was built upon the dignity and freedom of the individuals.54 Justice Shelat and Justice Grover were of the view that in addition to the above the mandate to build a welfare state contained in Part IV and the unity and integrity of the nation also formed basic structure.55 Justice Hegde and Justice Mukherjee illustrated basic structure with reference to sovereignty of India, democratic nature of our polity, unity of the nation, essential features of the individual freedoms secured to citizens and the mandate to build a welfare state and egalitarian society.56 Justice Khanna identified the democratic and parliamentary forms of government and secularism as constituting the basic structure of the Indian Constitution.57 Justice Jagmohan Reddy catalogued

53 Upendra Baxi, supra, n. 45 at pp. 65-66.
54 Kesavananda, supra, n. 30 at p.366
55 Id. at p. 454.
56 Id. at p. 472.
57 Id. at p. 767.
Sovereign Democratic Republic, Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship and equality of status and of opportunity as the contents of the basic structure. It is clear that there was hardly any consensus among the Judges as to the contents of basic structure. It is true that no features of the Constitution could be unanimously identified as basic structure by the court. The ratio of Kesavananda is that there are certain elements in the Indian Constitution beyond the reach of the power of Parliament to amend, though the Court did not identify unanimously which features of the Constitution constituted its basic structure.

A corollary of the doctrine is that if any amendment is found to be violative of basic structure it would be considered as unconstitutional and struck down. It implies two things. Constitution being the touchstone to determine validity of its alterations, like ordinary legislation, constitutional amendments are also likely to be held unconstitutional. It further implies the supremacy and finality of judicial review in determining the validity of constitutional amendments.

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58 Id. at p. 638.
60 Naturally a question arises here. Can a constitutional amendment be treated as ‘law’? The importance of such a question is that if it can be treated so, constitutional amendments can be also subjected to limitations to which ordinary legislation is subject. Such a question was raised before and answered by the Supreme Court in Shankari Prasad v Union of India, A.I.R 1950 S.C. 458 and Golaknath v State of Punjab, A.I.R. 1967 S.C. 1643.
61 See infra, n. 66.
Introduction of the doctrine of basic structure can be considered as one of the instances in which the Supreme Court of India was at the zenith of its creativity. Primarily, it is the direct outcome of the view of the Court that the power of Parliament under Article 368 was subject to certain implied limitations. Implied limitations are not legislatively incorporated in a statute, but are incorporated by the judiciary." They could be either substantive or procedural in nature. Article 368 does not contain any substantive limitations on the amending power. However the Court incorporated some implied substantive limitations upon the power of Parliament to amend the Constitution and the doctrine of basic structure is built upon such limitations. In other words the very foundation upon which the doctrine is built up and the doctrine itself are products of creative dialect of the judiciary. When the scope and extent of the power of Parliament to amend the Constitution is explained in the light of the doctrine of basic structure based on implied limitations, the doctrine would not be eaten away by amendment of the Constitution.

Further, by the doctrine, the Court was able to lay down the criteria for determining the validity of constitutional amendments. The Court evolved the criteria by basing on postulates like the scheme or 'spirit' or the 'philosophy' that permeates the Constitution. In the earlier cases while dealing with the

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power of Parliament to amend the Constitution, the Court had no opportunity to lay down such criteria applicable to all constitutional amendments since the only question posed in those cases was whether fundamental rights could be amended by Parliament. No question regarding the scope and extent of the power to amend was discussed in those cases. The issues raised in *Kesavananda*, on the other hand, extended the Court an opportunity to lay down the standard to evaluate the validity of all constitutional amendments.

Yet another innovative feature of the decision is that by the doctrine the Court brought constitutional amendments within the purview of judicial review. Judicial review of the constitutional amendments is a corollary of the doctrine of basic structure. It also is an example of high judicial creativity and innovation. The Supreme Court of India "is probably the only Court in the history of human kind to have asserted the power of judicial review over amendments to the Constitution."\(^{66}\) The extent of creativity of the decision will be clear when it is compared with the response of the Supreme Court of the United States in this respect. In the United States, the Supreme Court was reluctant to impose limitations on the constituent body. In *Coleman v. Miller*\(^ {67}\), when the validity of an amendment proposed to the Constitution of the US was challenged, the Supreme Court refused to look into the matter on the ground that it was a political

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\(^{67}\) 307 U.S. 433: 83 L.Ed. 1385. In 1924, the Congress proposed an amendment to the US Constitution for legislating on Child Labour. In 1925 the Kansas Senate voted on it. A *mandamus* was claimed in the State Supreme Court against considering the amendment as passed on the ground that it was not ratified in a reasonable time.
issue which the Congress and not the Court was competent to determine. The creativity of the Supreme Court of India becomes clear when it is realised that by introducing the doctrine of basic structure, the Court was trudging through an untrdden area and laying down the law imposing restrictions on powers of Parliament to amend the Constitution.

The doctrine of basic structure as introduced by the Court enjoys the merit that it brought constitutional amendments under judicial review, even when it recognizes the well-accepted distinction between ‘law’ and ‘constitution’. It therefore provided a jurisprudentially acceptable standard for evaluating constitutional amendments. In *Golaknath’s Case*, on the other hand, to bring constitutional amendments under judicial review, the Court held that amendments to the Constitution were also ‘law’ under Article 13(2). Such a holding led to the vanishing of the distinction between ‘law’ and ‘constitution’. Therefore it was subjected to criticisms. But, by the incorporation of the doctrine of basic structure the Court was able to keep constitutional amendments subject to judicial review without destroying the accepted distinction between constitutional and ordinary laws. It is clear that the doctrine does not suffer from the jurisprudential imbalances to which the decision of *Golaknath* fell a prey.

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68 In the U.S. the question relating to validity of constitutional amendments was considered as political in nature. See, Richard B. Bernstein with Jerome Agel, *Amending America* (1993), pp. 255-256.

69 *Golaknath v. State of Punjab* A.I.R 1967 S.C 1463. In this case the Supreme Court invalidated a constitutional amendment on the ground that the concept “law” under Article 13(2) encompassed constitutional amendments also and therefore fundamental rights could not be abridged even by constitutional amendments.
Yet another remarkable aspect of creativity of the decision lies in the wisdom of the Court in not keeping the doctrine a closed concept. In *Kesavananda*, the Judges illustrated the concept with certain examples. The examples only illustrated the contents of the concept and hence were not exhaustive. The doctrine, in other words is a fine example of legal category of indeterminate reference. By the enunciation of the doctrine, the Court opened up ample scope for leeways of choices, so that in future the concept could be given added colour and content according to the requirements of the time.

Moreover, though the doctrine limited the power of Parliament to amend the Constitution, the Court did not close all avenues for substantially altering or repealing the basic document. There is at least one mode of thoroughly revising the Constitution without violating the parameters of the doctrine as evolved in *Kesavananda*. It does not prohibit repeal or revision of the Constitution in any manner including through referendum by the people who are the real sovereign. In other words, the doctrine left the power of the people to amend the Constitution untouched and it limited only the power of the delegate - the Parliament. The doctrine is intended to operate only as a shield against the arbitrariness of Parliament and not against the interests of the people. Thus, viewed from any angle, one finds the decision of *Kesavanda* is replete with creativity of the judiciary. As Baxi has aptly observed, "I heralded *Kesavanda* by saying that

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70 For the concept of legal category of indeterminate reference see Julius Stone, *Legal System and Lawyers' Reasonings* (1968), p.263 et seq.

71 *Supra*, n. 44. at p. 66. See also Upendra Baxi, "The Constitutional Quicksands of Kesavananda Bharathi and the Twenty-fifth Amendment," (1974) 1 S.C.C. 45.
the judgement from now is the Constitution of India, no matter what the
Government Press puts out a document called ‘Constitution of India’.

(b) Raison d’être of Basic Structure

Innovative in many respects, the decision of Kesavananda has been
subjected to strong criticisms. Introduction of the doctrine has been objected as
amounting to assertion of superiority of judicial power in the arena of the
constitution. It has been condemned as a judicial attempt to limit constituent
power of Parliament. Such criticisms are based on some crucial questions. Is the
Supreme Court justified in reading implied limitations into the Constitution? Is the
doctrine of basic structure jurisprudentially correct? Is the Court right in
subjecting the power of Parliament to amend the Constitution to judicial review?

For a meaningful examination of these questions, a study of the meaning
of the expression Constitution and its place and function in a legal order
becomes necessary. A legal order may be seen as a hierarchy of norms. Each
norm looks up for its validity to the higher general norm. The higher the norm,
more general it would be. The basic norm of the legal system which gives validity
to the other norms cannot therefore be a purely legal one. Constitution forms the
highest norm in the level of legal order. But the term ‘Constitution’ has

72 “The function of a constitution is the grounding of validity.” Kelsen, “The Functions
385.
73 Supra, n. 4 at p.120.
different connotations and covers both material and formal constitutions. A material constitution is different from a formal one. The material constitution is the legal basis of the legal order.\(^75\) It consists of the rules for creation of the general legal norm itself. It is because of the material constitution that the Constitution emerges in its formal shape.\(^76\) A formal constitution is the solemn document, a set of legal norms, created by the material constitution changeable only under special prescriptions.\(^77\) It represents the regularity matters.\(^78\) The material constitution is the highest level of national law\(^79\) and formal constitution is the result of creation, enactment amendment and annulment in accordance with the material constitution. Amendment or abolition of the contents of the formal constitution serves to stabilise the material constitution.\(^80\) This implies that amendment, alteration or change in the formal constitution is to give effective expressions to the material constitution that lies closest to the basic norm. It is not difficult to understand that the doctrine of basic structure was an attempt of the Court to make the Constitution of India—the formal constitution—in tune with the material constitution that gave shape to it.

Validity of a constitution depends upon its conformity with a historically earlier constitution, which provided the basic norm of the legal order. The question of validity of a constitutional norm therefore depends upon its

\(^{75}\) *Id* at p. 222.

\(^{76}\) Kelsen, *supra*, n. 4 at p. 116.

\(^{77}\) *Id* at p. 124.

\(^{78}\) Kelsen, *supra*, n. 5 at p. 222.

\(^{79}\) Kelsen, *supra*, n. 4 at p. 124.

\(^{80}\) Kelsen, *supra*, n. 5 at p. 222.
conformity with the basic norm, which is the "constitution in the transcendentallogical sense as distinct from the constitution in the positive legal sense". If the Constitution is amended the amended form also forms part of the Constitution. Hence, just like the enactment of the formal Constitution, amendments also should conform to the earlier constitutions. It should satisfy the general norms of the constitution as well as the basic norm. Does not an amendment of the formal constitution counter to the historically earlier constitution or the material constitution lay down a bad norm? The answer seems to be in the affirmative. For, amendment also is a product of human will. The validity of amendment of the formal constitution has to be tested and the scope of the power to amend determined with reference to the basic norm. It is in this context that introduction of the concept of basic structure becomes highly relevant.

It is clear that there is a surprising semblance between the concept of basic structure of the Constitution as projected by the Supreme Court and the concept of the basic norm of the legal order as envisaged by Kelsen. Basic structure is considered by the Supreme Court as immutable while Kelsen conferred such a status to the basic norm of the legal order which but is a natural reality laying down the norms of the legal order. The basic norm is considered by Kelsen as not a product of free invention. The expressions 'basic structure', 'basic feature', 'the essential features' or 'the principle' of the constitution stand in close relation

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82 See, Kelsen, "The Function of the Constitution" quoted in Lloyd, op. cit at p.382. He observes, "The basic norm is thus not a product of free invention. It refers to particular facts existing in natural reality, to an actually laid down and effective constitution and to
with the "Constitution in the transcendental logical sense". The view of the Supreme Court in Kesavananda that the power to amend the Constitution under Article 368 does not envisage alteration of the basic structure naturally emanates from the reasoning that an amendment has to be in conformity with the basic norm. Illustrations of the doctrine of basic structure also establish that the 'basic structure' forms the basic norm, the highest in the hierarchy of norms. Validity of the provisions in the Constitution, which contain individual norms, depend on their conformity with the general norms. Amendment of the constitutional provisions being alteration of individual norms contained in the Constitution, should be in conformity with the general norms. It consequently implies that the power to amend the constitution cannot be exercised in such a manner as to affect the general norms. It is clear from the holding of the majority in Kesavananda that though Parliament could amend each and every provision of the Constitution, they could not be altered in such a fashion as to affect the fundamentals from which they emerge. Such reasoning reveals that there is nothing wrong in subjecting the power of Parliament to amend the Constitution to certain implied limitations. A similar restriction on the power of Parliament, which is a sovereign, to alter the norms of English legal order can be found in the celebrated words of Edward Coke,

"... it appears in our books that in many cases the common law will control Acts of Parliament and sometimes adjust them to be utterly

the norm-creating and norm-applying facts in fact established in conformity with the constitution"

83 "The validity of the lower, individual norms is grounded by the validity of the higher general norms. And the Judge, in fact, so grounds his judgements that it conforms to a valid general legal norm that authorizes him." See, Kelsen, supra, n. 72.
void: for when an Act of Parliament is against common right or reason or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void.34

The doctrine of basic structure can therefore be justified as an attempt of the Court to identify the permanent elements of the constitution and the legal system and to distinguish them from the impermanent ones. The doctrine was an innovation by the Court to limit the power of Parliament to alteration of the impermanent elements of the legal system. The holding is certainly a creative one in the sense that it avoids total amendment of the Constitution, which is as dangerous as its total non-amendment. The former may lead to uncertainty and incoherence in the legal system, while the latter may prepare the ground for a revolution. In short, the doctrine can be justified as an effective check on the possibility of alteration of the general norms contained in the Constitution by Parliament.

The doctrine gets justification on another ground also. There is a strong view that law is the product of “internal, silently-operating forces”85 and not exclusively the product of human will. Law, a child of national conviction86 develops as a response to the impersonal powers to be found in the peoples’ national spirit, the volkgeist, which is a “unique, ultimate and often a mystical reality”.87 Law, “like language, is a product not often arbitrary and deliberate will but of a slow, gradual and organic growth.”88 Like

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84 Bonham’s Case, (1610) 8 Co. Rep. 114 at p. 118
86 Lloyd, op.cit at p. 869.
87 Id at p. 868
88 Bodenheimer op. cit at p. 72.
civilisation, law is the emanation of unconscious, anonymous, gradual and irrational forces in the individual life of a particular nation. Such a view implies that deliberate legislation should obey the forces operating above human forces in a State. Enactment of a Constitution and its amendment are no exceptions to this process.

Enactment of the Constitution of India was the culmination of certain historical incidents and forces that took place prior to independence. It is the outcome of a variety of factors like struggle for freedom, national aspirations, national objectives and the complex structure of the nation due to different religions and languages. In other words in the Constitution there are some elements formed due to forces other than human will. Such elements are not therefore amenable to legislative will, but legislation will be attuned to them. The concept of basic structure can be considered as a product of such constitution-making forces. Viewing from such an angle it can be seen that alteration of the Constitution will be acceptable only to the extent it does not affect the elements brought out by such forces. The power to amend the Constitution therefore cannot include within it the power to alter such factors.

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90 Chief Justice Sikri observes, “…the background of the struggle for freedom, various national aspirations outlined during the struggle, the national objectives as recited in the Objective Resolution dated January 22 1947 and the Preamble, the complex structure of the Indian Nation consisting as it does of various peoples with different religions and languages and in different stages of economic stages of economic development.” supra, n. 30 at pp. 1541-1542.
Further, it is clear from the Constitution that Parliament wields both legislative and constituent powers. There is a view that a body, which wields constituent powers, acts in that capacity as a delegate or trustee of the people. The ultimate and absolute power is vested in the people. This may be a development of the theory that the political sovereign rests with the people and that Parliament is only a representative of the people. Such a proposition gets justification from the fact that constitutions which came into existence after the Second World War declare that they are given by the people unto themselves. This view gets further support from the provisions in some Constitutions that powers not explicitly conferred to any authority would be reserved to people and

91 The Constitution of India Article 245 (1) reads: "Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, ...

92 Id. Articles 4 and 368.

93 Edward S. Corwin, The Constitution and What it Means Today (1958), p. 177. He observes, "The amending, like all other powers is in form a delegated and hence a limited power, although this does not imply necessarily that the Supreme Court is vested with the authority to determine its limits." (Emphasis supplied).

94 See, for example, A.V. Dicey, Introduction to the Study of the Law of the Constitution (1962), p. 73. "That body is 'political' sovereign or supreme in a state what will of which is ultimately obeyed by the citizens of the State. In this sense of the word the electors of Great Britain may said to be, together with the Crown and the Lords, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate, and certainly of the electorate in combination with the Lords and the Crown, is sure ultimately to prevail on all subjects to be determined by the British government. The matter indeed may be carried a little further, and we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country."

95 K.C. Wheare, Modern Constitutions (1966), p. 55. He observes at another place thus, "Most modern Constitutions have followed the American model and the legal and political theory that lies behind it. The people, or a constituent authority acting on their behalf, has authority to enact a Constitution." (Emphasis added) (at pp. 54-55).

96 See, for instance, the Constitution of the United States, Amendment X. It reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."
from the provisions for referendum or initiation for their amendments in some others. In such a context, a pertinent question arises. Can an authority with delegated power exercise its powers in an absolute and arbitrary manner?

Scanning through this aspect some of the Judges who constituted majority in the Kesavananda held that since Parliament was only a delegate of the people, it should exercise the power to amend the Constitution only in a limited way. They read the implied limitations into the Constitution since it did not contain any such limitations and the basic structure was ultimately justified by them on the theory of delegation. It is an accepted principle in the legislative sphere that the legislature cannot delegate the essential legislative powers. They are to be exercised by the legislature itself. This principle can be accepted in the constitutional matters with much advantage. It can be inferred that people being the ultimate sovereign, they cannot confer an unlimited power on Parliament enabling it to abrogate the Constitution or to amend its basic aspects without their consent. Just as the essential legislative function cannot be delegated, the essential constituent power cannot be parted with. In other words, the power to amend the Constitution is to be understood as a scheme for conveniently altering the constitutional provisions without destroying its identity. Therefore, Article 368 cannot be construed as a provision conferring a representative body with a licence to alter the existing fundamental constitutional norm in any manner and fashion it likes.

97 See, for example, The Federal Constitution of the Swiss Federation, 1874, Article 120.
98 Id. Article 121.
99 Supra, n. 30 per Sikri C.J. (at p. 377); Shelat and Gover JJ. (at pp. 432-433) and Hegde and Mukharjea JJ. (at p. 481).
100 Re Article 143 of the Constitution of India. A I R. 1951 S C. 332.
However, the delegation theory has been criticized on various grounds. The main objection is based on the holdings of the Supreme Court of the U.S. in *Hawke v. Smith*, *Rhode Island v. Palmer* and *U.S. v. Sprague*. These cases do not support the view that the constituent body is not the delegate of the people. In *Hawk’s Case*, what the Court held was that in view of the provision in Article V of the Constitution, Congress was at liberty to decide whether an amendment was to be carried out by ratification or by a convention. But the Court did not negate the premise that the powers derived from the Constitution were derived from the people. The question that arose for consideration in the *Palmer’s Case* was whether the eighteenth amendment to the Constitution was effected in excess of the constituent power conferred by Article 5 of the Constitution. In *Sprague’s Case*, the Court held specifically that the Congress was the delegate of the people.

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102 253 U.S. 231 (1919): 64 L. Ed. 871. The plaintiff prayed for injunction to enjoin the Secretary of the State of Ohio from spending money to prepare ballot papers for reference to ratify the questions in relation to the enactment of the XVIII Amendment Act. The question raised in this case is whether the provisions in the Ohio Constitution extending ratification of the XVIII Amendment Act of the U.S. Constitution by reference to people was in conformity with Article V.

103 253 U.S. 350 (1919): 64 L. Ed. 946. The Constitution of the U.S. was amended by the XVIII Amendment Act whereby manufacture, sale or trade of intoxicating liquor within and import into or export from, the U.S. for the beverage purposes was prohibited. The power of Congress to amend the Constitution was challenged on the ground that it did not have the power to deal with matters relating to liquor. The Court rejected the argument on the ground that it fell within Article V of the Constitution.

104 282 U.S. 716 (1930): 75 L. Ed. 640. District court quashed an indictment charging the petitioners with unlawful transportation and possession of intoxicating liquor in violation of the National Prohibition Act. The court held that the XVIII amendment act by whose authority the statute was enacted has not been properly ratified to become part of the Constitution. Appeal against the order was filed in the Supreme Court. The Court held that it is for the Congress, the delegate of the people, to determine the mode of referendum.
in exercising the constituent power. Therefore, it may not be proper to reject the
theory of delegation in matters of constituent power on the basis of the cases
decided by the Supreme Court of the United States. A further objection to the
delegation theory is based on the view prevalent in England that Parliament is a
sovereign body and not a delegate of the people and that therefore it was not
subject to any limitations whatsoever. Unlike in India, in England, Parliament
derives authority not from a Constitution given by the people unto themselves. It,
on the other hand, is the creator of every law. Therefore, it may not be wise to
explain the constitutional principles of India, a nation with a limited Constitution
on the basis of the English law.

A construction that Parliament wields absolute power to amend the
Constitution can be grounded only on the positivist imperative theory of law which emphasizes that validity of a law has to be determined with reference to
 procedural regulations and not on the contents of law. On that basis alone can it be

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105 Id. at p. 733. The Court held, "Until and unless that Article be changed by
amendment, Congress must function as the delegated agent of people in the choice of the
method of ratification."

106 In Re Article 143. Constitution of India, A I R, 1951 S C 332 Justice Fazal Ali took
such a view on the basis of the English position that legislature was not the agent of the
people (at p. 349).

107 For a discussion of parliamentary sovereignty, See, Ivor Jennings, The Law and the
Constitution (1959), pp 137 et seq.

108 Even in England there is a contrary view which holds that authority of Parliament in
Britain is based on the consent of the people. "The legislative supremacy of the British
Parliament, as well as being a legal concept, is also the result of political history and is
ultimately based on fact, that is, general recognition by the people and the courts. It is
therefore at the same time a legal and political principle." O. Hood Phillips,

109 The Classical Imperative theory propounds that law is the command of the sovereign
and it has no correlation with morality. See for a discussion Bodenheimer, op cit. at pp.
91-99.
argued that validity and legality of constitutional amendments have to be decided solely on the basis of satisfaction of the procedural requirements expressly provided in the Constitution and not on the impact of such alterations. Such an approach has to be branded as one of legal formalism and is not acceptable.

The relevance and necessity of the doctrine of basic structure could be assessed and understood better if we contemplate what may happen in its absence. Constitution of India has accepted the theory of separation of powers though not in the traditional legal style. One of the concomitants of the theory of separation of powers is that the organs of government can exercise only a limited power and none of the organs of the government can act arbitrarily. Such an arrangement is envisaged by the makers of the Constitution only to check the arbitrary exercise of power by the legislature or the executive. If the power to alter the Constitution is not restricted, Parliament would be able to amend the Constitution in any manner it likes. Parliament would then be able to constitutionalise any law enacted, by altering the provisions of the Constitution. In other words, exercising the power under Article 368, Parliament would able to tide over any of the limitations imposed upon it in the capacity of legislature by the Constitution. Parliament is constituted on the basis of political parties. The views of the members of parliament are guided by the policies of those parties to which they subscribe. Hence decisions in Parliament including amendments of the Constitution depend upon the strength of those parties. A political party, which wields a two-thirds majority in the house, will not find it difficult to amend

the Constitution. In other words in such a context Parliament would play the role of an autocrat. It would be able to politicize the Constitution. It could for instance, “change the democratic government into dictatorship or hereditary monarchy.” A political party with a two-thirds majority for a few years could so amend the constitution as to debar any other party from functioning. Through constitutional amendments it would be possible to establish totalitarianism, to enslave the people and “after having effected these purposes make the Constitution unamendable or extremely rigid.” In short, if the power under Article 368 is treated as one of unlimited nature and content, limitations imposed on Parliament as a creature of the Constitution would be overcome by it. The very separation of powers and the consequent balance of powers within the constitutional framework could be upset and Parliament could emerge as the sole power holder if a mad Parliament decided to utilise the powers buried in Article 368. These considerations establish beyond doubt that the Supreme Court was...
not wrong in reading the implied limitations into the concept of power of Parliament to amend it and in incorporating the doctrine of basic structure.

A question arises here. Why did not the doctrine raise its head earlier when the question of amendment was mooted before the Supreme Court? Why did the Court adopt an approach of self-restraint on those occasions? Analysis of the earlier cases would reveal that many factors contributed simultaneously to the non-emergence of the doctrine earlier. Primarily, the earlier cases arose and decided at a time when India had just won independence. Indian democracy was at a very nascent stage. Political set up in India was very unstable. Legislatures were invoking widest possible powers for the political and economic stability of the nation and for the well being of the people. Therefore in the early decades of independence the Apex Court was not inclined to interfere with the progressive legislative measures unless it was absolutely necessary. Considering the fact that the nation had to fight fissiparous tendencies, the Supreme Court attuning itself to the social and political circumstances then prevailing in India rendered very restrictive constructions to constitutional provisions as to enable the State to check those fissiparous tendencies.


116 See for instance Sankari Prasad v. Union of India, A.I.R 1951 S.C 458. See also A.K.Gopalan, supra, n.115.
The earlier cases relating to amendments to the Constitution are to be analysed in this background. Though questions relating to amendments to the Constitution came up before the Court in those cases the nature and issues involved were somewhat different from those in Kesavananda. Sankari Prasad v. Union of India was the first case where the issue of the amendment of the Constitution was discussed. The only serious question raised in that case was whether 'amendment' under Article 368 could be considered as 'law' for the purpose of Article 13(2). If constitutional amendments come under the concept of law, Parliament would not be competent to amend the Constitution in derogation of fundamental rights. Therefore answering that question was necessary to determine whether fundamental rights could be abridged by amending the Constitution. Other issues raised in that case were those relating to the formalities and procedure for amending the Constitution. Later in Sajjan Singh v. State of Rajasthan the main questions were whether Parliament under Article 368 could amend fundamental rights and if it could what the procedure for it was. The question of amendability of fundamental rights was again raised.

117 A.I.R 1951 S.C 458. Certain States enacted agrarian reforms legislation. They were challenged as violative of fundamental rights by zamindars. To end such litigations, Parliament enacted Constitution (First Amendment) Act, 1951 incorporating Articles 31A and 31B to the Constitution. The amendment is challenged under Article 32 as unconstitutional.

118 Article 13 (2) reads "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, be void." (Emphasis supplied)

119 They inter alia included the question whether the power to amend the Constitution was conferred on two Houses of Parliament and whether Constitution provides for amending the amendment bill after its introduction in the House. supra, n. 117 at p. 460.

120 A.I.R 1965 S.C 845. The Constitution was amended by the first Constitution Amendment) Act 1951. By it some social welfare legislation were protected. Similarly some other legislation were protected by the XVII amendment to the Constitution in 1964. These legislation led to the cases of Sankari Prasad and Sajjan Singh on the ground that they violated the fundamental rights of the petitioner.
before the Court in *Golaknath v. State of Punjab*. In other words, the question in those cases centered mainly on the amendability of fundamental rights in exercise of the power conferred by Article 368. The general question of Parliament's power to amend the Constitution or any part of it other than fundamental rights did not arise for consideration of the Court.

In both *Sanakari Prasad* and *Sajjan Singh* the Court had the same view. In those cases it was held that in exercise of Article 368 Parliament could amend the fundamental rights. The Court reasoned that the makers of the Constitution did not want to keep the fundamental rights beyond the scope of amendment. Moreover, in both those cases the Court held that a constitutional amendment under Article 368 was not law as defined in Article 13(2) and therefore validity of a constitutional amendment under Article 13(2) could not be examined by the judiciary.

However in *Golaknath* a constitutional bench of the Court consisting of 11 judges considered the issue afresh. Examining the issue from the general point of amending the Constitution including the fundamental rights, the majority held that the power to amend the Constitution was contained in Entry 98 of the VII Schedule of the Constitution and therefore amendments to the Constitution were in the nature of legislative procedure. The Court therefore concluded that constitutional amendments carry with them the characteristics of law and held that

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121 A.I.R. 1967 S.C. 1643. Properties of the petitioners in different States were acquired under the provisions of different land laws. Such legislation were put in the IX Schedule by the Constitution (Seventeenth Amendment) Act, 1964 bringing them beyond the pale of judicial review. Three writ petitions were filed challenging the constitutional validity of the Amendment.
in view of Article 13(2) Parliament acting under Article 368, was incompetent to abridge or amend fundamental rights enshrined in the Constitution.\textsuperscript{122}

Thus for the first time the Court read into the Constitution, in the context of Article 368 read with Article 13(2) some limitations on the power of Parliament to amend the Constitution. To tide over the effect of the decision in \textit{Golaknath}, Parliament amended the Constitution\textsuperscript{123} Provisions were incorporated\textsuperscript{124} in the Constitution to the effect that constitutional amendments could not be treated as law for the purpose of article 13 (2) so as to keep constitutional amendments beyond the pale of judicial review.\textsuperscript{125} That amendment was in fact a turn in the history of Indian constitutional jurisprudence. Obviously, unlike the past amendments, the twenty-fourth amendment was enacted solely for the purpose of assuring that constitutional amendments would not be nullified on the ground that they violated Part III of the Constitution and to assert supremacy of the constituent power. The previous amendments to the Constitution on the other hand were exclusively for the purpose of public welfare. This amendment was a reply to \textit{Golaknath} that constitutional amendments are also amenable to judicial review. It can be considered as a signal of displeasure of Parliament.

\textsuperscript{122} \textit{Id. at p. 1669.}

\textsuperscript{123} The Constitution (Twenty fourth Amendment)Act 1971 was enacted for the purpose. By the Act two important changes were brought to effect. By section 2 of the amendment, clause 4 to Article 13 was incorporated. By section 3 of the Act, clause 1, 2 and 3 were incorporated to Article 368.

\textsuperscript{124} Articles 13(4) and Article 368(3) introduced by Constitution (Twenty-fourth Amendment) Act, 1971.

\textsuperscript{125} Article 13(4) reads: "Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

Article 368(3) reads: "Nothing in article 13 shall apply to any amendment made under this article."
against the judicial restriction of its power to amend the Constitution. It is a declaration that unlike in the legislative sphere, in exercise of constituent power Parliament could wield unlimited power. The peculiarity of the amendment is that unlike the past amendments, it was an assertion of the supremacy of the Parliament in matters of amendments to the Constitution. This amendment opened up an era of tussle for supremacy between Parliament and the judiciary. It was in such a context that the Supreme Court in Kesavananda held that though not law, constitutional amendments were amenable to judicial review, which in its turn led to the forty-second amendment of the Constitution.126

Thus the amendment of the Constitution by the twenty-fourth amendment altered the nature and content of the issues involved in matters of amendments to the Constitution. It raised the issue from one of amendability of the fundamental rights to one of nature, scope and extent of the amending power of the Parliament. Moreover, the question whether constitutional amendments could be judicially reviewed also was one of serious consideration before the Court. Small wonder that the Court in Kesavananda considered all these issues. The main issue in that case was whether the power of Parliament to amend the Constitution was limited in nature and not whether it could amend fundamental rights. It is in such a context that the Court expounded and incorporated the doctrine of basic structure to hold that the power of the Parliament to amend the Constitution was not unlimited. The doctrine was introduced by the Court as an objective criterion for

126 The constitutionality of the forty-second amendment act was challenged on the basis of the doctrine of basic structure in Minerva Mills v. Union of India, A.I.R 1980S.C. 1789. See, infra, chapter VI n. 68.
determining the validity of constitutional amendments. In other words, the
doctrine was necessary to prevent the arbitrary exercise of power of Parliament to
amend the Constitution and preserve the nature and identity of the Constitution.
In the earlier cases like Sankari Prasad, Sajjan Singh, and Golak Nath the Court
was able to decide the limited issue relating to amendment of fundamental rights
without the help of any such doctrine. But the issues in Kesavananda being
wider, necessitated introduction of the doctrine to base the judicial inclusion of
limited nature of the powers to amend the Constitution.

However, Kesavananda cannot claim full credit for the doctrine. It cannot
be said that the doctrine was originated in Kesavananda. It is true that the
doctrine got the content and present form in that case. But the idea that the Indian
Constitution has some aspects and features beyond the power of Parliament to
amend was first projected by Justice Mudholkar in his concurring judgement in
the Sajjan Singh's Case. However, one finds some fundamental differences
between the doctrine as developed in Kesavananda and the observations of
Justice Mudholkar. To identify such unamendable features Justice Mudholkar

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127 Though the wider question of the power to amend the Constitution was raised in
Golaknath the Court did not make use of the opportunity to examine the scope and extent
of the power. The petitioner raised the argument that the amendment "has a positive and
negative content and that in exercise of the power of amendment Parliament cannot
destroy the structure of the Constitution, but it can only modify the provisions thereof
within the framework of the original instrument for its better effectuation. If the
fundamentals would be amenable to the ordinary process of amendment with a special
majority... the sovereign democratic republic can be converted into a totalitarian system
of Government. There is considerable force in this argument... But we are relieved of
the necessity to express our opinion on this all important question, as, so far as the
fundamental rights are concerned, the question can be answered on a narrower basis".
Supra, n. 121 at p. 1664 (Emphasis applied).

128 He said, the Constitution "formulated a solemn and dignified preamble which appears
to be an epitome of the Constitution. Can it not be said that these are indicia of the
used the expression "basic features." Moreover he observed that such features remain unchangeable only in so far as the Preamble of the Constitution was left unamended. The Preamble according to him was an "epitome of the basic features of the Constitution." It is clear that the doctrine was given birth to by Justice Mudholkar. The concept of 'basic features', the mother of the doctrine of basic structure was not, however, elaborately dealt with, discussed or developed by him. The fundamental difference between the doctrine of basic features evolved by Justice Mudholkar and that of the basic structure evolved in Kesavananda lies in the fact that whereas Justice Mudholkar expounded the view that inalterability of the Constitution would exist only in so far as the Preamble- the epitome of the basic features-was not amended. The Kesavananda doctrine of basic structure proclaims that Parliament can under no circumstance amend the basic structure of the Constitution. It is clear that the doctrine became necessary in Kesavananda because Parliament asserted to invoke its power to amend the Constitution in any manner without being struck down by the judiciary. The doctrine is a novel solution to a novel issue.

What is the impact of Kesavananda on the earlier cases? Are they overruled? Though Kesavananda dealt with novel issues relating to the power of Parliament to amend the Constitution, the Court had to reconsider the questions raised in the previous cases also. The most important question raised in those cases was whether Parliament could amend the fundamental rights. To decide intention of the Constituent Assembly to give a permanency to the basic features of the Constitution. supra, n. 120 at p.864 (Emphasis added)
that, it is to be determined whether fundamental rights formed part of the basic structure of the Constitution. The majority held that it did not. In other words the Court held the fundamental rights were amenable to the amendment jurisdiction of Parliament under Article 368. Such holding in effect is an approval and acceptance of the holding in Sankari Prasad and Sajjan Singh that fundamental rights could be amended. It therefore negatives the holding in Golaknath that fundamental rights could not be amended. However the holding of the Court that the power of Parliament to amend the Constitution in accordance with Article is limited amounts to overruling of Sankari Prasad and Sajjan Singh. For, in those cases Judges proceeded on a presumption that the power of Parliament to amend the Constitution was unlimited. In this respect Kesavananda can be considered as reassertion of Golaknath. In short the decision of Kesavananda partly overrules all the previous decisions reducing them to academic and historical importance. After Kesavananda, constitutionality of an amendment solely depends upon the question whether it alters the basic structure of the Constitution and on nothing else.

129 There is a view that no constituent bodies in the world exercised the power to amend the respective Constitutions but for the public weal. See Seervai, *Constitutional Law of India* (1984) at p. 2691.

130 Of the Judges who constituted majority, viz., Sikri C.J., Shelat, Grover, Hegde, Mukharjee, Reddy and Khanna JJ., only Khanna J. opined that fundamental rights did not constitute an ingredient of basic structure (Supra, n 30 at pp. 764-765). The others held that fundamental rights also formed part of the basic structure, (Supra, nn. 54,55,56 and 58).

(c) An Appraisal of the Doctrine

The doctrine of basic structure has been acclaimed by a few and scathingly criticised by others. The criticisms are based on several grounds. The doctrine is condemned on the ground that it is an assertion of the supremacy of the judiciary over the constituent powers of Parliament. The doctrine is viewed as objectionable also on the ground that the concept of basic structure was a vague one disabling Parliament at every instance of amendment from knowing whether it affected the basic structure of the Constitution. It is also alleged that the doctrine would place embargoes on the attempt of Parliament to amend the Constitution in the public interest for implementing socio-economic reforms in furtherance of Directive Principles of State Policy. There are views that the doctrine is the outcome of partisan and non-neutral approach of the judiciary in interpreting the Constitution. Another criticism is that the doctrine

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134 S.P Sathe, "Limitations on Constitutional Amendment: "Basic Structure" Principle Re-examined" in Rajeev Dhavan and Alice Jacob, op. cit. at p. 179.


137 Id. at p. 3159, 3161.

is based on wrong precedents and that it pushed judges into politics. In addition to these specific criticism there were charges that it lacked logical consistency and philosophical background. Small wonder that amidst such varied criticisms, even the Supreme Court doubted the conceptual accuracy and logical precision as well as feasibility of the doctrine of basic structure in the Indian constitutional panorama. Therefore at the earliest opportunity, the Court made an attempt to review the doctrine. Such a decision was taken at the time of hearing *Indira Gandhi v. Raj Narayan* in which the doctrine was sought to be invoked. The attempt of the Court in reviewing the doctrine was criticised as "a truly extraordinary occurrence replete with puzzles and improprieties." The Court later dropped the steps to review the doctrine.

The juristic condemnation of the doctrine and the lack of self-confidence of the Court are not unexpected. For, the doctrine was unheard of anywhere in the world before, and the results of the doctrine in the constitutional and the legal parlance were yet to be known. Implications of the doctrine were not fully exposed. What was discussed by courts abroad was only the implied limitation on the power of the constituent bodies to amend the Constitution. They did not deal with an objective criterion like the doctrine of basic structure to determine such

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140 Rajeev Dhavan, "The Basic Structure Doctrine- A Footnote Comment" in Rajeev Dhavan and Alice Jacob op. cit. 160 at pp. 166,167 and 178.
142 See for a narration, Upendra Baxi, *The Supreme Court and Politics*, (1980) pp.70-76
144 *ibid* p. 70.
limitations. Moreover what the doctrine establishes is that it is the Constitution and not the Court or the Parliament that is supreme. The holding can therefore be treated as "...a remarkable feet of judicial activism unparalleled in the history of world constitutional adjudication". The doctrine represents the features of the Constitution, which give life to certainty, uniformity and continuity to the legal system which therefore are beyond the scope of amendment without the sanction of the people. Absence of a provision in the Constitution for reference to people for fundamental alteration of Constitution also would justify introduction of a limitation on the power of amendment, for, "if you do not apply brakes, the engine of amending power would soon overrun the Constitution".

Further, the decision cannot be disapproved on the ground that the principle of implied limitations upon which doctrine is based was rejected by the Supreme Court of United States and Courts of Ireland. There is a fundamental difference between the constitutions of those countries and that of India. The Constitutions of those States contain some explicit restrictions on the power of the respective constituent bodies to amend the Constitution. Presence of such limitations excludes any kind of implied limitations on the amendment power. The Constitution of India, on the other hand, does not contain explicit substantive restrictions on the power of the amending body. Such a situation calls for

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145 Upendra Baxi "Some Reflections on the Nature of Constituent Power in Rajeev Dhavan and Alice Jacob op. cit at p. 123.
147 Id at p. 68.
149 Expressio Unius Exclusio Alterius.
incorporation of some implied limitations. Moreover, in the federal countries like U.S., Australia and Canada, the fundamental features of the respective Constitutions have not been altered in exercise of the power to amend.\footnote{Seervai, op. cit. at p. 2691.} Amendment of the U.S. Constitution on an important matter like abolition of slavery was only the consequence of the civil war.\footnote{Ibid. He observed, "However, the problem of slavery was solved not by the exercise of the amending power but by victory in a civil war; the 13th, the 14th and the 15th amendments in so far as they relate to slavery only confirmed what the war had accomplished in fact."} Therefore there is no meaning in rejecting the doctrine of basic structure in India on the ground that it was not acceptable to foreign countries.

However, it is to be admitted that some of the criticisms levelled against the decision are not without some merit. Though full of creativity, it cannot be said that the decision in Kesavananda is without defects. While introducing the principle of implied limitations and developing the doctrine of basic structure, the Court referred to some foreign decisions and relied upon others. They include decisions of the Privy Council, Supreme Court of the United States, High Court of Australia and the Supreme Court of Ireland. However, those decisions were either irrelevant or do not support the holding of the Court in Kesavananda. Thus, Bribery Commissioner v. Pedrick Ranasinghe,\footnote{[1965] A C 172.} and Liyang v. The Queen\footnote{[1967] 1 A C 259.} referred to by the Judges\footnote{See for instance, Kesavananda, supra, n. 30 at pp. 441-444 (per Shelat and Grover JJ.).} were not similar to those in Kesavananda. In
The issue was the power of the legislature to enact laws contrary to the Constitution of Ceylon. The question in Liyanage on the other hand, related to exercise of judicial power by the Ceylon Parliament. Some of the decisions rendered by the High Court of Australia referred by the Judges also deal with constitutional validity of certain statutes. The observation of Chief Justice Kennedy in the decision, Jeremiah Ryan v. Captain Michael Lenons of the Irish Supreme Court, heavily relied upon by the Judges for identifying the implied limitations was in fact the dissenting view. Moreover, none of the cases deals with the power of the constituent body to amend the respective constitutions. That is so, because, in any of the above countries, no amendments altering the basic structure were effected.

In this case the respondents were punished in accordance with the Bribery Act 1954 as amended in 1958. Some of the provisions of the act where in conflict with the Constitution of Ceylon. It as provided in the Act that in case of conflict with the Constitution, those provision should be considered as amendments to it. But the Constitution provided for a procedure for its own amendment. However the impugned enactment was not in accordance with the procedure. Hence the petition for invalidating the conviction.

The Ceylon Parliament passed Criminal Laws (Spl. Provision) Act 1962 to try accused persons who participated in an abortive coup. Fresh legislation was enacted as the existing legislation was held unconstitutional. The Privy Council struck down that law also on the ground that Parliament usurped the judicial functions, which by virtue of the Constitution Parliament was not competent to hold.


See, for instance, Kesavananda, supra, n. 30 at pp. 349-353. (per Sikri C.J.)

Melbourne Corporation dealt with the question of constitutional validity of section 48 of the Banking Act 1945 which prohibits a bank from conducting any banking business for a State without the permission of the Commonwealth Treasury. Victoria, on the other hand deals with the question of validity of the Pay-Roll Tax Act 1941 and the Pay-Roll Tax Assessment Act 1941.

1935 Irish Reports 170.
The criticism that the concept of basic structure is vague and that for deciding whether any amendment is violative of the basic structure will be known only when the issue is decided by the Court is true to a certain extent. *Raghupath Rao Ganpath Rao v. Union of India*[^161] is such an example. The question raised in that case was whether the expression ‘integral part of the Constitution’ used in *Madhava Rao Scindia v. Union of India*[^162] was synonymous with ‘basic structure’? In *Raghupath Rao*, the validity of the Constitution (twenty-sixth Amendment) Act, 1971[^163] by which the payment of Privy Purse to the erstwhile rulers of princely states was discontinued, was challenged on the ground that it destroyed the basic philosophy, personality, structure and feature of the Constitution. The Court held that the expression ‘integral part’ of the Constitution did not mean the concept of ‘essential feature’ of the Constitution because they are totally distinct and qualitatively different concepts. Each and every provision, concept and institution in the Constitution is an integral part of the Constitution, but that does not mean that all of them constitute its essential feature[^164].

[^161]: 1994 Supp. (1) S.C.C. 191. That consisted of two writ petitions challenging the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 *inter alia* on the ground that it violated the basic structure and essential features of the Constitution and hence outside the power of the Parliament to amend the Constitution.

[^162]: See, *Madhava Rao Scindia v. Union of India*, (1971) 1 S.C.C. 85. It was observed in that case that the institution of Rulerships is an integral part of the constitutional scheme. And “an order mere ‘de-recognising’ A Ruler without providing for continuation of the institution of Rulership which is an integral part of the constitutional scheme is, therefore, plainly illegal.”

[^163]: By the impugned amendment Act Parliament deleted Articles 291 and 362 and inserted Article 363-A and substituted a fresh clause (22) under Article 366. The cumulative effect of the above alterations was to terminate the privy purse privileges of the former Indian Rulers and to terminate expressly the recognition already granted to them under those two deleted Articles.

[^164]: The Court observed thus, “It is clear that the learned Judge used the words ‘integral part’ in their ordinary and connotation—not in any lexicographical sense. Ordinarily
Further, it is clear from the discussion of Kesavananda that what the Judges meant by the doctrine is the fundamental feature of the legal system. If so, not only a constitutional amendment but also enactment of statute and even action of the Executive can be assailed on the basis of the doctrine. However, in Kesavananda, the Court did not make use of the doctrine to test the constitutionality of the impugned statute. It is perhaps this approach that led to the decision in Indira Gandhi v. Raj Narain, that the doctrine of basic structure was not applicable for testing the validity of statutes.\(^{165}\)

However, such criticisms do not show that the doctrine of basic structure is defective. The defect lies not in the innovation and introduction of the doctrine, but lies in the failure in Kesavananda in reaching a consensus as to what its contents are and in properly and comprehensively exploring and developing the doctrine. In spite of these defects in the formulation of the doctrine, the Supreme Court deserves appreciation for its contribution in Kesavananda.

The doctrine of basic structure implies that Parliament cannot exercise its constituent power under the Constitution so as to destroy the identity of the Constitution. Does it mean that constitutionality of all amendments right from the

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\(^{165}\) For a discussion, see, infra, chapter, VII nn. 159-168 and the text thereof.
first one in 1951 is liable to be evaluated on the basis of the doctrine of basic structure enunciated in *Kesavananda* in 1973? This aspect came up for consideration before the Court in *Waman Rao v. Union of India*. The issue considered by the Court in that case was whether Articles 31A and 31B incorporated by the First Amendment Act and 31C incorporated by the twenty-fifth amendment act were violative of the concept of basic structure and hence unconstitutional. The Court held that Articles 31A and 31C were not violative of the basic structure. It was further held that the first amendment has made the constitutional goal of equal justice a living truth and hence it strengthened the basic structure. However, in determining the constitutionality of Article

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166 A.I.R. 1981 S.C. 271. That was a bunch of writ petitions filed challenging the validity of Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 amended by subsequent Acts. Originally the challenge was before the High Court of Maharashtra in writ petitions entitled *Vithalrao Udhaorao v. State of Maharashtra*, A.I.R 1977 Bom. 90 on the ground that the Act violated Part III rights. The challenge was repelled by the Court on the ground that the statute and the amendments were protected by being in the Ninth Schedule of the Constitution and also because of the suspension of the fundamental rights due to the operation of emergency. The Court held that Article 31B as incorporated by the first amendment to the Constitution supported the basic structure rather than destroyed it. Appeals against the decision were filed before the Supreme Court. They were also dismissed while the emergency was on operation. After the revocation of emergency, the Court agreed to review the decision of those cases also.

167 It was inserted into the Constitution by section 4 of the Constitution (First Amendment) Act 1951.

168 It was inserted into the Constitution by section 5 of the Constitution (First Amendment) Act 1951.

169 It was inserted into the Constitution by section 3 of the Constitution (Twenty-fifth) Amendment Act 1971.

170 *Id.* at pp. 285 and 291.

171 The Court held, “The First Amendment has thus made the constitutional ideal of equal justice a living truth. It is like a mirror that reflects the ideals of the Constitution; it is not the destroyer of its basic structure. The First Amendment is aimed at removing social and economic disparities in the agricultural sector. It may happen that while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities cannot damage or destroy the basic structure of the Constitution.” (*Id.* at p. 285).
the Court did not check up its validity on the basis of the doctrine of basic structure. Instead, the Court proceeded to examine the constitutionality of amendments incorporating of statutes into the Ninth Schedule and held that amendments before 24 April, 1973 would not be open to challenge on the ground that they violated the basic structure. Amendments to the Constitution and incorporation of laws in the Ninth Schedule subsequent to that date alone are liable to be judicially reviewed on the anvil of basic structure doctrine. The Court reached the conclusion that the doctrine had only a prospective operation on the ground that if amendments prior to the decision were also evaluated on the doctrine, it would upset the settled claims and titles of the people who acted on the then existing constitutional position.

The implication of the decision is very clear. The Court was trying to reduce the operation of the doctrine of basic structure to amendments subsequent to its introduction. Such a limitation is an innovation by the Court, which helped

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172 It was provided by this Article that constitutionality of the enactments incorporated in the Ninth Schedule of the Constitution were could not be checked up and if found violative of fundamental rights, cannot be struck down by the courts. In other words, the provision has restricted the scope of judicial review.

173 It was on that day that the Supreme Court decided Kesavananda Bharathi and incorporated the doctrine of basic structure.

174 The Court observed thus, “We propose to draw a line, treating the decision in Kesavananda Bharathi (AIR 1973 SC 1461) as the landmark. Several Acts were put in the Ninth Schedule prior to that decision on the supposition that the power of the Parliament to amend the Constitution was wide and untrammelled. The theory that the Parliament cannot exercise its amending power so as to damage or destroy the basic structure of the Constitution, was propounded and accepted for the first time in Kesavananda Bharathi. This is one reason for upholding the laws incorporated into the Ninth Schedule before 24 April, 1973, on which date the judgment in Kesavananda Bharathi was rendered. A large number of properties might have changed hands and several new titles must have come into existence on the faith and belief that the laws included in the Ninth Schedule were not open to challenge on the ground that they were violative of Articles 14, 19 and 31. We will not be justified in upsetting settled claims and
leaving the settled claims and titles arising from such legislation untouched. But it is doubtful whether what the Court has done is correct. It is the concept of basic structure that gives identity to the Constitution. Amendment of the Constitution affecting its basic structure amounts to alteration of its personality. Therefore, prospective application of the doctrine is likely to lead to certain undesirable results. The dimensions of the doctrine of basic structure are not finally settled. New ingredients are being introduced into the doctrine. In such a situation, if any pre-Kesavananda amendment was found to have damaged any feature identified as an ingredient of basic structure, the Court would not be able to strike it down in so far it relates to pre-Kesavananda period. It is doubtful whether such implications were taken into account by the Court when it held in *Waman Rao* that basic structure had only a prospective application.

In spite of such conceptual errors, the Supreme Court has no doubt indulged in a highly creative exercise in introducing of the doctrine of basic structure in *Kesavananda*. It is beyond doubt that by the doctrine the Court tried to protect and maintain the identity of the Indian Constitution acting as the guardian of the Constitution.

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175 For such a development and widening of the doctrine, see, *infra* chapter VII.

176 In *Marbury v. Madison*, (1803) 1 Cranch. 137. 2 L.Ed. 60 Chief Justice Marshall observed that the judiciary was to uphold and guard the Constitution (at pp.178-179).