CHAPTER V

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Parliamentary Response to Judicial Conservatism

The Constitution of a country provides the politico-legal framework within which public activities of the State and all entities under its jurisdiction must take place. It would be wrong, however, to assume that the framework remains constant for ever. Rather, to keep pace with time, the framework must fit in with the changing role of the State—which is why a constitution needs to be amended from time to time. In the case of the Indian Constitution which, on an average, has been amended thrice every two years since its inception, the demand for change arose frequently to vindicate social legislations which had been the target of judicial conservatism. Before the rationale behind these amendments is examined, it will be useful to see if and to what extent the original provisions of the constitution really fell short of the requirements of a programme for socialist transformation. It will be seen that the constitutional amendments, though compelled by judicial conservatism, should be regarded as crucial indicators of the readiness or otherwise of the Government of the day to live up to the demands.
of a socialist programme. If, as we have noted earlier, the constitution represented an exercise in compromise of the various class interests prevailing at the time of its adoption, it would be quite natural to expect that any Government which professed a commitment to socialism should leave no stone unturned to tune the constitution to its programme.

The Congress Party's opposition to feudalism notwithstanding, the right to property found a place in the Chapter on Fundamental Rights viz. Art. 19(1) (f). Art. 31 laid down that no person could be deprived of his right to property save by the authority of law and went on to delineate the manner and circumstances in which the State could partially or wholly take over private authority. However, their ambivalence towards the right to property notwithstanding, the founding fathers, in particular Nehru, were shocked to find some High Courts strike down land reforms laws because they did not provide for adequate compensation. In opposition to this, the late Prime Minister Mr. Nehru wanted unlimited executive powers to carry out his socialist ideas. Thus, he had said in the Constituent Assembly:
"There is no permanence in a Constitution. There should be a certain flexibility. If you make anything rigid and permanent, you stop the growth of a living vital organic people. We cannot make this constitution so rigid that it cannot be adapted to changing conditions. When the world is in turmoil, and we are passing through a swift period of transition, what we do today, may not be wholly applicable tomorrow".¹

A careful examination of the above remark would clearly point to the fact that the legislature was fully aware of the changing needs of the society. But our Judiciary went a further step ahead. In matters of legislation, when a question crops up as regards its legal validity, they not only confine their opinion to the legal sphere but also expressed views on social aspects, which do not necessarily echo those of the legislators. Hence a confrontation arises between the Judiciary and the Legislature. To meet this situation, amendments to the Constitution had to be passed in the Parliament. Yet it is

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possible that the Parliament enacts amendments in one spirit and the Courts often take them in an entirely different light, thereby challenging the validity of the amendments. Both the Courts and the Parliament try to establish the fact that they are the real champion of democracy in this country, the former being on the side of individual liberties and the latter working for giving them a socialist content. Thus, long since 1951, a cold war between the Judiciary and the Legislature has been going on.

The Indian Constitution, as it was framed by the Constituent Assembly of India, has been amended so far on 44 occasions. Of these, the Constitution (First Amendment) Act of 1951, the Constitution (Fourth Amendment) Act of 1955, the Constitution (Seventeenth Amendment) Act of 1964, the Constitution (Twenty-fourth Amendment) Act of 1971, the Constitution (Twenty-fifth Amendment) Act of 1971, the Constitution (Forty-second Amendment) Act of 1976, and the recent Constitution (Forty-fourth Amendment) Act of 1978 have affected the fundamental rights as guaranteed by the Constituent Assembly embodied in Part III of the Constitution of India. In what follows, an attempt will be made to briefly review these controversial amendments, which purport to take away or abridge the Fundamental Rights.
It may be pointed out that the ultimate aim of the amendments is to exclude the jurisdiction of Courts of law from challenging the validity of the Acts passed by the Legislature. The legislature tries to tie the hands of the court through these constitutional amendments and wrest a decision favourable to the State.

The first Amendment, apart from various restrictions, protected land reforms legislation. It also incorporated into the Constitution the Ninth Schedule which protects any agrarian legislation included in it from being challenged on the ground of violation of Fundamental Rights. This, however, did not solve all problems and subsequent Court interpretations, in particular of terms such as compensation and the effect of the first Amendment, led to several other Amendments. The Fourth Amendment ended the justiciability of compensation, expanded the Ninth Schedule and protected some other socialist laws. The 17th Amendment too dealt with agrarian reforms.

The main objects of the 1st Amendment Act were to amend Article 19. The citizens' right to practice any profession or to carry on any occupation, trade or
business conferred by Art 19 (1)(g) is subject to reasonable restrictions which the laws of the State may impose "in the interests of the general public". The words cited are comprehensive enough to cover any scheme of nationalisation which the State may undertake. The Act also inserts provisions fully securing the constitutional validity of Zamindari abolition laws in general and certain specified State Acts in particular.

The Constitution 4th Amendment Act, 1955 amends Arts. 31, 31A and 305 of, and Ninth Schedule to, the Constitution, clause 2 of Art 31 seeks to restate more precisely the State's power of compulsory acquisition and requisitioning of private property and distinguish it from cases where the operation of regulatory or prohibitory laws of the State result in "deprivation of property". It also provides that the adequacy of compensation shall not be called in question in any court. Article 31A is extended so as to cover important social welfare legislation, viz.

(i) Fixing of limits to the extent of agricultural land that may be owned or occupied by any person, the
disposal of any land held in excess of the prescribed maximum and further modification of the rights of land owners and tenants in agricultural holdings;

(ii) State's control over the mineral and oil resources of the country, including in particular, the power to cancel or modify the terms and conditions of prospecting licenses, mining leases and similar agreements;

(iii) Taking over under State management for a temporary period a commercial or industrial undertaking or other property in the public interest or in order to secure the better management of the undertaking or property;

(iv) Elimination of the managing agency system, amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations; etc.
The 17th Amendment Act, 1964 seeks to amend Art. 31A following striking down of some acts relating to agrarian reforms.* The protection of Art. 31A is available only in respect of such tenures as were estates on the 26th Jan, 1950, when the constitution came into force. The expression 'estate' has been defined differently in different States and as a result of the transfer of lands from one State to another on account of reorganisation of states, the expression has come to be defined differently in different parts of the same State. Moreover, many of land reform enactments relate to lands which are not included in an estate. It is, therefore, proposed to amend the definition of "estate" in Article 31A of the Constitution by including therein lands held under Ryotwari Settlement and also other lands in respect of which provisions are normally made in land reform enactments.

*Foot-Note: The Kerala Agrarian Relations Act, 1961 was struck down by the Supreme Court in its application to Ryotwari lands transferred from the State of Madras to Kerala. The Act was further struck down by the High Court of Kerala in its application to lands other than estates in Malabar and Travancore. It was held that the provisions of the Act were violative of Arts 14, 19 and 31 of the Constitution and that the protection of Art 31A of the Constitution was not available to those lands, as they were not estates.
Turning to the historical setting of these amendments, we find that the common urge in each case was to defend existing and/or anticipated social legislation in the face of judicial objection.

After independence three States, viz, Bihar, Uttar Pradesh and Madhya Pradesh had decided to abolish the intermediaries between the cultivators and the State, viz. Zamindars and acts to that end were enacted in the respective State Legislatures by 1950, when the Constitution of India was promulgated. The validity of these Acts was challenged by the aggrieved Zamindars in their respective High Courts. Bihar Land Reforms Act was held unconstitutional by the Patna High Court (AIR 1951 Pat.91). But the Allahabad High Court held the U.P. Zamindari Abolition and Land Reforms Act to be constitutionally valid (AIR 1951/674). The M.P. Abolition of Proprietary Rights (Estates, Mahals, Alienated lands) Act was also held valid by the Supreme Court (AIR 1952 SC 252). This decision on appeal also validated the Bihar Land Reforms Act except for two sections. It was at this stage, before appeal was heard by the Supreme Court, the Article 31A and 31B and a clarificatory addition to Clause 6 of Art.19 were inserted by the Constitutional (First Amendment) Act of 1951. The aim of the amendment
was obviously to validate Zamindari Abolition Acts in case they are found to be unconstitutional by the Supreme Court. Its laudable object might be, as expressly stated in the statement of objects and reasons "to end dilatory and wasteful litigation". Cited at AIR 1960 SC 1080 from statement of objects and reasons to the Fourth Amendment Act.

Again the Constitution (Fourth Amendment) Act of 1955 has stated in its statement of objects and reasons that "recent decisions by the Supreme Court had given very wide meaning to clauses 1 and 2 of Art.31". Hence, the Amendment.

The Constitution (Seventeenth) Amendment Act was enacted because the Supreme Court had held the Kerala Agrarian Relations Act as unconstitutional, since the protection given to certain acts in the ninth schedule, was not available to Ryotwari lands. Hence this Amendment sought to enlarge the meaning of "estate" in Art 31A and adds 44 more acts to the ninth Schedule.

Thus it may be seen by a study of the statement of objects and reasons, and also the workings and the
historical setting of the constitutional amendments, first, fourth and seventeenth, that the aim of the said amendments is to nullify the effect of Court's judgments. So, when we talk of a confrontation between parliament and the judiciary, it takes its start long before the Golaknath Case ruling in 1967. And it has only been accelerated since then.

The 24th Amendment to the Constitution removed the restrictions imposed by Article 13(2) of the Constitution and empowered the Parliament to amend any part of the Constitution. It made it clear that the Supreme Court would no longer be able to hinder any move to amend the changing needs of the society. The 25th Amendment facilitated State acquisition of private property at a minimum cost. It inserted into our Constitution a new article, i.e. article 31(C), which established the paramountcy of the Directive Principles as embodied in Articles 39(b) and 39(c) over the fundamental rights. It also took away the power of judicial review by providing that no law formulated for giving effect to these Directive Principles shall be called in question in any Court of law.
II. **Parliamentarians' and Jurists' Reaction to the Amendments:**

Of the Amendment Acts discussed above, the 25th is the most debated and the most important amendment so far. It would be interesting to take into consideration the various currents and cross-currents of political opinion which were expressed in the Parliament on the eve of the passage of this bill in 1971.

First of all, there is the argument of Mr. H.R. Gokhale, the then Minister of Law and Justice, that the Bill seeks to restore Article 31 of the Constitution back in its proper perspective from which it was displaced by a number of adverse judicial decisions. By adding a new clause Art. 31-C the proposed amendment substitutes the word "amount" for the word "compensation". This 'amount' may be fixed by law or may be determined in accordance with such principles and given in such manner as may be determined by law. The proposed amendment also provides that no such law shall be called in question in any Court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of the amount is given otherwise than in cash.
The proposed amendment is necessitated by the judgment on what is now well-known as the Bank Nationalisation case in which it was held that despite the Fourth Amendment, the continued use of the word "compensation" meant that the money equivalent of the property acquired must be given for any property taken by the State for a public purpose. This interpretation given by the Supreme Court clearly defeated the plain intention of the Fourth Amendment which by amending Article 31 (2) made the adequacy of compensation non-justiciable. The present amendment, therefore, seeks only to restore the status-quo-ante which was prevalent after the Shantilal Mangal Das Case (the decision in the Shantilal Mangal Das Case was in tune with the object of the Fourth Amendment) and before the Bank Nationalisation Case.

Further, he argues that it was not proper that measures of social progress should be blocked by compelling payment of compensation of such a high quantum as to make impossible the implementation of these measures. "The agenda today, the political agenda today, is a far reaching programme aimed at reconstructing the entire

socio-economic fabric of the country, and this involves and would involve greater and greater intervention of the State including nationalisation of major areas of industries and commerce, and obviously, if we are compelled to pay the full market value for every thing we acquire, our programmes will become impossible of implementation and the whole road will be blocked by intervention of the Court, by litigation and by stay orders all the way".

As to the adequacy of compensation, it would be worth mentioning that during the discussion of the Fourth Amendment in Parliament, Pandit Jawaharlal Nehru expressed his views: "We cannot pay the full market value and even if we can, we should not pay the market value, because such a provision which requires the payment of full market value would defeat the purpose for which power is sought to be given to parliament to implement the socio-economic measures which form part of the important programme before parliament." Mahatma Gandhi likened the payment of full compensation to robbing Peter to pay Paul.³

Modern Jurisprudence does not support the view that property is a primordial right or is a natural right. On the contrary, it ensures that the needs of the society must be paramount and must take precedence over the needs of the individual. That is also the underlying spirit of the proposed amendment.

For the first time in the Constitutional history of India, article 31-C reasserts the position which is always intended to exist. And that position is that the Directive Principles do not and will not have a place of secondary importance in the structure of the Constitution. It reasserts that the Directive Principles, being the moral basis of the value underlying the structure of the Constitution, will have primacy and precedence over the Fundamental Rights.

The intention of the present amendment is to keep the Judiciary out so that they decide matters of law and are not called upon to sit in judgment on matters which genuinely and really belong to the sphere of political and economic ideologies.
Mr. M.S. Gurupada Swamy, the then Leader of the Opposition in the Rajya Sabha, supported the bill in principle. According to him, equality has now become a political frontier that must be reached. It is considered as a precondition to economic growth. It is understood by all of us that society based on extremes of wealth is generally exposed to periodic outbursts of discontent and it is especially so in developing countries. It is axiomatic that power flows from property and property is the classic symbol of inequality.\textsuperscript{4} If political power is to be shared by the broader masses, there has to be sharing of economic power by the broader masses. Political power and economic power are linked together. In India, political power is being managed, controlled and owned by a set of plutocrats and this has threatened harmonious and peaceful development. This also has eroded our social and economic stability. Therefore, what is required is to restructure our economic society and to bring about reordering of our property relations. We have to examine the present legislation against this backdrop.

\textsuperscript{4} Gurupada Swamy, M.S. - Ibid, pp. 7-8, 10-12.
Then he refers to the various clauses of the Bill. Firstly, in his opinion, the present measure tries to support and broaden the philosophy of equalisation; it tries to make socialist objectives more meaningful. It accepts, by implication that the rigid stratification of society poses a threat to the social order. From this point of view the Bill is welcome. But it has got various limitations. The first part of the amending bill deals with compulsory acquisition or requisitioning of property by the State. It reiterates the earlier accepted norm that the State can do so if it is for a public purpose and is done under the authority of the law. There is no change in this and this has been retained. But, now, 'compensation' is sought to be replaced by the word 'amount'. For the rich, compensation may be denied and this is obviously in accord with the socialist objective that seeks to level off incomes. But it will be different if the same principle is applied to pigmy properties and small owners. The bill proposes to treat both the rich owners and the poor owners in the same category. And here the idea of socialism fails because if the small owners are denied a fair equivalent of what will be taken from them, a different brand of inequality will emerge. It also introduces an element of
arbitrariness. Government can victimise the small owners and deny full compensation or full value of the property.

Secondly, the amendment does not pay equal importance to economic obligations incorporated in Arts. 41 and 43. These two Articles deal with the question of right to employment, right to education and assurance of living wages to the working class and so on. The Government ought to have brought before us a package of constitutional reforms whereby we will be able in the future to bring about a structural, socio-cultural and economic transformation.

Thirdly, it may be agreed that property relations have got to be restructured, reformed, refashioned but, in doing so, fundamental rights cannot be abridged or cut down. They cannot be sacrificed at the altar of the economy or economic changes since our philosophy is democratic socialism. We cannot afford the luxury of sacrificing socialism at the altar of democracy or vice versa.
Lastly, question is raised as to the clause that "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy". The people should have the opportunity of questioning the wisdom of the act of the Government whenever they take action under the bill. An arbitrary administration can take shelter under this and impose its will and there is no way of getting out of this predicament.

According to Mr. Jaisukhlal Hathi, a member of the Rajya Sabha from Gujarat, the first important amendment that is sought to be made is the substitution of the word "compensation" by the word "amount". This Art. 31 has a long history. If we go back to the year 1950 or to the day from which the Constitution came into force, several measures were taken for land reforms, for agrarian reforms, for abolition of Zamindari. Other social measures like taking over of the management of commercial undertakings and industrial enterprises were taken. Earlier, before

the 4th Amendment in the case known as Mrs Bela Banerjee's had
case, the courts held that compensation would mean "just
equivalent". Now, the word "just" is too vague for a
concept. This word is deliberately omitted because by
compensation, it is not meant to pay the existing market
value but certainly to compensate. For all this, the
Fourth Amendment Bill was passed in 1955. Justice Douglas
of American Supreme Court observed thus in his review of
Indian Constitution:

"Whatever the cause, the 1955 amendment casts a shadow over
every private factory, land or other individual enterprise
in India. The legislature may now appropriate it at any
price it desires, substantial or nominal. There is no
review of the reasonableness of the amount of compensation.
The result can be just compensation or confiscation
dependent only on the mood of the parliament.

If the parliament appropriates private property for
only nominal compensation the spectre of confiscation would
have entered in India contrary to the teaching of our
outstanding jurists".
In England, the Acts of parliament are not being judicially reviewed, but still they have trust and confidence in the parliament. In the Indian context also, there is a provision in the Constitution itself which is not being amended. Art 31 (2) clearly protects the people for whom we have the greatest anxiety. The two articles that the Bill seeks to amend to-day are the most important ones. Therefore, if we want to go ahead with social economic and progressive measures, it will be necessary to make legislation whereby we are in a position to avoid concentration of wealth, to see that there is equal opportunity of employment and that the available natural resources are not concentrated in a few hands. Therefore, it is not that the Directive Principles are merely a piece of decoration in the constitution. That they are not justiciable does not mean that they are just to show how magnificent our constitution is. They are there to be implemented.

Of the noted Jurists who wrote and spoke about the amendment, it will be interesting to recall the opinion of Mr M.C. Setalvad, a nominated member of the Rajha Sabha. He observes that the bill rightly proposes
elimination of the word 'compensation' and substitutes it by the expression 'amount'. This was always the intention of the Constitution makers and so understood by all concerned from the very inception of the Constitution. This was even made clearer by the Fourth Amendment. The second part of the amendment contains a welcome change for the very words "public purpose" and it has to be a public purpose for purposes of acquisition imply a reasonable purpose and, therefore, the restriction imposed by the acquisition would necessarily be a reasonable restriction. Regarding the rest he would, however, object that Art 39(b) and 39(c) cannot very well be subjects of legislation. He also objects to the last clause in the proposed Art 31(c). Such a wide and sweeping clause cannot be imported into the Constitution. No other article in the constitution has such a provision which destroys what has been really the basis of our Constitution, namely, judicial review in the rule of law.

Mr M. Rúthnawamy, a member of the Rajya Sabha from Tamil Nadu, does not agree with the main clause of these amendments, which substitutes the word 'compensation' for acquisition of property for public purposes by the word 'amount'. He raises the point as to what is to be called
an 'amount'. Does it mean amount of money, so many rupees or so much pounds or tonnes of grain, etc? But compensation is a legal term. If it is left to the Government to specify what 'amount' means it has got to be reviewed by the courts of law. He particularly opposed the amendment on the ground that instead of launching a war against poverty it directly launches a war against property. Property, as he thinks, has been recognised from time immemorial as one of the expressions of human personality. It is something which a man acquires by his labour, manual or mental. And laws have always guaranteed this right to property and its enjoyment. More civilised Governments have guaranteed the possession of property, enjoyment of property and the right to acquire property in a just manner. It is an expression of individual liberty. So, this amendment amounts to erosion of the right to liberty. Right to property is a right which expresses individual liberty.

Further, he goes on to add that it is very often argued that these amendments are necessary for the promotion of social and economic progress but at the same time it is stated that constitution is not an obstacle to progress. The judges are an obstacle to progress. Then one may question about the necessity of this sort of constitutional amendment.
If the judges are against social and economic progress, as in the Golak Nath Case, then a succeeding set of judges might overthrow the decision in the Golak Nath Case. Take for instance, the New Deal policy of President Roosevelt, which had once been declared ultravires by the Supreme Court in the U.S.A. and subsequently, a succeeding Supreme Court restored the validity of those proposals.

According to him, all this social and economic progress does not depend on constitutional amendments; it depends on the policies of the Government. They depend on the plan, they depend on the financial resources which they ought to collect and consolidate. They depend on the table of priorities which they give to their plans. Since the Government is not able to do any of these things, it comes before the Parliament and seeks constitutional amendments. "This is a very important moment in the history of Parliament because it attempts to erode into a very important right; a right which lies at the root of the social and economic activity of the individual".

According to Mr Bhupesh Gupta of the CPI, the twenty-fifth amendment is not something new. Apparently it seems
to be a new measure, but the process has already begun and it owes its origin in the ideals of the Fourth Amendment. As a result of the rising trends in the democratic movement, a radicalisation of masses, the Government has been obliged to undertake certain socio-economic measures striking against the vested interest and meeting out, to some extent, social justice. This measure will enable us to overcome the barriers created by the Supreme Court's interpretation of the Constitution. While he was not in favour of abolition of the right to property of the poor, he holds that the same right of the rich be restricted. Thus, he argued that so far as the common man, including the small property-holder, was concerned, his property be given full protection against the onslaughts of the capitalists, landlords, moneylenders, etc. At the same time, it wants the right to property of the monopolists, princes, landlords to be severely restricted so that they cannot abuse this right to carry on their plunder, perpetuate their vested interests and obstruct and block social and economic progress.

"The Directive Principles as enshrined in the constitution are only in paper. They have long since been
inoperative. As a result, the current economic turmoil emerges". Thus, he remarks that "today (i.e. in 1971), 60 percent of our people are living on the starvation line; 82 percent of our people do not have the means to spend a rupee per day; unemployment has risen to the staggering figure of 15 million; and 30 percent of our population constitutes the landless agricultural labour". In contrast to the provisions of Art 39 (c), an unjust and unequal distribution of wealth has taken place. For example, "at the time of Independence, the Birlas and the Tatas had industrial estates worth Rs 50 crores. Today, the Birlas and Tatas have industrial estates of the order of Rs 1300 crores. There are 75 big business families who among them concentrate 5000 crores of rupees worth of industrial wealth. Nearly 50% of the total investment in the corporate sector of the country is in their hands, despite the growth of the public sector. Such is the position today. This must change. Therefore, it is very right that we empower the parliament to bring about certain social and economic changes, which are absolutely essential".
As to the deprivation of the right of property, argues Mr Gupta, even the Magna Carta of 1215 did not make property a fundamental right. The Magna Carta provided that property could be taken away provided it was by law and by judgment. The proposed amendment also provides here that property may be taken away in the national interests by Parliament and the State Assemblies. In the Karachi Resolution of the Congress in 1931, it was said: - "Property shall be sequestered or confiscated save in accordance with law". Therefore, the emphasis was, nobody should take away property without the sanction of the law. We are making it possible for Parliament to give the sanction of law, keeping in view the demands of the people and certain socio-economic objectives.

Now, let us see what he argues about the justiciability of compensation. According to him, the consensus of opinion in this country has been in favour of making the quantum of compensation non-justiciable not today but at the time when the Constitution was passed.

Then he went on to suggest that the measures (i.e. the amendments) should not be looked upon as merely arming
the parliament and the State assemblies with certain powers "not to be treated as cosmetics" in order to beautify and display ourselves in parliament or the State assemblies. They should be treated as weapons in our hands to strike the vested interests, to take measures in the socio-economic interests and in order to improve the conditions of the masses and change the society. If that is so, then structural changes should be facilitated by measures and follow-up action armed with this Constitution Amendment Act."

Mr K. Chandrasekharan, a member from Kerala, opines that it is because of the term "public purpose" in the proposed amendment that the directive principles come in conflict with the fundamental rights. While the fundamental rights are only the rights of an individual citizen, the directive principles attempt to ensure the rights of the community as a whole, that is to say, the rights of the groups of citizens. When a conflict arises between the right of an individual and the right of the society, it has been held that the latter should prevail over that of the former. This is only fair and just in a democracy like ours.

Mr M.C. Chagla, a former Union Minister, has some reservations against the amendment. He argues that our constitution has certain basic principles viz. the Fundamental rights, the Directive Principles of State policy and judicial review. Also what the constitution proclaims is a Democratic Republic. When people talk of socialism, they forget that it must be democratic socialism and not socialism without democracy. Attainment of socialism is to be resorted to through democratic methods and not by arbitrary totalitarian methods. We have adopted democracy and if we want to march towards socialism, our constitution lays down that we should advance only by maintaining and preserving the democratic principles.

Mr Chagla criticises the bill on the ground of its discriminatory nature. The whole attempt is to attack people who have immovable or landed property, who have land in the villages or land in the cities. What about people who have got money and no land? He holds that right to property cannot be deprived of arbitrarily since India is a party to the universal Declaration of Human right which was passed in the United Nations in 1949.
Again, property has got a variety of aspects. Property may be immovable such as landed property, and movable such as money, gold and jewellery, promissory notes etc. To lay emphasis only on immovable property is illogical and irrational.

Arguing in favour of the bill, Mr. Mohan S. Kumaramangalam, the then Union Minister of Steel and Mines, expresses the view that the right to property, irrespective of its character of individual liberty, should be conditioned by the needs of the society. According to him, the property of one man depends, in a sense, on the lack of property of many others and that is much more so if we take a philosophical concept of property, when we have this large enormous control of property vested in a narrow, small section of our people. The possession of property by the big monopolists in our country depends on the deprivation of property of millions. This is the philosophical concept. As regards payment of compensation, he questions about the concept of market value to be the only criterion thereto. What compensation is to be paid, according to him, must be related to the circumstances in which a particular property is taken over by the Government. Justifying the introduction
of Art. 31(c), which bars the judicial review of the court, he conceives that the courts should decide only the legal aspect and not the political aspect of a measure. What is a "public purpose" and what is "agrarian reform" should not be examined by the courts but it should be examined by the Parliament.

Let us now turn to the Lok Sabha and see what the members had to say about this amendment. First of all, there is the view of Mr Frank Anthony, a nominated Anglo-Indian member, who argues while opposing the bill. So far as the new article 31(2) is concerned, it is more or less a reproduction of the previous one i.e. that property may be acquired for a public purpose and by authority of law. Therefore, no authority will be able to acquire property unless it satisfies the competent Court that it is doing it for a "public purpose". But he remarks that the expression "public purpose" has now assumed the form of a legal term of art almost. He points out that Art 31(c) is a monstrous provision. It subverts the whole basic fundamental character of the constitution. The introduction of it, gives the complete license to any legislature to expropriate.
The legislature is being given a blanket power, a license merely by an ipso dixit, deliberately dishonestly, to bring a measure within article 39(c) to expropriate. It is vague, it is amorphous, it is sweeping. 7

Mr P.K.Deo a member of the Lok Sabha, does not want to go into the merits of the twenty-fifth Constitution Amendment Bill. But, he thinks that there is no democracy anywhere in the world wherein the rule of law and constitutional practice, the right of property is not respected. In countries where the rule of law prevails the right of property is enshrined in the constitution whether it is Magna Carta or American Declaration of Independence or French Declaration of the Right of Man or German Constitution. Even in communist countries like U.S.S.R., they have a right to private property as fruit of labour and a right to inherit is recognised. In our constitution, the right to property has been very much watered down and subjected to reasonable restriction by the legislature and by the executive. 8

He further indicates that intermediaries have been done away with and the parliament has been given adequate powers to takeover industrial undertakings. A virtual ceiling has been put and adequate power has been given to scale down the property. It is a regular feature in the annual Finance Bill to further restrict property by fiscal measures. Under these circumstances, there is no reason on behalf of the Government to seek power for expropriation and that too is not justiciable.

Participating in the debate, Mr. Samar Mukherjee of the C.P.I.(M) clearly points out the class character of this constitution. As he views, it is a constitution to exploit and safeguard the exploitation of the society. Under this constitution, monopoly capitalism has grown on a big scale. It is under this constitution that the landlords and vested interests have got the protection of this Government and also the courts. Therefore, if it is felt to introduce any changes which are of a basic and fundamental nature then the entire constitution should be changed lock, stock and barrel. According to him, to bring about

basic social changes towards socialism, the primary condition is that the means of production must be taken away from the hands of the individual and placed under the control of society by nationalisation. They should be the property of the entire society. Without the socialisation of the means of production, changes in social structure could not be brought about and there can be no basic changes in the relationship of production without taking over the big properties in the hands of the entire society. And the greatest obstacle to this aspect lies in making the right to property into a fundamental right notwithstanding the fact that there are the Directive Principles. In order to change the social structure, the changes in the constitution should be more basic and fundamental.

Commenting on this amendment, Mr. Indrajit Gupta of the C.P.I. also contends that the constitution requires many more fundamental changes, really revolutionary changes, not pseudo-revolutionary changes. But he does not know whether these changes can be brought about within the four corners of this chamber. They may have to be brought about through some action somewhere else.

Further he likes to remind the House that it is not a legal question. It is primarily a political question and the question is which is to be given primacy — property rights or public welfare? It has nothing to do with socialism.

According to him, property is not in fact an impediment to socio-economic reforms. What is really disconcerting is the concentration of property in a few hands. It is economic concentration resulting in large holdings, industrial monopolies and big princes and land-lords.

Without further extending the opinion-survey over the controversial 25th amendment, we may note that the opinions reflected sharply contrasting ideological standpoints taken by different political groups and did not give rise to any consensus about what the public authorities should do, if they really wanted a radical transformation of the society. Those who were critical of the authorities were either not very convinced of their honesty of intentions or were terribly disturbed by the prospect of an all-out attack on the right to property. And the defence put up by the Government sounded so much like a manifesto that short of concrete policy measures, there was little to be expected from the amending exercise as such.
The question of amendability of the Constitution

Yet it was the power of amendment which constituted the main bone of contention between the Court and the Legislature. The former, in performing its role as the guardian of the Constitution, came forward to guard it from the reformist zeal of the lawmakers. So long the main thrust of judicial conservatism lay in proclaiming the inviolability of the provisions of the constitution vis-a-vis ordinary legislation, and not vis-a-vis an amendment act. Amendments passed by the parliament used to be accepted as part of the constitution or, rather, as necessary mutation of it for certain laws to come into force without being ultravires. This attitude towards amendments as a method of extending constitutional cover to social legislation flowed from a logical view of the prerogative of the court implicit in the saying "the constitution is what the court says it is".

However, as amendment after amendment came to be adopted by the parliament to make way for its measures of socialist transformation, the attitude of the judiciary suddenly hardened and the court was no longer ready to confine itself to a judicial review of the laws, ordinary or amendatory, but to arrogate to itself the last word as
to which parts of the constitution it will be proper for
the parliament to amend and which to leave undisturbed. In
other words, the court would recognise the constituent
functions of the parliament only at a discount.

The 24th Amendment, as also the 25th, was challenged
in the Keshavananda Bharati Case.¹¹ The main contentions
in that case were that parliament had no power to destroy
or impair the essential features, the basic elements of the
constitution and that Art. 368, which gave parliament,
after the 24th Amendment, the power to amend the consti-
tution could not prevail over the provisions of Art. 13.

The Supreme Court, by a majority of seven to six,
rulèd that Parliament cannot alter or destroy the basic
framework or structure of the Constitution.

This, obviously, was a serious assault on the
authority of the Parliament. It claimed that it had the
right as a matter of law to change or destroy the entire
fabric of the Constitution through the instrumentality of

Parliament's amending power. As a result, it passed the 42nd Amendment, which, among other things, provides that no constitutional amendment "shall be called in question in any Court on any ground". It also states that "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".  

Of the forty-two amendments to the Constitution from 1951-76, the most extensive and momentous, undoubtedly, is the 42nd Amendment Act. Though it is an 'amendment' Act passed under Art. 368, it cuts through the length and breadth of the Constitution, right from the preamble, down to Art. 368 itself and the Legislative lists as well.

The effect of the 42nd Amendment is that Parliament has asserted its right to amend the Constitution even to the extent of destroying it.

12. Vide Section 55 [Art. 368 (4) & (5)] of the 42nd Constitution Amendment Act, 1976
Two things thus clearly emerge before us. First, that the major amendments were the effect and not the cause of court rulings relating to property rights and Parliament's differing notions on what the Constitution really meant. Secondly, the question of the right of Parliament to abridge Fundamental Rights, so long a matter of discreet reflection by the judiciary, now came to be raised in a manner that resembled a loud quarrel being carried in public. 13

The 42nd Amendment solved the first question by deleting Art 19 (1) (f) as well as Art. 31. Thus, the right to property ceases to be one of the Fundamental Rights, but it still remains a constitutional right. A new Art. (300A) states that "no person shall be deprived of his property save by the authority of law". Now, to turn to the second problem. We have now two conflicting laws on the subject. The court's judgment in the Keshavananda Bharati Case that the basic structure of the Constitution cannot be tampered with is a law under Art. 141 and is binding on all courts. The 42nd Amendment says that "for

the removal of doubts, it is hereby declared that there shall be no limitation whatsoever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution".*

The 42nd Amendment has established the supremacy of the Directive Principles over the Fundamental Rights to equality before law, the Seven Freedoms or the right to property. Nor could any legislation containing a declaration that it sought to implement the Directive Principles be challenged before a Court of Law.

However, in taking the question of the Parliament's constituent power to the extreme, the judges did not and in fact could not speak in one voice. It may not be out of place here to quote the views/observations, expressed/made in some of the leading Cases in support of amendments

* Foot-Note : The Supreme Court in a recent judgment on the 9th May, 1980 has upheld the 42nd Amendment. But it held that this amendment has not destroyed the fundamental characteristics or basic structure of the Constitution. But it ruled out the amended Article 31 in which the Directive Principles would prevail over the Fundamental Rights.
to the constitution, specially in the context of economic
transition in India. In the Keshavanand Bharati Case itself
(1973) \(\text{Suppl. SCR P I to 822}\), Justice Chandrachud,
who was among those six judges holding the view that
Parliament's power of amendment was unlimited, pointed
out:

"The Preamble of our Constitution recites that the
aim of the Constitution is to Constitute India into a
Sovereign Democratic Republic and to secure to 'all its
citizens' justice social, economic and political, liberty
and equality. Fundamental Rights which are conferred and
guaranteed by Part III of the Constitution undoubtedly
constitute the arch of the Constitution and without them a
man's reach will not exceed his grasp. But it cannot be
overstressed that the Directive Principles of State policy
are fundamental in the governance of the country.
What is fundamental in the governance of the country cannot
surely be less significant than what is fundamental in the
life of an individual. That one fundamental is justiciable
and the other not, may show the intrinsic difficulties
in making the latter enforceable through legal processes,
but that distinction does not bear on their relative
importance."
"An equal right of men and women to an adequate means of livelihood; the right to obtain humane conditions of work ensuring a decent standard of life and full enjoyment of leisure; and raising of health and nutrition are not matters for compliance with the writ of a court.

"As I look at the provisions of Parts III and IV, I feel no doubt that the basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in Part IV. A circumspect use of the freedoms guaranteed by part III is bound to subserve the common good but voluntary submissions to restraints is a philosopher's dream. Therefore, Article 37 enjoins the state to apply the Directive Principles in making laws. The freedom of a few have then to be abridged in order to ensure the freedom of all. It is in this sense that Parts III and IV as said by Granville Austin, together constitute 'the conscience of the constitution'. The nation stands today at the cross roads of history and exchanging the time-honoured place of the phrase, may I say that the Directive Principles of the State Policy should not be permitted to become a 'mere rope of sand'. If the State fails to create conditions in which the Fundamental Freedoms should be enjoyed by all, the freedom of the few will be at the mercy of many and then
all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it".

A recognised principle of law is that legal relationships entered into by individual or by nations is based on some basic facts and assumptions, and it loses its validity when those facts and assumptions change. The terms "doctrine of frustration" in municipal law and "rebus sic stantibus" in international law can be referred to in support of this view. If this prevails in private contracts and international treaties, then it is not proper that constitutional provisions shaped and moulded under the special circumstances and conditions and necessities felt by one generation, will remain Immutable and will bind all future generations till eternity. In the absence of an inherent mechanism for the constitution to react and adjust to the changing social and economic needs, such an institution will be over-run and destroyed by violent revolutions. This is detrimental to democratic norms which precondition peaceful changes. Therefore, constitutional change is necessary for progress.
Refusal to change is dangerous because it would ultimately destroy the very foundation of democratic constitutionalism.

"The constitution is an organic document and it is intended to serve as a guide to the solution of changing problems which the Court may have to face from time to time. Naturally, in a progressive and dynamic society, the shape and appearance of these problems are bound to change with the inevitable consequences that the relevant words used in the Constitution may also change their meaning and significance. That is what makes the task of dealing with constitutional problems dynamic rather than static".

It is reasonable to assume that the Constitution-makers must have guessed that in dealing with socio-economic problems which the legislatures might have to face from time to time, the concepts of public interest and other important considerations might change and even expand. Parliament has the competence to make amendments in the fundamental rights enshrined in part III so as to meet the challenge in the matters of socio-economic progress and development of the country.
Earl Warren Burger, former Chief Justice of United States, has expressed the same view:

"Neither the laws nor the Constitution is too sacred to change - the constitution has been changing many times and the decision of the Judges are not holy writs".

An unamendable Constitution, according to Mulford, "is the worst tyranny. It places the sceptre over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres".

Justice D.G. Palekar apprehended the possibility of violent revolutions if a constitution was held immutable and unamendable. In the case of Keshavanand Bharati, he said: "The raison d'etre for making provisions for the amendment of the constitution is the need for orderly change. Indeed no constitution is safe against violent extra-constitutional upheavals. But the object of making such a provision in a constitution is to discourage such upheavals and provide for orderly change in accordance with the constitution. On this, all the text-books and authorities are unanimous. Those who frame a constitution naturally want it to endure but, however gifted they may be,
they may not be able to project into the future, when, owing to internal or external pressure or social, economic and political changes in the country, alterations would be necessary in the constitutional instrument responding all the time to the will of the people in changed conditions. Only thus an orderly change is ensured. If such a change of constitution is not made possible, there is great danger of constitution being overtaken by forces which could not be controlled by the instruments of power created under the constitution. Widespread popular revolt directed against the extreme rigidity of a constitution is triggered not by minor issues but by major issues. People revolt not because the so-called "unessential" parts of a constitution are not changed but because the "essential" parts are not changed. The essential parts are regarded as changed. The essential parts are regarded as a stumbling block in their progress to inform. It is, therefore, evident that, if for any reason, whether it is the extreme rigidity of a constitution or the disinclination of those who are in power to introduce change by amendment, the essential parts looked upon with distrust by the people are not amended, that constitution has hardly a chance to survive against the will of the people. If the constitution
is to endure it must necessarily respond to the will of the people by incorporating changes sought by the people".

Justice K.K. Mathew, in the same case, has observed:

"Owing to complexity of social relations, rights founded on one side of relations may conflict with rights founded on the other relations. It is obvious that human reason has become aware not only of the rights of man as human and civil person but also of his social and economic rights. For instance, the right of worker to a just wage, that is, sufficient to secure his family's living, or the right of unemployment relief, or unemployment insurance, sick benefits, social security and other just amenities, in short, all those moral rights which are envisaged in part IV of the constitution .......... The economic and social rights of man were never recognised in actual facts without having had to struggle against and overcome the bitter opposition of Fundamental Rights. This was the story of rights to a just wage and similar rights in the face of right to liberty, mutual agreement and right to private ownership ............."
The Fundamental rights themselves have no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgements, curtailments and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at a particular stage in the history of the nation by the moral claim embodied in part IV.

"Whether at a particular moment in the history of the nation, a particular Fundamental Right should have priority over the moral claims embodied in Part IV and almost yield to them, is a matter which must be left to be decided by each generation in the light of its experience and its value".

The views cited above of the learned Judges who were not only sympathetic to the movement for social justice but were anxious that the existing constitution was not used as insurmountable roadblocks on its way, certainly constituted a beacon light for the jurists and legal practitioners in this country. With due deference to their erudition and eminence it may be pointed out that they tend to speak
in a discordant voice on matters of momentous social change, not because they have any convincing reason to offer against the urge for change but because by temperament and training, if not professional compulsion, they have developed the strange conviction that law is there for the defence of the individual against the action of the community. Such a view, reminiscent of laissez-faire jurisprudence, is tenable only in a society which permits every individual to have the equal capacity to know and to fight for what he thinks his lawful claim against the community. In a society where more than 80% of the people are illiterate and some 60% or more struggling below the poverty line, the fight for their right to a decent living certainly takes precedence over the fight for the civil liberty of the few. What is more significant, the fight for the poor and the backward cannot be initiated in the court of law simply because their rightful claims have been made nonjustifiable. Hence the fight must start on the political plane first and is taken to the judiciary only when it militates against the privileges of the few who inevitably strike back by using the legal weapons given unto them and denied to their opponents. On such occasions,
the question not merely before the judiciary but before the entire legal profession is one of conscience and fair play, of the need to remedy a self-perpetuating injustice. The extent to which the legal profession in India is or is not indifferent to these issues of social ethics will certainly constitute a matter of interesting investigation. A sample survey of the opinions expressed by the jurists is presented below to give some idea as to the amount of confusion which still persists in the field.

Mr. M.C. Chagla, Former Union Minister and Former Chief Justice of Bombay High Court, held that the 44th Constitution Amendment Bill had taken away all the fundamental rights, leaving the citizen without any means to take recourse to law if he was deprived of the basic freedoms guaranteed to him under the constitution. The Bill had tampered with the basic features of the Constitution, namely, the rule of law, liberty, independence of the judiciary and judicial review.

The amendment had given precedence to the Directive Principles over the Fundamental rights without indicating the reasons for the change, argues Mr. Chagla. Also, he would think that there was no conflict between the
Fundamental Rights and the Directive Principles nor did the former come in the way of implementing the latter at any time during the past so many years.

Mr Ram Rao Adik, the then Maharashtra Advocate-General, thought that the 44th Amendment had not suggested any radical changes in the constitution. Nor did it touch the basic structure of the constitution. He added that the changes suggested by the Amendment were "only marginal". Also, he did not agree with those who had claimed that the 44th Amendment Bill had deprived the citizen of the fundamental rights enshrined in the constitution. His main contention was that the Directive Principles were more important to the poor people than were the fundamental rights.

Mr C.S. Pandit, the then Editor of the Free Press Journal, expressed the view that only the rich cared for fundamental rights because the right to private property was safeguarded by the constitution. Like Mr Adik, Mr Pandit shared the view that economic justice to the poor was more important than the fundamental rights. He felt that the poor had never enjoyed the basic freedoms provided for the constitution as much as did the rich.
According to Mr Soli Sorabjee, the noted lawyer, the freedoms, as provided under Art 19 of the Constitution, were the raison d'etre of the civil liberties which in turn were basic to the healthy growth of democracy in the country. In his view, the founding fathers had enshrined the fundamental rights from the point of view of "great national considerations" and had put "the nation's soul" in them. He held that the founding fathers had not been unaware of the poverty in the country and the economic disparities among the people.

Thereafter, he emphasized that it was false to argue that there existed a conflict between the economic advancement of the people and the fundamental rights. At the same time, the founding fathers did not want economic gains at the cost of human rights. The fundamental rights sprang from human personality and dignity. The argument that the fundamental rights came in the way of the nation's progress was untenable, he held. Moreover, to say that only the rich needed the fundamental rights so that they could safeguard their right to private property was also baseless. On the contrary, it was the poor who needed the fundamental rights most, for the rich had the means to safeguard theirs. In case of any injustice meted out to the poor either by the State or the rich, they should have the fundamental right to go to Court.
III. The myth of social transformation without Constitutional Amendment.

The above survey of the views expressed in and outside the Parliament and the Judiciary concerning the mode of using the Constitution to facilitate social change raises certain very pertinent points of legal as well as political significance. First of all, let us examine the view that socialist transformation was not impossible even without bringing about any major changes in the Constitution i.e. the Constitution in its original shape did not stand in the way of socialist transition. Those who argue in this direction tend to think that "the aspirations of the people can be achieved under the present constitution without eroding the basic rights of the people for which our freedom fighters sacrificed so much". Undoubtedly, Parts III and IV of the Constitution, as said by Granville Austin, together constitute "the conscience of the constitution". The framers of the Constitution envisaged the difficulties in implementing the Directive Principles. They wanted the economic and social revolution to be ushered in by maintaining a balance between Fundamental Rights and social justice, and through the rule of law.
It is said that the late Prime Minister Nehru was responsible for introducing the first few major amendments to the constitution. Nehru was well known for his socialist views. He wanted to reduce the constraints on executive power to realize his vision of a socialist society. As a socialist, Nehru had greater affinity, intellectually and politically, with the Fabians than the Marxists and looked upon Constitutional Government as an instrument rather than a fetter on the progressive transformation of the society. Consequently, he utilized parliamentary majority of his party in order to get those supplementary constitutional sanctions which he hoped to but could not obtain from the Constituent Assembly. A case in point is that the constitutional protection which he managed to extend to the various land reforms legislations awaiting judicial clearance in the fifties. Now, those who believe in the capacity of the Constitution in its original form to effect socialist transformation tend to overlook the very important fact underlined by justice Hidayatullah in the Sajjan Singh's Case (1965 I M L J 57 at p. 73) "Even the agrarian reforms could have been partly carried out without articles 31-A and 31-B but they would have cost more to the public exchequer". This was certainly the
necessary short-cut. For, otherwise there would have been no end to the argument why the Zaminders were to be paid full compensation for giving back to society a proprietary right which they have long wielded over the tillers of the soil.

On the question of just distribution of national wealth, it is argued that the constitution, as it stood before the amendments, was realistic enough not to tamper with the existing property relations without first ensuring that there was enough wealth to be redistributed. Changes, even if necessary, ought to come at the right moment. Thus, our constitution-makers have not only provided for the Fundamental Rights (Part III) but also the Directive Principles (Part IV). If the Rights cannot be taken away in any manner by the State, it is because they are a guarantee against executive tyranny. At the same time Part IV preserves the rights of the State to implement progressive reforms without the interference of the judiciary. Therefore, Part IV of the Constitution allows the Legislature, nay, imposes a duty on the Legislature, to bring in measures suitable to the fast changing needs of the society. No conflict could arise between Part III and
Part IV of the Constitution and the recognition of the Fundamental Rights in the Constitution is in no way inconsistent with the achievement of socialism provided their inter-relation is interpreted in the right spirit. Hence, schemes of nationalisation, as provided by Article 39(B) & (C) could be implemented when compensation is adequately paid to the owners and for paying the compensation the State must levy taxes.

In short, the kind of social transformation envisaged by the original constitution was of a peaceful and evolutionary nature, detrimental to but not destructive of the interests of the propertied class. This could be ensured by restricting the rights of the owners of property and by paying them full compensation only when the Government is sure to make that property yield greater wealth than under private management.

It is also stated that even without using the expression 'socialist' anywhere the constitution is not repugnant to the ideal of socialism. It does not regard private property as sanctimonious; it only concedes full compensation to the owner of the property when it is taken by the State.*

*Foot-Note : For a discussion how far the Indian Constitution is an expression of socialism, vide the article entitled "The Constitution and Socialism" by B.R.L.Iyangar in the "Indian Advocate" July - Dec. 1966 issue published by the Bar Association of India, New Delhi.
More importantly, the preamble to the Constitution does not mention the right to property at all unlike the French National Assembly of 1789 where property is considered as a Natural Right and unlike the 5th Amendment and Section I of 14th Amendment of the U.S. Constitution which guarantee the sanctity of private property.

These are, in short, the main arguments of those who do not think hasty constitutional amendments are necessary for socialist transformation. Evidently, this line of argument is full of flaws and totally misses the as compulsion, jural and/well as political, behind constitutional amendment.

To take up the contention that one ought first to produce and then to distribute, since socialism must ensure just and not perfunctory distribution of income and wealth, it is obvious that what calls for redistribution must itself exist in abundance. But the question that may arise in this connection is why there is so little to be redistributed among the vast population? The answer obviously lies in the continuation of a semi-feudal economy, arresting progress of agriculture as well as industry. After all, capitalism in India has
never held out the possibility of overcoming its own deformity; concentration of wealth has never led to a spurt of economic activities even in the years following independence, when socialism was no more than a matter of academic debate in the political circle and strong forces were operating within the Government to build up an alliance between the ruling party and the owning classes. Under the circumstances, it is logical to express that only by emancipating the peasantry from the bondages of institutional depressors by means of land reforms, could one unleash forces that could lead to an increase in the level of production in agriculture. That is to say, fundamental structural reforms in agriculture were urgently needed in order to boost up production.

The view of those, who think that the aspirations of the people can be achieved without eroding the basic rights of a few, is not altogether correct. They hold that the economic and social revolution would be ushered in by maintaining a balance between Fundamental Rights and social justice and through the rule of law. As noted earlier, once the State or rather, its rulemaking wing, Parliament, attempts to apply the Directive Principles
in making laws, in its constituent capacity, the judiciary comes in to foil such attempt on the ground that such a move on the part of the legislature would block individual liberties. Two facts therefore emerge out of this. Firstly, there is a built-in contradiction between the provisions of the Part III and Part IV of the Constitution. Secondly, this contradiction is also evident from the stipulation, so far as Part IV of the Constitution is concerned, that "it shall be the duty of the State to apply these principles in making laws", and at the same time to submit to an intensive judicial review in certain vital spheres of State action.

In Part III of the Constitution, a series of rights is categorised as "fundamental" rights involving individual liberties. Compare this with the constitution's treatment of the "Directive Principles of State Policy" which enjoin upon the State the duty to legislate various welfare measures that would meet the minimum needs of the masses. While the former are considered as entrenched rights, the priority of which cannot easily be altered, the latter set of provisions are regarded as merely recommendatory and not mandatory. They are principles that
the legislatures are required to keep in mind in putting through welfare legislation and are incapable of enforcement by the Courts.

This discriminatory treatment arises, of course, from the fact that it is easier for the Courts to enforce negative injunctions in the nature of "Fundamental Rights" than for them to ensure that Governments carry out the positive things required by the "Directive Principles". But social and economic revolution of necessity would involve sacrifice of the economic interests of the owning class for the betterment of the rest. An increase in the level of national production, which is the criterion of economic progress, also requires an adjustment in the relations of production. Part III of the Constitution envisages a status-quo in the relations of production. It guarantees individual justice and liberties in the name of "democracy". While Part IV of the constitution contemplates a change in the existing relations of production. It is quite illogical and inconsistent to provide in one place the change-oriented principles and at the same time, and in the same constitution, to provide for a
formidable set of change-resisting laws. To achieve social and economic justice and to bring about speedy and drastic changes, rights fundamental to a few are dispensable in the interest of the society. And any change in the provisions of Part III i.e. Fundamental Rights, necessarily involves an amendment to the Constitution. Amendments are necessary to allow the Constitution to have that vital social relevance without which it must face a political decay.

Another fallacy may not be lost sight of. The Directive Principles and the Fundamental Rights, as incorporated in the Constitution, stand in relation to each other as ends and means. The two together constitute an integral concept of freedom which our Constitution seeks to realise. In the constitutional scheme, the ends and means are essentially integrated. It is very often said that the founding fathers saw no difficulty in incorporating the Fundamental Rights and the Directive Principles side by side in the Constitution and introduced a judicial check against any precipitous action even by well-intentioned legislators and executives. So, the position is such that Parliament has been entrusted with the power of legislation and with the help of such powers it might
implement the directives in making laws for radical changes and on the other, such action of Parliament is to be tested by the judiciary and it has the unfettered right to test the validity of any action made on the part of the Parliament. Apparently, it seems to be a nice arrangement.

It is said that the Parliament is supreme in its legislative competence and the judiciary in the judicial sphere. But think of the situation when a confrontation occurs between the two arising from a difference of outlook. In such a context, actions for socialist transformation induced by Parliament might be turned down by the judiciary on the ground that such action infringes fundamental rights and individual liberty. Such instances of confrontation have been numerous during the three decades of the working of the Constitution and it has been widely felt that nothing short of a committed judiciary can really facilitate the role of the Government to bring about social change in the desired direction. But that too involves a great deal of uncertainties as it would cut both ways. Under the circumstances amendments are the only democratic means left to keep the judiciary strictly confined to the sphere of legal as distinguished from political dispensation.
The issue becomes politically instructive when one notes that it is with regard to the right to property that amendments to the constitution have met with a volley of protests. No single constitutional question has perhaps attracted as much public attention as this particular provision. There is a major difference of opinion among constitutional experts regarding fundamentality of the right to property. It has been dealt with in greater detail in an earlier chapter.

There is thus no exaggerating the significance of amendments to the constitution to facilitate its application for socialist transformation. It is obvious that none can say that a constitution is unalterable for ever. Ours is a written constitution and as such it has the inherent need to absorb the pressure of forces arising out of socio-economic transformation of the country. Social needs are always reflected in the constitution. With changes in time, it requires change from time to time. Basically, such changes seem to be made in two ways. First way is to make even more gaping holes in the existing constitutional document than it has been done so far so that the end product that emerges no longer resembles the original charter handed down to later generations by the
Founding Fathers. This course has the advantage of ensuring instant adaptability, a virtue that has some merit in the constitutional evolution of a nation. The second course would require the convening of a new constituent Assembly, or as an alternative, converting the present Parliament into a constituent body. We could then write ourselves a brand new constitution that avoids all the shortcomings that have been discovered in the working of the present document.

To examine the implication of the first method, it would be evident that our constitution-makers did not overlook it. That is why they incorporated Article 368 into the constitution for purposes of constitutional amendments. The marginal note to this article originally read "procedure for amendment of this constitution". The substantive part of that Article (prior to the twenty-fourth amendment) ran as follows:

"An amendment of this constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members
of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the constitution shall stand amended in accordance with the terms of the Bill".

The proviso to that Article further entails that if such amendment seeks to make any change in certain specified provisions or subject, e.g., the legislative lists or the representation of states in parliament, "the amendment shall also require to be ratified by the legislatures of not less than one-half of the states".

It was held in the Golaknath Case, 1967, that Article 368 merely laid down the procedure for amending the constitution. This is one of the most momentous decisions of the Supreme Court in recent years declaring that an amendment of the constitution under Article 368 is a 'Law' and would be void if it takes away or abridges any of the fundamental rights of the constitution. The effect of this decision is that Parliament cannot in future amend any of the fundamental rights. But Parliament differed and through the Twenty-Fourth Amendment, it clarified that Article 368 not only lays down the procedure but also
gives the Parliament the authority to amend the constitution. It further made it clear that "Notwithstanding anything in this constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this constitution in accordance with the procedure laid down in this Article".

The Twenty-fourth Amendment made two other changes in Article 368.

(i) It made it mandatory on the President to give his assent to an Amendment Bill passed by Parliament, by enacting that the President "shall give his assent to the Bill".

(ii) It superseded the decision of the Supreme Court in Golaknath's Case by providing that Article 13 (2) which prohibited the State from making "any law which takes away or abridges" the fundamental rights, shall not apply to any amendment of the constitution effected under Article 368.

Having conceded the need to empower the Parliament to amend the constitution as and when necessary, the question that needs to be squarely faced is: has Parliament
enough justification for exercise of this power of amendment? Whether one can discern any substantial socialist content in the amendments so far executed under Article 368. How much of them has real socialist potentialities or socialist bearings on the constitution? The answer would be in the affirmative because of the following reasons:

(I) With these amendments in hand the inherent problem of contradictions which have been discussed earlier, between the provisions of Part III and Part IV of the constitution would admit of easier solutions. Parliament would be entrusted with a limitless power of constitutional amendment, including the power to abrogate any of the fundamental rights in any manner it deems necessary in the public interest. This unlimited power of amendment is necessary to "meet the democratically expressed will of the people". "The principle involved is the basic one of the sovereignty of the people as reflected in the supremacy of Parliament, elected by the sovereign people".

(II) Since a series of amendments have been and will be carried out Article 368 ensures a regular exercise in
continuity an aspect which has great merit in the constitutional evolution of a nation. Without destroying the constitution itself, certain basic changes may be introduced by Article 368 from now on into it.

(III) So far, the judiciary has been playing an autonomous role in the sense that it is not accountable to the people. With the amended Article 368, Parliament would no doubt be given an upper hand. The judiciary, henceforth, would not be able to stand in the way of socialist legislation. Even if it stands, Parliament will have the power to alter the whole or any part of the constitution thereby curtailing the scope of judicial review. Take, for instance, the case of the Twenty-fifth Amendment which inserted Article 31(C) providing that "no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) or Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy".
Let us again consider the reaction of the professional jurists to the amendments to Article 368, the various aspects of it, including its political, legal and economic effects on the Constitution of India, through which amendability of this Article might be justified. To get a cross-section of the various viewpoints a brief recounting will be made of the public statements and writings of some eminent jurists.

To begin with, Mr. N.A. Palkhivala stood as counsel for the petitioners in the Fundamental Rights Case (i.e. Keshavanand Bharati vs. State of Kerala). He reminded the serious consequences of accepting the view that the amending power under Article 368 has an unlimited scope. He mainly pointed out the political consequences of that Article. Such a sweeping power, he apprehends, might subvert the entire structure of the Government, transferring it into a totalitarian one which is neither sovereign nor democratic nor republic. The States could also be abolished and the federal structure destroyed. He emphasized the significant point that Article 368 itself could be first amended so as to provide for a bare majority for all constitutional amendments and even the necessity of
ratification by the States could be deleted. Having done this, the constitution could be subverted by a simple majority of the Parliament alone.

He also contended that the Indian Parliament was prima facie a controlled agency under the constitution. "The Indian Parliament is the creature of the constitution and its powers, rights, privileges and obligations have to be found in the relevant Articles of the Constitution. It is not a sovereign body uncontrolled with unlimited powers".

He said that the theory propounded by the State of Kerala that there was a "constitution within the constitution" was untenable and had been advanced merely to gloss over the logical consequences of the fallacious arguments. He argued that it was impossible to dispose of this matter without dealing with the most crucial question of the true ambit of the amending power. This question could be decided either on the ground of the meaning of the word "amendment" in the unamended Article 368 or on the ground of "inherent and implied limitations". Challenging the 24th, 25th and 29th Constitution Amendment, he contended that Parliament was a creature of the
constitution and it could not claim the right to enlarge its power to become supreme even over the constitution.

He submitted that the doctrine of inherent and implied limitations was clearly applicable to the ordinary legislative power. It must also apply, with stronger reasons, to the constituent power which involved far greater stakes and where the survival of the constitution itself was at stake. An inherent limitation is one which exists in the power as a permanent and inseparable element arising from the character and constitution of the authority on whom the power is conferred. An implied limitation is one which is implicit in the scheme of which the power forms a part.

Explaining why inherent and implied limitation applied as well to the constitution-amending power under Article 368, he said the historical background left no doubt that the constitution would not have been accepted but for the Fundamental Rights. He said it was unarguable that there was no inherent and implied limitations on Parliament's right to amend the constitution because there were no express limitations. The whole question of inherent or implied limitations could arise only when
there were no express limitations. No court had ever rejected the principle that in the context and scheme of a constitution there can be inherent and implied limitations on the amending power. "Even in countries where the people are associated with the amending process, the basic principle of inherent or implied limitations in relation to the amending power has never been negatived by the highest court", he added.

By contrast, Dr. Gajendragadkar, in his Fourth Tagore Law Lecture, observed that the marginal note to Article 368, which refers to the procedure for amending the constitution, did not possibly afford any valid assistance in interpreting the Article. It was a well-recognised rule of construction that such a note had no relevance in the interpretation of a statutory provision. Nonetheless, it was also recognised that the heading of a chapter pertaining to a constitution document does hold a clue to the interpretation of an article belonging to the same chapter, especially to establish its ambit and specific context as well to resolve any ambiguities surrounding any crucial expression in the article. Significantly, the heading of chapter 20 read: Amendment of the Constitution. Further, a fair construction of the words of
Article 368 itself showed that the Article conferred on Parliament the power to amend the entire constitution as well as prescribed the procedure for it.

Article 368, Dr. Gajendragadkar said, consisted of two parts, the first part dealing with the procedure and the power of Parliament in respect of amendments which did not fall under the proviso. It laid down that after the procedure prescribed in it had been followed and the assent of the President obtained, "the constitution shall stand amended in accordance with the terms of the bill." The proviso dealt with certain entrenched provisions which could be amended by Parliament by following the procedure prescribed in the first part of Article 368 and then obtaining the consent of not less than half of the total number of State Legislatures.

Article 368 begins by saying that an amendment of the constitution may be initiated in the manner specified by the Article and ends by saying that the constitution shall stand amended. He stressed that the whole scheme of Article 368 clearly showed that it conferred on Parliament the power to amend the constitution by following the
prescribed procedure. He felt that the argument that the power to amend had not been conferred in specific terms on Parliament by Article 368 lacked substance. Article 5 of the American Constitution, section 128 of the Australian Constitution and section 96 of the Japanese Constitution were substantially similar to Article 368 and no one, he emphasized, had ever seriously suggested that the three Articles did not confer on the legislatures of the three countries the power to amend the constitution.

He pointed out that even in the Golkhanth Case, the majority of the Judges, including Mr. Justice Wanchoo and his four colleagues as well as Mr. Justice Hidayatullah, agreed that Article 368 conferred the power and prescribed the procedure to amend. Mr. Justice Hidayatullah, however, regarded the power as legislative, and not constituent, and agreed in the result with the decision of Chief Justice Subba Rao and his four colleagues that an amendment made under Article 368 must be tested under Article 13 (2). So far as construction of Article 368 was concerned, the majority view was that it conferred on Parliament the power to amend.

While construing Article 13 (2) Dr. Gajendragadkar reiterated the distinction between constituent and legislative powers and observed that a close examination
of Article 13 (2) and other Articles in Part III clearly revealed that the word "law" used in Article 13 (2) referred to "laws" passed by the legislative bodies in India by virtue of their ordinary legislative power and not to an amendment passed by Parliament in exercise of its constituent power. There was no conflict between the two Articles and they did not overlap. Thus Article 368 gave the Indian Parliament the power to amend even Fundamental Rights.

He then examined the alternative meaning suggested by Chief Justice Subba Rao and his colleagues. They had held that Article 368 dealt merely with the procedure to amend and that the power to amend is traceable to Entry 97 in the Union List of the Seventh Schedule read with Articles 245 and 248 of the Constitution. Dr. Gajendragadkar rejected this theory. It was, obvious, he said that Part XX was intended to deal with the amendment of the Constitution. It was inconceivable that the constitution-makers had failed to provide for the power to amend in Part XX itself. Besides, if the accepted rule of construction was to be followed, Entry 97 which was the residuary Entry in List-I could not include the power to convene a constituent
Assembly by passing a law for the purpose. Entry 97 refers "to any other matter not enumerated in List II or List III."

The most serious objection to the view held by Mr Subba Rao and his colleagues, Mr Gajendragadkar said was that if it were held to be correct then Article 368 would become otiose. If the proper procedure for amending the constitution was to convocate a Constituent Assembly, it was plain that the Constituent Assembly would frame and follow its own procedure. The procedure prescribed in Article 368 could not possibly apply to such a Constituent Assembly for Article 368 applied to a Bill before Parliament, and a Constituent Assembly could not obviously be equated with Parliament for the purpose of applying its procedure.

He found it difficult to accept the proposition that Parliament as a Constituent body could not amend the Constitution but it could bring into existence a Constituent Assembly for the purpose. From 1952, when the Supreme Court delivered its judgment in the Shankari Prasad Case, till 1967 the Court had consistently held that Article 368 provided not only for the procedure but also for the power to amend. And this was the correct constitutional position.
Equally strong arguments have been put forward in favour of a comprehensive construction of Article 368 by Mr P.B. Mukherjee (Chief Justice) while delivering the opening series of Bhulabhai Desai Memorial Lectures in 1971. According to him, there is little doubt that the Constitution is the Supreme Law of the land and Parliament is a creature of the Constitution. While the British Parliament is not only a legislative body but also a constituent body and can pass laws with the same ease as it can pass ordinary statutes or laws, the Indian Parliament or State Legislatures stand on a different footing and their Statute or Law-making power and Constitution amending cannot follow the same procedure. But in the latter case, the Constitution provides for its amendment and such an amendment requires special procedure laid down in Article 368 of the Constitution.

Article 368 of the Constitution, no doubt in its marginal note, described it as a procedure for the amendment of the constitution. He argued that Article 368 of the constitution has inherent proofs within itself to show that it is not merely a procedure but also a charter for the amendment of the constitution. This would be evident
from the language and expressions used such as (1) "The Constitution shall stand amended in accordance with the term of the Bill", (2) "Provided that if, such amendment seeks any change" and (3) "The amendment shall also require to be ratified".

Nor is the suggestion made by Justice Hidayatullah correct about the need to convene a Constituent Assembly. There is no such provision in the constitution authorising or empowering Parliament to call a Constituent Assembly under any circumstances or any terms. "The pages of world history of constitutional experiments show that in such a context the people call popular and representative convention for framing a constitution on such basis of representation and composition as the convention decides. This is an extra-constitutional method, short of revolution of framing or amending a constitution, belonging more to the region of politics than of constitutional law".

Also, with regard to the Indian constitution, a distinction has been made by the majority judgment in the Golaknath Case between its "basic structures and additions or alterations within that structure". Here, again, Article 368 is an unambiguous guide. Its caption says
that it relates to "amendment of the Constitution" and not just some alteration. Next, there is the provision of exceptions for five different clauses of amendments mentioned in sub-paragraphs (a), (b), (c), (d) and (e) under the proviso as requiring ratification of State Legislatures. Hence, the distinction is not justified.

Moreover, the proposition that Fundamental Rights are transcendental and hence beyond the reach of the constitution is incorrect. "Fundamental Right is a gift of the constitution". What the constitution has given the constitution can take away, no doubt according to the constitution. The word "fundamental" ipso facto does not mean constitutionally unalterable for all times. A constitution which cannot be constitutionally amended is an invitation to revolution". At the same time, there is a danger if the constitution is frequently and easily altered leading to an atmosphere of uncertainty and insecurity in general. As a solution to all these, Article 368 mediates by providing amendment of the constitution neither too easy nor impossible.

Part XX of the Constitution of India deals with "Amendment of the Constitution", where there is no attempt to restrict the power of the Parliament to amend the
Constitution. For the amendment of the constitution, the whole of the law is to be conceived within the context of that part. Now Part XX of the Indian Constitution has only a single article that is Article 368. Article 368 says "the procedures for the amendment of the constitution" relates to the entire procedures for the amendments of the constitution. It begins by saying that an amendment of the constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament. That does not indicate any restriction on the power of the amendment of the constitution. When the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the constitution shall stand amended in accordance with the terms of the Bill. That only means that the Bill is passed into law and the Constitution then is amended according to the Bill. Therefore, the first overriding consideration of Article 368 is that it relates to amendment of the constitution and the procedures for amendment of the constitution but puts no limit to the power of amendment.
Mr H.M. Seervai, Counsel for Kerala in the Fundamental Rights Case, defended constitutional amendments by which Parliament has asserted its power to amend Fundamental Rights. He said that the conventional arguments that power without limitation could be abused did not warrant that the power itself should be withheld. His view was that an amendment of the constitution under Article 368 prima facie, could do what the makers of the constitution could have done in the constitution they had enacted. Article 368 was a self-executing procedure. He said there was a special procedure for amending the constitution. If the procedure were ordinary it could be regarded as legislative procedure. When it distinguished legislative power from constituent power, it certainly called for a special procedure and that procedure brought in the doctrine of ultravires. It brought constitutional protection to every provision of the constitution. He contended that the constitution of India, considered as a whole, was a rigid or controlled constitution because none of its Articles could be amended otherwise than by a special procedure prescribed in it.

He maintained that Parliament's constitution-amending power was subject to "no limitations—express, implied or
inherent". Independently of the Golaknath Case, the bar in Article 13 (2) against a law inconsistent with the Fundamental Rights did not affect the constitution-amending power. If it did affect, the necessarily implied doctrine of "ultra-vires" applied to the constitution would impose a ban on the amendment of every provision of the constitution. Arguing that the theory of inherent and implied limitations was untenable, Mr Seervai said that the constitution-makers had excluded uncertain political, social and economic concepts as a test of judicial review.

The argument that if an unbridled power of amendment were conferred, the Constitution of India could be subverted or destroyed was supportable in theory but had not been supported by the actual experience in the country. For example, Parliament had possessed unlimited power of amendment until the 1967 court ruling in the Golaknath Case, yet the normal democratic process of the State had functioned.

According to him, it would be incorrect to say that Article 368 only dealt with the procedure of amendment and that the power of amendment was located in the residuary legislative power of Parliament. The correct view was that
Article 368 provided for a "self-executing procedure" on the completion of which the constitution stood amendment. Consequently, an inquiry about the power to amend was "unnecessary and irrelevant".

Defending the constitutional amendments by which Parliament has reaffirmed its power to modify Fundamental Rights guaranteed to the citizens, Mr Seervai submitted it could not be said that because people gave themselves the constitution, they did not entrust the power of amending its essential features to any other authority. It could be assumed that in a democracy the elected representatives voiced the will of the people.

Also, there was no express limitations as such in the exercise of the amending power under Article 368. The words of Article 368 were clear and once the language was unambiguous "we cannot read implied limitations into it". It was submitted that if Article 13 (2) could prevent amendment of Fundamental Rights, then the necessary implication was that there could not be any amendment to the constitution.

Mr Seervai said, it was essential that the amending power should extend to making necessary changes where
provisions of the constitution did not permit the implementation of certain policies in response to demands in a democracy. He pointed out that speeches of the late Mr Jawahar Lal Nehru and Dr B.R. Ambedkar in the Constituent Assembly show clearly that each and every provision of the constitution was amendable including the Fundamental Rights. Dr Ambedkar was the Chairman of the Constitution Drafting Committee and Mr Nehru had played a leading part in shaping and moulding the constitution. The framers of the constitution had clearly taken the view that constitution was a means to an end "and the end of a constitution is the safety, the greatness and the well-being of the country and its people for whom the constitution was enacted. Therefore, changes in the constitution which serve these great ends, carry out the real purposes of the constitution", he said.

Dr M.C. Setalvad, in his Tagore Law Lecture at Calcutta University, observed that the Supreme Court, in its short history, had many a time stood steadfast in support of the liberty of the citizen and had earned universal respect and confidence. He had no doubt that the Supreme Court would steer a course which would not now deny the pace of progress and reforms to the nation.
The most epoch-making decision the Supreme Court so far made, he said, was the interpretation it had put by a majority of 6 to 5 on Article 368 of the constitution. That decision in effect had banned Parliament's right to amend the constitution in matters of taking away or abridging fundamental rights. No doubt, he added, the view could be taken that the majority in the Court were merely interpreting Articles 13 (2) and 368 of the constitution and thus functioning within the domain of constitutional doctrine. Such a view was not well founded. One could not ignore the apprehensions expressed by one of its members which undoubtedly led to the adoption of the majority view. Nor could one disregard its grave consequences. It banned all reforms and attainments of the objectives laid down in the preamble to the Constitution and the Directive Principles of the State Policy.

In an attempt to refurbish the image of the judiciary which has become a target of controversy, Mr Soli J. Sorabjee, argued that it is in the fitness of things that the Basic Law of the country, which was approved after solemn deliberation, should not be altered without the people realizing its full implications. He opined that it has become fashionable to blame Courts for the tardy implementation of the socio-economic reforms
because of the injunctions and stay-orders issued by them. The true remedy lies in ensuring that these Acts are administered with efficiency and not in amending the constitution to curb the power of judicial review.

It must be remembered, he pointed out, that constitutions are the self-imposed restraints of a people on a majority of them to respect the rights of the minority. In a vast country like ours consisting of a mixed population with widely different religious, cultural and linguistic characteristics and beset with numerous regional and local problems, judicial review is the best hope of democracy. That is why our founding fathers had incorporated judicial review in the constitution.

A fitting reply to this line of argument has been given by Mr Niren De, former Attorney-General of India, while submitting his arguments in the Fundamental Rights Case. He thinks that the legislature is "as good a guardian of the liberties and welfare of the people as the Court". He said the new Article 31 (c) incorporated by the 25th amendment under which a law to give effect to directive principles shall not be challenged in the Court.
as being violative of certain Fundamental rights was not unlimited in its scope. The provision conferred a specific power on the legislature and a law in exercise of that power was limited by Article 39 (b) and (c). He mentioned that a duty was placed on the State in terms of Article 39—by "State" he meant all agencies of the State, not only the legislature but also the executive and the judiciary—to see that the directive principles in Article 39 (b) & (c) were given effect to. Fundamental Rights should not stand in the way of implementation of these principles.

We may wind up the discussion by pointing out that a constitution to be living must be growing. If the impediments to the growth of the constitution are not removed, the constitution will suffer a virtual atrophy. Hence, the necessity of amendment to the Indian constitution which should spell out expressly the high ideals of socialism, secularism and the integrity of the nation, make the Directive Principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles.

Even though Article 368 of the constitution is clear and
categorical with regard to the all-inclusive nature of the amending power, it is considered necessary to put the matter beyond doubt. To incorporate these changes, along with others, the then Congress President appointed a Committee of some Members of the Congress Party in Parliament and State Legislatures, headed by ex-Minister Shri Swaran Singh. The Swaran Singh Committee submitted a tentative report, which was approved by the All India Congress Committee at its meeting held in Delhi in May, 1976. It approved of all the recommendations made by the Swaran Singh Committee and requested it to submit its final report, with its recommendations on certain additional points. In the light of the final report submitted by the Swaran Singh Committee, the 42nd Amendment Act followed.

With the help of this Amendment, the constitutional balance is tilted in favour of Parliament, the centre further strengthened and the power of the judiciary circumscribed. The role of the judiciary as the protector of people's fundamental rights is reduced first by making the Directive principles Supersede the Fundamental Rights \( \text{i.e.} \) by amendment of Article 31 (c) and then by circumscribing the present jurisdiction of the Courts. As regards constitutional amendments, the Supreme Court can merely go into
the question whether or not the procedure laid down in Article 368 has been followed—it cannot go into the constitutionality of amendments. It may examine the legality or otherwise of Union or State laws, but it cannot declare a law invalid unless two-thirds of the judges of a mandatory seven member Bench do so.

The fifth Parliament, by passing the 42nd Amendment Act, 1976 have, more or less, enshrined the following principles in respect of the power of the legislature and the executive to give effect to Socialist programme:

(i) No part of the Constitution is unamendable;

(ii) The Constituent power to amend has been conferred by Article 368 without any reservations;

(iii) No Constituent Assembly need be convened to amend the constitution in any respect;

(iv) A Constitution Amendment Act would not be open to judicial review on the ground of an alleged abuse of the power conferred by Article 368 or an excessive uses thereof.

It may be noted that in introducing clauses (4)-(5) in Article 368 section 55, the judicial review of a
Constitution Amendment Act is precluded even if it violates the procedural requirements as provided in Article 368 itself. \( i.e. \) in clause (I) of Art. 368. This is obviously too radical a change for the conservative section of the legal profession in this country.

Another point to be noted is that the 42nd Amendment Act 1976 has expanded the scope of Article 31 (c) to its maximum extent, to include legislation to implement any of the directives included in Part IV so as to achieve "socio-economic reform". The enlargement of the Directive Principles to ensure that the poor are not denied justice, that children grow up in a healthy manner, that the environment is protected and improved and that the workers can participate in management is justified (viz. Articles 39A, 43A and 48A).

The whole purpose of the 42nd Amendment is to assert, and conclusively establish the Supremacy of Parliament in the exercise of its constituent powers of amending the constitution and to exclude the power of judicial review, even if the amendments so altered the balance of the various authorities in the constitution so as to destroy its essential character and identity. The sponsors of this Act perhaps proclaim that the principle of parliamentary
sovereignty is not subject to any nebulous maxim regarding basic structure of features of the constitution.

The conclusion is inevitable that in a democracy where the Constitution is supreme there will always be a difference between Parliament and the judiciary over what the Constitution means. If Parliament differs, it has the undoubted right to amend the Constitution. How far it can or ought to go is the question. The 42nd Amendment has recently been tested by the Supreme Court which once again ruled that the basic features of the constitution could not be altered or destroyed, reiterating the same ruling given in the Keshavanand Bharati Case. It ruled out the amendments of Article 31 whereby the Directive Principles were given precedence over the Fundamental Rights. Also, the power of judicial review was restored.

It must not be forgotten that ours is a written Constitution. It is very difficult in this system to think of removing the power of judicial review. An independent and impartial judiciary forms the corner-stone of every truly democratic Government. The Supreme Court of India enjoys a wider jurisdiction than higher courts in many other
federations. Naturally, it is to be expected that its "power of judicial review" will be so used as clearly to ensure the functioning of a system of impartial administration of justice that is not insensitive to the inequities inherent in our society.

The extensive power conferred by the 42nd Amendment upon the Parliament in respect of the amendment of the constitution and the manner in which the exercise of such powers has been kept outside the purview of judicial review can certainly be regarded as a sad commentary on the ability of the judiciary to inspire public confidence, or rather its consistency as an exponent of the progressive potential of the constitution. At the same time, it brings no special comfort to the people to see the judiciary at bay. For, the parliament on which now rests the entire responsibility of moulding the constitution to suit the needs of time must prove itself worthy of that august venture. For that purpose, it is imperative that the Parliament, both in its composition and in its action, must reflect the true will of the people who alone are
the sovereign in a democracy. Unfortunately, so far, the leading party in the Parliament has been able to command less than a respectable proportion of the people's support, although, in the absence of proportional representation, it has continued to retain its parliamentary majority.