CHAPTER TWO

NATURE OF INDIAN CONSTITUTION AND JUDICIAL REVIEW

* Emergence of Judicial Review in India.
* Judicial Review under the Constitution of India
* Judicial Review of Constitutional Amendment.
EMERGENCE OF JUDICIAL REVIEW IN INDIA

The landmark decision of Chief Justice John Marshall in *Marbury v. Madison* (1803) thus established fully and finally the doctrine of judicial review as a necessary corollary of a written constitution. Since our constitution is also a written federal constitution like that of the United States, it applies with equal forces under our constitution also. For this reason "if the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution". So observed Patanjali Sastri, J., in *State of Madras v. V.G. Rao*. Mr. Justice H.R. Khanna, former Judge of the Supreme Court of India has in his book "Judicial Review or Confrontation" made the following remarks in this connection.

"Judicial review has thus become an integral part of our constitutional system and a power has been vested in the High Court and the Supreme Court to decide about the constitutional validity of the provisions of Statutes".

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According to Dr. M. P. Jain, the Indian Constitution expressly provided for the doctrine of judicial review in Articles 13, 32, 131 to 136, 143, 226 and 246 which in the words of Sri M. C. Stalvad\(^1\) is the outstanding feature of our constitution.

The laws may be declared to be invalid if they are violative of fundamental rights is clear from Article 13 of the Constitution. Kania, C.J., in A.K. Gopalan v. State\(^1\) observes: "The inclusion of Art.13(1) and (2) in the Constitution appear to be a matter of abundant caution. Even in their absence if any of the fundamental rights was infringed by any legislative enactment, the court has always the power to declare the enactment to the extent it transgresses the limits invalid."

The doctrine of judicial review is not revelation to the modern world. In India the concept of judicial review is founded on the Rule of Law which is the proud heritage of the ancient Indian culture and traditions. Only in the method of working of judicial review and its form of application there have been characteristic charges, but the basic philosophy upon which the doctrine of judicial review hinges is the same. In the modern world also where the doctrine of judicial

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review hinges is the same. In the modern world also where the
document of judicial review prevails, the system of its
working and the method of its application are dissimilar in
different countries. The basic idea of judicial review is
that law should be the generator of peace, happiness and
harmony the rule has no legal authority to inflict pain,
torture and tyranny on the ruled and to usurp the basic rights
of freedom and liberty of the people which are rooted in the
ancient Indian civilization and culture. The fundamental
object of judicial review is to assure the protection of
rights, avoidance of their violation, socio-economic uplifts
and to alert the legislature to be in conformity with the
constitution. In ancient India such spirit was prevalent.

The ancient Indian concept of law is that law is the
king of kings and nothing can be higher than law by whose aid
even the weak may prevail over the strong. The vedic concept
of sovereignty was that the state was trust and the monarch
was the trustee of the people. The address of the people to
the monarch at the time of coronation and the reply of the
conseerated king to his people on the occasion of Abhishekha
(coronation) embodied in the Yayurveda reveals the concept of
ideal kingship and the democratic concept of law and order
which is enshrined in the doctrine of judicial review. Thus
the spirit of judicial review can be drawn from the funda-
mental concept of law and governace which required ancient
India.
In all history no republic had as rich a heritage of the system of judicial review as in India. The nascent Republic of India possessed enormous sources, materials and precedents from its own as well as from several other countries which afforded it magnificent opportunity to build up a unique tradition for a new democracy based on constitutional supremacy. The roots of judicial review go long back into ancient India, ancient and medieval Europe, pre-Revolution England, and into Colonial and Post-Constitution regimes in the United States of America and of certain other countries which had a heritage of judicial review from United States, such as Canada, Australia, Ireland, Japan etc.

In ancient India the Rule of Law had a firm stand which meant that the law was above the ruler and that the government had no constitutional authority to enforce any arbitrary or tyrannical law against the governed. Thus the people of ancient India visualised and cherished the supremacy of law and not the supremacy of the king.

In the colonial courts the legality of law in several instances, was vehemently challenged on the basis of the principle enunciated by Chief Justice Coke. Subsequently, the United States of America not by any specific and clear provision in the Constitution but by judicial precedents created before the world a new pattern of democracy and demonstrated
to the world that judicial review could act as a potent and powerful check on democracy against degenerating into autocracy and submitting to a rule of tyranny. India was wiser in incorporate into the Constitution itself the provision of judicial review and by this method India has established a Constitution which has its individuality and uniqueness in so far as it lays down new standards of constitutional rule in the modern world. Chief Justice Patanjali Sastri of the Supreme Court of India remarked—"while the court naturally attaches a great weight to the legislative judgement it can not desert its own duty to determine finally constitutionality of an impugned statute".

The Indian Courts had authority to determine constitutionality of legislative acts. In Empress v. Burah and Book Singh the Calcutta High Court held that a particular legislative enactment of the Governor-General in Council was in excess of the authority given to him by the Imperial Parliament and therefore invalid. The Privy Council held on appeal that the enactment was within the legal power of the council and therefore valid, but the jurisdiction of the High Court of Calcutta to consider whether the legislation of the Governor-General was or was not constitutional was not questioned by the Privy Council.

A historical interpretation of constitutional evolution of India becomes necessary in order to appreciate the growth, functioning and practical operation of judicial review. The system of judicial review in India is not an event of sudden emergence but it has a gradual evolution which predominantly depended on the constitutional thoughts and ideas in the different stages of the constitutional evolution in India. The enactment of Government of India Act, 1858 to the Government of India Act 1935, the Indian legislature was subordinate to the English Parliament and any legislative Acts in India in contravention of the Parliamentary directions and restrictions were void. By the Government of India Act of 1935 federalism was introduced which led to the expansion of the concept of judicial review in India. From 1885, when the Indian National Congress was established, to the inauguration of the Indian Republic there were constant and vigorous agitations for the establishment of federalism and for the state recognition of fundamental rights. India which had the heritage of the Rule of Law from ancient India acted strenuously and assiduously towards establishing the judicial control of the legislative powers. As a result the provisions for judicial review were incorporated in the Constitution itself.

The various stages of evolution of judicial review in India are as follows:-
(i) **1858**: Government of India Act of 1858 imposed some restrictions of the powers of the Governor-General in Council in enacting laws, but such power only by implication.

(ii) **1861**: The Indian Councils Act of 1861 provided that the measures passed by the Governor-General legislative council were not to become valid unless the assent of the Governor-General was received. It also contained constitutional restrictions against the making of any law or regulation which might have the effect of repealing or in any way affecting the provisions of the Indian Council Act. The provision to Section 22 of the Indian Council Act 1861 lays down constitutional restrictions in framing laws which reads:

"Provided always that the said Governor-General Council shall not have the power of making any law or regulations which shall repeal or in any way affect any of the provisions of this act...."^{1}

(iii) **1877**: The case of *Emperor v. Burab and Book Singh* ILR^3^ Cal.63(1877) was decided in the Calcutta High Court in which it was held that the aggrieved party had right to challenge the constitutionality of a legislative Act enacted by the Governor-General in Council in excess of the power given to him by the Imperial Parliament.

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(iv) 1913: Lord Haldane in 1913 in a Privy Council case laid down that the Government of India can not by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. Government of India Act of 1858\(^1\).

(v) 1918: Abdur Rahim, officiating Chief Justice of the Madras High Court relying on the Privy Council case decision observed in 1918 in a Special Bench case of Madras High Court that there was a fundamental difference between the legislative powers of the Imperial Parliament and the authority of the Subordinate Indian legislature. Any enactment of the Indian legislative in excess of the delegated powers or in violation of the limitation imposed by the Imperial Parliament will null and void\(^2\).

(vi) 1930: Col. K.N. Haskar and K.N. Pannikar wrote in their book 'Federal India' that the Supreme Judicial authority in India should be invested with the power to declare ultra vires, measures which would go against the Constitution\(^3\).

(vii) 1935: Government of India Act of 1935 which came into operation on December 6, 1937 embodied a federal Constitution. It was impliedly empowered to pronounce judicially

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upon the validity of the Statutes, though there was no specific provision for the same. Sir Brojender Mitter, Advocate-General of India in his address to the judges of the Federal Court on the occasion of its inauguration said that the function of the Federal Court would be to expound and define the provisions of the Constitution Act, and as guardian of the Constitution to declare the validity or invalidity of the Statutes passed by the legislatures in India\(^1\).

The Federal Court of India vigorously worked for more than a decade wisdom and dignity and by various constitutional decisions, it developed and brightened the constitutional atmosphere of the country from which the makers of Present Constitution received abundant inspiration and light. M.C. Setalvad, the first Attorney-General of India spoke on January 28, 1950, on the occasion of the inauguration of the Supreme Court of India. "The main function of the Court (Federal Court) was the interpretation of the constitution Act of 1935 and the resolving of the constitutional disputes"\(^2\).

The Federal Court treated the Constitution of India as a living organism. The Federal Court through various constitutional decisions created a congenial constitutional atmosphere in India which developed a background for the

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1. (1939) Federal Court Reports, p.4.
growth of the constitutional jurispedence in the present set-up of the constitutional Government.

The British Parliament introduced Federal Constitution by enacting the Government of India Act of 1935. The Central as well as the State Legislatures were given plenary powers in the sphere allotted to them. Wide legislative power to the Central as well as State Legislatures were provided. The legislatures under the Government of India Act were not the delegates of the British Parliament. They were, in their subjects allotted to them, as supreme as the British Parliament.

The Federal Court was introduced by the Government of India Act of 1935 to function as an arbiter in the Central and State relationship and to scrutinise the violation of the constitutional directions regarding the distribution of the powers on the introduction of federalism in India. It was highly essential to have an independent and impartial superior court to maintain balance between the centre and the provinces. The powers of judicial review were not specifically provided in the constitution, but the constitution being federal, the federal court was entrusted impliedly with the function of interpreting the constitution and to determine the constitutionality of legislative Acts. A large number of cases cropped up involving the question of the validity of the legislative Acts. The question of repugnancy
was one of the main topics of decision before the Federal court and the Privy Council. Maurice Gwyer C.J. of the Federal Court of India observed. "We must again refer to the fundamental proposition enunciated in (1878) 3 A.C. 889 (Reg. v. Burah) that Indian Legislatures within their own sphere have plenary powers of legislation as large and of the same nature as those of Parliament itself. It it was true in 1878, it cannot be less true in 1942"¹. But the court's power to examine the constituionality of a statute under the Government of India Act of 1935 became rather very much widened. The Rt. Hon'ble Sir Lyman Duff, Chief Justice of Canada in his message to the inauguration of the Federal Court of India said- "while in exercising one of its great primary functions, the interpretation of the Indian Constitution the court will pronounce judicially upon the validity of the statute as well as of administra-
tive act".²

During the span of a decade of their career as constit-
tutional interpreters the Federal Court and the High Courts of India reviewed the constitutionality of a large number of legislative Acts with fully judicial self-restra-
tint insight and ability. The Supreme Court of India as the successor of the Federal Court intened the great traditions built by the Federal Court³. Thus though there was no speci-

fic provision for judicial review in the Government of India Act of 1935 the constitutional problems arising before the court necessitated the adoption of judicial review of legislative Act in a wider perspective. This is a natural phenomenon where the sovereignty of legislature is not absolute.

(viii) 1950:- The Republican Constitution of India, adopted in 1950, which has specifically provided for judicial review regarding the infringement of fundamental rights and the Indian Courts have powers of judicial review regarding constitutional violations of the distribution and separation of powers and other constitutional restrictions. Art 13, 32 and 226 expressly provide for and envisage judicial review.

Under the Constitution of India, 1950, the scope of judicial review has been extremely widened. The Courts in India, in the present democratic setup, are the most powerful organ for scrutinising the legislative lapses. The spirit of protection of individual liberty and freedom yielded a great influence on the constitutional agitationists in India. The ancient Indian heritage is rooted in the constitution of India, 1950, in which are enshrined the various provisions of individual liberty and freedom against the state. Under the impact of ancient Indian heritage the constitution of India of 1950 evolved a unique system of judicial review.
The Constitution of India envisage a very healthy system of judicial review and it depends upon the Indian Judges to act in a way as to maintain the spirit of democracy. In the present democratic set up in India, the court cannot adopt a passive attitude and ask the aggrieved party to wait for public opinion against legislative tyranny, but the Constitution has empowered it to play an active role and to declare a legislation void and may refuse to enforce it, if violates the Constitution. Glanville Austin's historical analysis regarding the introduction of the provisions of judicial review in the Constitution of India of 1950 is noteworthy. "The judiciary was to be an arm of the social revolution upholding the equality that Indians had longed for during colonial days, but had not gained not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule .... The courts were also idealized because as guardians of the Constitution they would be expression of the new law created by Indians for Indians.... judicial review, Assembly members believed, was an essential power for the courts of a free India, with a federal constitution". "The word of the constitution is supreme in India

and the legislative and executive Acts to be valid will have to conform to it. The only agency capable of upholding the supremacy of the Constitution being the national judiciary, the process of judicial review is expected to play a no mean role in the working and development of the Constitution. The remark is amply justified. The Indian Judges have enough power under the Constitution to declare a legislation void if it is in violation of the Constitution or if the law is highly tyrannous and arbitrary against the intention of the Constitution and the sovereign people. Much depends upon the way the court approaches the matter and the degree of self-restraint the court exercise. The Constitution does not limit the powers of the Indian Court in the matter of judicial review but the constitution has left the matter entirely on the dignity and rational thinking of the courts.

JUDICIAL REVIEW UNDER THE CONSTITUTION OF INDIA

Judicial review is the process applied by the court to determine the constitutionality of legislative Act, Ordinance or customs having the force of law if enacted or having come into existence against the constitutional directions intention, prohibitions and limitations. The court has right to declare such law, ordinance or custom void and to refuse its enforcement. The legislature has to work under constitutional limitations. The legislature may not be able to decipher its own lapses free from bias and as such it is the constitutional policy that the court being an independent and impartial body is the best legal authority to scrutinise the validity of any legislative Act.

The Indian Constitution of 1950 is a unique institution and a model in itself, which might be a matter of emulation for other nations in framing their constitution. India has a written constitution with specific provisions for judicial review. The fundamental rights have been specifically guaranteed in Part-III of the Constitution, and in Part IV the Directive principles of the state policy have been enumerated in fifteen articles. Article 37, which is in Part IV lays down that the provisions contained in Part-IV shall not be enforceable by any court, but the principles embodied therein are nevertheless fundamental in the governance of the
country and it shall be the duty of the state to apply these principles in making laws. The articles of Part IV are very helpful in the interpretation of the Articles on the fundamental rights. Judicial review is the corner-stone of liberty and freedom and so the constitution-makers have incorporated specific provisions for judicial review in the constitution of India.

The nation grows with a good constitution and a good constitution envolves a good and effective system of judicial review. The relationship between the democratic written constitution and judicial review is inseparable. In the democratic federal state the nation prospers because of an efficacious system of judicial review. Since the existence of the system of Judicial review has an intensive and beneficial impact on the evolution of a good constitution, reciprocally the existence of a good constitution has similar impact on the growth of a better and efficient system of judicial review.

In India, judicial review is a process having the explicit sanction of the Constitution. Underlining this aspect of the matter, the Supreme Court stated in Madras v. Row that the constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution and that the courts "face up to such important
and none too easy task" not out of any desire "to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the constitution". As the Supreme Court emphasized in Gopalan. "In India it is the Constitution that is supreme" and that "statute law to be valid, must in all cases be in confirmity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not" and if a legislature transgresses any constitutional limits, the court has to declare the law unconstitutional "for the court is bound by its oath to uphold the constitution." Therefore, the courts in India cannot be accused of usurping the function of constitutional adjudication, it is a function which has been imposed on them by the constitution. It is a delicate task, the courts may even find it embarrassing at times to discharge it, but they cannot shirk their constitutional responsibility.

Just after the Constitution of India of 1950 came into force the Calcutta High Court in a Special Bench case gave a memorable decision by which the entire Bengal Criminal Amendment Act of 1930 was declared void. The court held—"The legislatures in his country have only those powers of legislation which are bestowed upon them by the Constitution

Act. If they pass an Act in excess of these powers, the Act becomes void to that extent. Under our constitution, the court i.e., the judiciary is to decide this and no body else.

We recognise that great powers necessarily involve grave responsibilities but we are not dismayed. Amidst the student clamour of political strife and the tumult of the clash of the conflicting classes we must remain impartial. This court is no respecter of persons and its endeavour must be to ensure that above this clamour and tumult, the strong Calan voices of justice shall always be heard.\(^1\) This view of the Calcutta High Court has been echoed in the several decisions of the Supreme Court and the High Courts of different states.

In 1958 even the law commission adopted the same view - "The constitution in express terms requires the courts to act as a supervisory body in the matter of laws alleged to encroach upon the exercise of fundamental rights. The line as to how far a law shall go in derogation of the citizens fundamental rights is, according to the constitution, to be drawn by none other than the judiciary.\(^2\)

The judiciary in free India thus showed a great promise in its constitutional career in preserving the liberty and freedom of the people. But in subsequent years a perceptible change in the judicial thinking came which was

noticed by the eminent jurists with great concern. M.C. Setalvad, Ex-Attorney General of India has observed—"The history of the court's attitude in regard to the interpretation of Article 14 seems to present a reserve picture". Having started in Anwar Ali Sarkar's case with a bold assertion of the doctrine of equality, later decisions have, in the guise of geographical and other kinds of classification, greatly diluted the citizen's right under Article 14.

A similar tendency has been apparent in the interpretation of Articles 32 and 226. The right to approach the court guaranteed by Article 32 received recognition in the amplest measure in early decision of the court. Later, the decisions in Daryao's case and in Ujjambai's case have sought to restrict the scope of both the articles 32 and 226 of the constitution. But again by the majority decision of Golaknath's case the Supreme Court has resurrected partially the fundamental rights of the citizen of India which were eclipsed by the constitutional amendments. In judicial review the Judges have to maintain balance between Union or State authority on the one hand and the liberty and prestige of the citizen on the other and also between the rule of the majority and the rights both relational and fundamental of the individuals.

Under the Constitution of 1950 judicial review assumed an important role in Indian democracy. Its working under the present Constitution of India, is a real protection of liberty and freedom of the people. Some Indian writers have observed that the scope of judicial review in India is very limited and the Indian Courts do not enjoy as wide jurisdiction as do courts in America. In their opinion it is due to the, 'Due Process' clause that the American Courts have wider rope, in India the scope of judicial review in narrower. But it does not appear to be in consonance with the spirit of the Indian Constitution. The Chapter on fundamental rights itself is so vast that fresh avenues of judicial review shall always continue to emerge. The changing social and economic standards and ideals generate new openings for judicial review under the constitutional working and it is very difficult to assign a limit to its exhaustion.

The Indian Constitution is a federal structure. Sovereignty is distributed between the Union and the states with greater weightage in favour of the Union. The supremacy of the Constitution is protected by the authority of an independent judicial body to act as an interpreter of a

scheme of distribution of powers. It is the fundamental principle of a federal state that the centre should be strong and not feeble. But the centre should not be autocrat having unlimited powers to swallow up the authority of the states. About the Indian federalism, K.R. Bombell remarks "The detailed and carefully spilled out distribution of powers of judicial review vested in the Supreme Court provide the necessary guarantee that such subversion cannot occur".¹

Political, social and economic conditions of India after 1935 urged and necessitated a new pattern of new constitution having combination of the concept of federalism, separation of powers with checks and balances, guarantee of fundamental rights and various other restrictions and limitations on the powers of the Government. The drafters of the Indian Constitution on the basis of their wide experiences and knowledge of the American and other Constitutions tried to avoid confusion and complexity by evolving quite a new system of federalism, conferring upon the court power of judicial review. In this connection G.N. Joshi observed:

Dicey says federalism means legalism and this is practically true of the Indian Constitution. Its most outstanding feature is the faith it places in law, in judicial process and judicial review"².

The Indian Constitution also intended to enlarge and preserve freedom by introducing the process of judicial review. The theory of social contract has thus been renovated by the introduction of judicial review in the Indian Politico-constitutional system. It is the moral obligation on the part of the people to subject themselves only to the valid law and not to the arbitrary and invalid law. The aggrieved person has right to challenge in the Law Court the validity of a particular law. In Indian federalism the system of judicial review has been introduced under Art. 226 read with Articles 245 and 246 and Schedule VII where the Federal and State powers have been demarcated. But regarding the remedy in respect of legislative lapses concerning distribution of powers, there is great lacuna in the Indian Constitution as there is no provision in the Constitution to approach the Supreme Court direct. The founding fathers of the Indian Constitution could not envisage this lacuna then, but it deserves to be rectified by a suitable constitutional amendment incorporating an article in the Constitution like Art. 32 enabling the party concerned to move the Supreme Court direct. It is for the Indian Parliament to rectify this lacuna by a suitable amendment. But in India unlike America, the amending power has been misused to curbing the power of judicial review. The judiciary must be given a free hand in judicial decisions as by its sound and analytical reasonings
and prudent view the judiciary can best harmonise the conflicting interest in different walks of life. The guarantee of relief by judicial review is a moral assurance to the nation. Without morality no nation can sustain its vitality. Therefore, curbing the power of judicial review is wholly unethical and the courts in India shall have to assert their existence in discharging the constitutional obligations. In any view of the case, constitutional amendments in any degree curbing or extinguishing the power of judicial review, are ultravires and the judiciary has to ignore such constitutional amendments. Judicial review is founded on the natural and eternal rights which are even above the constitution itself.

The growth of Commerce and enterprise and the development of an interdependent economy and nationalism are considered to be the factors in the evolution of co-operative federalism. In Co-operative federation the question about the scope of judicial review is a pertinent one. Any undue leniency in the spirit of judicial review by tolerating unconstitutionality of laws on a plea of co-operative federalism may seriously affect the centre-state and inter-state relationship and the social and economic structure of the country. In India the residuary powers vest in the Union Parliament and, as such, in India there is greater fear of interference from the side of the union. The Indian judiciary
has to keep this aspect in view while dealing with the constitutionality of the law violating the mandates of the constitution regarding distribution of powers. The Chairman of the Indian Constituent Assembly Drafting Committee had said - "A Federal Constitution means a division of the law of the Constitution between the federal Government and the States, with two necessary consequences:

(a) That any invasion by the Federal Government in the field assigned to the States and vice-versa is breach of the constitution, and

(b) Such breach is a justiciable matter to be decided by the judiciary only.

But inspite of the fact that the founders of the Indian Constitution had intended unrestricted power of judicial review, certain constitutional amendments have begun to make serious inroads on the power of judicial review.

India is a welfare state. Indian in its wake of nationalism is attending to evolve a socio-economic philosophy for the reconstruction of the society and for the prosperity of the nation. The Constitution of India contains various provisions for the social and economic reconstruction

of the society and judicial review has been provided to help in this pursuit. The courts in India have often joined hands with the legislatures in their activities of agriculture reforms, and development of rural economy. As for instance, by the Bombay Laws (Amendment Act 1956) which amended Bombay Act LXVII of 1948, the legislature sought to distribute equitably the lands between the landlords and the tenants by way of compulsory purchase of surplus lands from tenants in possession thereof. N.H. Bhagwati J. of the Supreme Court of India upholding this Act observed "with a view to achieve the objective of establishing a socialistic pattern of society in the State within the meaning of Articles 38 and 39 of the Constitution, a further measure of agrarian reform was enacted by the State Legislature being the impugned Act herein before referred to, which was designed to bring about such distribution of the ownership and control agriculture lands as best to subserve the common good, thus eliminating concentration of wealth and means of production to the common detriment\(^1\). M. Hidayatullah J. (as he then was) following the said view observed in another case "The scheme of rural development today envisage not only equitable distribution of land so that there is no undue unbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few, on the other, but envisages also the raising of economic standards and bettering rural health

and social conditions".\textsuperscript{1}

The courts in India had all along been vigilant in safeguarding the fundamental rights and realising the social needs but they have not recognised the claims which in fact were unrighteous but were pressed under the pretence of fundamental rights. In the case of \textit{state of Uttar Pradesh v. Kartar Singh}\textsuperscript{2} the respondent claimed fundamental right to carry on business in adulterated food but the Supreme Court denounced it and held that a person cannot assert fundamental right of carrying on business in adulterated food. Another respect of the matter is that though the courts in India have always tried to respect the wishes and policies of the legislature yet, on many occasions realising that the legislative Acts are sometimes so discriminatory and violative of the guaranteed rights of the citizens of India, that instead of developing the social and economic wellbeing of the people they may positively destroy it. The courts in India have been always alert in declaring such unsocial and uneconomic laws void as to relieve the people of hardship and worries and to maintain social standard and dignity. In a democratic India legislature has no constitutional authority to enact discriminatory laws which might lead to legislative

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\item State of Uttar Pradesh v. Kartar Singh \textit{A.I.R.1964, S.C.1135}
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tyranny  The present prevalent concept of judicial review in India the basis of declaration of unconstitutionality is the violation of the express provisions of the constitution.

The fundamental rights are the conscience of the Constitution of India. The insertion of fundamental rights in the Constitution of India is the result of constant struggle for freedom and the fundamental rights guaranteed in Part III are the manifestations and recognition of the cravings of the people for the blessings of liberty and freedom. The constitution-makers considered it necessary to recognise the right of judicial review in order to control the legislative actions of the state to take away the guaranteed rights without jurisdiction. The constitution-makers of India could not at the time of framing foresee and visualise all the aspects of the constitution mechanism which they were laying down. Although the Indian Constitution is elaborata, all the necessary provisions to safeguard the individual freedoms and rights could not expressly be made in the constitution. As such the courts is the only legal body to help the nation in reading the constitution into life and give a practical application of it through judicial interpretations.

In India, so long as the constitutional democracy prevails, judicial review is sure to have a firm stand. The Indian Judiciary, specially the Supreme Court, is the great
organ to protect individual rights and to operate as a balancing force between the individual rights and the social interests. The Indian courts have to interpret the constitution in Judicial review not always within a rigid frame, but they have to rise to the need of the hour and encounter new circumstances in order to relieve the citizens of India of the legislative impositions which are against the national spirit.
JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENT

The Amendment of the Constitution is made with a view to overcome the difficulties which may encounter in future in the working of the constitutions. No generation has monopoly of wisdom nor has it a right to place fetters on future generations to mould the machinery of Government according to their requirements. If no provision were made for the amendment of the constitution, the people would have recourse to extra-constitutional method like revolution to change the Constitution.

"It has been the nature of the amending process itself in federation which has led political scientists to classify federal constitution as rigid. A federal constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment in American Constitution is very difficult. It is a common criticism of federal constitution that is too conservative, too difficult to alter and that is consequently behind the times".

The framers of the Indian Constitution were keen to avoid excessive rigidity. They were anxious to have a docu-

ment which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. The nature of the 'amending process' envisaged by the framers of our constitution can be best understood by referring the following observation of the late Prime Minister Pt. Nehru, "while we want this constitution be as solid and permanent as we can make it, there is no permanence in the constitution. There should be a certain flexibility. If you make anything rigid and permanent you stop the nation's growth, of a living vital, organic people .... In any event, we could not make this constitution so rigid that it cannot be adopted to changing conditions. When the world is in a period of transition, what we may do today may not be wholly applicable tomorrow".

But the framers of Indian Constitution were also aware of the fact that if the constitution was so flexible it would be a plaything of the whims and caprices of the ruling party. They were therefore, anxious to avoid flexibility of the extreme type. Hence, they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes. The machinery of amendment should be like a safety value, so devised as neither to operate the machine with too great facility nor to require, in order to set in motion, an accumulation of force sufficient to explode it. The Constitution-makers have, therefore
kept the balance between the danger of having non-amendable constitution and a constitution which is too easily amendable

Under the American Constitution, the courts have stayed away from deciding upon the validity of constitutional amendments. The Supreme Court of America has time and again declared that the court is not a proper forum for deciding political questions. The constitutional amendments involve political question and, therefore, the court applying the doctrine of judicial review abnegation has consistently refused to employ the power of judicial review in relation to amendments to the Constitution. In India also in the beginning the position was the same. The question whether fundamental rights can be amended under Article 368 came for consideration of the Supreme Court in Shankari Prasad v. Union of India\(^1\). The Supreme Court was faced with the constitutional validity of the constitution (First Amendment) Act, 1951. This Amendment had made various changes throughout the length and breadth of the constitution including those in the area of fundamental rights\(^2\). Not the whole but those parts of this Amending Act which interfered with fundamental rights particularly the right to private property in Article 31, were challenged. The amendment was challenged on the ground that it purposed to take away or abridge the rights conferred

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2. Articles 31-A, 31-B and Schedule IX were added by this Amendment.
by Part III which fell within the prohibition of Article 13(2) and hence was void. It was argued that the "state" in Article 12 includes Parliament and the word "law" in Article 13(2), therefore, must include constitutional amendment. The Supreme Court, however, rejected the above argument and held that the power to amend the constitution including the fundamental rights was contained in Article 368, and that the word 'law' in Article 13(8) include only an ordinary law made in exercise of the legislative powers and does not include a constitutional amendment which is made in exercise of constituent power. Therefore, a constitutional amendment will be valid even if it abridged or takes any of the fundamental rights. This judicial pronouncement made by Supreme Court as early as 1951 remained unchallenged and undisturbed for fourteen long years. In 1965 the Supreme Court was once again invited to reconsider its opinion in Sajjan Singh v. State of Rajesthan\(^1\) and once again the court reiterated its earlier view that constitutional amendments made under Article 368 are outside the purview of judicial review of the courts\(^2\). In this case the Constitution (Seventeenth Amendment) Act, 1964 was challenged and upheld.

1. **A.I.R. 1965 S.C. 845.**

2. Unlike Shankari Prasad's case, this was not a unanimous judgement. Only three out of five judges who constituted the Bench for the purpose held that Shankari Prasad's case was rightly decided. The remaining two judges (Justice Madhokar and Hidayatullah did not express any opinion).
Within a short period of two years the same Seventeenth Amendment Act, 1964 was once again challenged in Golak Nath v. State of Punjab and the Supreme Court once again invited to reconsider its decision in the earlier two cases. The Supreme Court by a majority of 6 to 5 prospectively overruled its earlier decisions in Shankari Prasad and Sajjan Singh case and held that Parliament had no power, from the date of the decision to amend Part III of the Constitution so as to take away or abridge the fundamental rights ensured therein. Subha Rao, C.J., supported his judgement on the following reasonings:

(a) The Chief Justice rejected the argument that power to amend the constitution was a sovereign power and the said power was supreme to the legislative power and that it did not permit any implied limitations and that amendment made in exercise of that power involve political question and that therefore they were outside of judicial review.

(b) The power of Parliament to amend the constitution is derived from Article 245, read with Entry 97 of list I of the Constitution and not from Art.368. Art.368 only lays down the procedure for amendment of constitution. Amendment is a legislative process.

(c) An amendment is a 'law' within the meaning of Article 13(2) included every kind of law. Statutory as well as constitutional law and hence a constitutional amendment which contravened Article 13(2) will be declared void.

The Chief Justice said that the fundamental rights are assigned transcendental place under our constitution and therefore they were kept beyond the reach of Parliament. The majority held that the (17th Amendment) was void in as much as it took away or abridged the fundamental rights under Article 13(2) of the constitution. The Chief Justice applied the doctrine of Prospective overruling and held that this decision will have only prospective operation and therefore, the 1st, 4th and 19th Amendments will continue to be valid. The majority did not express any final opinion on the question whether the word 'amendment' in Article 368 included the power to destroy the basic structure of the constitution or abrogation of the constitution or the complete rewriting.

The majority view of five out of eleven judges was the word 'law' in Article 13(2) refers to only ordinary law and not a constitutional amendment and hence Shankari Prasad and Sajjan Singh cases were rightly decided. According to them, Article 368 dealt with only the procedure of amending the constitution but also contained the power to amend the constitution.
Hidayatullah and Madholkar, J.J., however, by a separate judgement doubled the correctness of the majority view, as to whether fundamental rights were really fundamental and should be amended under Article 368. Mudholkar, J., posed a further question, whether making a change in a basic feature of the constitution can be regarded as merely as amendment or would it, in effect be rewriting a part of the Constitution, and if the latter would, it be within the purview of Article 368.

It was, therefore, held that if a constitutional amendment had the effect of abridging or taking away any of the fundamental rights guaranteed in Part III of the constitution it would be struck down by the court as unconstitutional. The Seventeenth Amendment which was in challenge before Supreme Court in Golaknath's case, however, was validated by resorting to the American doctrine of 'Prospective overruling' which the Supreme Court applied in this country for the first time. The net result of the Supreme Court decision in Golaknath's case was that Parliament was deprived of its power to amend the fundamental rights so as to abridged or take them away with effect from February 27, 1967 the date of decision of the case.

The Supreme Court decision in Golaknath's case came as a stumbling block and prevented the Government and the
Parliament from proceeding further with socio-economic measures because the Government argued that nothing worth in this direction could be attempted without interfering with the fundamental rights particularly the right to property. With a view to obtaining mandate from the people for important and pressing amendments in the Constitution (including those in the area of fundamental rights) Smt. Indira Gandhi, the then Prime Minister of India went to the polls by getting the Lok Sabha dissolved on December 27, 1970. She returned to power with record majority and plunged headlong and rushed through a series of constitutional amendments beginning with the Twentyfourth Amendment in 1971 remodelling Article 368 which provides for Amendment of the Constitution.

In order to remove difficulties created by the decision of Supreme Court in Golak Nath's case Parliament enacted the Twentyfourth Amendment Act, 1971. The amendment added a new clause(4) to Article 13 which provides that "nothing in this Article shall apply to any amendment of this constitution made under Article 368. In all the amendment has made four changes in Article 368. (1) It substituted a new marginal heading to Article 368 in place of the old heading "Procedure for amendment of the Constitution". The new heading is "power of Parliament to amend the constitution and Procedure therefore". (2) It inserted a new sub-section (1) in Article 368 which provide'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". (3) It substituted the words, "it shall be presented to the President who shall give his assent to the Bill and thereupon" for the words "it shall be presented to the President for his assent and upon such assent being given to the Bill". Thus section 3(c) makes its obligatory for President to give his assent to the Amendment Bill. (4) It has added a new clause (3) to Article 368 which provides that nothing in Article 13 shall apply to any amendment made under this Article". Thus the Twentyfourth Amendment not only restored the amending power of the Parliament but also extended its scope by adding the words "to amend by way of the addition or variation or repeal any provision of this constitution in accordance with the procedure laid down in this Articles".

The flood-gate having been declared open fresh onslaughts on fundamental rights were effected; through the twentyfifth, twentysixth and the twentyninth amendments. The constitutionality of all these Amendments were challenged in Supreme Court in the famous case, Kesavanand [Bharti v. State of Kerala,1] popularly known as the Fundamental Rights case, decided by Supreme Court on April 24, 1973. The question involved was, what is the extent of the amending power

conferred by Article 368 of the constitution? On behalf of the Union of India it was claimed that amending power is unlimited and short of repeal of the constitution any change may be effected. On the other hand, the petitioner contended that the amending power was wide but not unlimited. Under Article 368, Parliament cannot destroy the 'basic feature' of the constitution. A Special Bench of 13 judges was constituted to hear the case. Out of the 13 judges 11 judges delivered separate judgement. The Twentyfourth Amendment was upheld and Golaknath expressly overruled. The Supreme Court, however, laid down a much complex, complicated; and vague doctrine of basic structure. According to the court, the power of the Parliament to amend the constitution under Article 368 did not extend to abrogating or destroying the basic features or framework of the constitution. What features were considered by the Supreme Court as 'basic' were not speltout or enumerated consistently in the various opinions given in this case^1. The majority held that Article 368

1. It would be interesting to note that largest ever Bench consisting of 13 out of 14 judges in Supreme Court was constituted in this case and the decision in the case was in a way worse than that in Golaknath for six judges held one view, six others held the opposite view and the judgement of the 13th Judge, Mr. Justice H.R. Khanna, was in no way clear as to whom he sided with. The Judgement ultimately was not 7-6 but 6.6 and 1. The judgement of Mr. Justice Khanna was very crucial for determining the exact ratio of the case.
even before the Twentyfourth Amendment, contained the power as well as the procedure of amendment. The 24th Amendment merely made explicit what was implicit in the unamended Article 368-A. The 24th Amendment does not enlarge the amending power of the Parliament. The amendment is declaratory in nature. It only declares the true legal position as it was before that amendment hence it is invalid.

Delivering the leading majority judgement Sikri C.J. said: "in the Constitution the word 'amendment' or 'amend' has been used in various places to mean different things. In some articles, the word 'amendment' in the context, has a wide meaning and another context it has a 'narrow meaning'. In view of the great variation of the phrases used all though the constitution it follows that the word "amendment" must derive its colour from Article 368 and the rest of the provisions of the constitution. Reading the Preamble, the fundamental importance of the freedom of the individual, its inalienability and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of Provisions like Articles 52, 53 and various other provisions, an irresistible conclusion emerges that it was not the intention to use the word 'amendment' in the widest sense. It was the common understanding that the fundamental rights would remain in substance as they are and they would not be amended
out of existence. It seems also to have been a common understanding that the fundamental features of the constitution namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state. In view of the above reasons a necessary implication arises on the power of Parliament that the expression 'amendment of this constitution' has consequently a limited meaning in our constitution and not the meaning suggested by the Attorney-General. The expression 'amendment' of this constitution in Article 368 means any addition or change in any of the provisions of the constitution within the broad colours of the Preamble and the constitution of carry out the objectives in the Preamble and the Directive Principles applied to fundamental rights' it would mean that while fundamental rights, cannot be abrogated reasonable abridge- ments of fundamental right can be effected in the public interest". If this meaning is given, the Chief Justice said, "it would enable Parliament to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen". The Chief Justice said, that the concept of amendment within the contours of the Preamble and of constitution cannot be said to be a vague and unsatisfactory idea which Parliamentarians and the public would not be able to understand. He said that the argument that because something
cannot be cut and dried or nicely weighed or measured and therefore does not exist is fallacious. There are many concepts of law which are not capable of exact definition, but it does not mean that it does not exist. It was also argued that every provision of the constitution is essential, otherwise it would not have been put in the constitution. The Chief Justice further said, "But this does not place every provision of the constitution in the same position. The true position is that every provision of the constitution can be amended provided in the result, the basic foundation and structure of the constitution remains the same". The right to property was held not to be a basic feature and, therefore, could be freely amended. The Supreme Court had no objection of even if it were to be completely wiped off from part III by a constitutional amendment. It is for this reason that the constitutional Twentyfifth Amendment which made various amendments in the area of fundamental right to property was upheld. The constitution Twenty Sixth Amendment, which abolished the Privy Purses and consequently interfered with right to property was similarly upheld.

Applying the basic structure doctrine enunciated above, the Supreme Court for the first time in the Constitutional History of India struck down as unconstitutional a part of Article 31-C introduced by the Twentyfifth Amendment. The portion which was struck down had provided for exclusion of
judicial review in respect of a particular matter\(^1\), even by the Supreme Court of India. The Kesvanand Bharti doctrine was subsequently applied by the Supreme Court in \textit{Indira Nehru Gandhi v. Raj Narain} \(^1\) (The Prime Minister's Election Case). In this case the Supreme Court applied the theory of basic structure and struck down Cl.(4) of Article 329-A, which was inserted by the Constitution (39th Amendment) Act 1975\(^3\), as unconstitutional and beyond the amending power of Parliament as it destroyed the 'basic features' of the constitution. The amendment was made to validate election of the Prime Minister which was declared void by the Allahabad High Court. Khanna J., struck down the clause on the ground that it violated the free and fair elections which in an essential postulate of democracy which in turn is a part of the basic structure of the constitution, Chandrachud, J., struck down cls(4) and (5) as unconstitutional on the ground that they are outright negation of the right of equality conferred by Art.14, a right

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1. Article 31-C reads as follows: Notwithstanding anything contained in Article 13, no law giving effect to the policy of the state towards securing the principles specified in clause(b) or clause(c) of 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". The underlined portion was struck down in K.Bharti's case and Article 31-C has further been amended by 42nd amendment in 1976.


3. The Presidencial assent to this Amendment was given on Aug. 1975.
which is a basic postulate of our constitution. He held that these provisions are arbitrary and are calculated to damage or destroy the Rule of law. The Supreme Court thus has added few features as basic features of the constitution to the list of basic features laid down in the Keshavananda Bharti's case are Rule of law, Judicial Review and Democracy, which implies free and fair Election. It has been held that the jurisdiction of the Supreme Court under Article 32, is the basic feature of the Constitution.

In Minerva Mills Case\(^1\), the Supreme Court held that the following are the basic features of the constitution:

(a) limited power of Parliament to amend the Constitution.

(b) harmony and balance between fundamental rights and directive principles.

(c) Fundamental rights in certain cases.

(d) Power of judicial review in certain cases.

Dr. P.K. Tripathi, Member Law Commission of India has pointed out that the Supreme Court of India is the only court in the world which has taken upon itself the power to judicially review constitutional amendments. This, according to him is a great responsibility of India has undertaken and it should proceed with due care and caution in handling constitutional amendments. Dr. Tripathi is of the view that there ought not to be any limitations whatsoever on the power of

\(^1\) A.I.R. 1980 S.C.1789.
Parliament to amend a Constitution. He has expressed doubt as to whether the so-called basic structure doctrine alleged to have been laid down by the Supreme Court in Kasavanand Bharti's case has at all taken firm roots and has become firmly established in Indian constitutional law. He emphatically contends that the Supreme Court in Kesavanand Bharti did not lay down the doctrine of basic structure and in the Prime Minister's Election case the fact that the Supreme Court had laid down the doctrine of basic structure in Kesavanand Bharti's case was not at all argued but the court proceeded to apply it because the learned Attorney-General and others appearing on behalf of the Union of India had conceded without argument that the Supreme Court in Kesavanand Bharti case had laid down the basic structure doctrine. This question of law being accepted and applied by the Supreme Court without arguments leaves the law in a state of flux.

The doctrine of basic structure has been vehemently criticised. It has been said that the court has not precisely defined as to what are the essential features of the basic structure, and if this doctrine is accepted every amendment is likely to be challenged on the ground that it effects some or the other essential features of the basic structure. In other words, the amending power of the Parliament cannot be subjected to this vague and uncertain doctrine. If the historical background, the Preamble, the entire scheme
of the constitution and the relevant provisions thereof including Art.368 are kept in mind then there can be no difficulty in determining what are the basic elements of the basic structure of the constitution. These words apply with greater force to the doctrine of the basic structure, because the federal and democratic structure of the constitution, the separation of powers, the secular character of our state are very much more definite than either negligence or natural justice.

Forty-Second Amendment and Article 368 :-

Lastly, we may consider the impact of the latest Amendment in Article 368 introduced by the Constitution (42nd Amendment) Act, 1976. The Amendment added two new clauses, namely, cl.(4) and cl.(5) to Art.368 of the constitution. The new clause(4) provided that "no constitutional amendment (including the provision of Part III) or purporting to have been made under Art.368 whether before or after the commencement of the constitution(42nd Amendment) Act, 1976 shall be called in any court on any ground. Clause(5) removed any doubts about the scope of the amending power. It declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal of the provisions of the constitution under

this Article. Thus by inserting clause(5) it makes it clear that even the "basic feature" of the Constitution could be amended.

This amendment would, according to Mr. Swaran Singh, the Chairman, Congress Committee on Constitutional Amendments, put an end to any controversy as to which is supreme, Parliament or the Supreme Court. Clause(4) asserts the supremacy of Parliament. Parliament represents the will of the people and if people desire to amend the constitution through Parliament there can be no limitation whatever on the exercise of this power.

This amendment removes the limitation imposed on the amending power of Parliament by the ruling of the Supreme Court in Kesavanand Bharti's case. It was said that the theory of 'basic structure' as invented by the Supreme Court is vague and will create difficulties. The amendment seeks to rectify this situation. It was, however, not pointed out clearly as to what were the difficulties faced by Parliament due to the basic structure theory.

Thus, the amended Article provides that constitutional amendments shall not be challenged in any court on any grounds. The Amendment has not to pass judicial scrutiny at the hands of the Supreme Court of India, although many constitutional experts have expressed their view that the change
effected by the 42nd Amendment in Article 368 is meaningless and redundant and they shall continue to exercise its power of judicial review over constitutional amendments in the same way as before the 42nd Amendment. They projected the view that the constitutional amendments made under Article 368 can still be challenged on the ground that they are destructive of any of the essential elements of the basic features of the constitution. In Kesavananda's case the Supreme Court has held that Parliament cannot alter the "basic structure" of the constitution exercise of amending power under Article 368 of the constitution. The 24th and the 42nd amendments were intended to bat the judicial review of constitutional amendments. But so long as the ruling in Kesavanand Bharti's case stands constitutional amendments can be challenged on the ground that they destroy some of the basic features of the constitution.

In Minerva Mills v. Union of India¹ the Supreme Court by 4 to 1 majority (Mr.Chandrachud, C.J. and Gupta, Untawalia and Kailasam, JJ for majority and Bhagwati, J. dissenting) held that section 55 of the 42nd Amendment 1976 which inserted sub-sections (4) and (5) in Art.368 is beyond the amending power of the Parliament and is void since it removes all limitations on the power of Parliament to amend the

constitution and confers unlimited amending power which is
destructive of its basic or essential features or its basic
structure. Applying the principles laid down in Kesavanand
Bharti's case the court struck down sub-clauses (4) and (5) of
Art. 368 of the Constitution as unconstitutional and void and
declared that the Parliament cannot have unlimited power to
amend the constitution. "Limited amending power" is the basic
feature of the constitution.

The order of the Supreme Court thus declares in cate-
gorical terms that the constitution— not Parliament— is
supreme in India. This is in accordance with the intention
of the framers who adopted a written constitution for the
country. Under the written constitution there is a clear
distinction between the ordinary legislative power and the
constituent power (amending power) of Parliament. Parliament
cannot have unlimited amending powers so as to damage or
destroy the constitution to which it owes its existence and
also derives its power. The Parliament elected for a fixed
period of five years is meant for certain specific purposes
and cannot be vested with unlimited amending power. The
Court, however, held that the doctrine of basic structure is
to be applied only in judging the validity of amendments to
the constitution and it does not apply for judging the
validity of ordinary laws made by legislatures.
Forty-Fourth Amendment Act, 1978:

This Amendment seeks to remove the distortions that the 42nd Amendment had brought about in the constitution during the Emergency. Beside, the Amendment has considerably modified the emergency provisions of the Constitution so as to ensure that it is not abused by the executive in future.

Article 71 "as originally enacted" gave jurisdiction to the Supreme Court to decide election disputes of the President and the Vice-President. The 42nd Amendment took away the jurisdiction of the Court in this respect. The 44th Amendment has restored the original.

The 44th Amendment Act has amended Article 132, 133 and 134 relating to appeals in the Supreme Court from the decisions of the High Courts. The 44th Amendment has inserted a new Article 134A under which the High Court can now grant a certificate for appeal to the Supreme Court under Article 132, 133 and 134(1)(c) either suo motu or on an oral application by the aggrieved party immediately after the delivery of the judgement, decree, final order or sentence. It has also omitted clause(3) of Article 132 relating the grant of Special leave by Supreme Court in cases where the High Court refuses to give a certificate cases of special leave to appeal by Supreme Court will thus be left to be
regulated exclusively by Article 136 of the Constitution. This Amendment is intended to avoid delay in matters of appeal to the Supreme Court from High Courts.

Article 139-A, which was added by the 42nd Amendment gives power to the Supreme Court in certain circumstances to withdraw cases from the High Courts and decide them itself. This Article is retained subject to some modification. Prior to 44th Amendment, the court could take action under this Article only if an application was made by the Attorney-General. The 44th Amendment enables the court to do so also on the application of a party to any such case. Thus the court may do so either suo motu or on the application of the party to any such case.

The Amendment omits sub-clause (c) of clause (e) of Article 217 which was inserted by the 42nd Amendment. This clause made provision for appointing distinguished jurists as judges of the High Court.

The Proviso to Article 225, as originally existed, gave original jurisdiction to the High Courts in revenue matters. The 42nd Amendment omitted this proviso and took away jurisdiction of the High Courts in revenue matters. The 44th Amendment now restores the said proviso to Article 225 and again given original jurisdiction to the High Courts on revenue matters.
Subject to a modification this amendment restores Article 226 as it existed prior to the 42nd Amendment Act, 1976. The provisions relating to the issue of an interim order as introduced by the 42nd Amendment was very cumbersome and detrimental to litigants. Instead of this, 44th Amendment introduces a simple provision in new clauses (3) and (4). Clause (3) provides that when an interim order is passed against a party ex parte (without giving him opportunity of being heard) that party may make an application to the High Court for the vacation of such order and the High Court must dispose of such an application within two weeks. If the High Court does not dispose of the application within two weeks, the interim order shall stand vacated after the expiry of two weeks.

The Amendment restores Article 227 to the form in which it was prior to the 42nd Amendment Act, and this gives their power of superintendence over the tribunals. The 42nd Amendment has taken away this power of the High Courts.