CHAPTER - V

CONSTITUTIONAL AMENDMENTS AND FUNDAMENTAL RIGHTS IN INDIA: RELATIONS BETWEEN ART. 368 AND ART. 13(2) IN THE LIGHT OF JUDICIAL DECISIONS AND PARLIAMENTARY ACTIONS.

I. I N T R O D U C T I O N

Before taking up a detailed discussion on the relations between constitutional amendments and Fundamental Rights in the entire scheme of the Indian Constitution, a preliminary observation regarding the general character of Fundamental Rights will be helpful.

The recognition and protection of fundamental liberties and freedoms is the essence of the political system of the liberal, constitutional democracy. Rights are the institutionalised forms of freedom. Whether a society is authoritarian or democratic can be determined by a comparison of the rights of the individuals in each society. As a liberal democratic concept, fundamental rights are peculiarly the symbol of fulfilment of the long, hard struggle against the forces of absolutism and authoritarianism that characterised the pre-democratic era in Europe and elsewhere. (1) The fundamental human rights are basic to the development of human personality and act as great safeguards against what John Stuart Mill had characterised the 'tyranny of the majority' (2) and afford considerable protection to the minorities.

Significance of fundamental human rights.

With regard to the question of necessity of incorporating Fundamental Rights, opinions of statesmen and publicists sharply

differ. It is generally believed that fundamental rights represent the modernised version of traditional natural rights. In the case of Lakshmindra V. The Commissioner, Hindu Religious Endowments, (3) the Court held that the Fundamental Rights relating to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and the shifting majorities in the Legislatures of the country should not be able to tamper with them.

Their necessity

The Supreme Court of the U.S.A., while deciding upon the case of West Virginia State Board of Education V. Barnette, (4) pointed to the fact that "the purpose of a Bill of Rights was to withdraw certain subject from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The views expressed by Justice Story in connection with the question of incorporating Bill of Rights may be mentioned. He was of the opinion that such a Bill of Rights was "neither unnecessary nor dangerous" in a Constitution. The question with him was not whether Bill of Rights was necessary, "but what such a Bill of Rights should properly contain." (5) He further observed that a Bill of Rights was important, and very often should be regarded as "indispensable"

necessity of their incorporation.

whenever it operated as "a qualification upon powers actually granted by the people to the Government."(6) He was of the opinion that a Bill of Rights might be important, even when it went beyond powers granted. To quote him: "It is not possible to foresee the extent of the actual reach of certain powers which are given in general terms. They may be construed to extend (and perhaps fairly) to certain cases which did not at first appear to be within them. A bill of rights, then, operates as a guard upon any extravagant or undue extension of such powers. Besides, as has been justly remarked, a bill of rights is of real efficiency in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private rights. It required more than ordinary hardihood and audacity of character to trample down principlers which our ancestors have consecrated with reverence; which we imbibed in our early education; which recommend themselves to the judgement of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of Rights are a part of the muniments of freemen, showing their title to protection; and they become of increased value when placed under the protection of an independent judiciary instituted as the appropriate guardian of the public and private rights of citizens."(7)

Keeping in view this argument in favour of incorporation of Fundamental Rights in the constitutional document, the framers of our Constitution did their best to prepare a comprehensive list of justiciable fundamental rights in Part III of the Constitution.

It has been held that "the history of our country, the composition of its population, ideological differences amongst different sections of population, our social traditions and the requirements of true democracy, all necessitated it."(8)

Modern political systems are characterised by the effort to strike the right balance and achieve a condition of equilibrium which will seek to promote the maximum individual development without jeopardising the community interests. In an ideal political system, the individual's personal liberties and restraints, or rights and duties, would be so harmonized that the ideal of liberty and freedom would be achieved, that is, a condition in which every individual enjoyed the maximum freedom to do as he pleased, compatible with the right of others to the same degree of freedom.(9) The negative aspect of freedom is not much emphasised now-a-days, except in a society characterised by intense class antagonisms and exploitation. Freedom in society involves some kind of restriction. As new dimensions of freedom come up before our vision, as more and more restrictions are sought to be imposed by the modern state on the freedom of the individual, the problem becomes more acute and defies easy solution. While excess of freedom might degenerate into anarchy, an excess of restrictions might destroy the very purpose of freedom itself and threaten the democratic process and the stability of the political system by generating tensions and conflicts. The dynamics of the modern mass society has inevitably narrowed the range within which the individual can exercise his liberties without impinging on those of others.(10)

the modern view

II. Historical development of the concept of Fundamental Rights : a general survey.

It is generally held that any study of the evolution of the concept of fundamental rights in a concerned way should start with Magna Carta - the Charter granted by King John in 1215. Of course, a section of the German and Italian jurists did not share this view because it has been argued by them that Magna Carta did not substantially differ from franchises granted during the Middle Ages in Germany, Hungary, Spain and Italy.(11)

Magna Carta

The next constitutional charter is said to be the Petition of Rights of 1628. The Preamble to this Petition of Rights proclaimed that it was concerned with the "diverse rights and liberties of the subjects." Holdsworth held that the Petition of Rights was declaratory Act and the result of the declaration was to vest jurisdiction over civilians in times of riot and rebellion in the ordinary courts of common law and not in military tribunals. It made provision for "an efficient protector of the principle that no man should be imprisoned without due process of the common law."(13)

Petition of Rights

The Bill of Rights of 1689 which was described as "an Act declaring the rights and liberties of the subject" holds the next important place in the history of the evolution of the concept of fundamental rights.(14) It was aimed at restricting the Crown's power to suspend law or their execution without the consent of the Parliament. It also restricted the power of the Crown to levy money for the execution of such laws without

Bill of Rights

the approval of the Parliament. It declared that 'freedom of speech and debates or proceedings in Parliament should not be impeached or questioned in any Court or place outside Parliament'. It has been held that two distinctive features may be noted by way of explaining the contents of these declarations. They are:

(a) In the first place, they dealt with the rights of the individuals as such and not as members of any collective group; and

(b) secondly, they did not speak of any natural or imprescriptible rights of man but referred to the positive rights of persons who owed allegiance to the Crown.(15)

Closely following these declarations came the Virginia Declaration and the American Bill of Rights. The Virginia Declaration of 1776 stated that all persons "shall have and enjoy all liberties as if they had been abiding and born within our realm of England." It had its two-fold origin. In the first place, it may be said to be a mere reiteration of the provisions contained in the British Bill of Rights. Secondly, it was deeply rooted in the doctrine of natural rights.

Virginia Declaration

It is interesting to note that there was no declaration of fundamental rights in the Constitution of the United States which came into force on March 4, 1789. A Charter of Bill of Rights was, in fact, incorporated by the first Ten Amendments to the Constitution. While commending on the nature and characteristics of these amendments, Frankfurter, J., held in the case of Dennis V. United States.(16) "The first ten Amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principle of government, but simply to embody certain guarantees and immunities which had been inherited from our British

American Bill of Rights

ancestors." An analytical study of the provisions of these amendments establishes the fact that in most cases they do not create any new rights but "merely reaffirm the rights under the common law." (17)

The First Amendment recognised four different fundamental rights: freedom of religion, freedom of speech, freedom of assembly and the right to petition the Government for the redress of grievances. The Second Amendment recognised the right of the people to bear arms. The prohibition against billeting soldiers was embodied in the Third Amendment. The Fourth Amendment declared the right of the people to be secure in their persons, houses, papers, and the effects against unreasonable searches and seizures. The Fifth Amendment is a compound one. In the first place, it reaffirmed the rule embodied in Art.39 of Magna Carta relating to personal liberty. Secondly, it also laid down that no person shall be subjected for the same offence to be twice put in jeopardy of life or limb.

The first ten amendments

The Sixth Amendment preserved the common law rights of the accused in criminal trials: the right to a speedy and public trial by an impartial jury, the right to be informed of the nature and cause of the accusation, the right to be confronted with the witness against him, the right to have compulsory process or obtaining witnesses in his favours, and the right to have the assistance of counsel. Under the Seventh Amendment, the right of trial by jury has been preserved in suits at common law, where the value in controversy exceeds twenty dollars. The Eighth Amendment guaranteed another fundamental right and stipulated that excessive bail shall not be required, nor excessive fine imposed, nor cruel or unusual punishments inflicted. The Nineth Amendment empowered the

people to retain certain rights, viz., certain natural rights. This Amendment may be said to be the embodiment of the dominant political thought of 18th century America, which taught that before the establishment of government, men lived in a state of nature, governed by natural law, which endowed them with certain natural rights. Lastly, the Tenth Amendment was passed with a view to reserving the powers of the States.(18)

Moreover, an important addition was made in this direction with the passing of the Fourteenth Amendment Act, which imposed restrictions on the authority of the States to interfere with the rights of the individuals. The Amendment provided: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The next important hall-mark in the process of evolution of the concept of fundamental rights, was the French Declaration of 1789. It was believed that the Declaration of 1789 was a natural and a direct product of the philosophy of the 18th century.

French Declaration

With regard to the nature and content of the French Declaration, Prof. Colliard has observed that "the great French Declaration is not then a purely original product; it had the American models and through them a more profound origin which is the ancient English liberal tradition as had been maintained in England since the Middle Ages and which the English Colonists in America had claimed against arbitrary royal authority."(19)

Since the World War II, significant progress had been noticed in the process of this evolution. The growth and advancement of the concept of socialist doctrine of state convinced the people of the democratic world that community interest should prevail over individual interest. The new Constitutions that were drafted after the World War II, incorporated this ideal within their broad framework.

Post-Second World War developments

The twentieth century marked a new shift from liberties to human freedoms, and the entire development from natural rights in the eighteenth century through civil and political liberties in the nineteenth century to human freedoms through government in the twentieth century is epitomised in the Universal Declaration of Human Rights of 1948,(20) which initiated the process of internationalisation of human rights and also the process of recognising the self-developing rights which comprise the freedom of creation and innovation calling for social security, work, education and leisure and a host of other socio-economic and cultural rights. In fact, socio-economic rights became the standard equipment of constitutionalism after the First World War.(21) The consequence of all these changing dimensions has been a shifting equilibrium between rights and the corresponding restrictions, altering the classical position in a substantive sense. Modern political systems seek to reflect the new dimensions of freedom in their constitutional frameworks, in a way that could not be conceived of in the earlier centuries.

III. Evolution of Fundamental Rights in India.

The foregoing discussion will help us in explaining the process of the evolution of the Fundamental Rights in India in their real perspective. An analysis of the character of the Fundamental Rights embodied in Part III of the Indian Constitution will reveal that "no originality can be claimed either for the content or for the character of the Indian Declaration."(22) The framers, while drafting these Fundamental Rights mainly relied on the Magna Carta, the Petition of Rights and the Bill of Rights.

The history of the growth of the Fundamental Rights in India covers a period of over sixty-five years, beginning roughly from the date of the formation of the Indian National Congress in 1885. In other words, the desire for fundamental rights in India may be viewed as a result of the liberal creed of the 19th century. In "the Constitution of India Bill, framed by the Indian National Congress, in 1895 -- just a decade after the birth of the Indian National Congress -- an explicit demand for fundamental rights was made. The Bill contained in itself the demand for the right to speech, free state education, imprisonment by competent authority and 'other incidental rights deemed to be of much value to human beings in a civilised society.'(23) With this beginning, a series of Congress resolutions adopted between 1917 and 1919 repeated the demand for civil rights and equality of status with Englishmen. These resolutions called for equal terms and conditions in bearing arms; for 'a wider application of the system of trial by jury; and for the rights of the Indians to claim that no less that one-half of the

Beginning of the process in 1885

jurors should be their own countrymen.'[24]

The demands for civil rights to be guaranteed to the Indians gathered new momentum by the mid-twenties when the Indian people witnessed the hollowness of the Montegu - Chelmsford Reforms and the new spirit of self determination that emerged out during the World War I. But is to be noted that demands were not aimed at achieving total independence for the Indian people at this stage.

The next hallmark in the process is the Commonwealth of India Bill, submitted by Mrs. Annie Besant in 1925, which contained some fundamental rights, viz., individual liberty, freedom of conscience, free expression of opinion and free assembly, equality before the law, free elementary education, equal right to the use of roads, courts of justice and all other places of business or resort dedicated to the public, and equality of sexes.[25] Incidentally it may be noted that this Bill is "the precursor of Art. 19 of the present Indian Constitution."[26]

Annie Besant Bill

Closely following the Besant Bill, came the announcement of the intention of the Government to set up the Simon Commission which would recommend the possible Constitutional reforms in India. The Congress sharply reacted to this announcement and decided in its Forty-third Annual Session at Madras in 1927 that the Working Committee would be empowered to set up a Committee for drafting a 'Swaraj Constitution' for India on the basis of a declaration of rights. The declaration of rights assumed importance in view of the fact that India was a land of communities, of minorities, racial, religious, linguistic. It has rightly been observed by Austin[27] that even though 'the Hindu community is a majority community, but,

generally speaking, it is so fragmented within itself by caste and linguistic divisions, that it is better to view it as a collection of closely related minorities.' In order to satisfy the demands of these different groups, it was felt necessary to unite them by framing a Constitution, containing a declaration of rights if the dream of making India a free State on a federal basis was to be realised.

In pursuance of the resolution of the Congress at Madras in 1927, a Committee headed by Mr. Motilal Nehru was formed in May, 1928, the report of which is known as the Nehru Report, after the name of the Chairman of the Committee. It was declared that the Committee was concerned with securing the Fundamental Rights that were denied to them. The Report contained the following observation:

Nehru Report

"It is obvious that our first care should be to have our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances ..... Another reason why great importance attaches to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the Constitution."(28)

The Committee claimed fullest liberty of conscience and religion and accordingly, the draft article provided that 'no person shall be deprived, nor shall his dwelling or property be

entered, requisitioned or confiscated save in accordance with law.' Austin has called the Fundamental Rights contained in the Nehru Report as 'reminiscent of those of the American and post-war European Constitutions' and a 'close precursor' of the Fundamental Rights of the present Constitution.(29)

The Nehru Report clearly contained the provision regarding the protection of the rights of the minorities relating to religion, culture and education and it was designed to prevent 'one community from domineering over other'. The Independence Resolution of January, 26, 1930 also echoed the same when it declared:

"We believe that it is an inalienable right of the Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth."

But the Simon Commission which published its Report in 1930, categorically rejected the Nehru Report by pointing out that 'abstract declarations are useless, unless there exists the will and means to make them effective.'(30)

Karachi Resolution.

Next in importance in the direction towards the realization of the Fundamental Rights comes the Resolution on Fundamental Rights and Economic and Social change, adopted at the Congress Session at Karachi, held in March, 1931. The Karachi Resolution has been described as a step towards 'social revolution' in so far as it was directed to end the exploitation of the masses. The Resolution sought to reconcile both positive and negative rights in such a manner as to secure for the working people "a living wage, healthy conditions, limited hours of

labour, protection from the economic consequences of old age, sickness and unemployment, state-ownership or control of key industries and services, mineral resources, railways, waterways, shipping and other means of public transport, and reform of the systems of land tenure, revenue and rent."(31)

Sapru Report

The Sapru Report of 1945 which suggested a constitutional scheme for India, made an advanced step towards this goal and declared that the fundamental rights of the new Constitution to be a 'standing warning' to all. The Constitution provided for "perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of freedom of religion, worship and the pursuit of the ordinary applications of life."(32)

IV.

Constituent Assembly and the Fundamental Rights: a brief survey.

A searching enquiry into the proceedings of the Constituent Assembly with regard to the drafting of the Chapter on Fundamental Rights will be of much help in understanding the process of the growth of these Rights, their nature and their relation with the amending clause.

The framing of the Fundamental Rights provisions was mainly the task of the Advisory Committee on Fundamental Rights which consisted of fifty-four members with Sardar Vallavbhai Patel as its Chairman,(33) while the Fundamental Rights Sub-Committee elected Acharya Kripalani as its Chairman.

The Fundamental Rights Sub-Committee which met in early 1947, began to consider a number of draft lists of rights, prepared by B. N. Rau, Shah, Munshi, Ambedkar, Harnam Singh and the Congress Experts Committee. Austin has observed that "these lists, sometimes annotated or accompanied by explanatory memoranda, were lengthy and detailed and contained both negative and positive rights taken from foreign constitutions and from the Indian rights documents....." (34)

The Sub-Committee, in framing the list of Fundamental Rights was confronted with the problem of techniques and the degree to which personal liberty should be infringed to secure governmental stability and public peace. With a view to averting the situation, the Members of the Sub-Committee decided to make these rights justiciable by their inclusion is the body of the Constitution. A careful study of the Fundamental Rights will show that the Chapter dealing with these rights tries to prevent state-intervention on individual rights, relating to freedom of religion, expression or conscience, which, at the same time, makes provisions adequately so that these Rights may not be used arbitrarily or wantonly, thus threatening the very security of the State.

One of the major problems faced by the makers of the Constitution, particularly, the Sub-Committee on Fundamental Rights, was the problem concerning the protection of the minorities. The

problem of minority protection.

protection took two forms: "First was the inclusion in the Fundamental Rights of the freedom of religion and other such provisions, plus those social provisions relating to the protection of script and culture, the rights of minorities to maintain their own institutions,

and so on, that appear in the Cultural and Educational Rights of the Constitution ..... The second type of protection of minority rights was the inclusion in the Constitution, but not within the Fundamental Rights, of provisions providing for adequate minority representation in legislatures and civil services, and other forms of special consideration."(35)

The Members were of the opinion that these Fundamental Rights should be made legally justiciable. With the provision of justiciable nature of the Fundamental Rights came the demand for the provision for constitutional remedies. Some of the Members demanded for the inclusion of the provision for the English device of prerogative writs or directions. But Members like Munshi, Ambedkar and Ayyar strongly and actively favoured the inclusion of the right to Constitutional remedies and other members of the Sub-Committee agreed with him.'(36) The recommendations of the Committee were accepted by the Constituent Assembly in the Third Session of the preliminary meeting. The decisions of the Assembly were incorporated by the Drafting Committee in Part III of the Draft Constitution.

the question of constitutional remedies.

V

Fundamental Rights and Constitutional Amendments under the Indian Constitution: Relation between Art. 368 and Art. 13(2) -- Background of the Problem.

With this historical background regarding the evolution of the concept of Fundamental Rights in general and subsequently their inclusion within the framework of the Indian Constitution, we now proceed to discuss the very thorny problem of amending the Fundamental Rights under the Indian Constitution in the face of their justiciable character, as guaranteed by the Constitution itself.

A glance at the scheme of the Chapter on Fundamental Rights will reveal that these Rights have been included in the Constitution in an orderly manner. The Rights included in Part III of the Constitution are : Right to Equality, Right to Freedom, Right against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights, Right to Property and Right to Constitutional Remedies.

Scheme of Fundamental Rights in India.

Part III of the Constitution begins with Art. 12 which along with Art. 13 with its sub-clauses have been put under the sub-heading "General". These Articles are meant for providing certain guidelines for the treatment of the Chapter purely from constitutional points of view. Art. 12, while defining the word "State" used in the Constitution, points to fact that the word 'State' includes the Government and Parliament of India, and the Government and Legislature of each of the State and all local and other authorities within the territory of India or

under the control of the Government of India. With regard to scope of this article, Dr. Ambedkar said that it ecompasses within its ambit "every authority which has been created by law and which has got certain powers to make laws, to make rules and to make by laws."(37) Incidentally, it may be pointed out that the Courts in India have ruled that this definition does not incoude Universities.(38)

Next in importance comes Art. 13 in which clause (1) deals with the laws which are inconsistent with or in derogation of the Fundamental Rights. Art. 13 (2) which is the pivotal point of our discussion, in its original form, categorically provided that the 'State' as defined in Art. 12, would not be competent to make any law with a view to taking away or abridging the rights conferred by Part III, and any such law would be declared void. It simply restricts the State from making any law in future, aiming at "abridging or taking away" of any of these Rights.

Whether the Parliament has the power to make any law, amounting to amending the Constitution in order to take away or abridge any of these Rights, is a question which has to be dealt with in the perspective of the actual relations between Art. 368 and Art. 13(2) as envisaged by the scheme of the Indian Constitution.

The answer to this question depends on a fair and reasonable construction of Art. 368 which appears in Part XX, with the title "Amendment of the Constitution". It is to be noted that Art. 368 is only article in this Part and naturally it appears from this scheme, that the framers wanted to accord a special constitutional significance to this article.

On a careful study of Art. 368, the following two questions can be raised:

Two questions arising out of a study of Art. 368

(a) Does this article provide merely the procedure which has to be adopted by Parliament in making an amendment of any of the provisions of the Constitution?

or

(b) Does it confer on the Parliament the power to amend the Constitution and then proceed to prescribe which the Parliament has to follow in exercising its power of amendment?

It is to be mentioned here that these two questions may appear to be correlated, but a thorough analysis of the question will establish the fact that, if the first question is adopted, then, the power to amend may have to be found in some other provisions of the Constitution. On the otherhand, if Art. 368 contains both the power to amend and prescribe the procedure to be followed in exercise of the said power, Art. 368, in that sense, would be 'self-contained.'

If one reads Art. 368 and Art. 13(2) together, the problem which confronts is, if Parliament, in exercise of its powers to amend the provisions of the Constitution, seeks to abridge, by amendment, any of the Fundamental Rights guaranteed by Part III, does the amended part of the Constitution fall within Art. 13(2)? If Art. 13(2) "applies to the amended provisions of the Constitution, resulting from the amendment made by Parliament by virtue of its power to amend the Constitution, then any amendment that may seek to abridge or take away any of the Fundamental Rights guaranteed by Part III would be void and then, in the result, the power to amend will not include the power to abridge or take away the said Fundamental Rights; if, on the otherhand, Art. 13(2) does not apply to the amendment effected by Parliament by virtue of its power to

amend, then, by the amending process, Parliament can abridge or take away the fundamental rights."(39)

The solution to this problem lies in the correct interpretation of the word 'law' used in Art. 13(2). Whether the word 'law' implies a legislative enactment or an exercise of constituent power, which is another name for amendment, is a question of much constitutional and legal significance. If it is held that the power to amend any provision of the Constitution, subject to the procedure laid down in the Constitution, is a constituent power and does not come under the legislative powers conferred on Parliament, then, an amendment made under Art. 368 would not be 'law' within the meaning of Art. 13(2) and Parliament will be entitled to amend any portion of the Constitution in compliance with the procedure laid down in Art. 368 in order to take away or abridge any of the Fundamental Rights guaranteed under Part III of the Constitution. If, on the otherhand, it is held that there is no distinction between the 'constituent power' and the 'legislative power', and the two kinds of powers are located in Art. 368, then abridgement of fundamental rights by constitutional amendment, would be invalied because of the stipulation already provided for in Art. 13(2).

VI

Attitudes of the Supreme Court towards this vital issue : An analysis of the judgements of the Supreme Court in some leading cases -- conflicting opinions expressed.

Until the Supreme Court decided otherwise in Golaknath V. The State of Punjab,(40) it was held by the Court in two earlier cases, viz., Shri Shankari Prasad Singh Deo V. The Union of India(41) and Sajjan Singh V. The State of Rajasthan,(42) that Art. 368 contains in itself the power to amend the Constitution including the Chapter on Fundamental Rights, and the word 'law', used in Art. 13(2), only refers to the ordinary legislative power. But it was first in the Golaknath case that the Supreme Court changed its earlier stand and declared that Parliament would not be in a position to amend the Chapter on Fundamental Rights because the word 'law' used in Art. 13(2) refers both to Constituent and ordinary legislative enactment.

Impact of Golaknath decision

The Golaknath decision gave rise to serious debate both inside and outside the Parliament. A section of the people felt that Parliament, being the repository of popular will, should have the unfettered power to amend the Constitution. Another section held the view that the Parliament, being a creature of the Constitution, should not be its master, thereby supporting the Golaknath judgement. In order to appreciate the significance of this debate, it is necessary to deal with the background of this issue by making reference to the relevant amendments affecting Fundamental Rights and the decisions of the Supreme Court, dealing with the question of their validity.

Immediately after the commencement of the Constitution on January 26, 1950, the Parliament passed the Constitution (First Amendment) Act, 1951, on June 18, 1951. This amendment Act directly affected the Fundamental Rights, guaranteed under Part III of the Constitution. Section 2 of the amendment Act made modifications in Art. 15 by adding a new clause (4) to it. Again Section 3 amended Art. 19 for the validation of certain laws. By the amendment, a new clause was substituted for the original clause (2) of Art. 19 and it also added certain words in clause (6) of Art. 19. By Section (4) and (5), Art. 31 was amended and two new articles 31A and 31B were inserted, for the validation of certain Acts and Regulations. These Acts and Regulations, thus validated, were enumerated in the Ninth Schedule to the Constitution, which itself was added by Section 14. The number of Acts, thus included in the Schedule was 13.

Constitution (First Amendment) Act, 1951

The validity of the amendments made by the Constitution (First Amendment) Act was challenged before the Supreme Court in Shankari Prasad's case.(43) The judgement of the Court was delivered on October 5, 1951. Six points were raised by the petitioners who challenged the validity of the amendments, sought to be made effective under Art. 32 of the Constitution. These points may be summarised in the following order:

'Shankari Prasad' decision.

In the first place, the power of amending the Constitution provided for under Art. 368 was conferred not on Parliament as a collective body but on the two Houses of Parliament as separate bodies for passing amendment Bill, and therefore, the provisional Parliament was not competent to exercise that power under Art. 379.

Secondly, assuming that the power was conferred on Parliament, it did not devolve on the Provisional Parliament, by virtue of Art. 379, as the words "all the powers conferred by the provisions of this Constitution on Parliament" could refer only to such powers as are capable of being exercised by the Provisional Parliament consisting of a single Chamber. The power conferred by Art. 368 calls for the co-operative action of the two Houses of Parliament and could be appropriately exercised only by the Parliament to be duly constituted under Chapter 2 of Part V.

Thirdly, the Constitution (Removal of Difficulties) Order No. 2 made by the President on 26.1.1950, in so far as it purports to adapt Art. 368 by omitting "either House of" and "in each House" and substituting "Parliament" for "that House" is beyond the powers conferred on him by Art. 392, as "any difficulties" sought to be removed by adaptation under that article, must be difficulties in the actual working of the Constitution during the transitional period whose removal is necessary for carrying on the Government. No such difficulty could possibly have been experienced on the very date of the commencement of the Constitution.

Fourthly, in any case, Art. 368 is a complete code in itself and does not provide for any amendment being made in the Bill after it has been introduced in the House. The Bill, in the present case, having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in Art. 368.

Fifthly, the Amendment Act, in so far as it purports

to take away or abridge the rights conferred by Part III of the Constitution, falls within the prohibition of Art. 13(2).

Lastly, as the newly inserted articles 31A and 31B seek to make changes in articles 132 and 136 in Chapter 4 of Part V. and Art. 226 in Chapter 5 of Part VI, they require ratification under clause (B) of the proviso to Art. 368, and not having been so ratified, they are void and unconstitutional. They are also ultravires as they relate to the matters enumerated in List II, with respect to which the State legislatures and not Parliament have the power to make laws.

It will be seen that the first four points, which are strictly not relevant for the purpose of the present study, proceeded on the assumption that Art. 368 conferred power on Parliament to amend and, on that assumption, certain contentions were raised in support of the plea that the amendments made by the Constitution (First Amendment) Act were invalid. The fifth contention was that the Amendment Act, in so far as it purported to take away or abridge the rights conferred by Part III of the Constitution, fell within the prohibition of Art. 13(2); and the sixth contention was that the newly inserted Art. 31A and 31B sought to make changes in articles 132 and 136 in Chapter IV of Part V and Art. 226 in Chapter V of Part VI, and therefore, they required ratification under clause (b) of the proviso to Art. 368 and, since they had not received such ratification, the amendments were void and unconstitutional. Along with this argument, another plea was raised that the said amendments were 'ultra-vires' as they related to matters

enumerated in List II in the Seventh Schedule with respect to which State Legislatures, and not the Parliament, have power make laws.

Mr. Patanjali Sastri, J., who spoke for the unanimous Court, observed:

"The 'State' includes Parliament (Art. 12) and 'law' must include a constitutional amendment. It was the deliberate intention of the framers of the Constitution, who realised the sanctity of the fundamental rights conferred by Part III, to make them immune from interference not only by ordinary laws passed by the legislatures in the country, but also from the constitutional amendments."(44)

Elaborating his points of arguments, the learned Judge held:

"Although 'law' must include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power." "The power to amend", said the learned Judge, "though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise must be difficult and rare. On the other hand, the terms of Art. 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect."(45)

"In short", the learned Judge concluded, "we have here two articles each of which is widely phrased, but conflicts

in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations above, we are of the opinion that in the context of Art.13 'law' must be taken to mean rules and regulations made in exercise of ordinary legislative power and not amendments to the Constitution, made in exercise of constituent power, with the result that Art. 13(2) does not affect amendments made under Art. 368."(46)

On April 27, 1955, Parliament, in exercise of its constituent power, passed the Constitution (Fourth Amendment) Act, 1955, abridging or amending further the fundamental rights, guaranteed by Art. 31 as it was amended by the Constitution (First Amendment) Act. This Act consists of five sections. By Section 2 of the Amendment Act, Art. 31 (2) has been amended by substituting the following clauses.(47)

Constitution (Fourth Amendment Act, 1955

"(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by the authority of a law which provides for compensation for the property so acquired or requisitioned, and either fixes the amount of the compensation or specified the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any Court on the ground that the compensation provided by law is inadequate.

(2A) where a law does not provide for the transfer of the ownership or the right to possession of any property to the State or to a Corporation owned or controlled by the State, it

shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

Section 3 amended Art 31A by substituting, in place of clause (1) amended clause (1), sub-clauses (a) to (e). It provided -

"(1) Notwithstanding anything contained in Art.13, no law providing for --

(a) The acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the management of any of the corporations, or

(d) the extinguishment or modifications of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or license shall be deemed go 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:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such a law, having been reserved for the consideration of the President, has received his assent." (48)

Section 5 added seven Acts to the Ninth Schedule. Thus, the number of Acts included in the Ninth Schedule became 20. But since the validity of the Amendment Act was not subsequently challenged, the Act came retrospectively into operation. (49)

Sixteenth Amendment Act, 1963.

Again, the Constitution (Sixteenth Amendment) Act which came into operation on October, 6, 1963, sought to amend Art. 19 by its Section 2. This Section 2 by its clauses (a) and (b) amended Art. 19 by adding certain words in clauses (2) and (3) respectively. But it is to be noticed that this Amendment Act came into operation without being challenged from any corner.

Next in importance comes the Constitution (Seventeenth Amendment) Act, 1964, which came into force on June 20, 1964.

Seventeenth Amendment Act, 1964

It consists of three sections. Section 2 further amended Art. 31A, as it then stood, by sub-clause (1) of Section 2, one more proviso was added after the existing proviso in clause (i) of Art. 31A, and by sub-clause (ii) of Section 2, a fresh sub-clause (a) was substituted for the original sub-clause (a) of clause (2) of Art. 31A retrospectively. (50) Section 2 of the said Amendment Act provided ---

"In 31A of the Constitution ---

(i) in clause (1), after the existing proviso, the following proviso shall be inserted, namely:-

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

(ii) in clause (2) for the sub-clause (a), the following sub-clause was substituted and would be deemed always to have been substituted, namely:-

"(a) The expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include ---

(i) any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any 'janmam' right;

(ii) any land held under rotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and

village artisans."(51)

Section 3 added forty-four (44) Acts to the Ninth Schedule. In the result, the total number of Acts brought in the Ninth Schedule became 64.(52)

The validity of the Constitution (Seventeenth Amendment) Act was subsequently challenged before the Supreme Court in Sajjan Singh V. The State of Rajasthan.(53) The Court delivered its judgement on 30.10.64. Five arguments which were urged before the Supreme Court for the invalidation of the Act, may be summarised as follows:-(54)

'Sajjan Singh' decision.

(a) Since the powers prescribed by Art. 226, which occurs in Chapter V, Part VI of the Constitution, were likely to be affected by the Seventeenth Amendment, it was necessary that the special procedure laid down in the proviso to Art. 368 should have been followed and since, it was not so followed, the Amendment Act was invalid;

(b) the decision in Shankari Prasad Singh Deo's case which negatived the first contention, needed to be reconsidered;

(c) the Seventeenth Amendment Act was legislative measure in respect of land and since Parliament had no right to make a law in respect of land, the Act was invalid;

(d) since the Act purported to set aside decisions of Court of competent jurisdiction, it was unconstitutional; and

(e) in so far as the Amendment Act purported to abridge the fundamental rights guaranteed by Part III, it was invalied under Art. 13(2).

The first four contentions were rejected unanimously by the Court, though Mr. Justice Madholkar observed:

"Even if Parliament can amend Part III of the Constitution and was, therefore, competent to enact therein Art. 31A and Art. 31B as also to amend the definition of 'estate', the question still remains whether it could validate a State law dealing with land."(55)

With regard to the question with which this discussion is concerned, there was a difference of opinion in the Court. P.B. Gajendragadkar, C.J., spoke for himself along with Justices Wanchoo and Raghubir Dayal. But Justice Hidayatullah and Justice Mudholkar, while concurring with the decision of the Court, expressed some doubt about the correctness of the view taken in Shankari Prasad's case.(56)

Commenting on the nature and scope of Art. 368, the Court held that the two parts of Art. 368 must on a reasonable construction be harmonised with each other in the sense that the scope and effect of either of them should not be allowed to be unduly reduced or enlarged. It is urged that any amendment of the fundamental rights, contained in Part III would inevitably affect the powers of the High Court, prescribed by Art. 226, and as such, the bill proposing the said amendment cannot fall under the proviso; otherwise the very object of not including Part III under the proviso would be defeated. When the Constitution-makers did not include Part III under the proviso, it would be reasonable to assume that they took the view that the amendment of the provisions contained in Part III was a matter which should be dealt with by

Parliament under the substantive provisions of Art. 368 and not under the proviso. It has no doubt been suggested that the Constitution-makers perhaps did not anticipate that there would be many occasions to amend the fundamental rights guaranteed by Part III. However that may be, as a matter of construction, there is no escape from the conclusion that Art. 368 provides for the amendment of the provisions contained in Part III without imposing on Parliament an obligation to adopt the procedure prescribed by the proviso. It is true that as a result of the amendment of the fundamental rights, the area over which the powers prescribed by Art. 226 would operate, may be reduced, but apparently, the Constitution-makers took the view that the diminution of the area over which the High Court's powers under Art. 226 operate, would not unnecessarily take the case under the proviso. (57)

Nature and Scope of Art. 368 as laid down by the Court.

The Court further held that, if the substantive part of Art. 368 is very liberally and generously construed and if it is held that even substantial modification of the fundamental rights which may make a very serious and substantial inroad on the powers of the High Courts under Art. 226 can be made without invoking the proviso, it may deprive clause (b) of the proviso of its substance. In other words, in construing both the parts of Art. 368, the rule of harmonious construction requires that if the direct effect of the amendment of fundamental rights is to make a substantial inroad on the High Court's power under Art. 226, it would become necessary to consider whether the proviso would cover such a case or not. If the effect of the amendment made in the fundamental rights on the powers

of the High Courts prescribed by Art. 226, is indirect, incidental, or is otherwise of an insignificant order, it may be that the proviso will not apply. The proviso would apply where the amendment in question seeks to make any change, inter alia, in Art.226, and the question in such a case would be: Does the amendment seek to make a change in the provisions of Art. 226? The answer to this question would depend upon the effect of the amendment made in fundamental rights.(58)

With regard to the question whether the power to amend which is conferred by Art. 368 includes the power to take away the fundamental rights guaranteed by Part III, the Court started with the interpretation of the word 'amend' and held 'what Art. 368 authorizes to be done is the amendment, of the provisions of the Constitution.'(59)

In Sankari Prasad's case,(60) it was contended that, though it might be open to Parliament to amend the provisions in respect of the fundamental rights, contained in Part III, the amendment, if made in that behalf, would have to be tested in the light of the provisions contained in Art. 13(2) of the Constitution. The argument was that the law to which Art. 13(2) applies, would include a law passed by Parliament by virtue of its constituent power to amend the Constitution, and so, its validity will have to be tested by Art. 13(2). It will be recalled that Art. 13(2) prohibits the 'State' from making any law which takes away or abridges the rights conferred by Part III and provides that any law, made in contravention of clause (2), shall, to the extent of contravention, be void. It was urged before the Court in Shankari

Prasad's case, that in considering the question as to the validity of the relevant provisions of the Constitution (First Amendment) Act, it would be open to the party challenging the validity of the said Act to urge that in so far as the amendment Act abridges or takes away the fundamental rights of the citizens, it would be void. This argument was, however, rejected by the Court on the ground that the word 'law' used in Art. 13 'must be taken to mean rules and regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power with the result that Art. 13(2) does not affect amendments made under Art. 368.

'Law' used in Art. 13(2)

The Court further observed that the words 'amendment of the Constitution' used in Art. 368 plainly and unambiguously meant amendment of all the provisions of the Constitution. Any restrictive interpretation of Art. 368 appeared to the Court to be untenable. The Court opined that Art. 368 conferred on the Parliament the right to amend the Constitution -- the power can be exercised over all the provisions of the Constitution. How the power should be exercised had to be determined by reference to the question as to whether the proposed amendment fell under the substantive part of Art. 368 or attracted the provisions of the proviso. (61)

With regard to the scope of Art. 13(2), the Court observed inter alia:

"It is true that Art. 13(2) refers to any law in general, and literally construed, the word 'law' may take in a law

made in exercise of the constituent power conferred on Parliament; but having regard to the fact that a specific, unqualified and unambiguous power to amend the Constitution is conferred on Parliament, it would be reasonable to hold that the word 'law' in Art. 13(2) would be taken in Constitution Amendment Acts passed under Art. 368. If the Constitution-makers had intended that any future amendment of the provisions in regard to fundamental rights should be subject to Art. 13(2), they would have taken the precaution of making a clear provision in that behalf."(62)

The Court further observed:

"There is no doubt that if the word 'law' used in Art. 13(2) includes a law in relation to the amendment of the Constitution, fundamental rights can never be abridged or taken away, because as soon as it is shown that the effect of the amendment is to take away or abridge fundamental rights, that portion of law would be void under Art. 13(2). We have no doubt that such a position could not have been intended by the Constitution-makers when they included Art. 368 in the Constitution."(63)

Mr. Justice Hidayatullah, however, expressed a doubt on the question as to whether fundamental rights could be abridged by exercise of the power, conferred on Parliament by Art. 368. "I would require", said the learned Judge, "stronger reasons than those given in the Shankari Prasad's case to make me accept this view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the States."(64)

Referring to the argument that the words used in Art. 368 are wide and explicit, the learned Judge observed inter alia:

"Art. 368 does not give power to amend 'any provision' of the Constitution. At least, the article does not say so. Analysed by the accepted canons of interpretation, it is found to lay down the manner of the amendment of this Constitution', but by 'this Constitution' it does not mean each individual article wherever found and whatever its language and spirit. ..... What Art. 368 does, is to lay down the manner of amendment and the necessary conditions for the effectiveness of the amendment. .... the article no where says that the Preamble and every single article of the Constitution can be amended by two-thirds majority despite any permanency in the language and despite any historical fact or sentiment." (65)

Differing views of Hidayatullah, J.

Mr. Justice Mudholkar, while concurring with the final decision of the court, observed inter alia:

"It seems to me that in taking the view that the word 'law' occuring in Art. 13(2) of the Constitution, includes an amendment to the Constitution, this Court had not borne in mind some important considerations which would be relevant for the purpose. The language of Art. 368 is plain enough to show that the action of Parliament in amending the Constitution is a legislative act like one in exercise of its normal legislative power. The only difference in respect of an amendment to the Constitution is that the Bill, amending the Constitution, has to be passed by a special majority (here I have in mind only those amendments which do not attract the

proviso to Art. 368). The result of a legislative action of a legislature cannot be other than 'law', and therefore, it seems to me that the fact that legislation deals with the amendment of a provision of the Constitution would not make its result anything less than a law. Art. 368 does not say that when Parliament makes an amendment to the Constitution, it assumes a different capacity, that of a constituent body ....."(66)

Again the learned Judge held:

"It is true that the Constitution does not directly prohibit the amendment of Part III. But it would indeed be strange that rights which are considered to be fundamental and which include one which is guaranteed by the Constitution (vide Art. 32) should be more easily capable of being abridged or restricted than any of the matters referred to in the proviso to Art. 368, some of which are perhaps less vital than fundamental rights. It is possible as suggested by my learned brother,(67) that Art. 368 merely lays down the procedure to be followed for amending the Constitution and does not confer a power to amend the Constitution which, I think, has to be ascertained from the provision sought to be amended or other relevant provisions or the Preamble. ..."(68)

Justice Mudholkar's reasoning

VII

Golaknath case and subsequent developments.

The next historic decision which definitely guided the course of events to a great extent, was pronounced by the Supreme Court on February 27, 1967 in Golaknath V. The State of Punjab.[69] In this case, the validity of the Seventeenth Amendment Act was challenged and the plea was heard by the Full Court. The result of the hearing was that, by a majority of 6:5, the Court reversed its earlier decisions in the cases of Shankari Prasad and Sajjan Singh.[70] Chief Justice Subba Rao spoke for himself and Justices Shah, Sikri, Shelat and Vaidialingam. Justice Hidayatullah concurred with their conclusion but delivered a separate judgement. Justice Wanchoo spoke for himself and Justices Bhargava and Mitter, while Justice Bachawat and Justice Ramaswami concurred, by their separate judgements, with the minority view expressed by Justice Wanchoo. A detailed analysis of the judgement will reveal the conflicting attitudes of the Judges on this issue.

A. The Majority View:

The conclusions and the reasoning of the majority judgements delivered in the case can be summarised as follows:

(1) The fundamental rights have to be viewed in the general context of the Constitution. The Preamble to the Constitution is not a mere platitude. The means of realising the principles enshrined in the Preamble are worked out in detail in the body of the Constitution

and every authority -- executive, legislature and judiciary, established by the Constitution -- is subject to them. The Constitution, which is supreme, has empowered the legislatures to make laws and in

Scheme and Design of the Fundamental Rights

Part IV prescribed the objectives which are to remain fundamental in the governance of the country. Since the Constitution-makers feared that uncontrolled and unrestricted power in the hand of the government might lead to authoritarian state, they ordained a higher judiciary which was to act as the sentinel of the fundamental rights of the individual and as the balancing wheel between individual freedom and social control. The Rule of law under the Constitution was designed to serve the needs of the people without infringing their rights. Every institution or political party that functions under the Constitution must accept. Otherwise, it has no place under the Constitution.(71)

(2) The fundamental rights are natural rights or moral rights which every human being, because he is rational and moral, ought to possess. They are the primordial rights necessary for the development of human personality. In these, the Constitution has included the right of the minorities, untouchables and other backward communities. The Constitution enjoins the State not to make laws which take away or abridge these declared rights. They are subject only to the limitations contained in the respective articles. This gives fundamental rights a transcendental position and takes them beyond the reach of Parliament.

The fundamental rights and directive principles

constitute an integrated scheme forming a self-contained code. The scheme is made so elastic that all the directive principles of state-policy can reasonably be enforced without taking away or abridging the fundamental rights, subject to social control.

Fundamental Rights and Directive Principles as an integrated code.

(3) The Constitution itself provides for the suspension or the modification of fundamental rights under specific circumstances, e.g., articles 33, 34, 35, 358 and 359. This suggests the conclusion that under no other circumstances, the State can take away or abridge fundamental rights.

(4) Art. 368 does not confer any power to amend the Constitution. It essentially prescribes, as is evident from its marginal note, various procedural steps in the matter of amendment. The power to amend the Constitution cannot be read in Art. 368 by implication because whenever the Constitution sought to confer such a power on any authority, it expressly said so, e.g., articles 4 and 392. There is no necessity to resort to the doctrine of implied power when Parliament is vested with the expressly stated planary powers to make any law, including the law to amend the Constitution, under articles 245 and 248 read with Entry 97 of List 1.

Meaning of Art. 368

(5) The 'law' in its comprehensive sense includes Constitutional law and the 'law' amending the Constitution is constitutional law. Art 13(2) gives an inclusive definition of the word 'law'. It does not exclude and, in fact, 'prima facie' takes

in constitutional law.

(6) It cannot be said that if fundamental rights cannot be amended, it would prevent Parliament from enforcing the directive principles and this would lead to revolution. Fundamental Rights are introduced exactly to prevent this attitude of Parliament and the Constitution-makers thought, and the majority of the Court agreed, that the directive principles could be reasonably enforced by Parliament within the self regulatory machinery provided by Part III.

(7) The Constitution does not speak against the doctrine of 'prospective overruling'. Articles 32, 141 and 142 are couched in wide and elastic terms as to enable the Court to formulate legal doctrines to meet the ends of justice, the expression 'declared' in Art. 141 is wider than the words 'found or made'. To declare is to announce 'opinion'. The latter involves the process, while the former expresses the result. Interpretation, ascertainment and evolution is declared as 'law'.

'Prospective Overruling'

(8) With regard to the doctrine, it is laid down that ---

(a) The doctrine can be invoked only in matters arising under our Constitution;

(b) it can be applied only by the Supreme Court; and

(c) The scope of the operation of the doctrine is left to the Supreme Court's discretion to be moulded in accordance with the justice of the cause are matter before it.

As such, on the application of the doctrine to the case, the First, Fourth and Seventeenth Amendments will continue to be valid and the Parliament from the date of this decision will not be able to amend any of the provisions of Part III of the

Court's decision.

Constitution so as to take away or abridge the fundamental rights.

Hidayatullah J., as he then was, delivering a separate judgement 'inter alia' made the following points:

Different reasoning Hidayatullah, J.

(1) The Court in Shankari Prasad and Sajjan Singh's cases reached the result by a mechanical jurisprudence in which harmonious construction was taken to mean that unless Art. 368 itself made an exception, the existence of any other provision indicative of an implied limitation on the amending power could not be considered. It was based on 'a priori' view of the omnipotence of Art. 368, a doctrinaire conceptualism based on an arid textual approach supplemented by one concept. No part of the Constitution is superior to another unless the Constitution itself says so. On the answer to question of reconciling Art. 368 with Art. 13(2) depends the solution of all the problems of this case.

Meaning of 'Law'

(2) The definition of the world 'law' in Art. 13(2) makes no exception to 'Constitutional law'. Though a distinction between 'Constitutional law' and 'law' is made in the U.S.A., it is not always essential, as in England. The Constitution itself has considered some of the ordinary laws (laws made under articles 327 or 328) as the Constitution-laws. The distinction does not exist if the legislative and constituent processes become one. The view held in the U.S. on this distinction is not final because the process of amendment in the U.S. is not a legislative process and there is no provision like our Art. 13(2).

If and 'amendment' of the Constitution is a 'law', such an amendment is open to challenge under Art. 32, if it offends against the fundamental rights. As such, the unlimited competence does not flow from the amendatory process.

(3) Art. 368 outlines a process, it followed strictly, results in the amendment of the Constitution. The article gives power to no particular person or persons. All the named authorities have to act according to the letter of the article to achieve the result. The procedure of amendment, if it can be called a power at all, is a legislative power but it is 'sui generis' and outside the three lists in the Seventh Schedule of the Constitution. It does not have to depend upon the entry in the lists.

Meaning of Art. 368.

(4) The First, Fourth and Seventeenth Amendments, being part of the Constitution by acquiescence for a long time, cannot now be challenged.(72)

Justice Hidayatullah therefore concluded, inter alia:

(1) that the fundamental rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights;

(2) that Shankari Prasad's case (and Sajjan Singh's case which followed it) conceded the power of amendment over Part III of the Constitution on an erroneous view of articles 13(2) and 368.

(3) that this Court having now laid down that the fundamental rights cannot be abridged or taken away by the

exercise of amendatory process in Art. 368, any further inroad into these rights as they exist to-day will be illegal and unconstitutional unless it complies with Part III in general and Art. 13(2) in particular.

(4) that for abridging or taking away fundamental rights, a constituent body will have to be convoked.

These conclusions and supporting reasoning led the majority of the Court to overrule its decision in Shankari Prasad Deo V. Union of India (73) and Sajjan Singh V. The State of Rajasthan. (74)

B. The Minority View.

The minority view was that the power of amendment conferred on Parliament included the power to amend the fundamental rights so as to take them away or abridge them. Giving the main dissenting judgement, Wanchoo, J., as he then was, held:

(1) The power to amend the Constitution is conferred upon Parliament by Art. 368 and not by Art. 245 or Art. 246 or Art. 248. The power so conferred is not limited either expressly or by implication.

(2) An amendment to the Constitution is a constitutional law made in exercise of constituent power which is not the same as ordinary legislative power under which laws are made.

(3) The cases of Shankari Prasad and Sajjan Singh were decided correctly and while Art. 13(2) prohibits a law abridging or taxing away the fundamental rights, it does not restrict the constituent power given by Art. 368 to amend any part of the Constitution, including the fundamental rights. The word 'law' does not apply to amendments of the Constitution.

(4) The power to amend the Constitution means that any part of it can be changed to such an extent as the sovereign body deems fit.(75)

VIII. Reactions to the decision and the follow-up moves: Nath Pai's Bill to counteract the decision.

The majority view of the nature of fundamental rights vis-a-vis amending power of the Parliament adopted in the Golaknath case 'evoked both criticism and approbation'.(76) It "expectedly enough, led to a raging controversy among the members of the Indian Parliament."(77) Even the then ruling Congress Party at the Centre "felt bitter about it, and the overall sentiment at the alleged affront to the power and authority of the Parliament."(78) It was observed that this decision "reversed the constitutional order acquised by practice and created juridical instability by treating earlier precedents somewhat lightly."(79) The decision was charged with ascribing "static and rigid element to the Constitution which was in reality intended to be dynamic and purposive, to subserve always the interest and welfare of the general public."(80)

Those who supported the judgement held that it "imposed a necessary limitation on the power of Parliament to amend the Constitution which had come to be exercised rather indiscriminately." Moreover, it was observed that "by giving the judgement prospective operation", the Court, "protected the economic and social order created by the majority in accordance with their understanding of the Constitution with the concurrence of the

of the earlier Benches of the Supreme Court."(81)

It was in this situation that the Late Nath Pai, the P.S.P. Leader, moved a private Bill in the Lok Sabha on April 7, 1967, seeking to amend Art. 368 of the Constitution "in such a way as to restore to Parliament the right to amend the Fundamental Rights."(82) The Bill sought to insert a new clause (1) before Art. 368 which would provide that "any provision of this Constitution may be amended in accordance with the procedure hereafter provided in this article, "and, further provided that the existing article should be numbered as clause (2) which would begin with the words "An amendment of any such provision" in place of the existing words "An Amendment of this Constitution." But a veteran leader like Acharyya J.B.Kripalani held that the Fundamental Rights could not be left to the mercy of the majority which often acted wrongly.(83) It is interesting to note that the then Law Minister, while supporting such a Private Bill on behalf of the Government, said on the floor of the House that "it is because of the importance of the Bill that, although it is not an official Bill, on behalf of the Government, I moved a motion that it be referred to a Joint Committee of both Houses."(84) Although the Bill was discussed in the Lok Sabha on November 15 and 29, and December 23, 1968, and again on May 14, 1969, it could not be implemented because of the unfortunate sudden demise of Nath Pai and subsequent dissolution of the Lok Sabha by the President.

IX. The Constitution (Twenty-Fourth Amendment) Act, 1971: Changes made by this Amendment. (85)

The return of the Congress (R) Party with a comfortable majority in the mid-term poll enabled then to proceed with the more already taken with the introduction of Nath Pai's Bill. It may not be out of place here to refer to the promise made by the Congress Party in their election manifesto that, if returned to power, the Party would 'seek such further constitutional remedies and amendments as are necessary to overcome the impediments in the path of social justice.' The Government came out with the Constitution (Twenty-fourth Amendment) Bill, 1971, which sought to empower Parliament to amend any part of the Constitution 'so as to include the provisions of Part III within the scope of the amending power.'

The Bill sought to amend Art. 368 in order to make it 'clear that Art. 368 provides for amendment of the Constitution as well as the procedure therefor'. The Bill sought to amend Art. 13 of the Constitution "to make it applicable to any amendment of the Constitution under Art. 368." (86) The Bill became an Act on November, 5, 1971 when it received the President's assent after it was ratified by more than half of the State Legislatures.

The Constitution (Twenty-fourth Amendment) Act can be regarded as 'historic' in so far as it sought to reverse the trend set in motion by the Supreme Court. The then Prime Minister hailed the measure as a milestone in the march of the people 'towards democracy, socialism secularism and just and humane society.' (87) It has been observed that "the Amendment (Twenty-fourth Amendment)

purports to mark a big leap forward for the fulfilment of the solemn pledges incorporated in the Preamble and the Directive Principles of State Policy."(88) The purpose of the 24th Amendment to include Part III within the scope of constitutional amendment "is definitely consistent with the constitutional scheme and the socio-economic objectives of a welfare State."(89) But the 24th Amendment Act is not free from certain inherent problems, "since it completed the cycle of inter-organ conflict and confrontation that characterised the relation between the legislature and the judiciary in India, especially over the interpretation of property rights."(90)

Significance of the Twenty-fourth Amendment Act.

X. Keshavananda Bharati case and its consequences.

The 24th Amendment, along with the 25th Amendment, and the 29th Amendment, was challenged in the Court in the case of Keshavananda Bharati V. The State of Kerala,(91) which is popularly known as the Fundamental Rights case. In this case, by a 7:6 majority, The Court held that the Constitution invested Parliament with the right to alter, abridge or abrogate the Fundamental Rights guaranteed by the Constitution and that the judgement given by the Court in the Golaknath case in 1967 was incorrect.(92)

Thirteen Judges of the Supreme Court, after hearing the case for 66 days, delivered eleven separate judgements. Justice Grover joined Justice Shelat and Justice Mukherjee joined Justice Hegde in giving their judgements. Justice Beg and Justice Dwivedi expressed their agreement with the views expressed by Justice Ray, Justice Palekar and Justice Mathews but gave separate judgements

also.(93) The findings of the Judges may briefly be summarised as follows:

All the thirteen Judges held that the 24th Amendment Act by which Art. 13 and Art. 368 were amended to enlarge the scope of power to amend the Constitution, unfettered by the provisions of Art. 13(2), was valid. It was unanimously held that the power to amend the Constitution was located in Art. 368 and the Parliament was not competent to call a Constituent Assembly to amend the Constitution in view of the clear provisions of Art. 368. It was held that the power to amend the Constitution was a Constituent power and the Amendment Acts made under it, were not always within the meaning of Art. 13(2).(94)

Validity of 24th Amendment upheld

On the question as to whether there are implied limitations on the power to amend the Constitution, the six senior Judges (Chief Justice Sikri, Shelat, Grover, Hegde, Mukherjee and Jaganmohan Reddy, J.J.) held that the amending power was limited by the basic structure of the Constitution.(95) It was held by them that while Parliament had the right to abridge Fundamental Rights, 'it can not damage or destroy the essential basic structure or framework of the Constitution.'(96)

Amending power limited by the basic structure.

On the other hand, six Judges (Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud J.J.) held that the power to amend the Constitution was unlimited. The scale of the judgement on this question was turned by the judgement of Khanna, J., who did not see

eye to eye with these twelve Judges. According to him, the power of amendment was limited. Parliament could not alter the basic structure of the Constitution; he held that Fundamental Right to property 'does not constitute the basic structure or framework of the Constitution.'(97) He also observed: "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."(98)

Amending power unlimited

He further held:

"There are no implied or inherent limitations on the power of amendment apart from those which inhere and are implicit in the word 'amendment'. The said power can also be not restricted by reference to natural or human rights. Such rights, in order to be enforceable in a Court or law, must become a part of the statute or the Constitution."(99) Considering all aspects, he concluded that "the Constitution (Twenty-fourth Amendment) does not suffer from any infirmity and as such valid."(100)

The diverse opinions expressed in the case donot enable one "to obtain a single, well-defined and focussed picture of what has been held by the Supreme Court in the Fundamental Rights case except in regard to their ultimate conclusions on the general questions and on the particular questions relating to the validity of the provisions of the Amending Acts."(101)

However, at least two specific results flow from the decision of the case. The first is that the Constitution shall stay with its basic structure and framework and it shall stay, not by the protection of any provision of the Constitution, but by inherent limitations found in the amending power itself. Justice Khanna observed, inter-alia, that Art. 368 does not contain 'the death-wish of the Constitution' nor does it allow 'its lawful homicide.'(192)

Two specific results of the judgement

The second important result of the judgement is that the decision of the Golaknath case that the Parliament may convene a Constitution Assembly for amendment of the Constitution, has been decisively rejected.

XI

The Constitution (Forty-Second Amendment) Act, 1976: further drastic changes in the Constitution, especially with respect to the amending power of the Parliament.

The next landmark in this process is the Constitution (Forty-Second Amendment) Act, 1976, which modified the Indian Constitution in some important respects.(104) It further amended Art.368 by adding two clauses (4) and (5).(105) By clause (4), it seeks to keep

all constitutional amendment outside the purview of judicial scrutiny.[106] By clause (5), it has been made clear that there are not even 'implied limitations' on the power of Parliament to amend the Constitution.[107] Section 55 of the Act makes the legislature supreme and by virtue of its exercise of the power under Art. 368, it can 'change, modify or abrogate and repeal any or all the provisions of the Constitution.'[108] It has been observed, by vesting this unfettered amending power on the Parliament, "a controlled Constitution" has been deliberately and categorically converted into "an uncontrolled Constitution."[109]

On analysing the constitutional events and developments right from Shankari Prasad's case to the Forty-Second Amendment, the following conclusions can be drawn:

(1) that an ordinary law cannot go against the Fundamental Rights in view of the restrictions imposed by Art. 13(2);

Some broad trends and patterns

(2) that an amendment is not an ordinary law. An amendment may, at best be called a 'Constitution in little'[110];

(3) that by an amendment, the entire Constitution cannot be changed. The legislature, through the exercise of the power of constitutional amendment, cannot change the Constitution 'unidentifiably';[111]

(4) that the power to amend the Constitution comes from Art. 368 and not from Art. 245, Art. 246 or Art. 248. Moreover, Art. 368 does not prescribe any express limitation. In the absence of such express limitations, 'the doctrine of implied limitation

should be invoked;'(112)

(5) that there is no inherent and real conflict between Directive Principles and Fundamental Rights. If, in any case, a conflict arises between them, the Court should apply the principle of 'harmonious construction' to resolve the deadlock.

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