CHAPTER – III

WORKING RELATIONSHIP BETWEEN THE PARLIAMENT

Indian constitution has not adopted separation of Power in absolute form. Though the Constitution defines the powers and functions of the institutions of the government, i.e., legislature executive and the judiciary, yet they do not function in isolation, keeping apart from each other. There is a deep inter-relationship between the three organs of the government. The parliament makes law and the courts interpret and apply it. The parliament sanctions all appropriations necessary for the maintenance of the judicial department. In the United States and India, congress and parliament respectively prescribe the number of judges, fix their salaries, and create new courts. On the other hand, the judiciary may exercise considerable control over legislation by review laws in order to determine their constitutionality. In India, there is no express provision declaring the Constitution to be the supreme law. But the Supreme Court’s power of Judicial Review is subject to controversy although its scope is not as extensive as that of the Supreme Court of the United States.

A perusal of the provisions of the Indian Constitution dealing particularly with the union judiciary clearly provides for a close relationship between the legislature and the judiciary not in a manner of controlling each other but of a mutually complementary working relationship which should necessarily be based on harmony between the two most important organs of the state.

Under Article 124 (4), a judge may be removed from his office by an order of the president only on ground of proved misbehaviour or incapacity. The order of the president can only be passed after it has been addressed to both houses of Parliament in the same session. The
address must be supported by a majority of total membership of that Houses and also by a majority of not less than two third of the members of that Houses present and voting. The procedure of the presentation of an address for investigation and proof of the misbehaviour or incapacity of a judge will be determined by Parliament by law.³

Article 138 (2) empowers the Parliament to invest the Supreme Court with such additional jurisdiction and powers with respect to any of the matters mentioned in the union list as it thinks fit.⁴ Article 140 provides, Parliament may by law, confer such supplementary power on the Supreme Court as made to appear to be necessary to enable it to perform effectively the functions placed upon it under the Constitution. But such supplementary powers should not be inconsistent with any of the provisions of the Constitution.⁵ Article 144 further provides that, all authorities civil and judicial, in the territory of India shall act in aid of Supreme Court.

Article 105 and 194 of the Constitution provide certain privileges to parliament and state legislatures respectively.

Article 105 (1) guarantees freedom of speech in Parliament⁶ and Article 194 (1) guarantees freedom of speech in state legislatures. Clause (2) of these two provisions confer immunity upon members of the respective houses from judicial proceeding in respect of anything said or any vote cast of them in the house.⁷ As for as the institutions of the Supreme Court and the Parliament are concerned, fortunately, the founding fathers of Indian Constitution, had introduced two more provisions in the Constitution, i.e., Article 121 and 122, which could prevent undue mutual interference by these two wings of the state.

Article 121 of the Constitution very clearly states:

'No discussion shall take place in Parliament with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an
address to the president praying for the removal of the judge as herein after provides.\textsuperscript{8}

Similarly Article 122 states:

\begin{quote}
'\text{The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged innegularity of procedure.}\textsuperscript{9}
\end{quote}

Under the Constitution of India, the Parliament may by law,

\begin{itemize}
\item extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union Territory,
\item establish a common High Court for two or more states or for two or more states and a Union Territory; and
\item constitute a High Court for a Union Territory or declare any court in any such territory to be a High Court for all or any of the purposes of the Constitution.
\end{itemize}

The Parliament may by law provide for the establishment of an administrative tribunal for each state or for two or more states. The law made under this provision may specify the jurisdiction and powers of the tribunals. Such a law may exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to certain specified matters. Further, the constitution empowers the Parliament to create an All India Judicial service which shall not include any post inferior to that of a district judge.

In the framework of a Constitution which guarantees individual fundamental rights, divides powers between the Union and the states and clearly defines and delimits the powers and functions of every organ of the state including the Parliament. Judiciary plays a very important role under its power of judicial review. The courts may declare a law made by parliament ultra-vires the Constitution and as such, null and void and unenforceable. Article 13 clearly prohibits the making of any law Parliament or the state legislature or by any other authority, which may be inconsistent with, or in derogation of, any of
the fundamental rights contained in Part III of the Constitution. Article 32 and 226 confer power on the Supreme Court and the High Courts, respectively, for the enforcement of these rights. Thus, the constitutional validity of a law can be challenged in India on the ground that the subject matter of the legislation:

- is not within the competence of the legislature which has passed it,
- is repugnant to the provisions of the Constitution, or
- it infringes one of the fundamental rights.

So the constitutional provisions are very clear as far as the norms of conduct of the Supreme Court and Parliament are concerned. Thus, the Parliament in India is not as Supreme as the British Parliament where no judicial review of legislation is permitted. At the same time judiciary in India is not as supreme as in the United States of America which recognises virtually no limit on the scope of judicial review.

From time to time, since the inauguration of the Constitution the question which has given birth to the controversy regarding the exercise of judicial review under the Constitution of India is that whether it can be exercised in case of amendment of the constitution? In any written constitution, there has to be a provision for its amendment. The power of amendment is often vested in a popular, representative body. Such power is necessary to avoid the stagnation of a constitution. If a constitution is unchangeable, it is bound to become unsuitable for or incapable of satisfying the aspirations of a changing society. In fact, the essence of a written constitution lies in its mode of amendment. According to John Burges, "the amending process envisaged in a constitution is the first of the three fundamental parts of a constitution; the second and the third being the constitution of liberty and the constitution of Government."

Granville Austin has appreciated the amending process as one
of the most ably conceived aspects of the constitution. In some countries, the process may be easier than in others, and accordingly, the constitutions are sometimes classified into flexible and rigid. A flexible constitution is one in which amendment can be effected rather easily, as easily as enacting an ordinary law. The best example of such a constitution is the British Constitution which can be amended by an ordinary act of parliament and there is thus, no distinction between ordinary legislative process and constituent process and in rigid constitution, the process of constitutional amendment is more elaborate and difficult than the enactment of ordinary legislation. There thus exists a distinction between legislative and constituent process, the former denotes making of an ordinary law, the latter denotes amendment of the constitution. If a constitution is amendable easily by passing an ordinary law, then it will be lose all permanence and supremacy.

Under Article 368 of the Constitution of India, the parliament is the repository of the constituent power of the Union. The procedure for constitutional amendment, as described in Article 368, has certain distinctive features which clearly mark out parliament's constituent capacity from its ordinary role as a legislature. The more elaborate procedure of referendum or constitutional convention has been avoided in India. The Constitution makers thus sought to find a via media between the two extremes of flexibility and rigidity so that the Constitution may keep pace with social dynamism in the country. As Dr. B.R. Ambedkar pointed out in constituent Assembly,

"The provisions for amendment while they embodied in certain measure of rigidity with regard to some parts of the constitution, were flexible and afforded facilities for a simple process of amendment with regard to others." Pointing out the details of the scheme he stated, "We propose to divide the various articles of the Constitution into three categories. In first category we have placed certain articles which
would be open to amendment by parliament by simple majority. The second set of articles requires a two thirds majority of parliament. The third category requires a two thirds majority of parliament plus ratification by the states. The states are given an important voice in the amendment of these matters. These are fundamental matters where states have important powers under the Constitution and any unilateral amendment by parliament may vitally affect the fundamental basics of the system built up by the Constitution.18

From the constitutional provisions, it is clear that the constitution of India provides for three types of amendments of its provisions. Firstly, amendments which can be made by a simple majority as is required for the passing of an ordinary law. Secondly, amendments which can be effected by a special majority as laid down in Article 368. Thirdly, amendments which require, in addition to the special majority ratification by resolutions passed by not less than one half of the states.

The Constitution of India, though expressly confers amending power on parliament, but it is the Supreme Court, which has to finally interpret the scope of such power and to spell out the limitations, if any, on such amending power. The higher courts in India are endowed with the power of judicial review of legislation. It is the power of courts to pass upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void.19 The question of validity of a law enacted by parliament may arise in two situations. The validity of such a law may be assailed either because it is outside of the parliament's the scope of legislative powers or because it takes away or abridges the rights conferred by Part III of the Constitution i.e. the fundamental rights or offends any other provision of the Constitution.

The subjects that loomed large in the minds of assembly
members when framing the judicial provisions were the independence of the courts and two closely related issues, the powers of the Supreme Court and judicial review. The constitution of India explicity establishes the doctrine of judicial review in several articles, such as 13, 32,131,136,143,226 and 246. The fundamental subject of judicial review in the constitution of India relates to:

(1) Enactment of legislative act in violation of the constitutional mandates regarding distribution of powers.

(2) Delegation of essential legislative power by the legislature to the executive or any other body.

(3) Violation of fundamental rights.

(4) Violation of various other constitutional restrictions embodied in the constitution.

(5) Violation of implied limitations and restrictions.

The importance of giving the Supreme Court the power of judicial review was pointed out by Ayyar and Munshi. Munshi believed that this power was especially necessary for the safeguarding of fundamental rights and for ensuring the observance of due process. Ayyar pointed out that judicial review in the United State, although favoured by Hamilton and others, had been inferred from the constitution. For his belief that in India the final word on the interpretation of the constitution rests with the Supreme Court. Judicial review, considered functionally, is one method for resolving disputes over constitutional boundaries.21 As a constitutional practice, judicial review is usually considered to have begun with the assertion by John Marshall, Chief Justice of the United State, in *Marbury Vs Madison* in 1803, of the power of the Supreme Court to invalidate legislation enacted by congress.

**Meaning of Judicial Review:** The doctrine of judicial review is enforcement of rights guaranteed under the constitution through constitutional remedies. It is one of the great protector of fundamental
rights. The fundamental object of judicial review is to exert great moral force upon the legislature to keep it within the limits of the constitution and to save the people from democratic tyranny. It is the power of courts to pass upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void.23

In simple words, judicial review means the power of the court to interpret the constitution and to declare acts of legislature, executive or administration void, if it finds them in conflict with the constitution.

The power of judicial review can be exercised by Indian courts over both executive action and legislative enactments24. The question of validity of such a law may be assailed either because it is outside the scope of legislative powers of the parliament or because it has taken away or abridges the rights conferred by part III of the constitution i.e. the fundamental rights or offends any other provisions of the constitution. The constitutional grounds on which legislation can be invalidated by the courts had to be found only in Articles 372 (1), 245 (1) and 13.

The power of judicial review of legislative acts has been reposed under various Articles of the constitution.25 But the potentialities of this power are much more limited, as compared to U.S.A. This is due to the detailed provisions of the India constitution and the easy method of its amendment. The main constitutional provisions in which the power of judicial review has been expressly curtailed or limited are Articles 31-A, 31-B, 31-C, 262 (2), 33. Apart from these limitations, there are certain other limitations under articles 122,105,212,359,361 etc. The limitations are imposed on the judicial review power of the court with a view that indiscriminate use of power may paralyse the entire government system in no time.
Since the commencement of the Constitution, it appears that parliament has been asserting the supremacy as enjoyed by the British parliament, but the Supreme Court has been interpreting parliament as a creature of the constitution, exercising powers under and not beyond the constitution. There are two Articles i.e., Article 368 and 13, which initially become the source of confrontation between them. As it is known that has Article 368 empowers the parliament to amend the constitution and Clause (2) of Article 13 lays down that the state shall not make any law which takes away or abridges the rights conferred by this part i.e. fundamental rights and any law made in contravention of this clause shall to the extent of the contravention be void. Fundamental rights are claimed mostly against the state, and state is defined by Article 12 in an expansive manner, to include the government and parliament of India, the legislature of a state, and all local or other authorities within the territory of India. The actions of these bodies comprised within the term state can be challenged before the courts on the ground of violating fundamental rights. From 1950, the Supreme Court of India declared several laws enacted by the parliament of India as ultra-virus on the ground that they infringed the fundamental rights. The parliament thereupon proceeded to amend the constitution under Article 368 of the same. During the period of 1950-65, the Supreme Court adopted the attitude of judicial restraint in which the court gave a strict and literal interpretation of the constitution. The nature and scope of judicial review was firstly examined by the Supreme Court in A.K. Gopalan case, where it accepted the principle of judicial subordination to legislative wisdom. The question of interpretation of Article 21 arose in the Gopalan case, where the validity of the preventive detention Act, 1950, was challenged. The Nehru government in 1949 succeeded in persuading the Constituent Assembly to amend draft Article 22 to add clause (7) allowing parliament by law to authorize detention in excess
of three months without the approval of an Advisory Board required under clause (3). The Constitution came into effect on January 26, 1950. On that day, the president issued the preventive detention order to address the problem that most if not all of the existing preventive laws failed to comply with the requirements of Article 22. The order was quickly challenged and many high courts declared it invalid within the following month.

The centre government responded to this situation by introducing the attached Preventive Detention Act of 1950 in parliament on February 24, 1950, and it was passed in a special session immediately. The main question in the case was whether Article 21 envisaged any procedure laid down by a law enacted by a legislature, or whether the procedure should be fair and reasonable. The Court interpreted Article 21 extremely literally and opined that the expression 'procedure established by law' only meant any procedure which was laid down in the statute by the competent legislature to deprive a person of his life or personal liberty, and that it was not permissible to read in the article any such concept as natural justice, or due process of law, or reasonableness. The Court further ruled that Articles 19, 21, 22 mutually exclusive and independent of each other and Article 19 not to apply to a law affecting personal liberty to which Article 21 would apply.

The Supreme Court made the following observation:-

- The Parliament and state legislatures are supreme in their respective fields.
- However, certain limitations have been imposed on the Parliament and state legislatures.
- The Court will declare a law unconstitutional if these limitations are transgressed. The Court’s supremacy is limited to this extent. It cannot go beyond this. Hence the court has no scope to play the role of American Supreme Court. The American
constitution is based on due process of law where the legislature is subordinate to the judiciary which is not the case with the Indian constitution.

- The constitution is supreme. The Court must take the constitution as it finds fit, even if it does not accord with its preconceived notions of what an ideal constitution should be.
- The protection against legislative tyranny lies in a free and intelligent public opinion which must eventually assert itself.
- The Court will not question the wisdom or policy or legislative authority in enacting the particular law, however harsh, unreasonable, archaic or odious the provisions of that law may be.

Chief Justice Kania also said that it is difficult for any general principles to limit the Omnipotence of sovereign legislative powers by judicial interposition, except in so far as the express words of a written constitution give that authority. It is only in express provisions limiting legislative powers and controlling the temporary will of majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find safe and solid grounds for authority of Courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of judiciary powers too great and too infinite either for its own security or for the protection of private rights.

So in that case, the Supreme Court, taking a narrow view of Article 21, refused to consider if the procedure established by law suffered from any deficiencies. The court used to adopt, by large, a restrictive and literal interpretation of the fundamental rights.

In that year, two more decisions, namely, *Romesh Thappar Vs State of Madras* and *Brij Bhushan Vs State of Delhi*, dealt with the interrelation between freedom of speech and reditious writing or speaking. These judgments showed differences in the interpretation of
Article 19 (2) of the constitution which, till then, did not contain the expression 'public order.' In *Romesh Thappar vs State of Madras* a law banning entry and circulation of journal in a state was held to be invalid. The petitioner was printer and publisher of a weekly journal printed and published in Bombay. The Government of Madras, in exercise of their powers under section 9 (1-A) of the Maintenance of Order Act, 1949, issued an order prohibiting the entry into or the circulation of the journal in the state. The Supreme Court observed that there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. Liberty of circulation is an essential to that freedom as the liberty of publication. Indeed, without circulation it would be of little value. Restrictions on freedom of speech and expression can only be imposed on grounds mentioned in Article 19 (2) of the constitution. A law which authorises imposition of restrictions on grounds of 'public safety' or the 'maintenance of public order falls outside the scope of authorized restrictions under clause (2) and therefore void and unconstitutional.

After that in *Brij Bhushan* an order issued under section 7 (l) (c) of the East Punjab Safety Act, 1950, directing the editor and publisher of a newspaper to submit for scrutiny, in duplicate, before publication, till further orders, all communal matters, news and views about Pakistan, including photographs and cartoons, was struck down by the Supreme Court by stating that there can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the freedom of speech and expression declared by Article 19 (l) (a).

In above cases, the Supreme Court followed the rule of implied fundamental rights. Soon after that the scope of the amending power of the Parliament came before the Supreme Court in *Shankari Prasad Vs Union of India* case in which the validity of the Constitution (First
Amendment) Act, 1951, curtailing the right to property guaranteed by Article 31 was challenged. The Constitution (Amendment) Act was enacted to remove certain difficulties brought to light by judicial pronouncements in regard to fundamental rights and the directive principles of the state policy.

In 1950, some state governments initiated proposal for incorporation of laws relating to agrarian reforms. These laws contained provisions for the abolition of zamindari system, as well for the compulsory acquisition of property for public propose. One such measure, the Bihar Land Reforms Act, 1950 was challenged in Kameshwar Singh Vs state of Bihar before the Patna High Court. In that case the Bihar Land Reforms Act, 1950, which made provision for the transference to the state of the interests of proprietors and tenure holders in land and of the mortgagees and lessees of such interests, including interests in trees, forests, jalkars, ferries, hats, bazars, mines and minerals, provided that compensation to the expropriated zamindars was to be paid in certain multiples.

The Bihar Act was challenged, among others, on the ground that the classification of zamindars made for the purpose of giving compensation was discriminatory and denied the equal protection of the laws guaranteed to the citizens under Article 14 of the constitution. The High Court held that though there could be no challenge regarding the adequacy of compensation or of the correctness of the principles prescribed by the Act for determining the compensation or of the manner in which the Act directed the compensation was to be given, clause (4) did not debar the judiciary from entering into the question of compensation in order to decide whether a law offended against Article 14. The Court struck down the Bihar Act as unconstitutional and void as it contravened the provisions of Articles 14 and Articles 19 of the Constitution.

In an another case, the Supreme Court adopted a rigid attitude
decided in 1951. In that case, the Madras Government had reserved seats in state Medical and Engineering colleges for different communities in certain proportions on the basis of religion, race and caste. The state defended the law on the ground that it was enacted with a view to promote the social justice for all sections of the people as required by Articles 46 of the Directive Principles of state policy. The Supreme Court held the law void because it classified students on the basis of caste and religion irrespective of merit. The Directive principles of State policy cannot override the Fundamental rights. Das, C J, speaking for the court observed that the Directive principles of state policy, which by article 37 are expressly made unenforceable by a court cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writes, orders or directions under Article 32. The chapter on fundamental rights in sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate article in part III. The Directive principle of state policy have to conform to and run as subsidiary to the chapter on fundamental rights. In our opinion that is the correct approach in which the provision found in part III and IV have to be understood. However, so long as there is no infringement of any fundamental right to the extent conferred by the provisions in Part III, there can be no objection the state acting in accordance with the directive principles set out in Part IV, but subject again to the legislative and executive powers and limitations conferred on the state under different provisions.

In that case it was held, in case of any conflict between fundamental rights and directive principles, the fundamental rights would prevail. But a year later, when the court dealt with Zamindari Abolition cases its attitude was considerably modified in the Kameshwar Singh Vs State of Bihar the court relied on Article 39 in
deciding that a certain Zamindari Abolition Act had been passed for a public purpose within the meaning of Article 31. Finally, in *Re Kerala Education Bill*, the supreme court observed that though the directive principles cannot override the fundamental rights, nevertheless, in determining the scope and ambit of fundamental rights the court may not entirely ignore the directive principles but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible.

In order to overcome the difficulties created by the Judgments of Supreme court on the one hand and hurdles created by the Patna High Court on the other hand, the Constituent Assembly functioning as the provisional parliament passed the Constitution Amendment) Act, 1951. Introducing the Constitution (First Amendment) Bill, 1951, B.R. Ambedkar, the then Union law Minister stated the Statement of objects and Reasons:

"The validity of agrarian reform measures passed by the state legislatures in the last three years has, in spite of the provisions of (Clause (4) and (6) of article 31, formed the subject matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people has been held up. The main objects of this bill are to insert provisions fully securing the constitutional validity of Zamindari abolition laws in general and certain specified Acts in particular."

The First Amendment Act inserted clause (4) in Article 15, which read as follows:

"Nothing in this article or in clause (2) or article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes."

Beside clause (4) in Article 15, Articles 31-A and 31-B along with Ninth Schedule were also added to the constitution by the First
Amendment Act of 1951.

Articles 31-A and 31-B read as under:

Article 31-A: Saving of laws providing for acquisition of estates, etc.-

1. Notwithstanding anything contained in Article 13, no law providing for:
   a. the acquisition by the state of any estate or of any rights there in or the extinguishment or modification of any such rights, or
   b. the taking over of the management of any property by the state for a limited period either in the public interest or in order to secure the proper management of the property; or ........ shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Articles 14 or 19 of the constitution.

2. In this article-
   a. the expression 'estate' shall in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing la relating to land tenures in force in that area.
   b. the expression 'rights' in relation to an estate, shall include any rights vesting in a proprietor sub-proprietary, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.

Article 31-B: Validation of certain Acts and Regulation:

Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provision of this part, and notwithstanding any judgment, decree or order of any court or
tribunal to the contrary, each of the said Acts and Regulations, shall, subject to the power of any competent Legislature to repeal or amend it, continue in force. The Ninth schedule at that time contained a list of thirteen enactments. The Bihar land reforms Act, 1950 was included at serial number one in this list.

Adopting the literal interpretation of the constitution, the Supreme Court upheld the validity of the Constitution (First Amendment) Act, 1951. The question before the Supreme Court was whether an amendment of the constitution made under Article 368 was included in term "Law" in Article 13? The Court rejected the contention and limited the scope of Article 13 by ruling that the word 'Law" in Article 13 (2) did not include an amendment enacted under Article 368. The Court insisted that there is a clear demarcation between ordinary law, which is made in exercise of legislative power and constitutional law, which is made in exercise of constituent power. The Court, thus, ruled that Article 13 refers to a 'legislative' law, i.e. an ordinary law made by a legislature, but not to a constituent law, i.e., a law made to amend the constitution. The Court also held that Article 368 conferred constituent power on Parliament, in the exercise of which it could amend every provision of the constitution, including the fundamental rights. The bench stated:

"No doubt, our constitution makers, following American Model have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the state. We find it, however, difficult in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. On the other hand, the terms of Article 368 are perfectly general and empower parliament to amend the constitution without any exception whatever."37

The Court on the issue of Article 31-A and 31-B held that the provision made in Articles 31-A and 31-B did not directly affect the
jurisdiction of High Court and the Supreme Court and as such ratification of the impugned amendment by not less than one half of the states was not required.

Thus in Shankari Prasad case the Supreme Court upheld the constitutional validity of the first Amendment Act and avoided any collusion with the Parliament. The court agreed that Article 368 empowers the parliament to amend the constitution without any exception and that the fundamental rights are not excluded from the scope of Article 368. Therefore, the court disagreed with the view that fundamental rights are inviolable and held that although the parliament cannot violate Part III using their ordinary legislative power but they certainly will be able to abridge or restrict fundamental rights using their constituent power. The Constitution (Fourth Amendment) Act, 1955, again amended Article 31 in several respects. The amendment was passed to remove the difficulties created by the Supreme Courts decision in Bela Banerjee’s case. In that case the court was called upon to consider the question whether compensation provided for under the West Bengal land Development and Planning Act, 1948 was in compliance with the provisions of Articles 31 (2) of the Constitution. Under the State Act, lands could be acquired many years after it came into force, but it fixed the market value that prevailed on December 31, 1946 as the ceiling on compensation without reference to the value of the land at the time of acquisition. The court considered the provisions of Article 31 (2) of the constitution and arrived at the following conclusion:

"While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is just equivalent of what the owner has been deprived of. Within the limits of this basic
requirement of full indemnification of the expropriated owner, the constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justifiable issue to be adjudicated by the court."\(^3\)

The Supreme Court’s decision mainly lays down three things, namely,

- the compensation under Article 31 (2) shall be just equivalent of what the owner has been deprived of;
- the principles which the legislature can prescribe are only principles for ascertaining just equivalent of what the owner has been deprived of; and
- if the compensation fixed was not just equivalent of what the owner has been deprived of or if the principles did not take into account all relevant elements or take into account irrelevant elements for arriving at a just equivalent, the question in regard thereto is a justifiable issue.

The Constitution (Forth Amendment) Act, 1955 modified Article 31 (2) and made it clear that clauses (1) and (2) deal with different things i.e. deprivation and compulsory acquisition. It substituted the following as clauses (2) and (2-A) for clause (2) as originally enacted.

Clause (2), "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given, and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate."
Clause (2-A), "where a law does not provide for the transfer of the ownership or right to possession of any property to the state or to a corporation owned or controlled by the state, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."\(^{39}\)

The amendment broadened the scope of Article 31-A and included more statutes in the Ninth schedule. But it will be noticed that the amended Article 31-A had specified three articles of Part III—Articles 14, 19 and 31 against which only the immunity of zamindari abolition laws or other categories of legislations enumerated in the Article was secured, whereas under the first Amendment Act, it excluded all the articles contained in Part III of the Constitution. It also amended Articles 305 and empowered the state to nationalise any trade.

According to its sponsors, the purpose of the Fourth Amendment was to bring the Constitution in accordance with the intention of the framers of the Constitution that the quantum of compensation was to be decided by the legislature. Prime Minister Nehru said in the Lok Sabha,

"It was obvious that those who framed the constitution failed to give expression to their wishes accurately and precisely and thereby the Supreme Court and some other courts have interpreted it in a different way."\(^{40}\)

It is true that Nehru and a few others in the constituent Assembly had thought that the original Article 31 (2) made the legislature the final arbiter of the quantum of compensation which could not be challenged in a court except when there was fraud on the Constitution or a fraudulent exercise of the power so given. To the extent the Fourth Amendment made compensation non-justiciable, it could be said to accord with the intentions of some of the constitution makers.
The amendment remained unchallenged because of decision in *Shankari Prasad case*. During the period of early sixties, certain other legislative measures adopted by different states for the purpose of giving effect to the agrarian policy were effectively challenged. Thus, in *Karimbil Kunhikoman Vs State of Kerala*,41 the validity of the Kerala Agrarian Relations Act, 1961 was challenged by writ petitions filed under Article 32 and as a result of the majority decision of the Supreme Court the whole Act was struck down. In *A. P. Krishnasami Naidu Vs State of Madras*,42 the constitutionality of the Madras Land Reforms Act, 1961 was the subject matter of debate and by decision of the court it was declared that the whole Act was invalid. It appears that the Maharashtra Agricultural Land Act, 1961 had been similarly declared invalid and in consequence, parliament thought it necessary to make a further amendment in Article 31-A and 31-B.

The Constitution (Seventeenth Amendment) Act, 1964, extended the scope of Article 31-A, and Ninth Schedule to protect certain agrarian reforms enacted by the Kerala and the Madras states. To save the validity of the Acts which had been struck down by the Supreme Court, as noted above and of other similar Acts which were likely to be challenged were added to the Ninth Schedule by this amending Act. Accordingly, the expression 'estate' in Article 31-A was amended retrospectively by a new definition given in Article 31-A (2).

The word 'estate' in Article 31-A now includes any jagir or inam, muafi or any other grant and janman right in the State of Kerala and Madras. Article 31-A(1) now reads as under:

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

Thus the main purpose of parliament to pass the amendment act was to save the validity of the acts which had been stuck down by the Supreme Court, as noted in above cases and of other similar Acts which were likely to be challenged, it was considered necessary to enlarge the Ninth Schedule. With that object in view 44 Acts were added to the Ninth Schedule by this act.

The validity of the constitution (Seventeenth Amendment) Act, 1964 was challenged in Sajjan Singh vs the State of Rajasthan case. One of the argument was that the amendment in question has reduced the area of judicial review (as under Article 31-B, many statutes had been immunized from attack before a court). Secondly, it was contended that the Amendment was likely to effect the power of judicial review of the High Court under Article 226 of the constitution, as the High Courts were excluded from looking into the constitutionality of these 44 Acts included in the Ninth Schedule as a result of Article 31-B. Moreover, the amendment had attacked the provision to Article 368 and the impugned amendment had not been ratified by half of the state legislatures, it was invalid.

The Supreme Court again rejected the argument by majority of 3 to 2. The majority expressed its full concurrence with the decision in Shakari Prasad and laid down that Article 13(2) did not effect amendments of the constitution made under Article 368. The court held that the constituent power conferred by Article 368 on Parliament, included even power to take away fundamental rights under Part III and if the Amendment affected Article 226 in an insignificant manner, that was only incidental. The court again drew the distinction between an 'ordinary' law and a 'constitutional' law made in exercise of 'constituent power' and held that only the former,
and not the latter, fell under Article 13. The court also held that it may overrule its early decisions. The bench said it is true that the constitution does not place any restriction on our power to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decisions of constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of public good. The doctrine of state decisis may not strictly apply in this context and no one can dispute the position that the said doctrine should not be permitted to perpetuate erroneous decisions pronounced by this court to the detriment of general welfare.

But the minority raised doubts whether article 13 would not control Article 368. Hidayatullah J, observed.

"I would require stronger reasons than those given in Shankari Prasad's case to make me accept the view that fundamental rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the states because the Constitution gives so many assurances in Part III that it would be difficult to think that they were playthings of a special majority." Justice Mudholkar, another minority judge, was not sure whether Article 13 excludes an amendment act and whether it was competent to parliament to make any amendment at all to Part III of the Constitution. But he adopted a much broader argument. His basic arguments were that every constitution has certain fundamental features which could not be changed."^{45}

These two dissents opened the door to future attempts to bring the exercise of the power of constitutional amendment under judicial scrutiny. It is seen that Golak Nath, the next case, was based on Justice Hidayatullah's argument of non amendability of fundamental rights while Kesavananda was based on Justice Mudholkar's
argument of basic features.

In the *Golak Nath V/s State of Punjab case*, the validity of many land Reform Acts was challenged on the ground they were ultravires the Constitution as they infringed the fundamental rights under article 14 and 19 of the Constitution. In this connection, the validity of the Constitution First Amendment Act, 1951, the Constitution Fourth Amendment Act, 1955 and the Constitution Seventeenth Amendment Act 1964, which were enacted from time to time in order to make the aforesaid Acts not vulnerable to attach on the ground that they contravened the provisions of Chapter III of the Constitution, was also challenged. The Seventeenth Amendment Act included the Mysore Land Reforms Act 1961 and the Punjab Security and Land Tenure Act 1953 in the Ninth Schedule of the Constitution thereby making them parts of the Constitution itself. The main contention of the petitioners was that a constitutional amendment was a law within the meaning of Article 13 (2) of the Constitution and as such the parliament was not competent to abridge or take away any of the fundamental rights enshrined in part III of the Constitution even in exercise of its constituent power under Act 368 and the view taken by the Supreme Court in two earlier decisions namely, *Shankari Prasad's case* and *Sajjan Singh's case* was not correct. The court headed by Subba Rao C.J. was sharply split and by a 6 to 5 majority the earlier decisions of the Supreme Court in *Shankari Prasad's case* and *Sajjan Singh's case* were overruled. According to the majority view, there was no distinction between legislative and constituent power of parliament and such a constitutional amendment was a law within the meaning of Article 13 (2). The fundamental rights could not, therefore, be taken away or abridged by the parliament even by amending the constitution under Article 368. The decision also proceeded on the ground that Article 368 related only to the procedure for amending the constitution. It did not confer any power of
amendment as such. In the words of Chief Justice Subba Rao:

"The marginal note to Article 368 describes that article is one prescribing the procedure for amendment. The article in terms only prescribes the various procedural steps in the matter of amendment. The article assumes the power to amend found elsewhere and says that it shall be exercised in the manner laid down therein. The argument that the completion of the procedural steps culminates in the exercise of the power to amend may be subtle but does not carry conviction. If that was the intention of the provisions nothing prevented the makers of the constitution from stating that the constitution may be amended in the manner suggested. Indeed, whenever the constitution sought to confer a special power to amend on any authority, it expressly said so. The alternative contention that the said power shall be implied either from Article 308 or from the nature of the articles sought to be amended, cannot be accepted for the simple reason that the doctrine of necessary implication cannot be invoked if there is an express provision or unless but for such implication that article will become otiose or nugatory. There is not necessity to imply any such power, as parliament has the plenary power to make any law, including the law to amend the constitution subject to the limitation laid down therein."

The Supreme Court further declared that Parliament would have no power in future, i.e., from the date of Golak Nath decision on Feb. 27, 1967, to amend any provision of Part III of the constitution so as to take away or abridge the fundamental rights enshrined therein. The Court ruled that the fundamental rights are the modern name for what have been traditionally known as natural rights. Thus, it can be said that fundamental rights are the primordial rights necessary for the development of human personality.

Chief Justice Subba Rao stated that a fundamental right should be looked upon, not from the point of view of any particular difficulty
of the moment, but as something that you want to make permanent in the constitution.

Justice Wanchoo, rejecting the contention that the power of amendment under Article 368 is subject to inherent and implied limitation, observed:

"We have given careful consideration to the argument that certain basic features of our Constitution cannot be amended under Article 368 and have come to the Conclusion that no limitation can be and should be implied upon the power of amendment under Article 368."

As to the first, fourth and seventeenth amendments of the constitution, the majority held that these amendments abridged the scope of fundamental rights. But they took recourse to the doctrine of prospective overruling and upheld the validity of these amendments. On the other hand, the minority, however, held that the word 'law' in Article 13 (2) referred to only ordinary laws and not a constitutional amendment and hence Shankari Prasad's and Sajjan Singh cases were rightly decided. According to them, Article 368 deals with not only the procedure of amending the constitution but also contains the power to amend the constitution.

The following major propositions can be drawn from the majority opinion in Golak Nath case:

- Article 368 only contains the procedure to amend the Constitution.
- The substantive power to amend is not to be found in Article 368.
- A law made under Article 368 would be subject to Article 13 (2) like any other law.
- The word 'amend' envisaged only minor changes in the existing provisions but not any major alterations there in.
- To amend the Fundamental Rights, a Constituent Assembly
ought to be convened by Parliament.

The result of the Supreme Court decision in the above case was that Parliament was deprived of its power to amend the fundamental rights so as to abridge or take them away with effect from Feb.27, 1967 the date of decision of the case. It was, therefore held that if a Constitutional amendment had to effect of abridging or taking away any of the basic rights guaranteed in Part III of the Constitution, it would struck down by the court as unconstitutional. The seventeen Amendment Act which was challenged before Supreme Court in Golaknath's case, however, was validated by resorting to the American doctrines of prospective overruling which the Supreme Court applied in this country for the first time. The Golaknath case stirred a great controversy regarding the scope of judicial review. For the first time, the judges had openly taken a political position. They had held that it was not desirable that Parliament’s power to amend the Constitution should be unlimited and that the fundamental rights should be at the mercy of the special majority of the members of parliament required for Constitutional amendment. Golaknath was an open rejection of the view that the court merely interpreted the Constitution and that it was not concerned with the consequences of its interpretation. The said decision was an assertion by the court of its role as the protector and preserver of the Constitution. Till then the court had not taken such a bold position on its constitutional role. The courts decision marks a watershed in the history of the Supreme Court of India’s evolution from a positivist court to an activist court. The judges did not merely interpret the Constitution as it was but interpreted it from the vantage point of what it should be. They brought in the natural law concept in understanding the position of fundamental rights in the Constitution. Following the natural law theory, these judges held that fundamental rights were inalienable rights of the people. The verdict in Golaknath's case led to direct conflict of power between the parliament and
judiciary. After that there were two notable decisions of the Apex Court of Constitutional importance. First of them was the Bank Nationalisation case\textsuperscript{48} and the other the Privy Purses case.\textsuperscript{49}

By an Ordinance promulgated by the president, many banks were nationalised. Under the ordinance, the entire undertaking of every named commercial bank was taken over by the corresponding new bank and all assents and contractual rights and all obligations to which the named bank was subject stood transferred to the corresponding new bank. The ordinance was later replaced by the 'Banking' Companies Act, 1969. R.C. Cooper, who held shares in the Central Bank of India Ltd. and many other nationalised banks and was also the Director of the Central Bank filed a petition under Article 32 before the Supreme Court challenging the Act on the ground that it violated his own fundamental rights guaranteed by Article 14, 19 and 31 of the Constitution. The Supreme Court in his majority judgment stated that the theory that the object and form of state action determine the extent of protection which the aggrieved party may claim, was not consistent with the Constitutional scheme which aims at affording the individual the fullest protection of his basic rights. The state action must, therefore, be adjudged in the light of its operation upon the rights of the individual and groups of individuals in all its dimensions. The Chief Justice declared that the Banking Companies Act of 1969 was invalid and the action taken or deemed to be taken in exercise of the powers under the Act was declared unauthorised.

The Court came to the conclusion that the principles fixed for the determination of the compensation payable to the Banks for the acquisition of their undertakings were irrelevant and violated the rights conferred on the Banks By Article 31 (2) and, therefore, the Act was invalid.

Next was the privy purses case. On September 6, 1970 the
President of India passed a order in respect of each of the Rulers of former Indian States.

In exercise of the powers vested in him under Article 366 (22) of the Constitution, the President hereby directs that with effect from the date of this order his highness Maharajdhiraja Madav Rao Jiwaji Rao Scindia Bahadur do cease to be recognised as the Rule of Gwalior.

The court held the orders of the President to be ultra vires and issued writs of Mandamus not to enforce the orders. Justice Hegde has further pointed out that the case was examined in the light of the provisions of Articles 31 (2) which provides for public purposes and it was misleading to link it with Article 39 which lays down the state policies for the economic betterment of the people in general. With regard to Article 39, he observed as under:

“To the best of my recollection the Supreme Court has not struck down any law distributing the ownership and control of material resources of the community in such a way as best to sub serve the common good, no has it struck down any law or impeded any efforts on the part of the state to see that the operation of the economic system does not result in the concentration of wealth and means of production to the detriment of common good.”50

Further justice Hegde observed; "In my opinion, it is not open to the executive or for that matter to any of the organs of the state to disregard the provisions of the Constitution merely because those provisions do not accord with its views. The mandate of every provision of the Constitution is a binding mandate. No one has power to depart from that mandate or circumvent it, whatever his views about the appropriateness of the mandates may be. If the Constitution or any part of it has become out of tune with the present day society of ours, appropriate steps may be taken to alter the Constitution. It is no virtue to uphold the Constitution when it suits us. What is important may necessary, is to uphold it even when it is inconvenient."

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to do so."

The decisions of the Supreme Court in the aforesaid two cases were interpreted by the Government as indication of a philosophy supporting the vested interests and the general opinion against the Supreme Court grew in volume. In 1971 when the Government emerged strong after the Lok Sabha elections, it took the bold step of amending the Constitution by the Constitution (Twenty Forth Amendment) Act, 1971, the Constitution (Twenty Fifth Amendment) Act, 1971, the Constitution (Twenty Six Amendment) Act, 1971, and the Constitution (Twenty Ninth Amendment) Act, 1972.

The Constitution (twenty forth) Amendment Act, 1971 made the following changes:

- It added a new clause (1) to Article 368, to confer on parliament, constituent power to amend by way of addition, variation or repeal any provision of the constitution including fundamental rights.
- A new clause (4) was added to Article 13, which provided that nothing in this Article shall apply to any amendment of the constitution made under Article 368.
- The marginal heading to article 368 which ran as procedure for amendment of the constitution was substituted by a new heading which runs as 'power of parliament to amend the constitution and procedure therefore.'
- It provided that president would give his consent to the amending bill having passed by the houses of parliament.52

The Constitution (Twenty Fifth Amendment) Act, 1971 was enacted to overcome the decision of the Supreme Court in Bank Nationalisation case in which it was held that the Constitution guaranteed right to compensation i.e. the equivalent in money of the property compulsorily acquired and thus it was open to the Court to go into the question whether the amount paid to the owner of the
property was what might reasonably be considered as compensation for loss of property. Article 31 (2) was, therefore, amended to substitute the word amount for compensation and a new clause 2-B was inserted in Article 31 which provides that Article 19 (1) F which provides the right to hold and dispose of property will not apply to any law relating to the acquisition of property for public purpose.

Further Article 31-C was added which provided that a law giving effect to the directive principles specified in Article 39 (b) and (c) will not be void on the ground of contravention of Article 14, 19 or 31 and that a law containing a declaration that it is for giving effect to these directive principles will not be open to judicial scrutiny on the ground that it does not give effect to them.53

The Constitution (Twenty Sixth Amendment) Act, 1971 was enacted to terminate the privy purses and privileges of the rulers of former Indian States by inserting a new Article 363-A.54

The Constitution (Twenty Ninth Amendment) Act, 1972 amended the Ninth Schedule to the Constitution inserting therein two Kerala Amendment Acts in furtherance of land reforms.55

So the difficulties created by the judgment in Golak Nath case were sought to be resolved by these Amendment acts which restored to Parliament its power to amend any provision of the Constitution including Part III comprising Fundamental Rights.

These constituent changes came to be challenged before the thirteen judge constitutional bench in Kesavananda Bharti Case. This time a majority of Judges held that the view taken in Golak Nath’s case that the word ‘Law’ in Article 13 included a constitutional amendment, could not be upheld. The said decision was, therefore, over ruled. Delivering the majority judgement Chief Justice Sikri observed:

In the constitution, the word amendment or amend has been used in various places to mean different things. In some Articles, the
word amendment in the context, has a wide meaning and another context, it has a narrow meaning.

The majority observed that the parliament has wide power of amending the constitution under Article 368, it extended to all the provision of the constitution, including those relating to fundamental rights, but the amending power is not unlimited and it does not include the power to destroy or abrogate the basic structure or framework of the constitution. The basic philosophy underlying the doctrine of non-amenability of the basic features of the Constitution, evolved by the majority judges in *Kesavananda* has been explained by justice Hegde and Mukerjee as below:

"Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed."

The majority of the Supreme Court thus, evolved the theory of basic structure. According to them the basic foundation of the basic features could be easily discernible from the preamble, as well as, from the whole scheme of the Constitution. But there was a considerable disagreement among the majority judges about the components of basic structure.

According to Sikri, C.J., the basic structure may include the following features:

- supremacy of the constitution;
- separation of power;
- republican and democratic form of government;
- secular character of the constitution; and
Justice Shelat and Justice Grover, Characterised the basic elements of constitutional structure as:

- the supremacy of the constitution;
- republican form of government and sovereignty of county;
- the dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare state contained in Part IV;
- secular and federal character of the constitution;
- demarcation of powers between the legislature, the executive and the judiciary;
- the unity and integrity of the nation.

Justice Jagmohan Reddy pointed out that the elements of basic structure are indicated in the preamble of the constitution. According to him following are the elements of basic structure:

- sovereign democratic republic;
- parliamentary democracy;
- the three organs of state;
- justice, social, economic and political;
- liberty of thought, expression, belief, faith and worship; and
- equality of status and of opportunity;

In the same case, Justice Hedge and Justice Mukherjee included the sovereignty and Unity of India, the democratic character of our polity and individual freedom in the elements of the basic structure of the constitution. They believed that parliament has no power to revoke the mandate to build a welfare state and an egalitarian society. Justice Khanna also said that parliament cannot change out democratic government into a dictatorship or hereditary monarchy not would it be permissible to abolish the Lok Sabha and the Rajya Sabha.

The minority led by Justice Ray held that the power to amend
was wide and unlimited and included the power to add, alter or repeal any provision of the constitution. They, therefore, upheld all the constitutional amendments. The minority held:

"The power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provisions of Constitution. There can be or is no distinction between essential and unessential feature of the Constitution to arise any impediment to amendment of essential features. Parliament in exercise of constituent power can amend any provision of the Constitution. Under Article 368 the power to amend can also be increased. He accepted that an amendment does not mean mere abrogation or wholesale repeal of Constitution. An amendment must have an organic mechanism providing the Constitution, organisation and system for state."57

Thus it can be observed that it would not be easy to identify with certainly, the basic structure or the provisions of the constitution which constitute the basic structure or features. It is, therefore, for the Supreme Court, to determine finally, as to what constituted the basic structure or what features constituted the framework of the constitution. It may be stated that by laying down the concept of basic structure, the Supreme Court has assumed to itself the constituent power. According to the Court in this case the word 'amend' enjoys a very restrictive connotation and the court can look into the validity if it threatens to nullify or destroy any fundamental feature of the Constitution. *Kesavananda* also answered an important question which was left open by *Golak Nath*, as to whether Parliament has the power to rewrite the entire Constitution and bring in a new Constitution. The court answered this by saying that Parliament can only do that which does not modify the basic structure of the Constitution. What was basic structure was unknown and had to be articulated by the court from time to time. It meant that the court
would decide which constitutional amendment was destructive of the basic structure and what constituted the basic structure. Lastly, *Kesavananda’s case* proved that the Parliament is not sovereign in Indian context and its power is not absolute but channelised and controlled.

Chief Justice Sikri was to retire within a few days from the day the decision in *Kesavananda Bharti* was rendered. Till then the practice had been to appoint the seniormost judge of the Supreme Court as the Chief Justice. If that rule were to be followed, Justice Shelat should have been appointed as Chief Justice. But the Government surprised everybody by appointing Justice A.N. Ray as Chief Justice in preference to three judges senior to him. This led to resignation by the three judges. The *Kesavananda* majority was therefore reduced by four judges. Justice Mukherjee died and Justice Reddy was to retire soon. Out of the seven judges who subscribed to the basic structure doctrine, only Justice Khajha remained.58

Soon after that in *Indira Nehru Gandhi Vs Raj Narain case,* Justice Chandrachud found the following to be the fundamental elements of the basic structure of the Constitution:

- India as a sovereign democratic republic;
- equality of status and opportunity;
- secularism and the freedom of conscience;
- rule of law.

In that case, Mrs. Indira Nehru Gandhi, (the appellant) the then Prime Minister filed an appeal before the Supreme Court against the judgment of the Allahabad High Court, in which the High Court had invalidated the election of the appellant to Lok Sabha, on the ground of having committed corrupt practice under the representation of the People’s Act, 1951. During the pendency of the appeal before the Supreme Court, Parliament enacted the Constitution (Thirty Ninth Amendment) Act, 1975.60 The amendment inserted a new Article 329-
A in the Constitution, to nullify the effect of the High Court judgment and also withdrawing the jurisdiction of all courts, including the Supreme Court, over disputes relating to the elections involving the speaker and the Prime Minister including the present appeal pending before the Supreme Court.

Clause (4) of the new Article 329 A, which is directly concerned with this appeal, stated that law made prior to the commencement of Thirty Ninth Amendment, in so far as it related to election petition would apply or should deemed to have applied to election of the Prime Minister to either House of Parliament. It further provided that such election would not be deemed to be void or even to have became void and that notwithstanding any decision of any court before Thirty Ninth Amendment, declaring such election to be void. In short, that amendment sought to decide the election petition in favour of Mrs. Indira Gandhi, the then Prime Minister of India, by legislative decision before her appeal could be heard by the Supreme Court. Perhaps for the first time in constitutional history of India, the amendment was challenged not in respect of social welfare programmes or right to property but with reference to the law guaranteeing free and fair elections which lie at the root of democratic form of government. The question was whether Parliament in its exercise of constituent power could exercise judicial power as was manifest by Article 329-A.

The court declared the clause (4) of Article 329 A as invalid. Chief Justice Ray and Justice Mathew pointed out that unlike in the American context, judicial power had not been expressly vested in the Judiciary by the Constitution of India. Therefore, parliament could, by passing a law within its competence, vest judicial power in any authority for deciding a dispute. It was held that in election matters, judicial review could be ousted. Beg. J. upheld the amendment entirely. Mrs. Gandhi's election was declared valid on the basics of the amended election laws. Thus the Election case was not only put a
query on the scope of amending power under Article 368 but also put a question mark about the correctness of the need for having an unlimited and absolute amending power. The judges grudgingly accepted parliament's power to pass laws that have a retrospective effect within three days of the decision on the Election Case Chief Justice Ray, Convened a thirteen judge bench to review the *Kesavananda Verdict* on the pretext of hearing a number of petitions, relating to land ceiling laws which had been languishing in high courts. The petitions contended that the application of land ceiling laws violated the basic structure of the constitution. In fact, the review bench was to decide whether or not the basic structure doctrine restricted parliament's power to amend the constitution. The decision in the *Bank Nationalisation case* was also up for review.

It must be remembered that no specific petition seeking a review of the *Kesavananda* verdict filed before the apex court a fact noted with much chagrin by several members of the bench. Ultimately, Chief Justice Ray, dissolved the bench after two days of hearings. Many people have suspected the government's indirect involvement in this episode, seeking to undo an unfavourable judicial precedent set by the *Kesavananda* decision.

The declaration of a National emergency in June 1975 and the consequent suspension of fundamental freedoms, including the right to move courts against preventive detention, diverted the attention of the country from this issue.

During the 1975 emergency, the president had issued an order under Article 359 of the Constitution suspending the right to move any court for the enforcement of the fundamental rights guaranteed by Articles 14, 21 and 22 of the Constitution. Attorney General therefore argued that during emergency, even if the executive shot a person dead or put him in prison, he could not invite the court to examine the validity of such an action. *In Habeas Corpus case* the
above presidential order was challenged on the ground that it had prohibited all persons to move writ petitions under Article 226 before a High Court to enforce any right of personal liberty of a person detained under MISA on the ground that the order of detention was illegal. It was argued that permitting the executive to defy and disobey the law made by the legislature was tantamount to destroying one of the important basic feature of the Constitution.

In the *Habeas Corpus* case, the Supreme Court held that the basic principle of rule of law that a person could not be divested of his liberty unless he had committed any breach of the law did not survive the proclamation of emergency. A court that only a few months ago had struck down a constitutional amendment as being against the basic structure of the Constitution in the *Prime Minister election* case did not consider the argument of the respondents that the above principle of rule of law, which was part of the basic structure of the Constitution, could not be whittled down through an order of the president issued under Article 359.

Thus, in *Habeas Corpus* case the Supreme Court gave a new dimension to the theory basic structure by declaring the whole range of emergency provisions as part of basic structure.

Soon after the declaration of National Emergency, the government constituted a committee under the chairmanship of S. Swaran Singh, to study the question of amending the constitution in the light of past experiences. Based on its recommendations, the government incorporated several changes to the constitution including the preamble, through the Forty Second Amendment Act of 1976. Among other things, the amendments gave preponderance to the Directive Principles of State Policy over the fundamental rights. It also introduced far-reaching changes in the constitution, mostly based on the proposals made by S. Swaran Singh's committee. The law minister while introducing the amendment bill stated that its principle
objective was to assert the supremacy of the parliament, especially its constituent power under Article 368, and thus to remove the difficulties which had arisen in achieving the objective of socio-economic revolution designed to improve the condition of the masses. Article 368 was amended to make it clear that there would be no limitation whatsoever on the constituent power of parliament. For this objective, two new clauses namely clauses (4) and (5) to Article 368 were added, as given below:

Article 368, clause (4) : No amendment of this constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the constitution (42nd Amendment) Act, 1976 shall be called in question in any court on any ground.

Clause (5): For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of parliament to amend by way of addition, variation or repeal the provisions of this constitution under this article.

The amendment further added 64 central and state land reform laws to the ninth schedule. The power of judicial review of the higher courts has been curtailed and diluted by various provisions introduced in the constitution. Clause (1) of Article 131-A confers exclusive jurisdiction on the Supreme Court to determine all questions relating to constitutional validity of any central law.

Article 144-A lays down that the minimum number of Judges of the Supreme Court who shall sit for the purpose of determining any question as to the constitutional validity of any central law or state law shall be seven and that no such law shall be declared to be invalid unless majority of not less than two thirds of the Judges sitting for the purpose hold it to be invalid. Clause (1) of Article 228 (A) provides that no High Court shall have jurisdiction to declare any central law to be invalid. The forty second amendment enacted during emergency was
thus far the most controversial and comprehensive amendment. It sought to spell out expressly the ideas of socialism, secularism and integrity of the nation in the preamble, to add a chapter on fundamental duties of the citizens and make the directive principles more comprehensive and give them precedence over fundamental rights. The most objectionable parts of the amendment were those that sought to tilt the balance in favour of the executive by reducing the role of the high court in the judicial process. Within less than two years of the restoration of parliament's amending powers to near absolute terms, the forty second amendment was challenged before the Supreme Court by the owners of Minerna Mills (Bangalore) a sick industrial firm which was nationalised by the government in 1974. Chief Justice Y.V. Chandrachud, delivering the majority judgment upheld the power of judicial review of constitutional amendments. The majority maintained that clauses (4) and (5) of Article 368 conferee unlimited power on parliament to amend the constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the constitutions basic structure. The court contained the following observations:

"Our constitution is founded on a nice balance of power among the three wings of the state, namely, the Executive, the Legislative and the judiciary. It is the function of the judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become unconstitutional."63
The court further stated;

Indeed, a limited amending power is one of the basic features of our constitution, and therefore, the limitation on that power cannot be destroyed. In other words, parliament cannot under article 368
expand its amending power so as to acquire for itself the right to
tear or abrogate the constitution or to destroy its basic and essential
features.

   The court also held that the following are the basic features of
   the Constitution;
   ➢ limited power of parliament to amend the constitution;
   ➢ harmony and balance between fundamental rights and directive
     principles;
   ➢ fundamental rights in certain cases;
   ➢ power of judicial review in certain cases.

   Justice Bhagwati in his minority judgment held that the power
   of judicial review is the integral part of Indian constitutional system.
   He agreed with the majority in holding amendments to Article 368 as
   invalid and unconstitutional on the ground of damaging the basic
   structure of the constitution. In his view, Clause (4) of Article 368 was
   unconstitutional as the consequence of excluding judicial review of
   constitutional amendments would be to enlarge the amending power
   of parliament and destroy the basic structure of the constitution.
   Clause (5) could not remove the doubt which did not exist, and so it
   was outside the amending power of parliament. The two clauses (4)
   and (5) were interlinked.

   For Justice Bhagwati, Article 31 (c) only codified the existing
   constitutional position and provided immunity to a law enacted to give
   effect to a Directive Principle, so that fertile and time consuming
   controversy whether such a law contravened Article 14 or 19 was
   eliminated. He saw the impugned section as a constitutional
   command to make laws for giving effect to the Directive Principles and
   not as negative weapon to encroach upon the fundamental rights
   embodied in articles 14 and 19. Therefore he declared that the
   amendment in Article 31 (c) is far from damaging the basic structure
   of the constitution, strengthens and re-enforces it.
The judgment of the Supreme Court in above case thus makes it clear that the Constitution, not the Parliament is supreme in India. This is in accordance with the intention of the framers who adopted a written constitution for the country. Under the written constitution, there is a clear distinction between the ordinary legislative power and the constituent power of the parliament. Parliament cannot have unlimited amending power so as to damage or destroy the constitution to which it owes existence and also derives its power. The court, however, held that the doctrine of basic structure is to be applied only in judging the validity of amendments to the constitution and it does not apply for judging the validity of ordinary laws made by legislatures.

In 1977, the then Prime Minister Indira Gandhi advised the President to dissolve the Lok Sabha and hold fresh elections. The Congress Party lost heavily and even Prime Minister Indira Gandhi was defeated in her own constituency. The Janta Party formed the government at the centre. During the short period of its rule, it did the work of amending the Constitution to seed out those draconian elements that had been inserted by the forty second amendment act.

The Constitution (Forty Fourth Amendment) Act, passed in 1978, removed most of the aberrations and distortions introduced into the constitution by the constitution (Forty Second Amendment) Act of 1976.

The Forty Fourth Amendment cancelled this amendment and Article 71 as originally enacted gave jurisdiction to the Supreme Court to decide election disputes of the President and the Vice-President. The Act has amended Article 132, 133 and 134 relating to appeals in the Supreme Court from the decision of the High Courts and inserted a new Article 134 A under which the High Court can now grant a certificate for appeal to the Supreme Court under Article 132, 133 and 134. It has also omitted Clause (3) of Article 132, relating the grant of
special leave by Supreme Court in cases where the High Court refuses to give a certificate cases of special leave to appeal by Supreme Court will thus be left to be regulated exclusively by Article 136 of the constitution. This Amendment was intended to avoid delay in matters of appeal to the Supreme Court from High Courts.

Forty Second Amendment had amended Article 225 so as to reimpose on the original jurisdiction of the High Courts restriction regarding matters concerning revenue or acts done in collection thereof. Forty Fourth Amendments again amended Article 225 so as to remove this bar on the High Courts original jurisdiction. Thus, the position as it obtained prior to forty second amendment has been restored in this respect.

To sum up, it can be said that after independence in the early years of its working, the Supreme Court adopted the attitude of judicial restraint in which the court gave a strict and literal interpretation of the constitution. Then the Golaknath case resulted in an open conflict between the judiciary and the legislature. The parliament asserted its supremacy and the Supreme Court asserted its power of judicial review, which resulted in a series of constitutional amendments in which the parliament tried to limit the power of judicial review. In the post-emergency scenario, the major parts of the constitution have come into the ambit of basic structures of the constitution which the parliament cannot change. The doctrine of basic structure of the Constitution is a great Constitutional concept that has been formally engrafted upon the Constitution by the judiciary through the interpretative process. The doctrine is well formulated and it has maintained a balance between the rigidity and the flexibility of the Constitution. It prevents the parliament from having unconditional power and becoming the master of law itself. Till date it has proved to be a very effective tool in deciding the validity of the Constitutional amendments. The Supreme Court has done a great
service to the nation by declaring that there are certain basic features of the Constitution which cannot be amended. Thus, the doctrine of basic structure may be allowed to operate as the very watchdog of Constitutional governance. There can still be debates about what constitutes basic structure.

The legislature and the judiciary are both supreme within their respective sphere. Thus, the existence of a fearless and independent judiciary can be said to be the very basic foundation of the constitutional structure in India. It has a written and controlled Constitution. The doctrine of the parliamentary supremacy as understood in England does not prevail in India except to the extent provided by the Constitution. The power of Judicial Review is exercised by the judges on behalf of the people of India. Mr. Justice V. R. Krishna Iyer has very aptly remarked that:

“The judicial power is exercised by courts on behalf of the people of India, so long as "we the people have appointed them to exercise such power."65
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