CHAPTER - V

ISSUES JOINED - II
The Parliament and the Supreme Court may be said to have been engaged in a vigorous chess game over the issue in regard to the question of according primacy to 'unenforceable' Directive Principles of State Policy over the 'justiciable' Fundamental Rights. The provisions of Article 37 of the Constitution categorically state that the Directive Principles of State Policy 'shall not be enforceable by any court' and thus exclude from the jurisdiction of the courts the power to enforce these in deciding the cases brought before it. Nonetheless, the second part of Article 37 cannot be ignored which makes it mandatory on the State to apply the Directive Principles while making laws and further provides that these are, 'fundamental in the governance of the country'. The

1. Article 37 which declares the Directive Principles of State Policy as unenforceable reads: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down 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."
Parliament is under a constitutional obligation to apply and implement the directives contained in Part IV of the Constitution. Though, strictly speaking from the legal point of view, a Constitution cannot embody conflicting provisions. The Indian Constitution adheres to this legal norm as it embodies provisions both in regard to Directive Principles and Fundamental Rights as the Parliament in the discharge of its legislative functions takes both in the ambit of its powers. But in view of the decisions of the Supreme Court in cases brought before it and the amendments passed by the Parliament to accord a more meaningful position to the Directive Principles, the Parliament has joined issues with the Supreme Court over this question of inconsistency between the provisions of the Directive Principles and the Fundamental Rights of according primacy to one over the other.

The Parliament, in pursuance of the objectives set forth in the Directive Principles of State Policy has passed legislation effecting socio-economic changes in the country. The Supreme Court has taken a different position in its decisions in cases where such legislation has been challenged on the ground of being violative of the Fundamental Rights guaranteed by the Constitution.

In the matter of the primacy or otherwise of the Directive Principles and Fundamental Rights of the one over
the other, the Supreme Court has shifted its position more than once as evidenced in its judgments in the cases before it.

The Supreme Court has held that Fundamental Rights have primacy over the Directive Principles. In State of Madras v Champakam Dorairajan¹, an Order of the Government of Madras which provided for reservation of seats for admission to Medical Colleges on communal basis, was challenged on the ground that it was violative of right to equality and also the right guaranteed under Article 29(2) which provides that no citizen can be denied admission into any educational institution maintained by the State on grounds only of religion, race, caste, language or any of them.

It was contended on behalf of the State that the Order had been issued in pursuance of Directive Principles contained in Article 46² of the Constitution.

The Supreme Court rejected the contention of the State and held: "The directive principles which by Article 37 are expressly made unenforceable by a Court, cannot


2. Article 46 provides: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

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override the provisions found in Part III* which notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders and directions under Article 32. The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative and Executive Act or Order except to the extent provided in the appropriate article in Part III. The directive principles.... have to conform to and run subsidiary to the Chapter on Fundamental Rights.*1 The Order was declared ultra vires of the Constitution.

In Champakam case, the judgment of the Supreme Court declaring the Directive Principles as subsidiary to the Fundamental Rights, set in a controversy in the country as to what is the position of the Directive Principles vis-a-vis the Fundamental Rights. G.S.Sharma commenting upon the judgment of the Court observed that the reaction of the Court to the Government Order which was communal in nature, at that time was expected and normal. He further opined that it would require a time lag and continuous familiarity with the specific problems of Scheduled Castes and Scheduled Tribes over a period before the Court or any other person could realize that under the special conditions of the

*Emphasis is mine.

1. A.I.R. 1951, S. C. 226
Indian society a special treatment to a particular minority for a specific period could be treated as a value comparable to the value of maintaining secular traditions of admissions for educational institutions.¹

P. K. Tripathi, however, on the other hand subscribed to the view that "The proper approach would be to interpret the fundamental rights in the light of directive principles, to observe the limits set by the directive principles on the scope of fundamental rights, and if at all one of the two set of principles is to conform to the other, it is the fundamental rights that should be made to conform to and seek their synthesis in the directive principles of State Policy."²

It seems paradoxical that the Supreme Court in the case of Shankri Prasad v Union of India³ declared that the Parliament was competent under its constituent power to amend the Constitution and this included the power to take away or abridge the Fundamental Rights which implies that the sanctity and the 'transcendental' position which the Court accorded to the Fundamental Rights in the case of State of Madras v Champakam Dorairajan⁴ was at the mercy of the

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Parliament. Both the above mentioned cases were decided by the Supreme Court in the same year (1951). Further, the Court considered the Directive Principles as 'subsidiary' to the Fundamental Rights. The two views expressed in the judgments of the Court in the above-mentioned two cases are irreconcilable. If the Parliament has an absolute power of amending the Constitution including the Fundamental Rights (judgment of the Supreme Court in Shankri Prasad case) then it is the Parliament who has to decide whether to give primacy to the Directive Principles or the Fundamental Rights and accordingly, there is no question of the Directive Principles 'to conform to and run subsidiary' to the Fundamental Rights (judgment of the Court in Champakam case).

The Parliament resorted to the amendment of the Constitution to nullify the effect of the decision of the Supreme Court in Champakam case and amended Article 15(3) "so as to ensure that any special provision that the State may make for the educational, economic or social advancement of any backward class citizens may not be challenged on the ground of being discriminatory." ¹

The Supreme Court has applied the doctrine of harmonious construction in interpreting the provisions of Part III and Part IV of the Constitution. The Directive

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¹ Statement of the Objects and Reasons of the Constitution (First Amendment) Act, 1951.
Principles have been interpreted in a manner as not to be in juxtaposition or conflicting with Fundamental Rights. Both the Parts i.e. Part III and Part IV have been considered as constituting an integrated scheme. Thus, in re Kerala Education Bill, the Supreme Court held: "... in determining the scope and ambit of the fundamental rights relied on by or behalf of any person or body, the Court may not entirely ignore directive principles of State Policy laid down in Part IV of the Constitution but should adopt the principles of harmonious construction and should attempt to give effect to both as much as possible." It is, however, significant to note that in this case even when the Court referred to the principle of harmonious construction in the interpretation of the provisions contained in Part III and Part IV, the Court referred to its judgment in Champakam Dorairajan case and reaffirmed the view expressed in that case that the Directive Principles must "subserve and not override fundamental rights conferred by the provisions of the Articles contained in Part III of the Constitution."^1

Again, the Supreme Court applied the doctrine of harmonious construction in M. H. Qureshi v State of Bihar^2

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2. Ibid., p. 966.
while upholding the legislation passed by different States (Bihar, Uttar Pradesh and Madhya Pradesh) banning the slaughter of animals including cows. The impugned legislation had been challenged by the Muslims as violative of the Fundamental Rights guaranteed by Article 25(1). The Court upheld the legislation in view of the provisions of Article 48 and observed that a harmonious interpretation had to be placed upon the Constitution. Significantly the Court, again, as was the case in Kerala Education Bill, did not miss to refer to the dictum of Champakam Dorairajan case. The Court in pronouncing the judgment in these two cases applied the doctrine of 'harmonious construction' and at the same time referred to its decision in Champakam case. The Court in doing so rendered an equivocal judgment and made its position uncertain.

In a number of cases the Supreme Court has referred to the provisions of Directive Principles in determining

1. Article 25(1) provides: "Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

2. Article 48 reads: "The State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and drought cattle."

whether a restriction imposed on the enjoyment of Fundamental Rights is reasonable or not. For example, the Supreme Court in State of Bombay v F. N. Balsara\textsuperscript{1} referred to the provisions of Article 47\textsuperscript{2} in determining whether or not the restriction imposed by the Bombay Prohibition Act in respect of a ban on possession, sale, consumption or use of liquor, is a reasonable restriction in the interest of the public under Article 19(1)(f). Again, the Court in State of Bihar v Kameshwar Singh\textsuperscript{3} relied upon Article 39\textsuperscript{4} to uphold the

\begin{enumerate}
  \item A.I.R. 1951, S. C. 318.
  Also see Nashirwar v M.P., A.I.R. 1975, S. C. 360;
  \item Article 47 provides: "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
  \item A.I.R. 1952, S. C. 252.
  \item Article 39 provides: "The State shall, in particular, direct its policy towards securing -
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      \item that the citizens, men and women equally, have the right to an adequate means of livelihood;
      \item that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
      \item that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
      \item that there is equal pay for equal work for both men and women;
      \item that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
    \end{enumerate}
\end{enumerate}

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validity of the Abolition of Zamindari Acts passed by the State Legislatures and declared that such legislation was for a public purpose. In the said case, Justice Mahajan observed: "...the concentration of big blocks of land in the hands of a few individuals is contrary to the principles on which the Constitution of India is based. The purpose of acquisition contemplated by the impugned Act therefore is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible...." Further, in the same case, Justice Das also opined: "...the law must keep pace with the realities of social and political evolution of the country as reflected in the Constitution. If, therefore, the State is to give effect to those avowed purposes of our Constitution we must regard as a public purpose all that will be calculated to promote the welfare of the people as envisaged in these Directive Principles of

Footnote 4 continued from page 130

(f) that children are given opportunities and facilities to develop in a healthy manner and in condition of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

State Policy...." He further added: "We must not read a measure implementing our mid 20th century Constitution through spectacles tinted with early 19th century notions as to the sanctity or inviolability of individual right." 

The Court again relied upon the provisions of Article 43 to uphold the Minimum Wages Act, 1948 in Bijay Cotton Mills v State of Ajmer. The Court in this case held that the fixation of minimum wages of labourers by the Legislature is in the interest of the general public and is not violative of the freedom of trade guaranteed under Article 19(1)(g) of the Constitution.


   It is important to note that it was Justice Das only who had propounded the view of the subservience of Directive Principles to the Fundamental Rights in Champakam case. In the present judgment, he clearly seems to have taken a different stand just one year after his earlier judgment.

3. Article 43 provides: "The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of living and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas."

Even in Golak Nath case\(^1\) when the question was raised that the denial of power to Parliament to amend the Fundamental Rights would impede the implementation of the Directive Principles, the Court speaking through Chief Justice Subba Rao observed: "Part III and Part IV form an integrated scheme forming a self contained code and the scheme is elastic enough to respond to the changing needs of the society." He further stated that the "directive principles can reasonably be enforced within the self-regulatory scheme provided by Part III."\(^2\)

This view was reaffirmed in Chandra Bhavan Boarding and Lodging, Bangalore v State of Mysore.\(^3\) "We see no conflict" the Court observed in this case, "on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other. The provisions of Part IV enable the legislatures and the Government to impose various duties on citizens. The provisions contained therein are deliberately made elastic because the duties to be imposed on the citizens depend on the extent to which the directive principles are implemented. The mandate of the Constitution is to build a welfare

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2. Ibid.
society in which justice, social, economic and political
shall inform all institutions of our national life."

However, the Supreme Court in Bank Nationalization\textsuperscript{2}
and Privy Purses\textsuperscript{3} cases declared the nationalization of banks
and the abolition of the privy purses as unconstitutional
in spite of the fact that Article 31 as amended by the Fourth
Amendment Act had specifically excluded from the purview of
the Courts the principles providing for the compulsory
acquisition or requisition of property or the question of
the adequacy of compensation.

This again put the Supreme Court and the Parliament
in juxtaposition. Parliament, peeved, reacted sharply and
enacted the Twenty-fifth Amendment to the Constitution "to
surmount the difficulties placed in the way of giving effect
to the Directive Principles of State Policy"\textsuperscript{4} and substituted
the word 'compensation' in Article 31 with the word 'amount'
and added a new Article 31C to accord supremacy to the
Directive Principles contained in Article 39(b) and (c) over
the Fundamental Rights embodied in Articles 14, 19 and 31.

\begin{enumerate}
\item Madhav Rao Scindia v Union of India, A. I. R. 1971,
S. C. 530.
\item Statement of the Objects and Reasons of the Constitution
(Twenty-fifth Amendment) Act, 1971.
\end{enumerate}
Not content with this Parliament attempted to curtail power of judicial review of the Supreme Court by excluding from the purview of the power of the Court to scrutinize such a law giving effect to the above said Directive Principles. The Directive Principles (Article 39(b) and (c)) so protected under Article 31C may be said to deal with the entire economic system and as such most legislation on economic matters could have the advantage of the protection of Article 31C.

The Twenty-fifth Amendment invited much criticism. It has been observed that the Parliament exceeded the power of amendment and flagrantly violated the provisions of Article 368 by declaring under Article 31C that all laws passed by a simple majority, even the laws passed by State Legislatures, which proclaimed to give effect to the Directive Principles (clauses (b) and (c) of Article 39) though violative of Fundamental Rights, are valid. The Parliament disturbed the balance of power created under the Constitution. The power of judicial review was usurped by the Parliament: it forbade the Courts to question the validity of laws passed by it; accorded supremacy to Directive Principles over Fundamental Rights whereas the provisions of the Constitution do not embody such a scheme; encroached upon the Fundamental Right of constitutional
remedies under Article 32 by providing that a fundamental right is unenforceable in the face of a law giving effect to the Directive Principles. The totality of the effect of Article 31C is a 'monstrous outrage on the Constitution.'

The Parliament passed the Twenty-sixth Amendment which abolished the privy purses as "the concept of rulership with privy purses and special privileges unrelated to any current functions and social purposes, was incompatible with an egalitarian social order." The Twenty-fifth and the Twenty-sixth Amendments were challenged in the case of Kesavananda Bharti v State of Kerala. The Supreme Court upheld the validity of the said Amendments but the attempt of Parliament curtailing the power of judicial review was frustrated by the Supreme Court which declared that part of Article 31C denying judicial scrutiny of laws enacted to implement Directive Principles contained in Article 39(b) and (c), as void. Justice Shelat and Justice Grover, supporting the majority decision of the Court, observed: "In our judgment Article 31C suffers from two kinds of vice which seriously affect its validity. The first is that it enables total abrogation

of fundamental rights contained in Articles 14, 19 and 31 and, secondly, the power of amendment contained in Article 368 is of special nature which has been exclusively conferred on the Parliament and can be exercised only in the manner laid down in that Article. It was never intended that the same could be delegated to any other legislature including the State Legislatures." Further, "... It is possible to fit in the scheme of Article 310 any kind of social and economic legislation. If the courts are debarred from going into the question whether the laws enacted are meant to give effect to the policy set out in Article 39(b) and (c), the Court will be precluded from enquiring even into the incidental encroachment on rights guaranteed under Articles 14, 19 and 31." In this context, it is relevant to take notice of the views expressed by Justice H. R. Khanna who opined:

"However tenuous the connection of a law with the objective mentioned in clause(b) and clause(c) of Article 39 may be and however violative it may be of the provisions of Articles 14, 19 and 31 of the Constitution, it cannot be assailed in a court of law on the said ground because of the insertion of the declaration in question in the law. The result is that if an Act contains 100 Sections and 95 of

2. Ibid. at pp. 1608-1609.
them relate to matters not connected with the objectives mentioned in clauses (b) and (c) of Article 39 but the remaining five sections have some nexus with those objectives and a declaration is granted by the Legislature in respect of the entire Act, the 95 sections which have nothing to do with the objectives of clauses (b) and (c) of Article 39, would also get protection."  

The Supreme Court upheld the validity of the Twenty-fifth Amendment Act in Kesavananda Bharti case, thus accepting the stand of the Parliament which accorded supremacy to Directive Principles over Fundamental Rights. Strange as it may seem, the Supreme Court or at least most of the judges of the Court had been talking of according the inferior position to Directive Principles vis-a-vis Fundamental Rights prior to the Court's judgment in Kesavananda Bharti case. But in according supremacy to Directive Principles by accepting the Twenty-fifth Amendment, the Court took a volte face. The Court justified shift in its stand when it observed: ".... The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment, and even abrogation of these

rights in circumstances not visualized by the Constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV."¹

The Court continued, ".... from the point of view of the Preamble both the Fundamental Rights and the Directive Principles are means of attaining the objectives which were meant to be served both by the Fundamental Rights and Directive Principles. Fundamental Rights are the end of the endeavour of the Indian people for which the Directive Principles provided the guidelines. It would be difficult to hold that, the necessarily changeable limits of the path, which is contained in the Directive Principles are more important than the path itself."²

The Parliament did not rest at giving supremacy to the Directive Principles contained in Article 39(b) and (c) which provide for distributive justice, as against the Fundamental Rights contained in Articles 14, 19 and 31, it enacted another Amendment (Forty-second Amendment) to the Constitution to enlarge the scope of Article 31C as it felt that it should remove the difficulties which had arisen in

*Emphasis is mine.


achieving the 'socio-economic revolution'. It was stated on the floor of the Parliament that the Government had been subjected to "considerable stresses and strains and that vested interests have been trying to promote their selfish ends to the great detriment of public good." The amended Article 31C under the said Amendment, accorded supremacy to all the Directive Principles over the Fundamental Rights contained in Articles 14, 19 and 31 and as it provided that no law passed to give effect to Directive Principles can be declared unconstitutional by the Court even if it violated any of the Fundamental Rights under Articles 14, 19 and 31.

The Forty-second Amendment was, however, challenged in Minerva Mills Ltd. v Union of India. The Supreme Court, once again shifted its position in regard to the question of primacy of Directive Principles over Fundamental Rights and held that Fundamental Rights are 'transcendental', 'inalienable' and 'primodial'. "To destroy the guarantees given by Part III", the Court observed, "in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic features."

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   The said Amendment was passed during the Emergency.
3. Ibid, at p. 1806.
The Supreme Court declared Section 4 of the Forty-second Amendment, invalid under which Article 31C had been amended. Y. V. Chandrachud, C.J. speaking for majority in the case observed: "The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution.* This harmony and balance between fundamental rights and directive principles is an essential feature of the Constitution."

He further added: "This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallized in the Preamble. We resolved to constitute

* Emphasis is mine.

ourselves into a Socialist State which carried with it the obligation to secure to our people justice - social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State Policy, which specify the socialistic goal to be achieved. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore put Part III in our Constitution conferring those rights on the people. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV. But first as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainments of the ideals set out in Part IV would become a pretence of tyranny if the price to be paid for achieving that ideal is human freedoms. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience.

*Emphasis is mine.*
Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.¹

Justice Bhagwati who delivered dissenting judgment in Minerva Mills case held the view that the rights of the society override the rights of the individual as embodied in Part III of the Constitution and observed: "The object of fundamental rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate .... The Directive Principles, therefore, impose an obligation on the state to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all.... It will thus be seen that the directive principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the directive principles that the fundamental rights intended to operate...."²

The views expressed by Justice Bhagwati in his dissenting judgment in Minerva Mills case were echoed in

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² Ibid. at p. 1847.
Bhim Singhji v Union of India\textsuperscript{1} and Som Prakash Rekhi v Union of India\textsuperscript{2}, by Justice Krishna Iyer who observed that the Directive Principles emphasize, in amplification of the Preamble that the goal of the Indian polity is not laissez faire but a welfare state. This enjoins on the State to dispense social and economic justice and provide dignity of the individual. He considers directive principles as instrument of instructions for the Government of the day. To him directive principles are "paramount in charity and fundamental in the governance of the country, distributive justice envisaged in Article 39(b) and (c)" and that "these principles have a key role in the developmental process of the socialistic republic that India has adopted."\textsuperscript{3}

Parliament and the Supreme Court again found themselves face to face on the issue of the election of the Prime Minister.

Parliament passed the Thirty-ninth Amendment to the Constitution with an objective to exclude, the election of the office of the Prime Minister and the

\textsuperscript{1} A.I.R. 1981, S. C. 234.
\textsuperscript{2} A.I.R. 1981, S. C. 212.
Speaker, from the purview of the Supreme Court.  

This Amendment was passed by the Parliament in the background of the Allahabad High Court judgment in the election case of Smt. Indira Gandhi. The Allahabad High Court had declared the election of Indira Gandhi invalid. This created an embarrassing situation for the ruling party and the Government as the decision of the Court had set aside the election of the Prime Minister. An appeal was preferred to the Supreme Court and before the Supreme Court pronounced its verdict, the Parliament hastened to enact

1. Section 4 of the Constitution (Thirty-ninth Amendment) Act, 1975 inserted a new Article 329A. Clause (4) of Article 329A provides:

"No law made by Parliament before the commencement of the Constitution (Thirty-Ninth Amendment) Act, 1975, in so far as it relates to election petition and matters connected therewith shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in Clause (1) to either House of Parliament and such election shall not deemed to be void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect."

Note: Article 329-A was omitted by the Constitution (Forty-fourth Amendment) Act, 1978, Section 36.

the Thirty-ninth Amendment, excluding the matters pertaining to the election of the office of the Prime Minister and the Speaker from the jurisdiction of the Supreme Court. This Amendment was passed during the period of Emergency and given retrospective effect.

This action on the part of the Parliament clearly demonstrated that the Parliament exercised its constituent power to pass a legislative measure amounting to a judicial judgment as it validated a disputed election, which function under the Constitution is vested in the Supreme Court.

The above said Amendment was challenged before the Supreme Court. The Court upheld the Amendment but struck down clause (4) of Article 329A on the ground that the said clause violated the principle of free and fair elections which forms the basis of democracy which in turn is a part of the basic structure of the Constitution. The Court further held that, "The decision of the amending body cannot be regarded as an exercise in constituent legislative validation of an election."

2. For the text of Clause (4) of Article 329A, see footnote No. 3 at page 23.

Justice Mathew commenting upon Article 329(b) said that the said Article provided for the settlement of an election dispute on the basis of a petition presented to an

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Justice Chandrachud in his judgment in the case observed that in a federal system of government where there is a division of powers between the three co-ordinate branches of government the disputes regarding the constitutional power have to be resolved by courts and as such it is necessary to differentiate between the judicial and other powers for the maintenance of the Constitution. He opined that the encroaching power which was feared most by the Federalists was the legislative power. In this context he said, "I do not suggest that such an encroaching power will be pursued relentlessly or ruthlessly by our Parliament. But no Constitution can survive without a conscious adherence to its fine checks and balances. Just as Court ought not to enter into, problems entwined in 'political thicket', Parliament must also respect the

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authority and in such manner as the legislature may by law provide. The nature of a dispute in an election petition is such that it can only be resolved by a judicial process. The result of a judicial process cannot be an amendment of the Constitution; it can only result in passing a judgment or an order. In this context he opined: "If, however, the decision of the amending body to hold the election of the appellant valid was the result of the exercise of an 'irresponsible despotic discretion' governed solely by what it deemed political necessity or expediency, then like a bill of attainder, it was a legislative judgment disposing of a particular election dispute and not the enactment of a law resulting in an amendment of the Constitution. And, even if the latter process (the exercise of despotic discretion) could be regarded as an amendment of the Constitution, the amendment would damage or destroy an essential feature of democracy as established by the Constitution.

preserve of the Courts.... In the name of the Constitution, the Parliament may not also turn its attention from the important task of legislation to deciding court cases for which it lacks the expertise and the apparatus...."¹

The Supreme Court under the Election Laws Amendment Act, 1975, upheld the election of the Prime Minister Smt. Indira Gandhi and set aside the judgment of the Allahabad High Court.²

It would be instructive to point out here that Parliament resorted to enacting the Thirty-eighth, the Thirty-ninth and the Forty-second Amendments to the Constitution, presumably to adversely affect or to erode, however, slightly, the position and the jurisdiction of the Supreme Court.

The Thirty-eighth Amendment made the grounds on which emergency is to be declared, as also the 'satisfaction of the President' for this purpose, non-justiciable as also the power of the Governor and that of the President and the Administrator to promulgate ordinances.³

Further, the Thirty-ninth Amendment as already pointed

out, excluded from the jurisdiction of the Supreme Court the question of election disputes concerning the office of the Prime Minister and the Speaker.¹

The Forty-second Amendment specified the minimum number of seven judges who shall sit for determining the constitutional validity of any central law and it was further provided that to declare a central law as invalid at least a majority of two-thirds judges sitting on the bench should pass a judgment to this effect. In addition, the power of the Supreme Court to decide questions in regard to constitutional validity of laws was restricted to the central laws.²

It is interesting to point out here that with the change in the complexion of Parliament and the Government in 1977, two amendments were enacted by the Parliament (Forty-third Amendment, Act, 1977 and the Forty-fourth Amendment Act, 1978) to negate the effect of the said three Amendments (the Thirty-eighth, Thirty-ninth and the Forty-second) and restored the position of the Supreme Court as it was before the said three amendments.

It seems necessary to point out here that a new question of great politics-legal significance with far

¹. The Constitution (Thirty-ninth Amendment) Act, 1975 amended Article 71, 329, added a new Article 329A and further expanded the Ninth Schedule.

². The Constitution (Forty-second Amendment) Act, 1976 amended Article 32 adding a new Article 32A, inserted a new Article 131A, 144A in addition to making other changes.
reaching consequences appeared on the Indian political scene. This question though not an issue between the Parliament and the Supreme Court, is, yet quite relevant to the discussion in these pages. This question concerned to the appointment of the Chief Justice of the Supreme Court. It was a matter between the Supreme Court and the Government yet Parliament made this question a point of discussion and this has been interpreted as an attempt to further erode the position of the Supreme Court.

The observance of the convention of seniority and consultation with the outgoing Chief Justice of India in the matter of appointment of the succeeding Chief Justice had been followed by the Government till 1972. The departure from this convention was necessitated in the case of Jafar Imam due to his illness. But in 1973, the convention of seniority was not observed in the case of the appointment of A. N. Ray as the Chief Justice. The deviation from the convention in this case resulted in the supersession of three judges senior to the appointee Chief Justice.¹

It may be at once instructive and interesting to take notice of the background heading to the breach of this

¹. The three superseeded judges senior to the appointee Chief Justice, namely, Justice Shelat, Justice Hegde and Justice Grover, resigned as a protest.
convention in regard to the appointment of Chief Justice (A. N. Ray). The appointment of the new Chief Justice was announced the day after the judgment in the Kesavananda Bharti case was given by the Supreme Court.¹

The question of supersession and reasons for it were debated in the Parliament. In support of its action Parliament was told by the Government: "We are entitled to look into the philosophy of a Judge. We are entitled to look into his outlook. We are entitled to come to the conclusion that the philosophy of this judge is forward looking and of that judge backward looking and to decide that we will take the forward looking judge and not the backward looking judge."²

In this context it is interesting to notice here the observation of the Union Minister of Steel, Kumaramanglam, "We are denounced for wanting committed Judges. No Judge has to commit himself. But we do want Judges who are able

1. Coincidently during the course of hearing of Kesavananda Bharti case, the Attorney General of India, Mr. Nirem De told the Supreme Court in case of a decision being handed down by the Court which was not favourable to the Government, an alternative in the form of 'political action' may have to be resorted to.


*Emphasis is mine.
to understand what is happening in our country; the wind of change that is blowing across our country; who is able to recognise that Parliament is sovereign; that Parliament's power in relation to future are sovereign powers...."¹

The Government's stand on the appointment of the Chief Justice by ignoring the rule of seniority was hotly contested in the Parliament and the Government found itself in an embarrassing position. It tried to retrieve its position by declaring in the Parliament that its action was based on the recommendation of the Fourteenth Law Commission.²


2. The Report of the Law Commission says: "For the performance of the duties of Chief Justice of India, there is needed, not only a judge of ability and experience, but also a competent administrator capable of handling complex matters that may arise from time to time, a shrewd judge of men and personalities and, above all, a person of sturdy independence and towering personality who would, on the occasion arising, be a watchdog of the independence of judiciary.... In our view, therefore, the filling of a vacancy in the office of the Chief Justice of India should be approached with paramount regard to the considerations we have mentioned above. It may be that the senior most puisne judge fulfils these requirements. If so, there could be no objection to his being appointed to fill the office.... It is therefore, necessary to set a healthy convention that appointment to the office of the Chief Justice rests on special considerations and does not as a matter of course go to the senior most puisne judge. If such a convention were established, it would be no reflection on the senior most puisne judge if he be not appointed to the office of the Chief Justice."

The action of the Government in taking protection by referring to the Report of the Law Commission was criticized by the Chairman and other signatories of the Report. It further drew the opprobrium from legal luminaries.¹

The above mentioned case was not an isolated one as the convention of seniority was again ignored in 1977 in the matter of the appointment of the Chief Justice when Justice H. M. Beg (the present Chairman of the Minorities Commission) superseded Justice H. R. Khanna.²

However, the convention was observed in the appointment of the Chief Justice in 1978 (Justice Y.V. Chandrachud).

The situation arising from this continuing competitive rivalry between the Supreme Court and the Parliament attracted the attention of the Indian Law Commission which issued a questionnaire which directly did not refer to this question but included certain questions which create a lurking suspicion that the Commission was seized of the situation but did not like to take up this question directly and specifically.³

1. Sikri stated "These words (about a Judge's or a party's social philosophy) do not exist in the oath a Judge takes. Hidayatullah remarked: "Well, I am afraid that if this goes on the men who will be chosen will be people not forward looking but looking forward.


3. The Questionnaire sent by the Tenth Law Commission headed by Justice Mathew dated January 1, 1982 is "to study the problem of evolving a methodology for speedier disposal of matters coming before the Supreme Court and High Courts." For details see Appendix-II.
The questionnaire contains a list of thirty four questions with short notes. Some of the questions are tendencious, for example, - Do you feel the Supreme Court is acting as a third chamber; are the courts grasping at jurisdiction in matters which lie squarely within the competence of the executive branch of government; should appointees to judgeship of Supreme Court and High Courts have a political background?

The discussion in the foregoing pages leads inevitably to one conclusion that the two most important pillars of the Indian polity are continuously engaged in claiming and asserting their respective jurisdictions, the primacy of one as against that of the other. In this struggle between the two, the government has stepped in if only because it has the right to initiate legislation in Parliament which represents the will of the people, and in which it commands the majority. When the Supreme Court either strikes down the law made by Parliament or passes an adverse verdict, the Government is bound to feel hurt as the government in a parliamentary democracy is a government of the party in majority and ipso

1. Question No. 4.
2. Question No. 6.
3. Question No. 7.
facto the images of the party is bound to suffer.

This is a concomitant of having a parliamentary democracy. This kind of confrontation is inherent in a parliamentary and federal set up as elsewhere.