The debate on the amendment of the Indian Constitution

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Article 368 of the Constitution of India provides that the Constitution can be amended by a two-thirds majority of members in each of the two houses of the Union of Parliament present and voting, supplemented in some cases by ratification of the legislatures of half of the constituent States. The Supreme Court of India has developed a doctrine that article 368 does not empower Parliament to alter the "basic structure or framework" of the Constitution. During the period of Mrs Gandhi's Congress Government this development led to confrontation between the Supreme Court and Parliament. The present Janata Government is seeking support for a formula under which certain "basic features" of the Constitution can be amended by resort to a referendum.

I. INTRODUCTION

A. The Westminster Model

Many of us have been taught to believe that the parliamentary system of government — otherwise known as the "Westminster model" — is one of the more successful manifestations of the British genius. So much so that, in the period since the last world war, it has been exported to many dependent territories that are now independent. In the case of countries with which New Zealand has been directly concerned, the model was used, with variations, in Western Samoa, the Cook Islands and Niue. The model has, on the face of it, proved to be infinitely adaptable in new surroundings, but the path of constitutional development has followed varying courses in the countries concerned — and in many it has been abandoned for more authoritarian forms of government. India is one country that has, on the face of it, preserved the main features of the Westminster model with, of course, significant modifications.

However, in 1975, the then Prime Minister of India, Mrs Indira Gandhi, with the support of her Congress Party, chose to declare an Emergency and establish an authoritarian regime. That Mrs Gandhi should, nevertheless, decide to hold

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an election in March 1977 and that she should be overwhelmingly defeated at the polls by the opposition Janata Party were hailed as triumphs for democracy and, in particular, for the parliamentary system.

The traditional constitution-maker thinks in terms of the powers and functions of the three main arms of government — the legislature, the executive and the judiciary — and of their relationship to one another. A feature of the original Westminster model is that the executive is the dominant arm of government in that it can command a majority in the legislature and so determine the latter's legislative activity, while the doctrine of parliamentary sovereignty ensures that no attack can be made on parliamentary legislation. In this context the rule of law means in practice that a body of administrative law has been built up under which the individual has access to the courts to protect himself against unauthorised or arbitrary executive action, which can include the executive's interpretation of parliamentary legislation, but not the clear-cut mandates of that legislature itself. A system such as this, which provides for an all-powerful executive, was attractive to leaders of countries that had recently acquired, or were about to acquire, independence and were faced with stupendous tasks of social and economic development. But when it came to constitution-building there were other pressures at work — and in most cases lengthy constitutional documents emerged, the majority of which included, not only a written formulation of the parliamentary system with a responsible executive, but also elaborate provisions for the protection of the rights of individuals and, where appropriate, the rights of minorities. To ensure that these rights remained effective, constitutions provided for access to the courts in respect of infringements and appropriate provisions of the constitution were entrenched, i.e. those provisions could not be amended by the normal legislative process and the validity of amendments could be tested in the courts.

In recent years it has become more fashionable in the developed world — and particularly in Britain and New Zealand (the two countries with flexible constitutions) — for commentators to express alarm at the increasing dominance of the executive whether it be of ministers who form the political executive or the public servants who comprise the bureaucracy. This alarm has been reflected in attempts to reform the procedures of Parliament so that its members can maintain a more effective surveillance of executive action, and in such measures as the establishment of parliamentary commissioners, or ombudsmen, authorised to investigate administrative irregularities. In Britain and New Zealand there are spokesmen who call for more radical solutions, including the acceptance of new constitutional settlements, involving the adoption of written constitutions with entrenched provisions imposing restraints on legislative as well as executive action. In particular, there are demands for the protection of the rights of the individual in the form of bills of fundamental or human rights, with access to the courts in the event of infringement of those rights.

B. The Relevance of India

For those concerned with recent developments a study of the constitutional development of the Republic of India is most relevant and of absorbing interest. India prides itself on being the world's largest democracy and on its adoption of the parliamentary system. At the same time, it has a written constitution, which

has been described as the longest constitution in existence, and this constitution contains elaborate provisions for the protection of fundamental rights and a procedure for access to an independent judiciary in respect of infringement of those rights. The Constitution also contains directive principles of state policy by which it is recognised that India is a country with immense problems of socio-economic development calling for government action. Given that the conflict between the rights of the individual and the demands of the social service state are a constant theme of modern government; given that India has an able, well-educated, articulate elite, be they politicians, public servants, the press, lawyers, or academics; and given that, except for the brief period of the Emergency, India has continued to be a free society and that Indians have a penchant for litigation, we can expect to find that there have been extensive and well-informed debates in legislatures, the press, official reports, academic writings and the courts on the problems that face modern governments and constitution-makers. So much is this the case that few individuals can expect to be conversant with the mass of material that is available.

Nevertheless, there are aspects of the Indian experience that must give ground for concern — and even for cynicism. Too much attention is given to an uncritical acceptance of overseas stereotypes — "democracy", "the parliamentary system", "the freedom of the press", "the rule of law", "the independence of the judiciary", "the integrity of the public services", and the like. The truth is that these democratic institutions, as adopted by the Indians, are fragile. There is not as yet an established democratic tradition and a strong and articulate public opinion. One distinguished Indian critic has said:[1]

> Factionalism, politicking, unrest, indiscipline, violence, corruption, the pursuit of power, regionalism, agitational methods and the availability of a largely unawakened electorate as material for exploitation by the politicians are together the hallmark of the Indian system as it works on the ground and not as it reads under the label 'parliamentary democracy' or as it is proclaimed by the legal pundits.

In these circumstances, Indian thinking should be innovative rather than imitative. India must develop institutions that are suited to her needs and that are related to her own norms and values. This country is, after all, a world of her own with problems that are not only daunting but peculiar to the subcontinent. Hence the need to evolve an Indian polity. The hope must be that with her rich cultural background, her great physical resources and the qualities of her people — their skills and their capacity to endure — India will find a way of realising her potential and of providing those people with the rich and full life that should be their lot.

C. India's Procedure for Constitutional Amendment

In this paper an attempt will be made to isolate one particular controversy that is a matter of current concern in India — the method by which the Constitution of India can or should be amended. It so happens that this issue has to a large

1 N. J Nanporia "The Writing on the Wall" *The Illustrated Weekly of India* Vol. XCIX 22, 28 May 1978 (Bombay).

extent revolved around provisions of the Constitution dealing with the protection of fundamental rights — and this fact increases the interest of the amendment issue for the New Zealand reader. On the other hand, considerations of space and the fact that the writer can make no claim to even a superficial knowledge of the vast literature on the subject could mean that the issues have been over-simplified.

II. THE CONSTITUTION OF INDIA[2]

A. Features of the Constitution

The Constitution of India was framed by a Constituent Assembly which was set up in 1946 on a restricted franchise according to the proposals of the British Cabinet Mission sent out to suggest a settlement of "the Indian problem". Under the Indian Independence Act of 1947 (U.K.) the powers of the legislature of the new Dominion of India were in the first instance to be exercised by the Constituent Assembly and that Assembly was not to be subject to any limitation in the exercise of its constituent powers. The Constitution was not finalized until 26 November 1949, when in terms of its Preamble:

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC . . . IN OUR CONSTITUENT ASSEMBLY . . . do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

The framers of the Constitution were faced with an immense task. The population of India at the time was over 300 million. (It is now over 600 million.) Its people were not homogeneous — there were many many different communities speaking different languages and professing different religions. There were castes within the religions, backward people and tribal areas to be considered. On the other hand, the Constituent Assembly included eminent political leaders and lawyers of distinction who had taken an active part in the struggle for freedom from British rule and who were aware of the problems faced by an independent India. As many of them had been trained in England, the Assembly drew freely on the British parliamentary system, with borrowings from Canada, Australia, Ireland, the United States of America, Switzerland and Japan. The Assembly also adopted provisions of the Government of India Act 1935, a United Kingdom statute.

The Constitution that emerged was a unique and elaborate document with a Preamble, 395 articles (divided into 22 Parts) and 8 Schedules. It is not necessary to enter into the debate whether the Constitution can properly be described as "Federal", but the Constitution itself describes India as "a Union of States". The Union comprises States (originally provinces of British India and semi-autonomous princely states under the sovereignty of the British Crown) and certain Union Territories with a lesser degree of autonomy than the States. New States can be

2 Granville Austin *The Indian Constitution: Cornerstone of a Nation* (Bombay, reprinted 1976) gives a detailed account of the origins of the Constitution. See also V .N. Shukla *The Constitution of India* (6th ed., with Supplement, by D. K. Singh, Lucknow, 1978) and H. M. Seervai *Constitutional Law of India* in two volumes (2nd ed., Bombay, 1975-1976).

admitted or formed — or the areas, boundaries or names changed — by normal Act of the Union Parliament and many such changes have been made (articles 3 and 4 and First Schedule). Sikkim became a State under the Constitution (Thirty-sixth Amendment) Act, 1975. Special provisions of the Constitution relate to Sikkim (article 371F), the State of Jammu and Kashmir (article 370), and certain other States. Special provisions are also made for Scheduled Castes and Tribes and for "socially and educationally backward classes" (Part XVI).

Significant features of the Constitution are, in summary:

(i) Parliamentary government is established for both the Union (Centre) and the States.

(ii) The executive power of the Union is vested in the President, as Head of State. He is chosen by an electoral college consisting of elected members of the Centre Parliament and State Assemblies. He is advised at the Centre by a Council of Ministers, or Cabinet, with the Prime Minister at its head. The Council of Ministers is collectively responsible to the House of the People, now known as the Lok Sabha. There are comparable provisions in respect of the States, with an appointed Governor as executive head and Councils of Ministers, led by Chief Ministers, to act as advisers.

(iii) The Union Parliament consists of the President and two Houses, the Council of States, or Rajya Sabha, and the Lok Sabha.

(iv) The Rajya Sabha consists of 12 nominated members and 232 members elected by the elected members of the Legislative Assemblies of the States or by electoral colleges in the Union Territories. The Rajya Sabha is a permanent body with a third of its members retiring every second year. This meant that when the victory of the Janata Party in 1977 led to a dramatic change in membership of the Lok Sabha this change was not reflected in the membership of the Rajya Sabha.

(v) The Lok Sabha consists of 525 members chosen by direct election and adult suffrage from territorial constituencies in the States, up to 20 members to represent the Union Territories, chosen in most instances by direct election and adult suffrage, and 2 members appointed by the President to represent the Anglo-Indian community. Seats are reserved for the Scheduled Castes and Scheduled Tribes.

(vi) There are Legislative Assemblies in the States elected on adult suffrage with provisions for the representation of the Scheduled Castes and Scheduled Tribes and the Anglo-Indian community. Seven States in the Union are bicameral and have upper Houses (or Legislative Councils).

(vii) The Lok Sabha and Legislative Assemblies are elected for terms of not more than 6 years.[3]

(viii) The distribution of legislative powers between the Union and the States is dealt with by articles 245, 246 and the Seventh Schedule of the Constitution. The Seventh Schedule divides possible areas of legislative activity into three lists. The Union Parliament has exclusive power to make laws with respect to items in the Union List (List I); the State Legislatures have corresponding powers in

3 This was changed from five years by the Constitution (Forty-second Amendment) Act, 1976. The Constitution (Forty-fifth) Amendment Bill, 1978, provides for a return to the five year term.

relation to the State List (List II); and there is a Concurrent List (List III) listing items on which both the Union Parliament and State Legislatures can make laws. It is significant for the present discussion that, under article 248, "Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List." Item 97 in the Union List is to the same effect.

(ix) There is a Supreme Court of India consisting of the Chief Justice of India and up to seventeen[4] other judges. Appointments are made by the President. He may consult such judges of the Supreme Court and the High Courts as he "may deem necessary for the purpose", but in the case of the puisne judges he is required to consult the Chief Justice. There are provisions that seek to ensure the independence and security of tenure of judges. The retirement age is sixty-five years. The Supreme Court has an original jurisdiction in disputes involving the Government of India and the States and an appellate jurisdiction in respect of certain appeals from the High Courts. Not less than five judges are to sit on cases involving substantial questions of law as to the interpretation of the Constitution.[5]

(x) There is a High Court in each of the States. Judges are appointed by the President of India after consultation. Their independence and security of tenure are protected and they retire at sixty-two years. The jurisdiction of the High Court originally provided for the issue of orders or writs, including the prerogative writs, in respect of administrative and other action. This jurisdiction was severely restricted by the Constitution (Forty-second Amendment) Act, 1976, but the Constitution (Forty-fifth Amendment) Bill, 1978, seeks to reestablish the old jurisdiction.

(xi) Under article 352 a Proclamation of Emergency can be made "If the President is satisfied that a grave emergency exists whereby the security of India . . . is threatened, whether by war or external aggression or internal disturbance . . . ." A Proclamation under this article was made on 3 December 1971 on the occasion of the outbreak of the Indo-Pakistan war. This was not revoked until 27 March 1977. The "internal" disturbance provision was invoked by the Prime Minister, Mrs Indira Gandhi, when a Proclamation of Emergency was made on 25 June 1975. It was revoked on 22 March 1977 by Mrs Gandhi's Congress Government after its defeat at the polls.

B. Fundamental Rights

When India achieved Independence in 1947 the national revolution had been realised, but Indian leaders knew that their country's survival as a nation depended

4 This number was very recently increased from thirteen. There are at present fifteen puisne judges.

5 The Constitution (Forty-second Amendment) Act, 1976, introduced restrictions on the jurisdiction of the High Courts and special provisions relating to the composition of the Supreme Court and High Courts when considering constitutional issues and the majorities that would be required before a law could be declared invalid (two-thirds in the case of the Supreme Court). Some of these provisions, particularly those relating to the composition of courts and their majorities, were repealed by the first constitutional amendments introduced by the Janata Government in the Constitution (Forty-third Amendment) Act, 1977.

on the satisfaction of the needs of the Indian people. This involved a fundamental change in the structure of Indian society; there had to be a social revolution. The Indian Constitution is a social document designed to establish the conditions necessary for the achievement of this social revolution, but as one writer has pointed out:[6] "the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution."

The leaders of the Indian independence movement were inheritors of the 19th century liberal tradition. They had long been envious of the rights and privileges that the British enjoyed in India; and they were well aware that their country comprised many minorities based on racial, religious, linguistic, social and caste distinctions. Hence the decision of the constitutional draftsmen to depart from the Diceyan approach of the Common Lawyers that was unsympathetic to the concept of a written Bill of Rights and to include in Part III of their Constitution a detailed formulation of fundamental rights. The list of rights begins, in article 14, with the guarantee of equality before the law. Article 15 proceeds to prohibit discrimination on grounds only of religion, race, caste, sex or place of birth, while article 17 abolishes untouchability. Under the rubric "Right to Freedom", article 19 provides that all citizens are to have the right to freedom of speech, assembly, association and movement and (in article 19(f)) the right "to acquire, hold and dispose of property". Other articles deal with the Right against Exploitation, the Right to Freedom of Religion, and Cultural and Educational Rights.

Under the heading "Right to Property", article 31 provides that "No person shall be deprived of his property save by authority of law." Article 31(2), in its original form, proceeded to set out the circumstances in which property could be compulsorily acquired or requisitioned on the payment of compensation. During discussions in the Constituent Assembly this article had proved to be one of the more controversial articles, since it was to be expected that a government committed to social revolution would wish to see a more equitable distribution of land, and, in particular, the abolition of the rural landlords known as Zamindari. Article 31 was to continue to be a source of controversy, both in Parliament and in the courts. Parliament's first constitutional step was to pass the Constitution (First Amendment) Act, 1951, which added article 31A and article 31B and the Ninth Schedule to the Constitution. Article 31A extended the authority of the Union Parliament and State Legislatures to pass laws dealing with certain property, no such law to "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". This meant, for example, that compensation need not be paid for an estate acquired under the new article as a measure of agrarian reform. Article 31B was a constitutional device under which such legislation of the Union or States as was listed in the Ninth Schedule was placed beyond any attack on the ground that it infringed Part III of the Constitution. Although the Ninth Schedule originally contained only agrarian reform legislation, article 31B does not specifically refer to such legislation and it will be seen that the Schedule has since been used to protect Union legislation impinging on fundamental rights other than the right

6 Austin, op. cit., 50.

to property. Articles 31, 31A and 31B and subsequent amendments to these articles became the main focus of the debate that has taken place over the power to amend the Indian Constitution.

The Constituent Assembly realised that the fundamental rights that it was proclaiming could not be absolute and that some limitations would need to be placed on their exercise. For instance, State intervention in support of social policies was to be expected. Accordingly, the prohibition of discrimination in article 15 is not to prevent special provision for women and children. Again, the various freedoms are to be exercised with regard to the interests of the State and the general welfare. Thus, under article 19(2),[7] the right to freedom of speech and expression does not preclude the making of any law imposing

> reasonable restrictions on the exercise of the right . . . in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The right to freedom of religion is not to prevent the State from providing for social welfare and reform (article 25(2)); and it has already been noticed that article 31 sets out the conditions on which the citizen can be deprived of his property. Articles 33 and 34 enable Parliament to make exceptions to the fundamental rights in their application to the armed forces or while martial law is in force.

Article 13 of Part III of the Constitution protects the citizen against legislation derogating from the fundamental rights. Article 13(1) makes void all pre-existing laws inconsistent with Part III. Article 13 continues:

> (2) The State[8] shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
> (3) In this article, unless the context otherwise requires, —
> (a) law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
> . . . .[9]

An essential element of an effective Bill of Rights is that the citizen should be able to seek the protection of the courts against the violation of his rights. In the case of the Indian Constitution this protection is given by article 32 which guarantees "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by [Part III] . . . ." Concurrent jurisdiction is given to the High Courts by article 226.

C. Directive Principles of State Policy

The statement of fundamental rights contained in Part III of the Constitution was primarily designed as a protection for the Indian citizen against arbitrary action

7 As amended by the Constitution (First Amendment) Act, 1951, and the Constitution (Sixteenth Amendment) Act, 1963.
8 "State" includes the Government and Parliament of the Union and the Government and Legislature of each of the States: art. 12.
9 For clause (4) inserted by the Constitution (Twenty-fourth Amendment) Act, 1971, see infra p. 370.

by the State. However, the need for a social revolution called for a statement of the obligations of the State to take positive steps to implement that revolution. This statement is to be found in the Directive Principles of State Policy contained in Part IV of the Constitution. Article 37 recognises that these Principles will be non-justiciable — but they are to be "fundamental in the governance of the country". The statement of Principles that follows covers a range of social, economic and political objectives that are widely recognised in the policies of the modern social service state. Their essence is to be found in article 38 under which the State is to strive "to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." Article 39 is more specific. It begins:

> The State shall, in particular, direct its policy towards securing —
> (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
> (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
> . . . .

and goes on to call for equal pay for equal work for men and women, the protection of the health of workers and the health and welfare of children.

It could be expected that the compatibility of State policies designed to implement the provisions of article 39, as quoted above, with the right to property enunciated in article 31 would be a source of future controversy.[10]

D. The Amendment Procedure

Part XX of the Constitution, entitled "Amendment of the Constitution", contains one article, article 368, which, along with its marginal heading, originally read:

> *Procedure for amendment of the Constitution.*
> *Article 368*
>
> An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill the Constitution shall stand amended in accordance with the terms of the Bill:
>
> Provided that if such amendment seeks to make any change in —
>
> . . . .
>
> (d) the representation of States in Parliament, or
> (e) the provisions of this article,
>
> the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States . . . by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

10 The Forty-second Amendment (1976) added a new Part IVA to the Constitution. This sets out the Fundamental Duties of the citizens of India.

There are a number of provisions in the Constitution that can be amended by the normal legislative action of the Union Parliament (e.g. article 4 dealing with the creation of new States). Article 368 introduced two more categories of amendment procedure:

(i) Amendments, affecting the majority of the provisions of the Constitution, that require the two-thirds majority specified by article 368.

(ii) Amendments that require, in addition to the two-thirds majority, ratification by resolutions passed by not less than one-half of the State Legislatures. The provisions of the Constitution falling within this requirement are specified in the proviso to article 368. Besides the inclusion of article 368 itself, the provisions are a selection of those that affect the position of the States of the Union, viz. the manner of election of the President, the extent of the executive powers of the Union and States, the establishment and jurisdiction of the Supreme and High Courts, and the distribution of legislative powers.

It appears that the Constituent Assembly was not unaware of, but left unresolved, an issue that is apparent when article 13(2), quoted earlier, is read along with article 368. Is a constitutional amendment under the procedure prescribed in article 368 a "law" as defined in article 13(2) or something different? In other words, is there a distinction between enactments involving constitutional amendments and normal legislation? The answer to this question bears on the authority of Parliament to take away or abridge the fundamental rights in Part III of the Constitution.

III. THE SUPREME COURT AND THE AMENDMENT POWER

A. Early Decisions

The validity of the First Amendment (1951) which added articles 31A and 31B (including the Ninth Schedule) to the Constitution arose for determination in *Shankari Prasad Singh Deo* v. *Union of India*.[11] The Supreme Court, with a bench of five judges, unanimously rejected the contention that in so far as the First Amendment took away or abridged the fundamental rights conferred by Part III it should not be upheld in the light of the provisions of article 13(2). Shastri J., delivering the judgment of the court said[12]

> Although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in the exercise of legislative power, and constitutional law, which is made in the exercise of constituent power. Dicey defines constitutional law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State." . . . [T]he terms of Art. 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever.

Shastri J. was here implementing Dicey's doctrine of parliamentary sovereignty. He recognised that an amendment in terms of article 368 was the "exercise of sovereign constituent power";[13] and that there was no indication that the constitution-makers intended to make fundamental rights immune from constitutional amendment.

11 A.I.R. (38) 1951 S.C. 458; [1952] S.C.R. 89.
12 Ibid., 463; 106. 13 Idem.

Therefore "law" in article 13 must be taken to mean rules or regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power. Article 13(2) did not affect amendments made under article 368.

Notwithstanding the First Amendment, agrarian legislative measures adopted by the States were effectively challenged in the High Courts and two further amendments were passed to save the validity of those measures. The Constitution (Fourth Amendment) Act, 1955, amended article 31A, while the Constitution (Seventeenth Amendment) Act, 1964, amended article 31A again and added 44 Acts to the Ninth Schedule. The validity of the Seventeenth Amendment was contested in *Sajjan Singh* v. *State of Rajasthan*.[14] The main contention before the five-judge bench of the Supreme Court was that the Seventeenth Amendment limited the jurisdiction of the High Courts and, therefore, required ratification by one-half of the States under the provisions of article 368. The court unanimously disposed of this contention, but members of the court chose to deal with a second submission, that the decision in the *Shankari Prasad* case should be reconsidered. The Chief Justice (Gajendragadkar C.J.) in delivering the view of the majority (Gajendragadkar C.J., Wanchoo and Raghubar Dayal JJ.) expressed their full concurrence with the decision in the earlier case. The words "amendment of this constitution" in article 368 plainly and unambiguously meant amendment of all the provisions of the Constitution; it would, therefore, be unreasonable to hold that the word "law" in article 13(2) took in Constitution Amendment Acts passed under article 368. While recognising the importance of the guarantee of fundamental rights contained in Part III, their Honours asked: ". . . can it be said that the fundamental rights . . . are eternal and inviolate in the sense that they can never be abridged or amended?"[15] While conceding that a number of the articles in Part III themselves provided for limitations on the rights protected, the majority argued[16]

> . . . it is legitimate to assume that the Constitution-makers knew that Parliament should be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course of socio-economic progress and development of the country.

They went on to point out that, even if the powers to amend the fundamental rights were not included in article 368, Parliament could by a suitable amendment assume those powers.

The Chief Justice also dealt in his judgment with the wording of article 31B. That article, he considered, left it open to the Legislatures concerned to repeal or amend Acts that had been included in the Ninth Schedule. But the inevitable consequence would be that an amended provision would not receive the protection of article 31B and that its validity could be examined on its merits.

Hidayatullah and Mudholkar JJ., in separate judgments, gave notice that they would have difficulty in accepting the reasoning in *Shankari Prasad*'s case in regard to the relationship of articles 13(2) and 368. Hidayatullah J. said he would require stronger reasons than those given in that case to make him accept

14 A.I.R. (52) 1965 S.C. 845; [1965] 1 S.C.R. 933.
15 Ibid., 857; 952. 16 Ibid., 858; 954.

the view that the fundamental rights were not really fundamental, but were intended to be within the power of amendment in common with other parts of the Constitution:[17] "The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special majority." Mudholkar J. took the view that the word "law" in article 13(2) included an amendment to the Constitution under article 368: "Article 368 does not say that when Parliament makes an amendment to the Constitution it assumes a different capacity, that of a constituent body."[18] The learned Judge recalled that India had a written constitution, which created various organs at the Union and State levels and recognised certain rights as fundamental.

> Above all [the Constituent Assembly] formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?
> It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?[19]

The judgments in *Sajjan Singh*'s case were to provide the outlines of what was to become, and still is, a national debate on the method by which the Indian Constitution can be amended. As an Indian commentator[20] has pointed out the doubts expressed by Hidayatullah and Mudholkar JJ. in *Sajjan Singh*'s case about the correctness of the decision in *Shankari Prasad*'s case were to be confirmed by the majority in the next case to be considered (*Golak Nath*'s case).[21] *Golak Nath*'s case was itself to be overruled by a majority in the *Kesavananda*[22] case, this time in favour of Mudholkar J.'s view that certain features of the Constitution were basic and unalterable. The minority judges in *Kesavananda*'s case were to return to the view of the court in *Shankari Prasad*'s case and the majority in *Sajjan Singh*'s case.

B. The Golak Nath Case

The doubts of the minority judges in *Sajjan Singh*'s case as to the correctness of the decision in *Shankari Prasad*'s case were raised before a bench of eleven judges of the Supreme Court in *Golak Nath* v. *State of Punjab*[23] in which the validity of the First and Seventeenth Amendments to the Constitution insofar as they affected fundamental rights was again challenged. The Fourth Amendment was also challenged. This time a majority of six judges to five decided that Parliament had no power "to amend any of the provisions of Part III . . . so as to take away or abridge the fundamental rights enshrined therein."[24] The majority were, however, faced with the problem that, if the First, Fourth and Seventeenth Amendments were at a late stage to be invalidated, the impact on

17 Ibid., 862; 962. 18 Ibid., 863; 964. 19 Ibid., 864, 966-7.
20 Rajeev Dhawan *The Supreme Court of India and Parliamentary Sovereignty* (New Delhi, 1976).
21 *Golak Nath* v. *State of Punjab* A.I.R. (54) 1967 S.C. 1643; [1967] 2 S.C.R. 762.
22 *Kesavananda* v. *State of Kerala* A.I.R. (60) 1973 S.C. 1461; 1973 Supp. S.C.R.
23 A.I.R. (54) 1967 S.C. 1643; [1967] 2 S.C.R. 762. 24 Ibid., 1669; 815.

social and economic affairs would be chaotic. On the other hand, the court considered that it had a duty to correct errors in the law. It, therefore, adopted a doctrine of prospective overruling under which the three constitutional amendments concerned would continue to be valid, and the decision to the effect that Parliament had no power to amend the provisions of Part III would operate for the future only. In arriving at this conclusion Chief Justice Subba Rao, speaking for five of the majority judges (Subba Rao C.J., Shah, Sikri, Shelat and Vaidialingam JJ.), decided that a correct appreciation of the place of fundamental rights would give a proper perspective for solving the problem before them. Fundamental rights were, they said, "the primordial rights necessary for the development of human personality." Therefore, "fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament."[25]

Given this "policy and . . . doctrinaire decision to favour Fundamental Rights",[26] the majority judgment of Subba Rao C.J. proceeded to accept the following propositions:

(i) Article 368 with its marginal note "Procedure for amendment of the Constitution" dealt only with the procedure for amendment. Amendment was a legislative process and the power of Parliament to make amendments was contained in article 248 and Entry 97 in List I of the Seventh Schedule (the Union List) which confer residuary legislative powers on the Union Parliament.[27]

(ii) An amendment to the Constitution, whether under the procedural requirements of article 368 or under any other article, is made as part of the normal legislative process. It is, therefore, a "law" for the purpose of article 13(2).

Chief Justice Subba Rao and his majority colleagues were not unmindful of the problem of implementing the principles of state policy without infringing fundamental rights. They argued that Parts III and IV of the Constitution "constituted an integrated scheme forming a self-contained code."[28] The scheme, they said, was so elastic that all the directive principles of state policy could reasonably be enforced without taking away or abridging the fundamental rights. They pointed to the provision in article 19 for "reasonable restrictions" on such rights in "public interest" [sic] and to articles 33 and 34 permitting modification of rights in their application to members of the armed forces or while martial law was in force. However, in the face of subsequent criticism of the *Golak Nath* decision, Subba Rao (by then an ex-Chief Justice) later felt constrained to add a further clarification.[29]

> The Supreme Court of India in Golaknath Judgment did not say that the Parliament has no power to abridge the fundamental rights. What it said was it has no power to abridge the fundamental rights *except in the manner and to the extent prescribed in Part III of the Constitution* . . . . Parliament cannot by amendment take away the core of the fundamental rights.

25 Ibid., 1656; 789.
26 Dhavan, op. cit., 63.
27 The sixth majority judge (Hidayatullah J.) accepted the amendatory process of art. 368 but found that it did not extend to abridgement of fundamental rights.
28 Ibid., 1656; 789.
29 "The Two Judgments: Golaknath and Kesavananda Bharati" (1973) 4 SCC 225 reprinted in *Fundamental Rights Case: The Critics Speak!* (ed. S. Malik, Lucknow, 1975) 61, 62-3. Emphasis added.

The judgment of three of the dissentients[30] (Wanchoo, Bhargava and Mitter JJ.) in the *Golak Nath* case was delivered by Wanchoo J. The learned Judge pointed out that article 368 was the sole article in Part XX of the Constitution entitled "Amendment of the Constitution"; that article 368 specifically provided that upon the prescribed procedure for the passage of a Bill being completed, "the Constitution shall stand amended in accordance with the terms of the Bill"; and that article 368 avoids the use of the word "law". He concluded, therefore, that[31]

> . . . Article 368 provides for the coming into existence of what may be called the fundamental law in the form of an amendment of the Constitution and therefore what emerges after the procedure under Article 368 is gone through is not ordinary legislation but an amendment of the Constitution which becomes a part of the fundamental law itself . . . . which cannot be tested . . . . under Art. 13(2) of the Constitution or under any other provision of the Constitution.

C. The Twenty-fourth Amendment

In 1970 and 1971 Mrs Gandhi's Congress Government lost another two important constitutional cases. In the *Bank Nationalisation* case[32] the compensation provisions of legislation nationalising the commercial banks were held to violate article 31 of the Constitution, while in the *Privy Purses* case[33] it was held, inter alia, that government action depriving the Rulers of the Princely States of their privy purses was an infringement of articles 19 and 31. After this second decision Mrs Gandhi dissolved Parliament and in the ensuing election the Congress Party came back with a majority large enough to make changes to the Constitution. The first of a number of amendments, the Constitution (Twenty-fourth Amendment) Act, 1971, was intended to nullify the effect of the *Golak Nath* decision. The Constitution (Twenty-fifth Amendment) Act, 1971, dealt with the rule laid down in the *Bank Nationalisation* case, while the Constitution (Twenty-sixth Amendment) Act, 1971, derecognised the Rulers of the Indian States and abolished privy purses so that no payments would be made to ex-Rulers.[34] The Constitution (Twenty-ninth Amendment) Act, 1972, added two State land reform Amendment Acts to the Ninth Schedule to the Constitution.

The Twenty-fourth Amendment made changes to articles 13 and 368:

(i) A new clause was added to article 13: "(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

(ii) Amendments were made to article 368:

(a) The article was given a new marginal heading: "Power of Parliament to amend the Constitution and procedure therefor."

(b) A new clause was added as clause (1): "(1) 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."

30 The other two dissenting judges Bachawat and Ramaswami JJ. each delivered separate opinions.

31 Ibid., 1678, 1679; 830, 832.

32 *R. C. Cooper* v. *Union of India* A.I.R. (57) 1970 S.C. 564; [1970] 3 S.C.R. 530.

33 *Madhav Rao Jivaji Rao Scindia* v. *Union of India* A.I.R. (58) 1971 S.C. 530; [1971] 3 S.C.R. 9.

34 See art. 363A of the Constitution.

(c) Another clause was added as clause (3): "(3) Nothing in article 13 shall apply to any amendment under this article."
Another amendment to the old article 368 (now article 368(2)) made it obligatory rather than discretionary for the President to give his assent to any Bill duly passed under the article.

Amongst the amendments made by the Twenty-fifth Amendment was the introduction of a new article 31C. This provided that notwithstanding anything contained in article 13 no law giving effect to the policy of the State towards securing the principles specified in paras (b) and (c) of article 39 was to be deemed to be void on the ground that it was inconsistent with or took away or abridged any of the rights conferred by articles 14, 19 or 31.[35] Article 31C continued in its second part:

> 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 . . . .

D. The Kesavananda (Fundamental Rights) Case

The validity of the Twenty-fourth, Twenty-fifth, Twenty-sixth and Twenty-ninth Amendments came before a Special Bench of thirteen judges of the Supreme Court in 1973 in *Kesavananda Bharati* v. *State of Kerela.*[36] The hearing took sixty-five working days and the eleven judgments take up 594 pages of one law report and 1002 of another. Much has been written by way of interpretation and commentary on the case, but here only some observations bearing on the question of amendment of the Constitution can be attempted.

For present purposes it can be said that the *Kesavananda* case decided:

(i) *Golak Nath*'s case was wrongly decided.

(ii) The power to amend the Constitution was to be found in article 368 (even as it stood before the Twenty-fourth Amendment). This included the power to amend article 368 itself.

(iii) Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution.

(iv) The Twenty-fourth and Twenty-ninth Amendments were valid, as was the Twenty-fifth Amendment except the second part of article 31C (quoted above) — that part was invalid.[37]

Although counsel for the petitioners relied in the first instance on the majority decision in the *Golak Nath* case, the members of the court showed no sympathy for this approach — they were quite clear that the power to make amendments was to be found in article 368. There was more support for the alternative submissions of the petitioners that

(i) There was an inherent or implied limitation to article 368 in that it did not empower Parliament to alter or destroy the essential features of the Constitution.

35 The Forty-second Amendment (1976) widened art. 31C to protect all the principles of State policy included in Part IV, while the Forty-fifth Amendment Bill (1978) seeks to restore the original reference to paras (b) and (c) of art. 39.

36 A.I.R. (60) 1973 S.C. 1461; 1973 Supp. S.C.R. See also S. Malik (ed.) op. cit.

37 The validity of the Constitution (Twenty-sixth Amendment) Act, 1971, was left to be decided by the Constitution Bench.

(ii) Fundamental rights were among the essential features of the Constitution.

Six of the Judges (Sikri C.J., Shelat and Grover, Hedge and Mukherjea and Jaganmohan Reddy JJ.) accepted both these submissions. However, they were not at one when it came to a definition of the extent of the inherent or implied limitation to article 368. A confusing range of terminology was used — "essential elements", "basic features", "basic structure", "basic foundations and structure", "fundamental features" and other formulas. When it came to identifying the aspects of the Constitution that fell within any particular formula, there was once again a variety of views and much vagueness. A republican or democratic form of government, the secular character of the Constitution, the separation of powers, the federal character of the Constitution, the dignity and freedom of the individual, the mandate to build a welfare state contained in the directive principles of state policy, the unity and integrity of the nation, the sovereignty of India, and other formulas, were advanced by way of illustration by one or more of the majority judges.

The final decision of the court on the issue of the inherent or implied limitation to article 368 turned on the judgment of Khanna J. He accepted that the power of amendment did not include the power to abrogate the Constitution; nor did it include the power to alter the basic structure or framework of the Constitution. He continued[38]

> Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.

Khanna J., however, differed from the views of Chief Justice Sikri and his five colleagues in that he did not regard the right to property as forming part of the basic structure. Hence Khanna J.'s judgment became pivotal in that there were seven[39] judges who were prepared to accept the "basic structure or framework" formula and this formula was endorsed by the nine judges who signed a summary "of the view of the majority of the Special Bench",[40] issued after the judgments were delivered. And it will be seen that the principle thus laid down was later accepted as the law in *Indira Nehru Gandhi* v. *Raj Narain*[41] by judges who dissented in the *Kesavananda* case. On the other hand, there was not a majority of judges who recognised the right to property as a part of the basic structure or framework and, therefore, none of the Amendments under attack was held to be invalid on the ground that the right to property was being infringed.

Khanna J.'s views turned out to be crucial on another issue. Consistently with their view on the ambit of article 368, Sikri C.J. and four other judges found that article 31C was invalid on the basis that it enabled the abrogation of fundamental rights contained in articles 14, 19 and 31. Jaganmohan Reddy J. found that part of the article, including the part that we have described above as "the second

38 Ibid., 1903-4; 758-9.
39 The six dissenting judges were Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud JJ.
40 Ibid., 1461-2; 1001-2.
41 A.I.R. (62) 1975 S.C. 2299; (1975) Supp SCC.

part", was invalid. Khanna J. struck down the second part on the ground that it gave carte blanche to Parliament to make any law violating articles 14, 19 and 31 and, by inserting the requisite declaration, to make it immune from attack in the courts, even if it was not for the object mentioned in article 31C. "The exclusion by the Legislature . . . of even that limited judicial review strikes at the basic structure of the Constitution."[42] This meant that there was a majority of seven to six in favour of invalidating the second part of article 31C.

Khanna J.'s judgment suggests that there can be four categories of amendment to the Constitution — those that abrogate the Constitution; those that alter the basic structure or framework; those that relate to essential features;[43] and, presumably, a category of "run-of-the-mill" amendments, the validity of which cannot be questioned. It can be assumed, however, that when the basic structure principle is applied by the courts, the decision of individual judges will not depend on any clear-cut distinction between that principle and "essential features". Certainly, the judgments of Sikri C.J. and his five colleagues do not suggest that they would have been inhibited by the distinction in giving a wide interpretation to basic structure. In practice, too, when discussing the elements of the basic structure or framework it is necessary to use some such description as "basic features". This is now being done in the context of the amendment to article 368 proposed in the Constitution (Forty-fifth Amendment) Bill, 1978, to be discussed below. What then is the distinction between "a basic feature" and "an essential feature"?

The basic structure principle would effectively exclude any attempt by Parliament to repeal or abrogate the whole Constitution. But this principle can be justified only on the basis of an implied or inherent limitation on constitutional amendment. A nice question arises whether, if we exclude any implied or inherent limitation, the power of "amendment" conferred by article 368 must stop short of total repeal or abrogation. Counsel for the respondents in the *Kesavananda* case conceded that this was the position and the minority judges in that case were disposed to accept one limitation on the power of amendment — the entire Constitution cannot be amended at one stroke, leaving a constitutional void. As expressed by Mathew J.:[44]

> The only limitation is that the Constitution cannot be repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organised. That limitation flows from the language of the Article itself.

A succession of judges of the Supreme Court — the dissentients in the *Sajjan Singh* case and the majorities in the cases of *Golak Nath* and *Kesavananda* — have been seeking a formula by which they could place limitations on what appears to

42 Ibid., 1904; 756.

43 N. A. Palkhiwala, who argued the "essential features" approach on behalf of the petitioner in the *Kesavananda* case, holds the view that the basic structure or framework principle gives a wider scope to the amending power than an essential features principle; and he argues that the latter principle represents the law; see N. A. Palkhiwala *Our Constitution Defaced and Defiled* (New Delhi, 1974) 149. See also Dr V. A. Seyid Muhammad M.P.'s answer to the various points made by Palkhiwala, *Our Constitution for Haves or Have-nots?* (New Delhi, 1975).

44 Ibid., 1967; 857.

be the clear wording of article 368 as to the power to amend the Constitution. Some, at least, have been activated by a concern that a political party with a two-thirds majority in Parliament could, in the words of Chief Justice Sikri in the *Kesavananda* case,[45] "so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid". On the other hand, it has been questioned whether the possibility of this undesirable, but on the face of it legitimate, use of the power of amendment can justify the courts in endeavouring to place restrictions on that power.[46] The majority in *Sajjan Singh*'s case had no doubt that the power to amend the Constitution must depend solely on whether that power was included in article 368. "The question about the reasonableness, or expediency or desirability of the amendments in question from a political point of view would be irrelevant in construing the words of Art. 368."[47] The same point was made by Wanchoo J. in his dissenting opinion in the *Golak Nath* case, in reply to what he described as the "argument of fear" — the argument that frightful consequences would follow if article 368 was interpreted as conferring complete power to amend each and every provision of the Constitution:[48]

> . . . mere possibility of abuse cannot result in courts withholding the power if the Constitution grants it . . . . [P]ossibility of abuse of any power granted is always there and if possibility of abuse is a reason for withholding the power, no power whatever can ever be conferred on any authority be it executive, legislative or even judicial . . . . [E]ven if [Parliament] abuses the power of constitutional amendment under Art. 368 the check in such circumstances is not in courts but is in the people who elect members of Parliament.[49]

E. Indira Nehru Gandhi v. *Raj Narain*

The Supreme Court did not have long to wait before it was called upon to consider the basic structure principle in highly dramatic circumstances. On 12 June

45 Ibid., 1534; 164.

46 See P. K. Tripathi "Kesavananda Bharati v. The State of Kerela Who Wins?" Malik (ed.), op. cit., 89, 112 ff.

47 A.I.R. (52) 1965 S.C. 845, 858; [1965] 1 S.C.R. 933, 953.

48 A.I.R. (54) 1967 S.C. 1643, 1688; [1967] 2 S.C.R. 762, 848.

49 The Indian practice has been to appoint the senior puisne judge of the Supreme Court to the Chief Justiceship when a vacancy occurred. However, on the retirement of Sikri C.J. immediately after the conclusion of the *Kesavananda* case, the three senior-most judges, Shelat, Hedge and Grover JJ., were passed over and the appointment given to Ray J. The three judges immediately resigned. It so happened that they had each found against the Government in the *Bank Nationalisation* case (supra n. 32), the *Privy Purses* case (supra n. 33) and the *Kesavananda* case, while Ray J. had found for the Government. See Kuldip Nayar *Supersession of Judges* (Delhi, 1973). The same thing happened in 1977 on the retirement of Ray C.J. Khanna J., by then the senior puisne, was passed over for Beg J. Khanna J. also resigned. In 1978 Chandrachud J., the senior puisne, was, after some public controversy, appointed on the recommendation of the Janata Government to succeed Beg C.J. Chandrachud C.J.'s term can be expected to be over seven years, which is unusually long for an Indian Chief Justice because the practice of appointing the senior puisne has led to many short terms. See also R. Dhavan and A. Jacob *Selection and Appointment of Supreme Court Judges* (Bombay, 1978).

1975 Mr Justice Sinha of the Allahabad High Court delivered his judgment on the election petition of Raj Narain contesting the election of Mrs Indira Gandhi, the Indian Prime Minister, to the electorate of Rae Bareli at a parliamentary election for which the polling date had been 7 March 1971.[50] Mrs Gandhi was found guilty of two corrupt practices and under the relevant legislation was disqualified from holding any public office for a period of six years. At the time it was generally conceded that the two charges were purely technical in character, and involved no moral turpitude. Nevertheless, the judgment immediately led to a crisis as to Mrs Gandhi's legal status as member of Parliament and Prime Minister and as to whether political propriety required her to resign. She made a successful application to the Supreme Court for a stay order pending an appeal. The granting of this order on 24 June 1975[51] precipitated an intensification of political activity. Huge political rallies were followed by the arrest, in the midnight hours of 25 June, of leading members of the opposition. Then, on 26 June, Mrs Gandhi announced that the President had the previous day declared an Emergency under article 352 of the Constitution.

The Proclamation of Emergency did not dispose of the election proceedings in which Mrs Gandhi was involved. A supine Parliament set out to frustrate these proceedings by two measures. First, it passed the Election Laws (Amendment) Act, 1975, which purported to eliminate retrospectively all the corrupt practices on which Mrs Gandhi's election had been challenged. The second measure was the Constitution (Thirty-ninth Amendment) Act, 1975. The significant provision for present purposes was contained in an addition to the Constitution, article 329A. Clause (4) of this new article declared, in effect, that no law relating to election petitions made before the Amendment was to apply to the election of the Prime Minister, Mrs Gandhi; that her election was not to be deemed to be void, but was to continue to be valid in all respects; and that the order that had invalidated her election was to be deemed to be void. The Thirty-ninth Amendment also included the Election Laws (Amendment) Act, 1975, in the Ninth Schedule of the Constitution.[52]

When Mrs Gandhi's appeal on her election petition came up for hearing[53] counsel for Mrs Gandhi claimed that Parliament had passed these measures because of the controversial character of the case and the desire to avoid embarrassment for the judiciary. He submitted that the Election Laws (Amendment) Act, 1975, removed the basis on which Mrs Gandhi had been found guilty; further, the case should be disposed of on the basis that the Thirty-ninth Amendment declared the election valid.

50 See Prashant Bhushan *The Case that Shook India* (New Delhi, 1978).

51 *Indira Nehru Gandhi* v. *Raj Narain* A.I.R. (62) 1975 S.C. 1590.

52 The Constitution (Thirty-ninth Amendment) Act, 1975, made thirty-eight new entries in the Ninth Schedule. Some of these did not involve agrarian legislation and included legislation that affected fundamental rights other than the right to property, e.g. the Maintenance of Internal Security Act, 1971, known as MISA, which became notorious as the authority under which many detentions without trial were made during the Emergency.

53 *Indira Nehru Gandhi* v. *Raj Narain* A.I.R. (62) 1975 S.C. 2299; (1975) Supp SCC. Raj Narain defeated Mrs Gandhi in the 1977 election by a substantial majority and was until recently Minister of Health and Family Welfare in the Janata Government.

Counsel for the respondent Raj Narain conceded that he would have to challenge the validity of the Thirty-ninth Amendment, and he argued that the Amendment was not an amendment of the Constitution in that it was the exercise by Parliament of a judicial power in the guise of a constitutional amendment. Alternatively, he argued that the Amendment destroyed basic features of the Constitution, i.e. the separation of powers, the democratic character of the Indian polity, equality before the law and equal protection of the laws, the rule of law and judicial review, and political justice as enshrined in the Preamble of the Constitution.

It is of interest to recall that the five judge bench Supreme Court, which was hearing the case and which unanimously upheld Mrs Gandhi's appeal, comprised Ray C.J., Khanna, Mathew, Beg and Chandrachud JJ. All had been involved in the *Kesavananda* case and all but Khanna J. had been in the minority that had not accepted the basic structure principle. Nevertheless, all five judges conceded that for the purpose of the case they had to proceed on the basis that the basic structure principle was binding on the court.

Three judges found clause (4) of the Thirty-ninth Amendment invalid on one or other limb of the basic structure limitation: Khanna J. (destructive of free and fair election); Mathew J. (election dispute not resolved by exercise of judicial power); and Chandrachud J. (destructive of equality by discriminating in favour of the Prime Minister, negation of the rule of law and offence against the separation of powers). Khanna J. found that the vice in clause (4) was that, having disposed of the election law in force, it created a legal vacuum, and provided no law for determining the validity of Mrs Gandhi's petition. Mathew J. made a similar point in stronger terms. The decision of the amending body to hold the election valid was the exercise of "an 'irresponsible despotic discretion'" governed solely by political necessity or expediency — "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."[54] The Chief Justice, Ray C.J., based his judgment on the same point. The constituent power did not have any law to apply and since the validation was effected without applying any law it offended the rule of law.

The respondent's attack on the validity of the Election Laws (Amendment) Act, 1975, raised an aspect of the basic structure principle that had not been disposed of in the *Kesavananda* case. The Thirty-ninth Amendment had included the Election Laws (Amendment) Act in the Ninth Schedule to the Constitution and so protected that Amendment from challenge on the ground that it violated any of the fundamental rights protected by Part III of the Constitution. The respondent argued that Acts included in the Ninth Schedule could nevertheless be challenged under the basic structure principle.[55] However, he was in the difficult position that he had to establish either that the availability of such a challenge was the result of inclusion of the relevant Act in the Ninth Schedule, or that any Act of Parliament, otherwise valid under the Constitution, could be struck down as

54 Ibid., 2383; 134.

55 It was contended that the Election Laws (Amendment) Act, 1975, had the effect of damaging democracy and, in the discriminatory effect of its retrospective action, offended against equality.

offending the principle. Three members of the court (Ray C.J., Mathew and Chandrachud JJ.) found that respect for the basic structure principle did not require them to go this far and they held that an ordinary law is not subject to the principle and could not become so by inclusion in the Ninth Schedule. In the words of Mathew J.[56]

> The concept of a basic structure as brooding omnipresence in the sky apart from the specific provisions of the Constitution constituting it is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law.

Beg J. appeared to dissent on this point, while Khanna J. did not pronounce on the question of the applicability of the principle to ordinary legislation because he found that the Election Laws (Amendment) Act did not strike at the basic structure of the Constitution. The effect of these views was that the Election Laws (Amendment) Act provided Mrs Gandhi with the basis for a successful appeal.

Nothing was said in the *Indira Nehru Gandhi* case to suggest that Chief Justice Ray and his colleagues (other than Khanna J.) — or, of course, the appellant Prime Minister, Mrs Gandhi — had any affection for the basic structure principle. Indeed, before the judgments on the case were actually announced, the Chief Justice took a step that has been described[57] as "unusual, novel and unique." At the request of the Attorney-General, he constituted a thirteen member bench to hear a review of the *Kesavananda* case. At the hearing on 10 November 1977, Mr N. A. Palkhiwala,[58] who, as counsel for the petitioner in the *Kesavananda* case had propounded a basic features limitation, raised a preliminary objection against the proposed procedure. He pointed out that there were still cases awaiting hearing in which the *Kesavananda* case must be regarded as res judicata. He also argued that the decision could only be reconsidered if it was manifestly wrong or was baneful to the public interest.[59] The Attorney-General in his plea for review said great confusion had been caused by the incoherent decision in the *Kesavananda* case: "Every constitutional amendment is being challenged in the High Courts all over the country. Everybody was giving a different interpretation to the decision. In these circumstances, it is essential that the Court clears up the issues."[60] After two days of argument the Chief Justice summarily announced at the beginning of the third day — "This bench is dissolved . . . ."[61]

IV. PARLIAMENT AND THE AMENDMENT POWER

A. The Forty-second Amendment

The Congress Party in its election manifesto of 1971 had suggested that it would embark on constitutional change, but it was not until after the Emergency was declared that there was any move for an overall revision of the Constitution.[62] The Congress Party established a Committee, under the Chairmanship of Mr

56 Ibid., 2388-9; 141. Mathew J. made the reservation that an Act placed in the Ninth Schedule would be open to challenge if it took away or abrogated a fundamental right which constituted a basic structure.

57 Dhavan, op. cit., 189. 58 See supra n. 43.

59 Bhushan, op. cit., 258-9. 60 Ibid., 265. 61 Ibid., 266-7.

62 However, eighteen constitutional amendments beginning with the Twenty-fourth Amendment (1971) had already been passed by the Parliament elected in 1971.

Swaran Singh, a former Congress Minister, to consider amendments to the Constitution. The Committee in its two reports made a number of drastic proposals,[63] but by the time the Constitution (Forty-fourth Amendment) Bill, 1976 (later to become the Constitution (Forty-second Amendment) Act, 1976), was drafted further amendments had been introduced. The amendments were wide-ranging, their overall effect being to increase the authority of the Union Executive, to strengthen the position of the Centre vis-a-vis the States and to place restrictions on the courts.[64] The amendments were controversial, but in a time of Emergency, when the press was heavily censored and thousands of critics of the government (including many opposition members of Parliament) were in detention, Mrs Gandhi's undertaking that they would be the subject of a national debate was an empty promise. The amendments quickly passed pliant Houses of the Union Parliament, while those amendments requiring State action were soon ratified by Legislatures with Congress Governments.[65]

The amendment of present interest was the addition of two new clauses to article 368:

> (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court on any ground.
> (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

In the statement of objects and reasons supplied with the Forty-fourth Amendment Bill (1976) it was explained that Parliament and the State Legislatures embodied the will of the people

> and the essence of democracy is that the will of the people should prevail. Even though article 368 . . . is clear and categoric with regard to the all inclusive nature of the amending power, it is considered necessary to put the matter beyond doubt.

The Forty-second Amendment (1976) was one of the issues of the election held in March 1977 at which Mrs Gandhi's Congress Government was ousted by the newly-constituted Janata Party. The Janata Government was committed to the repeal of the Forty-second Amendment. However, this was not an easy promise to keep, because the new government did not have a majority in the Rajya Sabha; nor, at the time, were there any Janata Governments in the State Legislatures. Agreement was, however, reached with the opposition on what was to become the Constitution (Forty-third Amendment) Act, 1977, which repealed some of the

63 *Proposed Amendments to the Constitution of India by the Committee Appointed by the Congress President, Shri D. K. Borooah on February 26, 1976* and *Resolution on Amendment of the Constitution of India adopted by All India Congress Meeting on 29 May 1976* (with Reports of Swaran Singh Committee).

64 See supra n. 5.

65 Books on the Forty-second Amendment (1976) include Rajeev Dhavan *The Amendment: Conspiracy or Revolution?* (Allahabad, 1978); and Sunder Raman *Fundamental Rights and The 42nd Constitutional Amendment* (Calcutta, 1977). See also H .M. Seervai *The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism* (Bombay 1978).

provisions of the Forty-second Amendment that had placed restrictions on the courts.[66]

The Constitution (Forty-fifth Amendment) Bill, 1978, which would repeal many, but not all of the outstanding amendments from the Forty-second Amendment, was introduced into the Lok Sabha on 15 May 1978, and it is expected to be debated in the monsoon session of the Lok Sabha which convened on 17 July 1978. The Bill has been discussed with opposition parties and is said to have their support, but given the split that has taken place in the Congress Party and the emergence of the Congress (Indira) Party, led by Mrs Gandhi, as the official opposition, the government cannot be confident that it can obtain the required majority in the Rajya Sabha. A good deal of inter-party negotiation will no doubt take place before the fate of the Amendment is known.

For the present purpose the significant amendment is again that proposed for article 368.[67] The existing procedure for constitutional amendment would be retained with the additional próviso that an amendment must be approved by the people of India at a referendum if it

> (a) seeks to make any change which, if made, would have the effect of —
> (i) impairing the secular or democratic character of this Constitution; or
> (ii) abridging or taking away the rights of citizens under Part III; or
> (iii) prejudicing or impeding free and fair electons to the House of the People or the Legislative Assemblies of States on the basis of adult suffrage; or
> (iv) compromising the independence of the judiciary;[68] or
>
> (b) . . . . seeks to amend this proviso,

New clauses, replacing clauses (4) and (5) of article 368 as introduced by the Forty-second Amendment, deal with the referendum requirement. All persons eligible to vote at elections for the Lok Sabha are to be entitled to vote and a simple majority can approve the amendment if "the voters voting at such poll constitute not less than fifty-one per cent . . . of the voters entitled to vote at such poll."

The effect of the new amendment to article 368 would, therefore, be to include in the Constitution a specific statement of what are being popularly described as "basic features" and to provide a procedure by which those basic features can be changed by resort to the people. At the same time the replacement of clauses (4) and (5) would mean that the authority of the Supreme Court to determine the validity of constitutional amendments would be re-established.

The Forty-fifth Amendment Bill would introduce another important innovation. By the repeal of articles 19(f) and 31 it would remove the right to property from the fundamental rights protected by Part III of the Constitution. These articles would be replaced by a new article 300A which, by providing that no person is to be deprived of property save in accordance with law, would recognise property as a legal right.

66 See supra n. 5.
67 Clause 45 of the Bill.
68 It seems that the Janata Government considered, but rejected, the principle of federalism and the system of responsible government for inclusion in this list.

B. Amendment by Referendum?

The proposed amendment, under which "basic features" would be written into article 368, brings into clear focus the various issues that arise in relation to the amendment of the Indian Constitution. Mrs Gandhi's Government had, by its action during the Emergency in adding two new clauses (4) and (5) to article 368 by the Forty-second Amendment, sought to demolish the basic structure limitation espoused in the *Kesavananda* case. By providing that "No amendment . . . shall be called in question in any court on any ground." it reiterated the Congress view that Parliament represented the voice of the people, even to the extent of seeking to exclude judicial review of any question that might arise as to whether the procedure prescribed by article 368 had actually been followed.

The Janata Government by its election manifesto was committed to a repeal of clauses (4) and (5) of article 368 and, by implication, to an acceptance of the basic structure principle. On the other hand, there is no assurance that the Supreme Court, with its changed composition, will itself adhere to a principle, the implementation of which could lead to a confrontation with the Parliament of the day. The present Chief Justice (Chandrachud C.J.) was a member of the minority in the *Kesavananda* case and there have been a number of judicial comments about the vagueness of the principle. Besides, an unenthusiastic judge, given this absence of definition, can be expected to construe it narrowly.

In these circumstances, an attempt to spell out the basic features in article 368 itself could be an appropriate step. Parliament, as the people's forum, would itself be defining the basic features. The Supreme Court would be given an opportunity to avoid any further pronouncement on the validity of the basic structure principle or on its actual content, although, no doubt, there would be plenty of scope for legal argument as to whether a constitutional amendment actually fell within the ambit of the basic features as defined in article 368.

The ease with which Mrs Gandhi's Congress Government was able to command a two-thirds majority in Parliament and the Legislatures of a majority of the States in support of authoritarian policies suggests that the solution of the confrontation that has taken place between Parliament and the Supreme Court may be to entrench more firmly certain provisions of the Constitution. Some form of referendum procedure is an obvious possibility, and this is what is now proposed. Such a solution is an answer to those who argue that sovereignty belongs to the people rather than to Parliament. It also seems that the referendum proposal may have been a compromise with the Congress Party which is as opposed to restoring the power of review to the Supreme Court as the Janata Government is opposed to leaving the amendment power with Parliament alone. However, the Congress (Indira) Party has announced its opposition to the referendum proposal on the score that any limitation on Parliament's power to modify the provisions of the Constitution is to be resisted.

Arguments have been advanced against the idea of a referendum and there can be no doubt that a referendum in a vast and populous country like India presents many difficulties in addition to the problem usually associated with a referendum, that of presenting the issue to be resolved in the form of a simple question and answer procedure that is fair and readily understood. There is, also,

the fact that in India elections are held on the basis of symbols. As one editorial has put it:[69]

> Is it right to expect average voters, seven out of ten of whom cannot read or write, to understand the finer points of law and Constitution to be able to give their verdict on whether or not, for instance, a change in the jurisdiction of High Courts involves the question of the independence of the judiciary?

It has been suggested, too, that a referendum can be resorted to by those bent on pursuing authoritarian rule. Again, there could be controversial issues, for instance those concerning religion or language, for which a fifty percent majority of a fifty-one percent referendum poll might be all too easy to obtain, but at the expense of dividing the nation.

On the other hand, the issue of finding a procedure for amending the Indian Constitution that provides adequate protection for "basic features" and at the same time a desirable element of flexibility is an intractable one. The Emergency regime, during which Parliament meekly acquiesced in the policies of an authoritarian government, has given some vindication to the views of those judges of the Supreme Court who have sought a formula under which the court itself can impose limitations on the power of Parliament to amend the Constitution. However, the Constitution, in its Preamble, does emphasise that it is the Constitution of the "People of India" and it would be consistent with the "democratic character of the Constitution" which the proposed amendment to article 368 would seek to preserve that some procedure should be evolved under which basic amendments to that Constitution are, indeed, in the hands of the people of India. If this is to be the case some form of referendum procedure or even a provision for summoning a Constitutional Convention could be appropriate.

Another argument in favour of a referendum is that it will necessarily lead to some delay. The point has already been made that Mrs Gandhi's Government forced through the Forty-second Amendment without the national debate that had been promised; and there has already been criticism of the Janata Government that it evidently does not propose to submit the Forty-fifth Amendment Bill to the critical examination of a Parliamentary Select Committee and so increase the opportunities for public debate. There are, of course, other entrenching procedures that can enforce delay, but the time that it would take to set up a referendum and the fact that the Indian public would be actually involved would provide an opportunity for debate, and possibly reflection, on the case for a proposed amendment.

Finally, it is relevant to notice again that the Forty-fifth Amendment Bill proposes to remove the right to property as a fundamental right from Part III of the Constitution. The constitutional amendments, other than that involved in the *Indira Nehru Gandhi* case, that have led to controversy over the power to amend the Constitution have concerned the implementation of agrarian policies and they have therefore been attacked as infringements on the right to property as a fundamental right. This is not the place to debate the issue, with its ideological overtones, of the place of property rights in the ideal polity. The fact remains that a central feature of the social revolution was likely to be the problem of striking

69 *The Indian Express*, 22 April 1978 (New Delhi).

a balance between benefits for the many and privileges for the few. In terms of the Indian Constitution this has meant the compatibility between the requirement that ownership and control of material resources should subserve the public good (a directive principle of state policy set out in article 39) and the protection given to the right of property (a fundamental right set out in articles 31 and 19(f)).

The Janata Government has evidently had to concede that the common good is to prevail since it has resiled from the undertaking in its manifesto to repeal article 31C in toto and has provided in the Forty-fifth Amendment Bill that the article is to return to the form it took when introduced by the Twenty-fifth Amendment.[70] That is: notwithstanding the provisions of article 13, legislation giving effect to the directive principles set out in clauses (b) and (c) of article 39 shall not be void on the ground that it conflicts with the rights conferred by article 14 (equality before the law) and article 19 (freedom of speech, etc.).[71]

It seems likely, having regard to the decisions of the Supreme Court that have been discussed, that the court would recognise the validity of the proposed amendments to articles 19, 31 and 31C should the Forty-fifth Amendment Bill be passed. The result would be to remove the main area of contention that has required the Supreme Court to pronounce on the powers of constitutional amendment conferred by article 368 of the Constitution.[72]

ADDENDUM

On 23 August 1978 the Lok Sabha unanimously approved all the clauses of the Constitution (Forty-fifth Amendment) Bill (renumbered the Constitution (Forty-fourth Amendment) Bill). The voting on the third reading was 355 in favour and none against. Earlier, a vote on clause 45 was supported by 314 members with 88 opposed. This clause would amend article 368 to provide for a referendum procedure in respect of named "basic feature" amendments to the Constitution.[73]

The Forty-fourth Amendment Bill then went to the Rajya Sabha. There, on 31 August 1978, an opposition majority (consisting of the Congress (Indira) and Congress Parties and the Communist Party of India (CPI)) voted down five clauses of the Bill. These included clause 45 and clause 8 (which would have amended article 31C), but not clauses 2 and 6 removing the right to property as a fundamental right. The voting down of clause 45 means that the attempts to define the "basic features" of the Constitution and to introduce a referendum procedure for their amendment will have failed. The defeat of clause 8 ensures that the supremacy of all the directive principles of state policy over the fundamental rights, as established by Mrs Gandhi's Congress Government's Forty-second Amendment (1976), will continue.[74]

The future of the Forty-fourth Amendment Bill is not clear. It goes back to

70 Clause 8 of the Bill; see supra n. 35.
71 The amended article would not refer to art. 31 nor to art. 19(f) since they would be repealed by the Forty-fifth Amendment Bill itself.
72 This paper sets out the position as it was on 24 July 1978.
73 See supra p. 380 et. seq.
74 See penultimate paragraph of article, supra p. 379.

the Lok Sabha for approval of the changes made by the Rajya Sabha. However, the Lok Sabha had already adjourned sine die and is not likely to meet until mid-November. The Janata Government will then have to decide whether it accepts the Bill in its amended form or allows it to lapse. In either event, unless alternative amendments to article 368 are adopted, the amendments to that article introduced by the Forty-second Amendment will remain in force.