CHAPTER IV

FUNDAMENTAL RIGHTS AND AMENDING PROCESS

The Fundamental Rights are Natural rights or moral rights which every human being because they are rational and moral every where and at all times, ought to possess. These are the primordial rights necessary for the development of human personality.

The fundamental rights of the constitution are, in general, those, negative obligations of the state that prevent the encroachments on individual freedom and have been inspired by Magna Carta, the U.S. Bill of Rights and Franch declaration of Rights of man. But the State, in addition to obeying these negative injunctions, must also at positively to protect those very a rights from encroachment by society. The fundamental rights are, therefore, vested with a dual function, to protect freedom and to provide social change towards an egalitarian social set up where citizens are not only free from state coercion but also from social exploitation of one form or another.

So, Fundamental rights have aptly described as the very foundation and corner stone of the democratic way of life ushered in every country by the constitution. Thus, fundamental rights are the Modern name for what
have been traditionally known as 'Natural rights or Moral rights.\(^1\)

**EVOLUTION OF FUNDAMENTAL RIGHTS:**

The primitive man had no notion of fundamental rights, though he did have a number of freedoms which no civilized man can ever have. In theory, he had all possible and conceivable freedoms, but in the primitive society these freedoms had no meaning, no relevance. Freedoms and liberty in an unorganized society are freedoms and liberty in wilderness. The fact of the matter is that in society, the social need for liberty and freedoms do not exist.

It is a unique feature of the history of the development of political institution that the progress towards organized society was not a movement towards the fundamental rights, but towards the suppression of the absolute and anarchic freedom of the primitive man.\(^2\)

In the feudal society, there was left nothing of the primitive man's freedoms and liberty. The feudal society was a total negation of the fundamental rights of men and citizens. In that society only the rulers, the

1. See Peterson, P.W.: Natural Law and Natural rights P. 61
2.\(^a\) See Locke : Principles of Civil Government Book 2, P. 149
Nobility and Clergy had rights and privileges. The common middle class and poor persons had no rights, no freedoms, no privileges. The monarch had no merely the absolute law making power, but even the enforcement of law and judgment on it "defended on the sweet will, whim and fancy of the ruler." 3

In the 16th and 17th Centuries a rising middle class of bourgeois flanked by lawyers, physicians, artists and philosopher, who were most dissatisfied with the system and resented it most. The philosophers of this era awake to people by their philosophy. Rousseau the greatest master of the Natural law school of all times and the philosopher spark thrower of the French Revolution, opened his celebrated book words: "All men are born free but everywhere they are in chains." 4

Those Philosophers emerged a new and vigorous idea before the people. They told the people that we have certain inherent, inalienable, immutable and involuble freedoms and rights which could not be taken away by the King, since God himself endowed with these rights. Thus a new thesis of fundamental rights was profounded by these philosophers.

3. See Actor: This History of Freedom and Power, P. 81
4. Quoted by Burke: Recollections on the Revolution in France and other writings, P. 23.
This New theory of fundamental rights was starting point of French Revolution and spread in all over the European countinent, which consumed the entire feuded order and installed on the throne of state the New Goddesses of equality liberty and freaternity.5

In England, as early as 1215 the English people exacted an assurance from the King John for this respect and the Magna Carta is the evidence of this success. Thereafter, from time to time the King had to accede to many rights to his subjects. In 1689 the bill of rights was written consolidation and all important rights and liberties of the English people. This laid the foundation of the Modern constitution by disposing of the more extravagant claims of the Stuarts to rule by prerogative rights. This established the rule of law and removed the discretionairy prerogatives of Crown.6

On this point Maitland rightly observed:

"The Fundamental Rights manifested themselves in political and Governmen­
tal sphere by replaceing absolutism with constitutionalism. The supremacy of fundamental rights implies that the Government has the duty to refrain from course of action which may result

5. Ibid P. 25

in the infringement of these rights. It was ushered the age of Democracy, "7

Democracy essentially and primarily means a Government with the consent of people. The first fundamental right that has proclaimed and the right and freedom to choose one's rulers. This replaced the King's right to rule by divine authority with the rule by free consent of the people. The logical concomitant to this right was the fundamental right to hold the rulers responsible for their conduct. This made rulers accountable to 'Man and Not to God'.

A attempt made by Magna Carta and bill of rights followed by France in form of Declaration of rights of Man and Americans incorporated it in the constitution itself. The incorporation of bill of Rights in the constitution, therefore, acts as a great safeguard not only against misconstruction or abuse of power by the Government but also against any 'Excess party spirit' and what now has came to be called as the 'Tyranny of the majority'. Indeed the Tyranny of the majority in the words of prof. Willoughly is :

"One of the evils most to be feared in a democracy - The most to be feared because of the case with which it can be exercised and the severity with which it operates..... there can be no Tyranny of a Monarch so intolerable as that of multitude for it has the power behind it that no King can Sway." 8

Justice Jacson, in West Virginia Board of Education Vs. Barnette,9 explaining the nature and the purpose of bill of rights observed:

"The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majority and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech a free press, freedom of worship and Assembly and other Fundamental Rights may not be submitted to vote, they defend on the outcome of no elections." 10

Seeing the importance of Fundamental Rights, a trend to include Fundamental Rights as a part of bill of rights in the constitution started in the past - First world war era. Fundamental Rights in incorporated in constitution of West Germany, U.S.S.R., Irish republic,

8. Willoughly, W.W : The Nature of the State, 416
10. Ibid at Page 631
Japan, Shrilank, Burma and India. But in the constitution of Australia, Canada and Switzerland there are no provision about Fundamental Rights in the specific form. Though constitution of Switzerland does not specifically contain any bill of rights, its provisions guarantee equality before the law, freedom of concience, press, speech and association. Similarly there are no Fundamental Rights conferred on the people of Canada by their constitution and the question of declaring laws to be invalid on the ground that they infringe a fundamental right does not arise in Canada. On the same line D.d. Basu observed:

"A most conspicuous example of departure from American precedents is offered by the fact that there is no bill of rights in the Australian constitution Act."

Though there are no fundamental Rights in a specific term, but personal liberty, right to property freedom of religion and right to trade and commerce have been protected, on this point P.H. Lane rightly said:

"The prohibitions under the commonwealth constitution which I have in mind are the following. There are others, but I have only taken the four main ones.

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I. The Commonwealth and the states are forbidden to interfere with traders or others who have business between the state or who travel between States.

II. The States are forbidden to tax goods which are imported into, or exported out of, Australia or to tax goods which are already in Australia.

III. Federal Parliament is forbidden to take property without giving just terms in return.

IV. Federal Parliament is also forbidden to set up any religion or to interfere with any religion.

From another point of view you can call these prohibitions guarantees. For example an interstate trader speaks of the freedom which the constitution guarantees him or christians can speak of their religions guarantees under the constitution."12

Thus, Modern democratic states have adopted the scheme of granting Fundamental rights to its citizen through the constitutions of their countries, though they may differ in name as fundamental rights, Guarantees, bill of rights, basic rights, Assurance to people or prohibition.

SIGNIFICANCE OF FUNDAMENTAL RIGHTS:

The object of Fundamental Rights is to ensure the ideal of political democracy and prevent authoritarian rule. The Fundamental Rights are general obligations of the State that prevent the encroachments, on individual freedom and have been inspired by Magna Carta or bill of rights. Fundamental Rights are deemed essential to protect the rights and liberties of the people against the encroachment of the power delegated by them to their Government. Thus through the Fundamental rights concept of 'Limited Government' is developed and rule of Law is established. On the point Supreme Court of U.S.A., in Hartado Vs. People of California, observed: 13

"Fundamental Right..... are limitations upon all the powers of the Government, legislative as well as executive and they are essential for the preservation of public and private rights, notwithstanding the representative character of political instrument".

The same view is expressed by Justice Marshall.14

These rights.... May establish certain limits on the Government...... which may not be neglected by the Government department" 14


14. Marbury Vs. Madison 1801, ICL, 137, 175
In West Virginia State Board of Education Vs. Barant Justice Jackson observed: 15

"Very purpose of a bill of Rights was to withdraw certain subjects from the vicissitudes of Political controversy, to establish them beyond the reach of Majorities and Officials...."

The same approach has been adopted by Supreme Court of India in Gopalan Case and Patanjali Shastri J. Observed 16.

"It is true to say that, in sense the people delegated to the legislative, executive and the judicial organs of State their respective powers while reserving to themselves the Fundamental right which they made paramount by providing that the state shall not make any law which takes away or abridges the rights superceded by that part. To that extent the Indian Constitution may be said to have been based on the American Model...."

Hidayatullah J. also relised the necessity of fundamental rights and he said:

"Fundamental laws are needed to make a Government of Laws and not of man and the Directive Principles are needed to lay down the objectives of good Govt." 17

Fundamental Rights are necessary for the establishment of Democratic organisations without the freedom of speech and expression no body can think about the democratic form of Government. In Ramesh Thapper Vs. State of Madras, Patanjali Shastri J. Observed as follows 18

"Freedom of Speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular Government, is possible. A freedom of such amplitude right involve risks of abuse. But the framers of the constitution may well have reflected with Madison, who was the leading spirit in the preparation of the first Amendment of the federal constitution, that it is better to leave a few of its noxious franchises to their luxuriant growth than by Pruning them away to injure the vigour of those yielding the proper fruits.

The first fundamental right that has proclaimed was the right and freedom to choose one's rulers. Without the free discussion and fair criticism no body can think about the democratic form of Government. The freedom speech or throught and assembly are essential part of any constitution which provided the people Govern themselves, because without these rights self government becomes impossible.

Fundamental rights are also necessary for the maintaining the dignity and liberty of the Individual. Declaration of Human Rights represents the civil, political, religious liberties for which men have struggled through the centuries and those new social and economic rights of the individual which the Nations are increasingly recognising in their constitutions. Some these were proclaimed during the French Revolution and are included in the declarations of Nation taking pride in the dignity and liberty of the individual.

Justice Field in slaughter House case observed. 19

"To make every one in the country a free man and as such to give him the right to pursue the ordinary advocation of life without restraint than such as a affect others and to enjoy equally with them fruits of this labour. A prohibition to him to pursue certain calling open to others of the same age and condition and sex would so far deprive him of his rights as free man and place him, as respect to others in a condition of perpetual servitude".

Gajendragadkar in Sajjan Singh case called to fundamental rights: 20

19) Slaughter House, 16 Wall 36 (1873) at P.90.
20. Sajjan Singh Vs. State Rajasthan 1965 SC 833 at P.852
"As the Very foundation and corner stone of the democratic way of life...."

Chief Justice Subba Rao gave answer to the Question 'What are the fundamental rights? In the following way:

".....They are the rights of the people preserved by our constitution'. Fundamental Rights' are the modern Name for what have been traditionally known as Natural rights.' As one author puts: they are moral rights which every human being everywhere at all times ought to have simply because of the fact that in contradiction with other beings, he is rational and moral'. They are the primer- dial rights necessary for the development of human personality. They are the rights which enable a man to chalk out his own life in the manner he likes best. Our constitution, in additional to the well known fundamental rights, also included the rights of the Minorities, untouchables and other backward communities in such rights." 21

Seeing the significance of fundamental Rights Justice Hidayatullah also said:

"The constitution gives so many assurances impart III that it would be difficult to think that they were the play-things of a special majority. To hold this would mean prima facie that the not solmen part of our constitution stand on the same footing as any other provision and even on a less firm ground than one on which the serious mentions in the proviso stand". 22

Justice Bhagwati accepted the significance of Fundamental Rights and observed:

"These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a pattern of guarantee on basic structure of human rights and impose negative obligations on the state not to encroach on individual liberty in its various dimensions".  

Thus it may be submitted that Fundamental Rights are essential to protect the dignity of Individual and to cherish basic values of humanity for developing his personality.

**FUNDAMENTAL RIGHTS AND AMENDING PROCESS:**

There is no doubt, in fact, that Fundamental rights play a very vital role in developing the personality. These are essential for the existence of the human status and without it no one can think about the democracy. These are essential for the preservation of public as well as private rights. Fundamental rights impose check on the discretionary powers of Government, establish the limited Government and chress the concept

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of Rule of Law. Common law rights and liberties and the American bill of rights are intended as bulwarks against arbitrary powers whoever might exercise them. This point was pointed out by Justice Mathews, in the early case of Hurtado Vs. California\textsuperscript{24}. Thus:

"In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisional of Magna Charta were incorporated into bill of rights. They were limitations upon all the powers of Government, legislative as well as executive and judicial.

It necessarily happened therefore, that as these broad and general maximum of liberty and Justice held in our system a different place and performed different function from their position and office in English constitutional history and laws, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and Tyranny, here they have become bulwarks also against arbitrary legislation but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but they very substance of individual rights to life, liberty and property". 24

\textsuperscript{24} Justice Matthews: Hurtado Vs California (1884) 110 US 516 at P.531.

Ibid at P. 531
The Constitution of U.K. is unwritten and there is sovereignty of parliament even though these liberties are protected by the doctrine of 'Rule of law' and by the principle of 'Natural Justice.'

In U.S.A. fundamental Rights are protected through the Due process clause. In the same way these fundamental rights are protected by Article 13(2) of the Constitution of India.

Thus, it may be said that these liberties are so important that they are protected by the constitutions though they may be written or unwritten federal or unitarily.

Article 97 of Japan constitution preserves to fundamental rights for all time in express manner in the constitution itself. Article 97 says:

The fundamental human rights by this constitution guaranteed to the people of Japan are fruits of the age-old struggle of Man to be free, they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

The German Concept of super-constitutional norms is founded on the express provision in the constitution in article 79(3) which says:
An amendment of this Basic law effecting the division of the Federation into Länder, the participation in principle of the Länder in legislation or the basic principles laid down in articles 1 and 20, shall be inadmissible.

The constitution itself declared the provisions of Articles 1-20 as basic principles and makes them unamendable. No implication is necessary for this purpose. It is clear, therefore, that if the amending authority seeks to amend the provisions of Art. 1-20 of the constitution of the entrenched federal provisions, such amendment shall be null and void.

The principle which inspired the makers of the transitory Basic law of West Germany to incorporate the entrenched provision in Art. 79(3) has thus been explained by the West German constitutional Court.

"The purpose of Art. 79, para 3, as check of the legislator's amending the constitution is to prevent both abolition of the substance or basis of the existing constitutional order, by the formal legal means of amendment....
and the abuse of the constitution to legalize a totalitarian regime.\textsuperscript{25}

Similarly in the constitution of U.S.A. conditional restriction has been imposed by the constitution itself as:

"No state to be deprived of its equal sufferage in the senate, without its consent."\textsuperscript{26}

About the express limitation upon the amending process writer like Thomas M. Cooley Says:\textsuperscript{27}

"There is no limit to the power of amendment beyond the one contained in Article V, that no state shall deprived of its equal sufferage in the senate without its consent".

He further says:

"An amendment must be confined in its scope to an alteration or improvement of that which is already contained in the constitution and can not change its basic structure, include new grants of power to the federal Government nor relinquish to the State those which already have been granted to it."\textsuperscript{28}

\begin{itemize}
  \item[25.] Privacy of communication case (1970 at 30 B-Ver FGE-1)
  \item[26.] See Article V, Constitution of U.S.A.
  \item[27.] Thomas M. Cooley: The General Principles of constitutional law in U.S.A., 4th Ed. P. 46
  \item[28.] Ibid at P. 47
\end{itemize}
Similarly, Prof. Willis about the express limitation says:

"... Probably the correct position is that the amending power embraces every things; in other words there are no legal limitations; whatever on the power of amendment except what is expressly provided in Article V". 29

Quick and Garran also in reference to Australian amending process observes:

"... It may be concluded that there is no limit to the power to amend to constitution, but that it can only be brought into action according to certain model prescribed in article 128". 30

The theory of express limitation, in relation to amending process, have been clearly laid down by the justice in the different countries and they rejected to the theory of implied limitation over the express provision of the constitution.

In American constitution Article V was challenged in so many cases on the ground of implied limitation but supreme court of U.S.A. did not accept the theory of implied limitation over the express wording of Article V of the constitution.


In Rohde Island Vs. a Mitchel Palmer, 18th Amendment was challenged. The grounds of attack were that the amendment was legislative in character and an invasion of Natural rights and an encroachment on the fundamental principles of dual sovereignty but the contentions were not accepted by the supreme court and it is said that article V was held to be plain and to admit of no doubt in its interpretation. Taking the plain and express meaning of the Article V, Supreme Court upheld the amendment.

In Hawke Vs. Smith, 18th Amendment was challenged. When 18th amendment was passed by the Congress, then it was sent to states for the ratification, the legislature of state of Ohio ratified it in accordance with Article V of the federal constitution, but in addition, sought to submit it to the referendum of people of the state on the ground that the constitution of State of Ohio provided for a referendum in the case of amendment of the constitution even of the U.S.A. The plaintiff, Hawke, a citizen of Ohio brought a suit for injunction to retain the secretary of State to spend the money of State over such referendum, which was alleged to

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31. 1919, 253, US 350
32. 1920, 253, U.S. 221
be unconstitutional. Supreme Court of U.S.A. accepted the contention of plaintiff and held that the word 'Legislature of State' in Article V of federal constitution meant the representative legislative body which made laws for state and were the electors even though the authority of representatives came from the electors. Article V did not envisage direct action by the people ratification was a specific duty imposed on state legislatures by Article V and no state could change the methods therein set out for performing that duty. It is not the function of courts, or legislative bodies national or State, to alter the method which the constitution has fixed.

Similarly in leser VS Garnett,33 U.S. Vs. Spragve34 rule of strict interpretation was adopted and did not accept the theory of implied limitation.

In Australia, High Court in Engineer Case35 also rejected the theory of implied limitation against the express ordinary plane rule of interpretation and High Court clearly observed:

33. 1922, 258 US 130
34. 1931, 282 US 716
"...It is an interpretation of the constitution defending on the implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted.... But arrived at by the Court on the opinions of Judges as to hopes and exceptions respecting vague external conditions. The method of interpretation can not...... provide any secure foundation for common-wealth and state action and must inevitably lead... to divergences and inconsistencies more and more pronounced as the decisions accumulate. 35

In the same strength privy council also affirmed the plain and clear rule of interpretation and disregarded to the implication. Section 7A of the New Southwales constitution act 1902 was challenged on the ground of procedure which was not followed properly. Privy council in his judgement said that when a constitution provided for referendum as a set up for amendment, itself, no amending bill would be valid by virtue of it's passage by the legislature and assent to it by head of the state so long as the referendum is not held.

35. Amalgated Society of Engineer Vs. Adelaide Steamship Co. Ltd., 1920, 28 CLR 129 at P. 132
Above all decisions are authorities for the proposition that there is no implied limitation on the power of amendment. Amending body has to follow all the clear and express directions of constitutional provisions which have been given in the constitution itself though it may be procedural or substantial.

A great controversy that has been raging regarding constitutions amendments in India is whether an amendment could be made to the articles in the part - III relating to fundamental Rights so as to abridge the rights conferred by the constitution.

In Indian constitution, there is no express wording about such restriction under article 368, though in Article 13(2) it is said:

"The State shall not make any law which take away or abridge the rights conferred by this part and any law made in constravention of this clause shall to the extent of the contravention, be void".

Supreme Court in Shankari Prasad Case 36 and Sajjan Singh 37 case took the express and plain meaning of

36. Shankari Prasad Vs. Union of India AIR 1951 SC 455
37. Sajjan Singh Vs State of Rajasthan AIR 1965 SC 845
Article 368 and Article 13(2) and reached on the conclusion that parliament can amend each and every provision of the constitution.

First time, the question, whether fundamental Rights can be amended under Article 368 came before the Supreme Court of India in Shankari Prasad case. In that case the validity of the constitution First amendment Act 1951, which inserted interalia Article 31-A and 31-B of the constitution was challenged. The amendment was challenged on the ground that it tends to take away or abridge the rights suffered by Part-III which fell within the provision of Article 13(2) and hence it was void. It was argued that the word 'State' in Article 12 includes parliament and word 'Law' in article 13(2) includes constitutional amendment. The Supreme Court rejected the above argument and held that the power to amend the constitution including the fundamental Rights is contained in Article 368 and that word 'Law in Article 13(2) includes only an ordinary law made in exercise of legislative powers and does not include constitutional amendment which is made in exercise of constituent power. Therefore a constitutional amendment will be valid even if it abridge or takes away any of the fundamental rights.
Patanjali Shastri speaking for the unanimous court said that no doubt our constitution maker following, the American model, have incorporated certain fundamental rights in Part - III and made them immune from interference by laws made by the State, but thought that they were not intended to be immune from constitutional amendment because the framers must have had in mind the frequent occurrence of invasion of rights by the legislature and executive in exercise of their legislative power and not by alterations of constitution, itself in exercise of sovereign constituent power, if they were intended to be saved from the invasion by exercise of constituent power it was easy for the framer to make the intention clear by adding a proviso to that effected both Article 368 and 13(2) are widely praised applying the doctrine of harmonious construction, for the reason stated above 'Law' in Article 13(2) must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments of the constitutions.

38. Patanjali Shastri J. Shankari Prasad case at P.462
Although the decision of Shankari Prasad's case was not challenged in Sajjan Singh, but Chief Justice Gajendragadkar thought it fit to give reason for expressing full concurrence with that decision. Gajendragadkar C.J. added four more reasons in Shahkari Prasad decision:

I) The word used in proviso unambiguously indicate that the substantive part of the article applies to all the provisions of the constitution and it is on this basic assumption that the proviso prescribes a specific procedure in respect of amendment of the Articles mentioned in clause (a) to (c) thereof.

II) That when the framers took the precaution of excluding certain matters from the scope of Article 368 e.g. Article 4(2) and Article 169(3) if they intended, they could have likewise excluded fundamental rights from the scope of amending power under Article 368.

III) It was legitimate to assume that the constitution makers visualised that the parliament would be competent to make amendments in these rights so as to meet the challenge of the problem which may arise in the course of socio-economic progress and development of the country.

39) See Sajjan Singh Case, Judgment of Gajendragadkar CJ, 856 to 859
Even though the relevant provisions of part - III can be justly described as the very foundation and the corner-stone of the democratic way of life unheard in this country by the constitution, it can not be said, that the fundamental rights guaranteed to citizens are external and inviolate in the sense that they can never be abridged or amend.

But two other judges Hidayatullah and Mudholkar doubted the correctness of the law laid down in Shankari Prasad case, but upheld the validity of 17th amendment act by rejecting the containtion raised to challenge it validity. Hidayatullah J. 40 doubted the correctness of the law laid down in Shankari Prasad case in the following ways:

1. It is true that there is no complete defination of the word 'Law' in the Article but it is significant that the defination does not seek to exclude constitutional amendments".

40. See Judgment of Hidayatullah J. in Sajjan Singh case
2. If an amendment can be said to fall within the term 'Law'. The fundamental Rights become external and inviolate to borrow the language of the Japanese constitution article 13 is then & part with Article 5 of American Federal constitution in its immuable prohibition as long as it stand.

3. Our preamble is more akin in Nature to the American Declaration of Indeplendence (July 4, 1776) then the preamble to the constitution of the united states. It does not make any grant of power but it gives a direction and purpose to be constitution which is reflected in part-III and IV. Is it to be immagined that a two thirds majority of the two houses at any time is all that is necessary to alter it without even included in the proviso to article 368 and it is difficult to think that as it has not the protection of the proviso it must be within the main para of Article 368.

4. The constitution gives so many assurances in part-III that it would be difficult to think that they were the play - thing for special majority to hold this would mean prima faie that the most solemen part of our constitution stand on the same footing as any after provision and even as on less firm ground than me on which the Articles in the forward stand.
Mudholkar J.⁴¹ although agreeing that the writ petition should be dismissed raised various doubts. He observed that:

I. It is true that the constitution does not directly prohibit the amendment of Part-III, but it would indeed be strange that rights which are considered to be fundamental and which includes me which is guaranteed by the constitution should be more easily capable of being abridged or restricted than any of the matters referred to in the proviso to Article 368 some of which are perhaps less vital than fundamental rights.

II. It is also a matter for consideration whether making a charge in a basic feature of the constitution can be regarded merely as a amendment or would it be in effect rewriting a part of the constitution and if the letter, would it be within the purview of Article 368.

⁴¹ See Judgment of Mudholkar in Sajjan Singh Case
III No doubt, that the preamble is not a part of our constitution but I think that if upon a comparison of the preamble with the broad features of the constitution it would appear that the preamble is an epitome of those features or to put it differently if these features are an amplification or concretisation of the concepts set out in the preamble it may have to be considered whether the preamble is not a part of the constitution. While considering this question, it would be of relevance to bear in mind that the preamble is not of the common run such as is to be found in an act of legislature. It has the stamp of deep liberation and is markable by precisions would this not suggest that the framers of the constitution attached special significance to it.

Thus, Shankari Prasad's decision, reiterated in Sajjan Singh case by majority of 3 to 2, the Supreme Court was taken to have affirmed the position that fundamental rights of the individual under the constitution - though Sacrostant and constituting limits on the power of the executive and legislative are not immuralbe and absolute in character but subject to parliament power to amend the constitution under article 368.
The doubts of two judges Hidayatullah and Madholkar in Sajjan Singh case give a new way of thinking in the Golak Nath case. The position directly changed in Golak Nath case, when the Supreme Court by majority of 6 to 5 dissented from the view in earlier both cases and held:

1) Article 368 of the constitution as its marginal note shows in term only prescribes the various procedural steps in the matter of amendment of the constitution but does not confer power on Parliament either expressly or impliedly to amend the constitution. The doctrine of necessary implication can not be invoked if there is an express provision or unless but for such implication the Article will become otiose or Negratory. Article 245, 246, 248 read with Sch. 7. List I item 97 show that the residuary power of legislation is vested in parliament. Whether in the field of constitutional law or statutory law amendment can be brought about only by law. The residuary power of parliament certainly takes in the power to amend the constitution. Articles 245, and 392 do not indicate any contrary

42) Golak Nath Vs state of Punjab AIR 1967 SC 1643
43) Ibid See Majority Judgment.
intention. Apart from the limited scope of Articles 392, which is intended only for the purpose of removing difficulties and for bringing about a smooth transition an order made by president can not attract Article 368, as the amendment contemplated by that provision can be initiated only by the introduction of bill in the parliament.

2) It will be seen from Judgment given in MCCawly Vs. The King\(^45\) and Bribery commissioner Vs Pedrick Ramasigle\(^46\) that an amendment is a legislative process and an amendment of the constitution is made only by legislative process with ordinary majority or with special majority as the case may be. therefore amendments either under article 368 or under other articles are made only by parliament by following the legislative process adopted by it in making other law. In the premises an amendment of the constitution can be nothing but 'LAW'.

\(^45\) MCCawly VS the King 1920, AC 191
\(^46\) Bribery Commissioner Vs. Pedrick Ramasigle 1964 WLR 1301
3) The wide proposition that the power to amend is a sovereign power that the said power is supreme to the legislative power, that it does not permit any implied limitations and that amendments made in exercise of that power involve political question and that therefore, they are outside judicial review can not be accepted. There is nothing in the nature of the amending power which enables the parliament to override all the express or implied limitations imposed on that power. Over constitution adopted a Novel method in the sense that parliament makes the amendment by legislative process subject to certain restrictions and that the amendment so made being 'law' is subject to article 13(2). Therefore if amendment takes away or abridges the fundamental rights conferred by Part - III it is void.

Hidayatullah J. Delivered a separate Judgment agree with majority opinion of Subba Rao C.J. and gave suggestion for amendment of the fundamental Rights in the following ways:

"It is submitted that it leaves revolution as the only alternative if change is necessary."
This is not right.... There is a legal method. Parliament must act in a different way to reach the fundamental rights..... Just as the French or the Japanese etc., can not change the articles of their constitution which are made free from the power of Amendment and must call a convention or constituent body, so also we in India can not abridge or take away the fundamental rights by ordinary amending process. Parliament must amend article 368 to convoke another constituent assembly, pass a law under item 97 of the First list of Sch. 7 to call a constituent assembly and them that assembly may be able to abridge or take away the fundamental rights if desired. It can not be done otherwise..."47"

Thus, it may be submitted that by taking a plain and express meaning of article 368 and Article 13(2) Shankari Prasad36 and Sajjan Singh case 37 Majority opinion reached on the conclusion that parliament can amend each and every provision of the constitution including part-III of the constitution.

On the other hand with the help of same principle Supreme Court in Golak Nath Case42 reached on the other conclusion that parliament can not take away or abridge the fundamental rights given in part - III of the constitution.

The above controversy relating to the competence of the parliament to amend fundamental rights thus centres round the interpretation of three Articles 12, 13 and 368 of the constitution. The Supreme Court, it seems did not apply abundant caution in interpreting these articles keeping in view the intent and spirit of the constitution. The Supreme Court took an erroneous view by equating constitutional law with ordinary law. The constitution under article 13(2) which defines the term 'Law' does not directly include the constitution amendment act but the supreme court arrived at its own conclusion by interpreting this word 'Law' according to its own wishes.

The court also failed to distinguish between the legislative power and the constituent power. Our Supreme Court had no occasion to notice the American decisions. Though they were placed before the court in Golak Nath case, Hidayatullah J. supposed that the American decisions were in applicable in India because under Article 368, the process of amendment is legislative, which article V of the American constitution is not equited to the legislative process.

The court also arrived at the doctrines of immutability of fundamental rights, more from a philosophic angle rather than legal angle.

The third episode of Judicial interpretation is Kesavananda Bharti case. It introduced a novel and amorphous sphere of entrenchment by judicial interpretation, by inventing, the doctrine of basic features of the constitution as constituting 'Implied limitations'. The seeds of 'Basic structure theory' had been planted by Mudholkar J. In Sajjan Singh case took the shape of majority opinion in Kesavananda Bharti case, through the instrument of implied limitation theory.

In that case, on the point of Amending power of parliament under Article 368, all 13 judges unanimously held that parliament has power to amend each and every provision of the constitution, but these judges divided equally in two groups on the point of limitation over the power of parliament under article 368.

Six Judges Sikari C.J. Shelat, Grover, Hegde, Reddy and Mukherjee held that there are inherent or implied limitation on the amending power of parliament and article 368 does not confer power to amend the constitution so as to damage or destroy the essential elements or basic features of the constitutions.

On the other side Six Judges, Ray, Chandrachud, Mathew Beg, Dwivedi and Palkar held that there are no limitations express or implied, on the amending power under Article 368.

The Khanna J. took the middle path but his opinion about the basic feature made a majority opinion of 6 judges. Khanna J. held that there is no implied limitation on the amending power but the power to amend does not include the power to destroy & abrogate the basic structure or frame work of the constitution.

Majority in Kesavananda Bharti over ruled the majority opinion of Golak Nath case and held that parliament has power to amend each and every provision of the constitution but it can not alter or change the basic structure of the constitution and rejected to the erroneous opinion about word law under article 13(2) and
adopdted the view that amending process is constituent power of parliament rather than' ordinary legislative power.

The majority Judges\(^{51}\) agreed that in its generictc sense 'Law' include constitutional law. It includes an amendment of the constitution'. But for the purpose of Article 368 that does not seem to be the connotation of that word as used in article 13(2). They said article 13(2) and 368 must be construed harmoniously So out of the two meaning of 'law', that meaning stand be given which harmonise with Article 368. Unlike Golak Nath\(^{42}\) case, it was rightly appreciated by the Supreme Court in Kesavananda Bharti\(^{50}\) that in order to find the true scope of Article 13(2) in the context of its possible impact on the power of amendment one should read it not in insolation but alongwith Article 368.

Thus Khanna J\(^{50}\) referred to the rule of construction evolved by Lord wright M.R. in James Vs. Common-wealth of Australia\(^{52}\) where said :

\[\text{51. Supre note 50, Sikri C.J. Shelat, Grover, Hegde, Mukherjee, Khanna and Reddy JJ - See the judgment of these judges} \]

\[\text{52. 1936, A.C 578} \]
"The actual words should not be read in vacuo but as occurring in single complex instrument in which one part may throw light on another.

In Kesavananda Bharti court refused to accede to argument that though the framers of the constitution put no express limitations in Article 368 on the power to make amendment, they curtailed that power by implication under Article 13(2). Thus Reddy J. said "...its just to impute to the framers of the constitution a lack of respect to the amending power by making the bar of Article 13(2) applicable to it by mere implication, when in respect of minor instruments they were careful enough to include them in the definition of law." 53

The court in Kesavananda rightly appreciated the vital distinction between 'Constitutional law' and 'Ordinary law' on the premises that an amendment which is made by the exercise of constituent powers of parliament is a part of the fundamental law and not an ordinary law, the validity of which is subject to some other superior law. They relied on cases of McCawley Vs King 54 and Bribery commissioner Vs. Pedrick Ramasinghe 55.

53. Supra Note 50 at P. 599-600
54. 1920 AC 1961
55. 1964 WLR 1301
These decisions make clear distinction between legislative and constituent power. In Golak Nath, it was this distinction which was not appreciated by the majority, judges and they were wrong in their approach. There is distinction between a ordinary power to legislate and a power to legislate by special legislative procedure and the results, of the exercise of two powers are different.

In Kesavananda Bharti, the court unanimously over ruled the Golak Nath decision and located both the power and procedure for amendment of the constitution in article 368 only Court unanimously said that no undue importance should be attached to the marginal note which say's procedure for amendment of the constitution rather they relied on the words of article 368. The constitution shall stand amend in accordance with the terms of the bill and held that these words clearly indicate that the said article provide not merely the procedure for amendment but also contains the power to amend the constitution.

Thus, the majority judgment in Golak Nath and Kesavananda Bharti reveal that an attempt was made to give narrow meaning to the word 'amendment' in the sense that the term amendment stands for 'Improvement' only and
rejected the word 'Omission' or 'Repeat' including any supposed basic or essential permission.

In Golak Nath, majority judges relied on various factors, as nature of fundamental rights, intention of the founding fathers, and need for convening a constituent assembly, reached on conclusion that fundamental rights are 'Transeendental' and this immulability or permanence of the fundamental right was sought to be established on erroneous interpretation of the words given on the Article 13(2) and 368. On the other hand, although, majority opinion of the Ratan-Hand Blurt case gave correct meaning to art. 13(2) and 368 and overturned to Golak Nath case, but ultimately, they reached on the same conclusion in different way when they held:

"Article 368 does not enable the parliament to alter the basic structure or frame-work of the constitution".

A majority, consisting of Ray, Palkar, Mathew, Beg, Darivedi and Chandrachud J.J. Plus Khanna J. upheld parliament's power to amend all part of the constitution including the fundamental rights.

Another majority constituting of Sikri C.J. Shelat, Hedge, grover, Reddy and Mukherjee plus Khanna J.

56. Supra Note 50 at P. 1462
held that parliament's power to amend the constitution could not be so exercised as to destroy the basic structure or basic feature of the constitution.

It was a strange coincidence that Khanna J. was responsible for laying down the two propositions (1) Parliament has power but (2) it can not so amend the constitution as to destroy the basic features of the constitution.

Thus majority held that the fundamental rights were basic features, in the sense that these could not be destroy though these could be abridged or curbed.

In the conclusion of the Chapter, it may be submitted that position of Fundamental Rights before the Golak Nath case was that they may be amended by the parliament but after the Golak Nath case they can not be amended by the parliament. But after the Kesavananda Bharti case provision is that fundamental rights may be amended by the Parliament without disturbing the basic structure of the constitution.

Now Question is that whether any fundamental right is a basic structure or not. It is a question for Judiciary to decide it. If court says that it is
a part of basic structure then parliament can not amend it and if court says that it is not a part of basic structure then parliament can amend it. It is totally depend on the whim of the judiciary.