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MINERVA MILLS LTD. & ORS.

v.

UNION OF INDIA & ORS.

July 31, 1980

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[Y. V. CHANDRACHUD, C. J., P. N. BHAGWATI, A. C. GUPTA, N. L. UNTWALIA AND P. S. KAILASAM, JJ.]

Constitution of India Forty Second Amendment Act, Sections 4 *and* 55—*Whether the Sections are beyond the amending power of the Parliament under Article* 368 *of the Constitution and therefore void—Whether the Directive Principles of State policy contained in Part IV of the Constitution can have primacy over the fundamental rights conferred by Part III of the Constitution—Constitution of India Articles* 14, 19, 31C, 38 *and* 368.

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Minerva Mills Ltd. is a limited company dealing in textiles. On August 20, 1970 the Central Government appointed a committee under section 15 of the Industries (Development Regulation) Act, 1951 to make a full and complete investigation of the affairs of the Minerva Mills Ltd. as it was of the opinion that there had been or was likely to be substantial fall in the volume of production. The said Committee submitted its report to the Central Government in January 1971, on the basis of which the Central Government passed an order dated October 19, 1971 under section 18A of the 1951 Act, authorising the National Textile Corporation Ltd., to take over the management of the Mills on the ground that its affairs are being managed in a manner highly detrimental to public interest. This undertaking was nationalised and taken over by the Central Government under the provisions of the Sick Textile Undertakings (Nationalisation) Act, 1974. The petitioners challenged the constitutional validity of certain provisions of the Sick Textile Undertakings (Nationalisation) Act, 1974 and of the order dated October 19, 1971, the constitutionality of the Constitution (Thirty Ninth Amendment) Act which inserted the impugned Nationalisation Act as Entry 105 in the Ninth Schedule to the Constitution, the validity of Article 31B of the Constitution and finally the constitutionality of sections 4 and 55 of the Constitution (Forty Second Amendment) Act, 1976, on the ratio of the majority judgment in *Kesavananda Bharati's* case, namely, though by Article 368 of the Constitution Parliament is given the power to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure.

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Opining that sections 4 and 55 of the Constitution (Forty Second Amendment) Act are void and beyond the amending power of the Parliament, the Court by majority (Per Chandrachud, C.J., on behalf of himself, A. C. Gupta, N. L. Untwalia & P. S. Kailasam, JJ.)

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HELD: (1) The newly introduced clause 5 of Article 368 transgresses the limitations on the amending power of Parliament and is hence unconstitutional. It demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever". No constituent power can conceivably go higher than the sky-high power conferred by clause (5), for it even empowers the Parliament to "repeal the provisions of this Constitution", that is to say, to abrogate the democracy

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and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificient ideal of a society of equals. The power to destroy is not a power to amend. [240C-E] A

Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of Indian Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one. [240E-G] B C

Smt. Indira Nehru Gandhi v. *Raj Narain,* [1976] 2 SCR 347, followed.

(2) The newly introduced clause (4) of Article 368 is equally unconstitutional and void because clauses (4) and (5) are inter-linked. While clause (5) purports to remove all limitations on the amending power, clause (4) deprives the courts of their power to call in question any amendment of the Constitution. [241E-F] D

Indian Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, may their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Article 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction is a transparent case of transgression of the limitations on the amending power. [241H, 242A] E

If a constitutional amendment cannot be pronounced to be invalid even if it destroys the basic structure of the Constitution, a law passed in pursuance of such an amendment will be beyond the pale of judicial review because it will receive the protection of the constitutional amendment which the courts will be powerless to strike down. Article 13 of Constitution will then become a dead letter because even ordinary laws will escape the scrutiny of the courts on the ground that they are passed on the strength of a constitutional amendment which is not open to challenge. [242A-C] F

(3) Though it is the settled practice of the Supreme Court not to decide academic questions and the Court has consistently taken the view that it will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, it is difficult to uphold the preliminary objection to the consideration of the question raised by the petitioners as regards the validity of sections 4 and 55 of the Forty-second Amendment. In the instant case, the question raised as regards the constitutionality of sections 4 and 55 of the Forty Second Amendment is not an academic or a hypothetical question. Further an order has been passed against the petitioners under section 18A of the Industries (Development and Regulation) Act, 1951, by which the petitioners are aggrieved. [248C, E-G] G H

A Besides, there is no constitutional or statutory inhibition against the decision of questions before they actually arise for consideration. Here, in view of the importance of the question raised and in view of the fact that the question has been raised in many a petition, it is expedient in the interest of Justice to settle the true position. Secondly, what the court is dealing with is not an ordinary law which may or may not be passed so that it could be said that the court's jurisdiction is being invoked on the hypothetical consideration B that a law may be passed in future which will injure the rights of the petitioners. What the court is dealing with is a constitutional amendment which has been brought into operation and which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes. [248G, 249A-B]

C *Commonwealth of Massachusetts* v. *Andrew W. Mellon,* 67 Lawyers' Edition, 1078, 1084; *George Ashwander* v. *Tennessee Valley Authority,* 80 Lawyers' Edition, 688, 711, quoted with approval.

(4) The answer to the question whether in view of the majority decision in *Kesavananda Bharati* it is permissible to the Parliament to so amend the Constitution as to give a position of precedence to directive principles over the fundamental rights, must necessarily depend upon whether Articles 14 and 19, which must now give way to laws passed in order to effectuate the policy of D the State towards securing all or any of the principles of Directive Policy, are essential features of the basic structure of the Constitution. It is only if the rights conferred by these two articles are not a part of the basic structure of the Constitution that they can be allowed to be abrogated by a constitutional amendment. If they are a part of the basic structure, they cannot be obliterated out of existence in relation to a category of laws described in Article 31C or, for the matter of that, in relation to laws of any description whatsoever, E passed in order to achieve any object or policy whatsoever. This will serve to bring out the point that a total emasculation of the essential features of the Constitution is, by the ratio in *Keshavananda Bharati,* not permissible to the Parliament. [249E-H]

(5) The importance of Directive Principles in the scheme of our Constitution cannot ever be over-emphasized. Those principles project the high F ideal which the Constitution aims to achieve. In fact Directive Principles of State Policy are fundamental in governance of the country and there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realisation of his aspirations. But to destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure. Fundamental rights occupy a unique place in the lives G of civilized societies and have been variously described as "transcendental", "inalienable" and "primordial" and as said in *Kesavananda Bharati* they constitute the ark of the Constitution. [250B-C, 254H, 255A]

The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the H scheme of the Indian Constitution. Parts III and IV are like two wheels of a chariot, one no less important than the other. Snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set

before themselves. In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution. [255B-D] A

The edifice of Indian Constitution is built upon the concepts crystallized in the Preamble. Having resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice-social, economic and political, Part IV has been put into our Constitution containing directive principles of State Policy which specify the socialistic goal to be achieved. Having promised the people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved, Part III has been put in our Constitution conferring those rights on the people. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV. Therefore, the rights conferred by Part III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms. One of the faiths of our founding fathers was the purity of means. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of our Constitution. [253D-H, 256A-B] B C D E

(5A) On any reasonable interpretation, there can be no doubt that by the amendment introduced by section 4 of the Forty Second Amendment, Articles, 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31C. The startling consequence which the amendment has produced is that even if a law is in total defiance of the mandate of Article 13 read with Articles 14 and 19, its validity will not be open to question so long as its object is to secure a directive principle of State Policy. [256D-E] F

(6) No doubt, it is possible to conceive of laws which will not attract Article 31C, since they may not bear direct and reasonable nexus with the provisions of Part IV. However, a large majority of laws, the bulk of them, can at any rate be easily justified as having been passed for the purpose of giving effect to the policy of the State towards securing some principle or the other laid down in Part IV. In respect of all such laws, which will cover an extensive gamut of the relevant legislative activity, the protection of Articles 14 and 19 will stand wholly withdrawn. It is then no answer to say, while determining whether the basic structure of the Constitution is altered, that at least some laws will fall outside the scope of Article 31C. [256E-H] G

(7) A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. The fact, therefore that some laws may fall outside the scope of Article 31C is no answer to the contention that the withdrawal of protection of Articles 14 and 19 from a large number of laws destroys the basic structure of the Constitution. [256H, 257A-B] H

A (8) Article 38 provides that the State shall 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. It is not correct that all the Directive Principles of State Policy contained in Part IV eventually verge upon Article 38. Article 38 undoubtedly contains a broad guideline, but the other Directive Principles are not mere illustrations of the principle contained in Article 38. Secondly, B if it be true that no law passed for the purpose of giving effect to the Directive Principle in Article 38 can damage or destroy the basic structure of the Constitution, there was no necessity and more so the justification, for providing by a Constitutional amendment that no law which is passed for giving effect to the policy of the State towards securing any principle laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges the rights conferred by Articles 14 and 19. [257C-F]

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The object and purpose of the amendment of Article 31C is really to save laws which cannot be saved under Article 19(2) to (6). Laws which fall under those provisions are in the nature of reasonable restrictions on the fundamental rights in public interest and therefore they abridge but do not abrogate the fundamental rights. It was in order to deal with laws which do not get the protection of Article 19(2) to (6) that Article 31C was amended to say D that the provisions of Article 19, *inter alia* cannot be invoked for voiding the laws of the description mentioned in Article 31C. [257F-G]

(9) Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of a democracy. They are universally so regarded, as is evident from the Universal Declaration of Human Rights. If Articles 14 and 19 are put out of operation in E regard to the bulk of laws which the legislatures are empowered to pass Article 32 will be drained of its life-blood. [257G-H, 258A]

Section 4 of the Forty Second Amendment found an easy way to circumvent Article 32(4) by withdrawing totally the protection of Articles 14 and 19 in respect of a large category of laws, so that there will be no violation to complain of in regard to which redress can be sought under Article 32. The F power to take away the protection of Article 14 is the power to discriminate without a valid basis for classification. By a long series of decisions the Supreme Court has held that Article 14 forbids class legislation but it does not forbid classification. The purpose of withdrawing the protection of Article 14, therefore, can only be to acquire the power to enact class legislation. Then again, regional chauvinism will have a field day if Article 19(1)(d) is not available to the citizens. Already, there are disturbing trends on a part of the G Indian horizon. Those trends will receive strength and encouragement if laws can be passed with immunity, preventing the citizens from exercising their right to move freely throughout the territory of India. The nature and quality of the amendment introduced by section 4 of the Forty Second Amendment is, therefore, such that it virtually tears away the heart of basic fundamental freedoms. [258B-E]

H Article 31C speaks of laws giving effect to the policy of the "State". Article 12 which governs the interpretation of Article 31C provides that the word "State" in Part III includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other

authorities within the territory of India or under the control of the Government of India. Wide as the language of Article 31C is, the definition of the word "State" in Article 12 gives to Article 31C an operation of the widest amplitude. Even if a State Legislature passes a law for the purpose of giving effect to the policy by a local authority towards securing a directive principle, the law will enjoy immunity from the provisions of Articles 14 and 19. The State Legislatures are thus given an almost unfettered discretion to deprive the people of their civil liberties. [258E-G] A B

(10) The principles enunciated in Part IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like those conferred by Articles 14 and 19. Those are the most elementary freedoms without which a free democracy is impossible and which must, therefore, be preserved at all costs. If the discipline of Article 14 is withdrawn and if immunity from the operation of that article is conferred, not only on laws passed by the Parliament but on laws passed by the State Legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment. [259A-D] C D

(11) The device of reading down the provisions of a law for the purpose of saving it from a constitutional challenge is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's liking to have been passed. Article 31C cannot be read down so as to save it from the challenge of unconstitutionality because to do so will involve a gross distortion of the principle of reading down depriving that doctrine of its only or true rationale when words of width are used inadvertently. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment. [259E-G] E

If the Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature. In the history of the constitutional law, no constitutional amendment has ever been read down to mean the exact opposite of what it says and intends. In fact, reading down Article 31C so as to make it conform to the ratio of the majority decision in *Kesavananda Bharati* is to destroy the avowed purpose of Article 31C as indicated by the very heading "Saving of certain laws" under which Articles 31A, 31B and 31C are grouped. Since the amendment to Article 31C was unquestionably made with a view to empowering the legislatures to pass laws of a particular description even if those laws violate the discipline of Articles 14 and 19, it is impossible to hold that the court should still save Article 31C from the challenge of unconstitutionality by reading into that Article words which destroy the rationale of that Article and an intendment which is plainly contrary to its proclaimed purpose. [259H, 280A-C] F G

(12) Reading the existence of an extensive judicial review into Article 31C is really to permit the distortion of the very purpose of that Article. It provides expressly that no law of a particular description shall be deemed to be void on the ground that it violates Article 14 or Article 19. It would be sheer H

A adventurism of a most extraordinary nature to undertake such a kind of judicial enquiry. [260F-G]

(13) In the very nature of things it is difficult for a court to determine whether a particular law gives effect to a particular policy. Whether a law is adequate enough to give effect to the policy of the State towards securing a directive principle is always a debatable question and the courts cannot set aside the law as invalid merely because, in their opinion, the law is not ade-
B quate enough to give effect to a certain policy. The power to enquire into the question whether there is a direct and reasonable nexus between the provisions of a law and a Directive Principle cannot confer upon the Courts the power to sit in Judgment over the policy itself of the State. At the highest, courts can, under Article 31C, satisfy themselves as to the identity of the law in the sense whether it bears direct and reasonable nexus with a Directive Principle. If the court is satisfied as to the existence of such nexus, the in-
C evitable consequence provided for by Article 31C must follow. Indeed, if there is one topic on which all the 13 *Judges* in *Kesavananda Bharati* were agreed, it is this: that the only question open to judicial review under the unamended Article 31C was whether there is a direct and reasonable nexus between the impugned law and the provisions of Articles 39(b) and (c). Reasonableness is evidently regarding the nexus and not regarding the law. The attempt therefore to drape Article 31C into a democratic outfit under which an
D extensive judicial review would be permissible must fail. [260H, 261A-E]

(14) The avowed purpose of clauses (4) and (5) of Article 368 is to confer power upon the Parliament to amend the Constitution without any "limitation whatever". Provisions of this nature cannot be saved by reading into them words and intendment of a diametrically opposite meaning and content. [261F-G]

E (15) Article 31A(1) can be looked upon as a contemporaneous practical exposition of the intendment of the Constitution, but the same cannot be said of Article 31C. Besides there is a significant qualitative difference between the two Articles. Article 31A, the validity of which has been recognised over the years, excludes the challange under Articles 14 and 19 in regard to a specified category of laws. If by a constitutional amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is
F reasonable in public interest, the basic framework of the constitution may remain unimpaired. If the protection of those articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a 'parchment in a glass case' to be viewed as a matter of historical curiosity. [262A-C]

(16) There is no merit in the contention that since Art. 31A was also upheld on the ground of *stare decisis,* Art. 31C can be upheld on the same
G ground. The five matters which are specified in Article 31A are of such quality, nature, content and character that at least a debate can reasonably arise whether abrogation of fundamental rights in respect of those matters will damage or destroy the basic structure of the Constitution. Article 31C does not deal with specific subjects. The directive principles are couched in broad and general terms for the simple reason that they specify the goals to be achieved. The principle of *stare decisis* cannot be treated as a fruitful source of perpe-
H tuating curtailment of human freedoms. No court has upheld the validity of Article 31A on the ground that it does not violate the basic structure of the Constitution. There is no decision on the validity of Article 31A which can be looked upon as a measuring rod of the extent of the amending power. To

hark back to Article 31A every time that a new constitutional amendment is challenged is the surest means of ensuring a drastic erosion of the Fundamental Rights conferred by Part III. Such a process will insidiously undermine the efficacy of the ratio of the majority judgment in *Kesavananda Bharati* regarding the inviolability of the basic structure. That ratio requires that the validity of each new constitutional amendment must be judged on its own merits. [262C-G] A

(17) It is not correct to say that when Article 31A was upheld on the ground of *stare decisis*, what was upheld was a constitutional device by which a class of subject-oriented laws was considered to be valid. The simple ground on which Article 31A was upheld, apart from the ground of contemporaneous practical exposition, was that its validity was accepted and recognised over the years and, therefore, it was not permissible to challenge its constitutionality. The principle of *stare decisis* does not imply the approval of the device or mechanism which is employed for the purpose of framing a legal or constitutional provision. [262G-H, 263A-B] B C

(18) Under clauses (2) to (6) of Article 19, restrictions can be imposed only if they are reasonable and then again, they can be imposed in the interest of a stated class of subjects only. It is for the courts to decide whether restrictions are reasonable and whether they are in the interest of the particular subject. Apart from other basic dissimilarities, Article 31C takes away the power of judicial review to an extent which destroys even the semblance of a comparison between its provisions and those of clauses (2) to (6) of Article 19. Human ingenuity, limitless though it may be, has yet not devised a system by which the liberty of the people can be protected except through the intervention of courts of law. [263B-D] D

Three Articles of the Indian Constitution and only three stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual. [263D-E] E

*Per Bhagwati, J. (concurring)** F

(1) Since the question in regard to the constitutional validity of the amendment made in Article 31C did not arise in the writ petitions and the counter-affidavits, it was wholly academic and superfluous to decide it. Once it is conceded that Articles 31A, 31B and the unamended Article 31C are constitutionally valid it became wholly unnecessary to rely on the unamended Article 31C in support of the validity of Sick Textiles Undertaking (Nationalisation) Act, 1974 because Article 31B would, in any event, save it from invalidation on the ground of infraction of any of the fundamental rights. [268F-H] G

(2) Now either the Nationalisation Act was really and truly a law for giving effect to the Directive Principles set out in Article 39 clause (b) as declared in section 39 of the Act or it was not such a law and the legislative declaration contained in section 39 was a colourable device. If it was the H

*This headnote as well as His Lordship's Judgment will hold good in the case of *Waman Rao & Ors. Etc.* v. *Union of India & Ors.* to be published in the subsequent issue of SCR.

former then the unamended Article 31C would be sufficient to protect the Nationalisation Act from attack on the ground of violation of Articles 14, 19 and 31 and it would be unnecessary to involve the amended Article 31C and if it was the latter, then neither the unamended nor the amended Article 31C would have any application. Thus in either event, the amended Article 31C would have no relevance at all in adjudicating upon the constitutional validity of the Nationalisation Act. In these circumstances, the court could not be called upon to examine the constitutionality of the amendment made in Article 31C. [269B-E]

Dattatraya Govind Mahajan v. *State of Maharashtra,* [1977] 2 SCR 790, followed.

(3) Clause (4) of Article 368 of the Constitution is unconstitutional and void as damaging the basic structure of the Constitution. [288E]

The words "on any ground" in clause (4) of Article 368 are of the widest amplitude and they would obviously cover even a ground that the procedure prescribed in clause (2) and its proviso has not been followed. The result is that even if an amendment is purported to have been made without complying with the procedure prescribed in sub-clause (2) including its proviso, and is therefore unconstitutional, it would still be immune from challenge. [284E-F]

As per *Kesavananda Bharati's* case any amendment of the Constitution which did not conform to the procedure prescribed by sub-clause (2) and its proviso was no amendment at all and a court would declare it invalid. Thus if an amendment was passed by a simple majority in the House of the People and the Council of States and the President assented to the amendment, it would, in law, be no amendment at all because the requirement of clause (2) is that it should be passed by a majority of each of the Houses separately and by not less than two-third of the Members present and voting. But if clause (4) was valid it would become difficult to challenge the validity of such an amendment and it would prevail though made in defiance of a mandatory constitutional requirement. Clause (2) including its proviso would be rendered completely superfluous and meaningless and its prescription would become merely a paper requirement. Moreover, apart from nullifying the requirements of clause (2) and its proviso, clause (4) has also the effect of rendering an amendment immune from challenge even if it damages or destroys the basic structure of the Constitution and is, therefore, outside the amending power of Parliament. So long as clause (4) stands, an amendment of the Constitution, though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in *Kesavananda Bharati's* case, would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent and it would not be incorrect to say, for covertly and indirectly by the exclusion of judicial review the amending power of Parliament would stand enlarged contrary to the decision of this Court in *Kesavananda Bharati's* case. This would, undoubtedly, damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of the Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers. [284F-H, 285A-D]

Our Constitution is a controlled constitution which confers powers on the various authorities created and recognised by it and defines the limits of those

powers. The Constitution is *suprema lex*, the paramount law of the land and there is no authority, no department or branch of the State which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship which checks and balances and limits are placed on the powers of every authority of instrumentality under the Constitution. Every organ of the State, be it the Executive or the Legislature or the Judiciary, derives its authority from the Constitution and it has to act within the limits of such authority. Parliament too is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the Constitution, it cannot have such inherent power but the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. Now, if by constitutional amendment, Parliament was granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity. Therefore, the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment was enlarged into an unlimited power the entire character of the Constitution would be changed. It must follow as a necessary corollary that any amendment of the Constitution which seeks, directly or indirectly, to enlarge the amending power of Parliament by freeing it from the limitation of unamendability of the basic structure would be violative of the basic structure and, hence, outside the amendatory power of Parliament. [285E-H, 286A-C]

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It is a fundamental principle of our Constitution that every organ of the State, every authority under the Constitution derives its powers from the Constitution and has to act within the limits of such power. The three main departments of the State amongst which the powers of Government are devided are: the Executive, the Legislature and the Judiciary. Under our Constitution there is no rigid separation of powers but there is a broad demarcation though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The Constitution has created an independent machinery, namely, the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the Legislature. It is a solemn duty of the judiciary under the Constitution to keep the different organs of the State, such as the Executive and the Legislature, within the limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution. [286D, E, 287B-C].

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It is a cardinal principle of our Constitution that no one, howsoever highly placed and no authority however lofty, can claim to be the sole judge of its power under the Constitution or whether its actions are within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which *inter alia* requires that "the exercise of powers by

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A the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law". The power of the judicial review is an integral part of our constitutional system and without it, there will be no Government of Laws and the rule of law would become a teasing illusion and a promise of unreality. If there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial re-
B view and it is unquestionably a part of the basic structure of the Constitution. However, effective alternative institutional mechanism arrangements for judicial review cannot be made by Parliament. Judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground,
C even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on
D any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and effect the basic constructure of the Constitution. [237F-H, 288A-E]

E (4) Clause (5) of Article 368 of the Constitution is unconstitutional and void. [289E-F]

After the decisions of *Kesavananda Bharati's* case and *Smt. Indira Gandhi's* case there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution and clause (5) could not remove the doubt which did not exist. What clause (5) really sought to do was to remove the limitation on the amend-
F ing power of Parliament and correct it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of the Parliament. [288G-H, 289A]

The Constitution has conferred only a limited amending power on Parliament, so that it cannot damage or destroy the basic structure of the Constitution and Parliament by exercise of that limited amending power convert that very power into an absolute and unlimited power. If it were permissible to
G Parliament to enlarge the limited amending power conferred upon it into an absolute power of amendment, then it was meaningless to place a limitation on the original power of amendment. Parliament having a limited power of amendment cannot get rid of the limitation of exercising that very power and convert it into an absolute power. Clause (5) of Article 368 which sought to remove the limitation on the amending power of Parliament by making it absolute, therefore, is outside the amending power of Parliament. However,
H clause (5) seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which is itself an essential feature of the Constitution and it is, therefore, violative of the basic structure. [289B-E]

Per contra :

(5) Section 4 of the Constitution (Forty-second Amendment) Act, 1976 making amendments in Article 31C and giving primacy to Directive Principles over Fundamental Rights, in case of conflict between them, does not damage or destroy the basic structure of the Constitution and is within the amending power of Parliament and therefore amended Article 31C is constitutional and valid. [342E-F]

(i) It is not correct to say that Fundamental Rights alone are based on Human Rights while Directive Principles fall in some category other than Human Rights. Fundamental Rights and Directive Principles cannot be fitted in two distinct and strictly defined categories. Broadly stated, Fundamental Rights represent civil and political rights, while Directive Principles embody social and economic rights. Both are clearly part of broad spectrum of human rights. Even, the universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10th December, 1948 contains not only rights protecting individual freedom (Articles 1 to 21) but also social and economic rights intended to ensure socio-economic justice to every one (Articles 22 to 29). The two other International Covenants adopted by the General Assembly for securing human rights, namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are also to the same effect. The socio-economic rights embodied in the Directive Principles are as much a part of human rights as the Fundamental Rights. Together, they are intended to carry out the objectives set out in the preamble of the Constitution and to establish an egalitarian social order informed with political, social and economic justice and ensuring dignity of the individual not only to a few privileged persons but to the entire people of the country including the have-nots and the handicapped, the lowliest and the lost. [320C-H]

Kesavananda Bharati v. *State of Kerala*, [1973] Supp. SCR, referred to.

(ii) Although Fundamental Rights and Directive Principles appear in the Constitution as distinct entities, there was no such demarcation made between them during the period prior to the framing of the Constitution. From the point of view of importance and significance, no distinction was drawn between justiciable and non-justiciable rights by the Fathers of the Constitution and both were treated as forming part of the rubric of Fundamental Rights, the only difference being that whereas the Fundamental Rights were enforceable in Courts of Law, the Directive Principles of social policy were not to be enforceable. [321A-B, 322C-D]

(iii) To limit the potential of Fundamental Rights on the ground that they are merely negative obligations requiring the State to abstain as distinct from taking positive action is impermissible. [323D-C]

No doubt, it is said that the Fundamental Rights deal with negative obligations of the State not to encroach on individual freedom, while the Directive Principles impose positive obligations on the State to take certain kind of actions. Though the latter part may be true that the Directive Principles require positive action to be taken by the State, it is not wholly correct that the Fundamental Rights impose only negative obligations on the State. There are a few Fundamental Rights which have also a positive content, with the result that new dimensions of the Fundamental Rights are being opened up by the Supreme Court and the entire jurisprudence of Fundamental Rights is in a

A stage of resurgent evaluation. Moreover, there are three Articles, namely, Article 15(2), Article 17 and Article 23 within the category of Fundamental Rights which are designed to protect the individual against the action of other private citizens and seem to impose positive obligations on the State to ensure this protection to the individual. [322 F-H, 323 A-B].

Hussainara Khatoon v. *State of Bihar,* [1979] 3 SCR 160; *Madhav Hayawadanrao Hoskot* v. *State of Maharashtra,* [1979] 1 SCR 192 and *Sunil Batra etc.* v. *Delhi Administration & Ors. etc.,* [1979] 1 SCR 392, followed.

(iv) The only distinguishing feature between Fundamental Rights and Directive Principles of State Policy is that whereas the former are made enforceable in a Court of Law the latter are not. They are not justiciable because the social and economic rights and other matters dealt with in the Directive Principles are by their very nature incapable of judicial enforcement and moreover, the implementation of many of those rights would depend on the state of economic development in the country, the availability of necessary finances and the government's assessment of priority of objectives and values. But merely because the Directive Principles are non-justiciable, it does not follow that they are in any way subservient or inferior to the Fundamental Rights. [323 B-C, E-F].

(v) The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the socio-economic revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. The Fundamental Rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to the common man and to create socio-economic conditions in which there can be social and economic justice to everyone, is the theme of the Directive Principles. It is the Directive Principles which nourish the roots of a democracy, provide strength and vigour to it and attempt to make it a real participatory democracy which does not remain merely a political democracy but also becomes a social and economic democracy with Fundamental Rights available to all irrespective of their power, position or wealth. The dynamic provisions of the Directive Principles fertilise the static provisions of the Fundamental Rights. The object of the Fundamental Rights is to protect individual liberty, but individual liberty cannot be considered in isolation from the socio-economic structure in which it is to operate. There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. There cannot be any individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system. Their individual liberty would come in conflict with the liberty of the socially and economically more powerful class and in the process get mutilated or destroyed. The real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few which is in conflict with the liberty of the many. The Directive Principles, therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the

country. Thus, the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people, who do not have even the bare necessities of life and who are living below the poverty level. [323F-G, 324C-H, 325A-B]. A

(vi) Article 37 of the Constitution is an Article of crucial importance unlike the Irish Constitution which provided the inspiration for introducing Directive Principles in our Constitution. Article 37 says that the *Directive Principles shall not be enforceable* by any court, makes the Directive Principles *fundamental in the governance of the* country and enacts that *it shall be the duty of the State* to apply the Directive Principles in making laws. The changes made by the framers of the Constitution are vital and they have the effect of bringing about a total transformation or metamorphosis of this provision, fundamentally altering the significance and efficacy. The Directive Principles are not excluded from the cognizance of the court, as under the Irish Constitution; they are merely made non-enforceable by a court of law. Merely because the Directive Principles are not enforceable in a court of law, it does not mean that they are of subordinate importance to any part of the Constitution or that they cannot create obligations or duties binding on the State. The crucial test which has to be applied is whether the Directive Principles impose any obligations or duties on the State, if they do, the State would be bound by a constitutional mandate to carry out such obligations or duties, even though no corresponding right is created in any one which can be enforced in a court of law. On this question Article 37 is emphatic and make the point in no uncertain terms. There could not have been more explicit language used by the Constitution makers to make the Directive Principles binding on the State and there can be no doubt that the State is under a constitutional obligation to carry out this mandate contained in Article 37. In fact, non-compliance with the Directive Principles would be unconstitutional on the part of the State and it would not only constitute a breach of faith with the people who imposed this constitutional obligation on the State but it would also render a vital part of the Constitution meaningless and futile. For the purpose of the Directive Principles, the "State" has the same meaning as given to it under Article 13 for the purpose of the Fundamental Rights. This would mean that the same State which is injuncted from taking any action in infringement of the Fundamental Rights is told in no uncertain terms that it must regard the Directive Principles as fundamental in the governance of the country and is positively mandated to apply them in making laws. This gives rise to a paradoxical situation and its implications are far reaching. The State is on the one hand, prohibited by the constitutional injunction in Article 13 from making any law or taking any executive action which would infringe any Fundamental Right and at the same time it is directed by the constitutional mandate in Article 37 to apply the Directive Principles in the governance of the country and to make laws for giving effect to the Directive Principles. Both are constitutional obligations of the State. When the State makes a law for giving effect to a Directive Principle, it is carrying out a constitutional obligation under Article 37 and if it were to be said that the State cannot make such a law because it comes into conflict with a Fundamental Right, it can only be on the basis that Fundamental Rights stand on a higher pedestal and have precedence over Directive Principles. But it is not correct to say that under B C D E F G H

A our constitutional scheme Fundamental Rights are superior to Directive Principles or that Directive Principles must yield to Fundamental Rights. Both are in fact equally fundamental and the courts have, therefore, tried to harmonise them by importing the Directive Principles in the construction of the Fundamental Rights. For the purpose of determining the reasonableness of the restriction imposed on Fundamental Rights the court may legitimately take into account the Directive Principles and where executive action is taken or B legislation enacted for the purpose of giving effect to a Directive Principle, the restriction imposed by it on a Fundamental Right may be presumed to be reasonable. [325C, E-H, 326A-D, 327H, 328A-H, 329A-B].

State of Bihar v. *Kameshwar Singh*, [1952] SCR 889; *Pathumma* v. *State of Kerala*, [1978] 2 SCR 537; *M/s. Kasturi Lal Lakshmi Reddy etc.* v. *The State of Jammu & Kashmir & Anr.*, [1980] 3 SCR p. 1338, applied.

C *State of Madras* v. *Champkam Dorairajan*, [1951] SCR 529, dissented from.

In Re Kerala Education Bill, [1959] SCR 995, Referred to.

(vii) If a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a Fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving effect to a Directive Principle in furtherance of the constitutional goal of social and economic justice it may D conflict with a formalistic and doctrinaire view of equality before the law, but it would almost always conform to the principle of equality before the law in its total magnitude and dimension, because the equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice. The dynamic principle E of egalitarianism fertilises the concept of social and economic justice; it is one of its essential elements and there can be no real social and economic justice where there is a breach of the egalitarian principle. If, therefore, there is a law enacted by the legislature which is really and genuinely for giving effect to a Directive Principle with a view to promoting social and economic justice, such law does not violate the principle of egalitarianism and is in accord with the principle of equality before the law as understood not in its strict and F formalistic sense, but in its dynamic and activist magnitude. In the circumstances, the Court would not be unjustified in making the presumption that a law enacted really and genuinely for giving effect to a Directive Principle in furtherance of the cause of social and economic justice, would not infringe any Fundamental Right under Article 14 or 19. This being the correct interpretation of the constitutional provisions, the amended Article 31C does no more than codify the existing position under the constitutional scheme by G providing immunity to a law enacted really and genuinely for giving effect to a Directive Principle, so that needlessly futile and time-consuming controversy whether such law contravenes Article 14 or 19 is eliminated. The amended Article 31C cannot in the circumstances be regarded as violative of the basic structure of the Constitution. [329F-H, 330A-F].

(viia) A law enacted really and genuinely for giving effect to a Directive H Principle, in discharge of the constitutional obligation laid down upon the State under Article 37, would not be invalid, because it infringes a fundamental right. If the Court takes the view that it is invalid, it would be placing Fundamental Rights above Directive Principles, a position not supported at all by

the history of their enactment as also by the constitutional scheme. The two constitutional obligations, one in regard to Fundamental Rights and the other in regard to Directive Principles, are of equal strength and merit and there is no reason why, in case of conflict, the former should be given precedence over the latter. Whether or not a particular mandate of the Constitution is justiciable has no bearing at all on its importance and significance and justiciability by itself can never be a ground for placing one constitutional mandate on a higher pedestal than the other. The effect of giving greater weightage to the constitutional mandate in regard to Fundamental Rights would be to relegate the Directive Principles to a secondary position and emasculate the constitutional command that the Directive Principles shall be *fundamental* in the governance of the country and it shall be the duty of the State to apply them in making laws. It would amount to refusal to give effect to the words "fundamental in the governance of the country" and a constitutional command which has been declared by the Constitution to be *fundamental* would be rendered non-fundamental. The result would be that a positive mandate of the Constitution commanding the State to make a law would be defeated by a negative constitutional obligation not to encroach upon a Fundamental Right and the law made by the legislature pursuant to a positive constitutional command would be delegitimised and declared unconstitutional. This plainly would be contrary to the constitutional scheme because the Constitution does not accord a higher place to the constitutional obligation in regard to Fundamenal Rights over the constitutional obligation in regard to Directive Principles and does not say that the implementation of the Directive Principles shall only be within the permissible limits laid down in the Chapter on Fundamental Rights. [330A, 331A-F].

Karimbil Kunhikoman v. *State of Kerala*, [1962] 1 SCR 319 (supra) referred to.

(viii) It is not correct to say that consequent to the amendment of Article 31C the Constitution is now made to stand 'on its head and not on its legs.' Prior to the amendments, Fundamental Rights had a superior or a higher position in the constitutional scheme than Directive Principles and there is accordingly no question at all of any subversion of the constitutional structure by the amendment. There can be no doubt that the intention of the Constitution makers was that the Fundamental Rights should operate within the socio-economic structure or a wider continuum envisaged by the Directive Principle, for then only would the Fundamental Rights become exerciseable by all and a proper balance and harmony between Fundamental Rights and Directive Principles secured. The Constitution makers, therefore, never contemplated that a conflict would arise between the constitutional obligation in regard to Fundamental Rights and the constitutional mandate in regard to Directive Principles. But if a conflict does arise between these two constitutional mandates of equal fundamental character, since the Constitution did not provide any answer and perhaps for the reason that such a situation was not anticipated, the problem had to be solved by Parliament and some *modus operandi* had to be evolved in order to eliminate the possibility of conflict howsoever remote it might be. [331G-H, 332A-D].

Parliament took the view that the constitutional obligation in regard to Directive Principles should have precedence over the constitutional obligation in regard to the Fundamental Rights in Articles 14 and 19, because Fundamental Rights though precious and valuable for maintaining the democratic way of life, have absolutely no meaning for the poor, down trodden and economically

A backward classes of people who unfortunately constitute the bulk of the people of India and the only way in which Fundamental Rights can be made meaningful for them is by implementing the Directive Principles, for the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and every one, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development B and exercise the Fundamental Rights. Parliament, therefore, amended Article 31C with a view to providing that in case of conflict Directive Principles shall have precedence over the Fundamental Rights in Articles 14 and 19 and the latter shall yield place to the former. The positive constitutional command to make laws for giving effect to the Directive Principles shall prevail over the negative constitutional obligation not to encroach on the Fundamental Rights embodied in Articles 14 and 19. [333C-F].

C Parliament made the amendment in Article 31C because it realised that "if the State fails to create conditions in which the fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish" and "in order, therefore, to preserve their freedom, the privileged few must part with a portion of it." Therefore, it cannot at all be said that the basic structure of the Constitution is affected when D for evolving a *modus vivandi* for resolving a possible remote conflict between two constitutional mandates of equally fundamental character, Parliament decides by way of amendment of Article 31C that in case of such conflict the constitutional mandate in regard to Directive Principles shall prevail over the constitutional mandate in regard to the Fundamental Rights under Articles 14 and 19. The amendment in Article 31C far from damaging the basic structure of the Constitution strengthens and re-enforces it by giving fundamental importance to the rights of the members of the community as against the rights of E a few individuals and furthering the objective of the Constitution to build an egalitarian social order where there will be social and economic justice for all, every one including the low visibility areas of humanity in the country will be able to exercise Fundamental Rights and the dignity of the individual and the worth of the human person which are cherished values will not remain merely the exclusive privileges of a few but become a living reality for the F many. [334H, 335A-D].

(ix) The principle of egalitarianism is an essential element of social and economic justice and, therefore, where a law is enacted for giving effect to a Directive Principle with a view to promoting social and economic justice, it would not run counter to the egalitarian principle and would not therefore be violative of the basic structure, even if it infringes equality before the law in its narrow and formalistic sense. No law which is really and genuinely for G giving effect to a Directive Principle can be inconsistent with the egalitarian principle and therefore the protection granted to it under the amended Article 31C against violation of Article 14 cannot have the effect of damaging the basic structure. Therefore, there is no violation of the basic structure involved in the amendment of Article 31C. In fact, one it is accepted that the unamended Article 31C was constitutionally valid, it could only be on the basis that it did not damage or destroy the basic structure of the Constitution, it cannot be H said that the amended Article 31C is violative of the basic structure. If the exclusion of the Fundamental Rights embodied in Articles 14 and 19 could be legitimately made for giving effect to the Directive Principles set out in clauses (b) and (c) of Article 39 without affecting the basic structure, these

Fundamental Rights cannot be excluded for giving effect to the other Directive Principles. If the constitutional obligation in regard to the Directive Principles set out in clauses (b) and (c) of Article 39 could be given precedence over the constitutional obligation in regard to the Fundamental Rights under Articles 14 and 19, there is no reason in principles why such precedence cannot be given to the constitutional obligation in regard to the other Directive Principles which stand on the same footing. It would be incongruous to hold the amended Article 31C invalid when the unamended Article 31C has been held to be valid by the majority decision in *Kesavananda Bharati's* and by the order, in *Waman Rao's* case, dated 9th May, 1980. [335E-H, 336A-C].

(x) It is clear from the language of the amended Article 31C that the law which is protected from challenge under Articles 14 and 19 is law giving effect to the policy of the State towards securing or any of the Directive Principles. Whenever, therefore, any protection is claimed for a law under the amended Article 31C, it is necessary for the Court to examine whether the law has been enacted for giving effect to the policy of the State towards securing any one or more of the Directive Principles and it is only if the court is so satisfied as a result of judicial scrutiny that the court would accord the protection of the amended Article 31C to such law. Now it is undoubtedly true that the words used in the amended Article are "law giving effect to the policy of the State" but the policy of the State which is contemplated there is the policy towards securing one or more of the Directive Principles. It is the constitutional obligation of the State to secure the Directive Principles and that is the policy which the State is required to adopt and when a law is enacted in pursuance of this policy of implementing the Directive Principles and it seeks to give effect to a Directive Principle, it would both from the point of grammar and language, be correct to say that it is made for giving effect to the policy of the State towards securing such Directive Principle. The words "law giving effect to the policy of the State" are not so wide but in the context and collocation in which they occur, they are intended to refer only to a law enacted for the purpose of implementing or giving effect to one or more of the Directive Principles. [337A-F].

(xi) The Court before which protection for a particular law is claimed under the amended Article 31C would, therefore, have to examine whether such law is enacted for giving effect to a Directive Principle, for genuinely it would have the protection of the amended Article 31C. A claim that a particular law is enacted for giving effect to Directive Principles put forward by the State would have no meaning or value; it is the court which would have to determine the question. Again it is not enough that there may be some connection between a provision of the law and a Directive Principle. The connection has to be between the law and the Directive Principle and it must be a real and substantial connection. To determine whether a law satisfies this test, the court would have to examine the pith and substance, the true nature and character of the law as also its design and the subject matter dealt with by it together with its object and scope. If on such examination, the court finds that the *dominant object* of the law is to give effect to the Directive Principle, it would accord protection to the law under the amended Article 31C. But if the court finds that the law though passed seemingly for giving effect to a Directive Principle, is, in pith and substance, one for accomplishing an unauthorised purpose—unauthorised in the sense of not being covered by any Directive Principle—such law would not have the protection of the amended Article 31C. The amended Article 31C does not give protection to

A a law which has merely some remote or tenuous connection with a Directive Principle. What is necessary is that there must be a real and substantial connection and the dominant object of the law must be to give effect to the Directive Principle, and that is a matter which the court would have to decide before any claim for protection under the amended Article 31C can be allowed. [337F-H, 338A-B, F-G].

The words used in the amended Article 31C are : "law giving effect to B the policy of the State towards securing all or any of the principles laid down in Part IV" and these words on a plain natural construction do not include all the provisions of law but only those which give effect to the Directive Principle. Therefore, it is not every provision of a statute which has been enacted with the dominant object of giving effect to a Directive Principle that is entitled to protection but only those provisions of the statute which are basically and essentially necessary for giving effect to the Directive Principles C are protected under the amended Article 31C. If there are any other provisions in the statute which do not fall within this category, they would not be entitled to protection and their validity would have to be judged by reference to Articles 14 and 19. Where, therefore, protection is claimed in respect of a statute under the amended Article 31C, the court would have first to determine whether there is real and substantial connection between the law and a Directive Principle and the predominant object of the law is to give effect to D such Directive Principle and if the answer to this question is in the affirmative, the court would then have to consider which are the provisions of the law basically and essentially necessary for giving effect to the Directive Principle and give protection of the amended Article 31C only to those provisions. The question whether any particular provision of the law is basically and essentially necessary for giving effect to the Directive Principle, would depend, to a large extent, on how closely and integrally such provision is connected with the E implementation of the Directive Principle. If the court finds that a particular provision is subsidiary or incidental or not essentially and integrally connected with the implementation of the Directive Principle or is of such a nature that though seemingly a part of the general design of the main provisions of the statute, the dominant object is to achieve an unauthorised purpose, it would not enjoy the protection of amended Article 31C and would be liable to be struck down as invalid if it violates Article 14 or 19. [338-G-H, 339A, D-H, F 340A-D].

Akadasi Padhan v. *State of Orissa,* [1963] 2 Supp. SCR 691; *Rashbihari Panda etc.* v. *State of Orissa,* [1969] 3 SCR 374; *M/s. Vrailal Manilal & Co. & Ors.* v. *State of Madhya Pradesh & Ors.,* [1970] 1 SCR 400 and *R. C. Cooper* v. *Union of India,* [1970] 3 SCR 530, followed.

(xii) If the Court finds that even in a statute enacted for giving effect to a Directive Principle, there is a provision which is not essentially and integrally connected with the implementation of the Directive Principle or the G dominant object of which is to achieve an unauthorised purpose it would be outside the protection of the amended Article 31C and would have to meet the challenge of Articles 14 and 19. [340F-H].

(xiii) Articles 39 to 51 contain Directive Principles referring to certain specific objectives and in order that a law should be for giving effect to one of those Directive Principles, there would be a real and substantial connection H between the law and the specific objective set out in such Directive Principle. Obviously, the objectives set out in these Directive Principles being specific and limited, every law made by a legislature in the country cannot possibly have a real and substantial connection with one or the other of these specific

objectives. It is only a limited number of laws which would have a real and substantial connection with one or the other of the specific objectives contained in these Directive Principles and any and every law would not come within this category. [341A-C]. A

(xiv) Article 38 is a general article which stresses the obligation of the State to establish a social order in which justice—social, economic and political—shall inform all the institutions of national life. It no doubt talks of the duty of the State to promote the welfare of the people and there can be no doubt that standing by itself this might cover a fairly wide area but the objective set out in the Article is not merely promotion of the welfare of the people, but there is a further requirement that the welfare of the people is to be promoted by the State, not in any manner it likes, not according to its whim and fancy, but for securing and protecting a particular type of social order and that social order should be such as would ensure social, economic and political justice for all. Social, economic and political justice is the objective set out in the Directive Principle in Article 38 and it is this objective which is made fundamental in the governance of the country and which the State is laid under an obligation to realise. This Directive Principle forms the base on which the entire structure of the Directive Principles is reared and social, economic and political justice is the signature tune of the other Directive Principles. The Directive Principles set out in the subsequent Articles following upon Article 38 merely particularise and set out facets and aspects of the ideal of social, economic and political justice articulated in Article 38. [341C-G]. B C D

(xv) The concept of social and economic justice may not be very easy of definition but its broad contours are to be found in some of the provisions of the Fundamental Rights and in the Directive Principles and whenever a question arises whether a legislation is for giving effect to social and economic justice, it is with reference to these provisions that the question would have to be determined. There is nothing so vague or indefinite about the concept of social or economic justice that almost any kind of legislation could be justified under it. Moreover, where a claim for protection is made in respect of a legislation on the ground that it is enacted for giving effect to a Directive Principle, the Directive Principle to which it is claimed to be related would not ordinarily be the general Directive Principle set out in Article 38, but could be one of the specific Directive Principles set out in the succeeding Articles because these latter particularise the concept of social and economic justice referred to in Article 38. Therefore, it is not correct to say that if the amendment in Article 31C were held valid, it would have the effect of protecting every possible legislation under the sun and that would in effect and substance wipe out Articles 14 and 19 from the Constitution. This is a tall and extreme argument, not justified in the provisions of the Constitution. [341H, 342A-D]. E F G

HELD *further* (concurring with the majority) :

6. Clause (a) of Article 31A is constitutionally valid even on the application of the basic structure test. [290D].

Where any law is enacted for giving effect to a Directive Principle with the view to furthering the constitutional goal of social and economic justice, there would be no violation of the basic structure, even if it infringes *formal* equality before the law under Article 14 or any fundamental right under Article 19. Here, clause (a) of Article 31A protects a law of agrarian reform which is clearly in the context of the socio-economic conditions prevailing in H

A India, a basic requirement of social and economic justice and is covered by the Directive Principles set out in clause (b) and (c) of Article 39 and it cannot be regarded as violating the basic structure of the Constitution. On the contrary, agrarian reforms leading to social and economic justice to the rural population is an objective which strengthens the basic structure of the Constitution. [290B-D].

B Even on the basis of the doctrine of *stare decisis* the whole of Article 31A is constitutionally valid. The view that Article 31A is constitutionally valid has been taken in atleast three decisions of the Supreme Court, namely, *Shankri Prasad's* case, *Sajjan Singh's* case and *Golaknath's* case and it has held the field for over 28 years and on the faith of its correctness millions of acres of agricultural land have changed hands and now agrarian relations have come into being transferring the entire rural economy. Even though the constitutional C validity of Article 31A was not tested in these decisions by reference to the basic structure doctrine, the court would not be justified in allowing the earlier decisions to be reconsidered and the question of constitutional validity of Article 31A re-opened. These decisions have given a quietus to the constitutional challenge against the validity of Article 31A and this quietus should not now be allowed to be disturbed. [290E, 292D, 294G-H, 295A].

D *Shankri Prasad* v. *Union of India*, [1962] 2 SCR 89; *Sajjan Singh* v. *State of Rajasthan*, [1965] 1 SCR 933; *I.C. Golaknath* v. *Union of India*. [1967] 2 SCR 762; *Ambika Prasad Mishra* v. *State of U.P. and Ors.*, [1980] 3 SCR p. 1159, followed.

It is no doubt true that the Supreme Court has power to review its earlier decisions or even depart from them and the doctrine of *stare decisis* cannot be permitted to perpetuate erroneous decisions of the court to the detri- E ment of the general welfare of the public. Certainty and continuity are essential ingredients of rule of law. Certainty and applicability of law would be considerably eroded and suffer a serious set back if the highest court in the land were ready to overrule the views expressed by it in earlier decisions even though that view has held the field for a number of years. It is obvious that when constitutional problems are brought before the Supreme Court for its decision, complex and difficult questions are bound to arise and since the F decision of many of such questions may depend upon choice between competing values, two views may be possible depending upon the value judgment or the choice of values made by the individual judge. Therefore, if one view has been taken by the court after mature deliberation the fact that another Bench is inclined to take another view would not justify the court in reconsidering the earlier decision and overrule it. The law laid down by the Supreme Court is binding on all the courts in the country and numerous ques- G tions all over the country are decided in accordance with the view taken by the Supreme Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the decision given by the Supreme Court. It would create uncertainty, unstability and confusion if the law propounded by the Supreme Court on the face of which numerous cases have been decided and many transactions have taken place is held to be not the correct law after a number of years. The doctrine of H *stare decisis* is evolved from the maxim *"stare decisis et non quita movere"* meaning "adhere to the decision and not unsettle things which are established" and it is a useful doctrine intended to bring about certainty and uniformity in the law. But the doctrine of *stare decisis* cannot be regarded as a rigid

and inevitable doctrine which must be applied at the cost of justice. There may be cases where it may be necessary to rid the doctrine of its petrifying rigidity. The court may in an appropriate case overrule a previous decision taken by it, but that should be done only for substantial and compelling reasons. The power of review must be exercised with due care and caution and only for advancing the public well-being and not merely because it may appear that the previous decision was based on an erroneous view of the law. It is only where the perpetuation of the earlier decision would be productive of mischief or inconvenience or would have the effect of deflecting the nation from the course which has been set by the Constitution-makers or "where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake or the basic direction of the nation itself is in peril of a shake up", that the court would be justified in reconsidering its earlier decision and departing from it. It is fundamental that the nation's Constitution should not be kept in constant uncertainty by judicial review every now and then, because otherwise it would paralyse by perennial suspense all legislative and administrative action on vital issues. The court should not indulge in judicial stabilisation of State action and a view which has been accepted for a long period of time in a series of decisions and on the faith of which millions of people have acted and a large number of transactions have been effected should not be disturbed. [292G-H, 293A-H, 294A-D].

Ambika Prasad Mishra v. *State of U.P. and Anr.*, [1980] 3 SCR p. 1159, followed.

(7) Article 31B was conceived together with Article 31A as part of the same design adopted to give protection to legislation providing for acquisition of an estate or extinguishment or modification of any rights in an estate. [295E-F].

The Ninth Schedule of Article 31B was not intended to include laws other than those covered by Article 31A. Articles 31A and 31B were thus intended to serve the same purpose of protecting the legislation falling within a certain category. It was a double barelled protection which was intended to be provided to this category of legislation, since it was designed to carry out agrarian reform which was so essential for bringing about a revolution in the socio-economic structure of the country. [295F, H, 296A].

Since all the earlier constitutional amendments were held valid on the basis of unlimited amending power of Parliament recognised in *Shankri Prasad's* case and *Sajjan Singh's* case and were accepted as valid in *Golakhnath's* case and the Twenty Ninth Amendment Act was also held valid in *Kesavananda Bharati's* case, though not on the application of the basic structure test and these constitutional amendments have been recognised as valid over a number of years and moreover, the statutes intended to be protected by them are all falling within Article 31A with the possible exception of only four Acts, it would not be justified in re-opening the question of validity of these constitutional amendments and hence these amendments are valid. [297F-H].

But all constitutional amendments made after the decision in *Kesavananda Bharati's* case would have to be decided by reference to the basic structure doctrine, for Parliament would then have no excuse for saying that it did not known the limitation on its amending power. Now out of the statutes which are or may in future be included in the Ninth Schedule by subsequent constitutional amendments, if there are any which fall within a category covered

A by Article 31A or 31C, they would be protected from challenge under Articles 14 and 19 and it would not be necessary to consider whether their inclusion in the Ninth Schedule is constitutionally valid, except in those rare cases where protection may be claimed for them against violation of any other fundamental rights. This question would primarily arise only in regard to statutes not covered by Article 31A or 31C and in case of such statutes, the Court would have to consider whether the constitutional amendments including B such statutes in the Ninth Schedule violate the basic structure of the Constitution in granting them immunity from challenge of the fundamental rights. It is possible that in a given case even an abridgement of a fundamental right may involve violation of the basic structure. It would all depend on the nature of the nature of the fundamental right, the extent and depth of the infringement, the purpose for which the infringement is made and its impact on the basic values of the Constitution. For example, right to life and C personal liberty enshrined in Article 21, stands on an altogether different footing from other fundamental rights. If this fundamental right is violated by any legislation, it may be difficult to sustain a constitutional amendment which seeks to protect such legislation against challenge under Article 21. So also where a legislation which has nothing to do with agrarian reform or any Directive Principles infringes the equality clause contained in Article 14 and such legislation is sought to be protected by a constitutional amendment by D including it in the Ninth Schedule, it may be possible to contend that such constitutional amendment is violative of the egalitarian principle which forms part of the basic structure. However, other situations may arise where infraction of a fundamental right by a statute, is sought to be constitutionally protected might effect the basic structure of the Constitution. In every case, therefore, where a constitutional amendment includes a statute or statutes in the Ninth Schedule, its constitutional validity would have to be considered by E reference to the basic structured doctrine and such constitutional amendment would be liable to be declared invalid to the extent to which it damages or destroys the basic structure of the Constitution by according protection against violation of any particular fundamental right. [297H, 298C-H, 299A-B].

(8) Even on principle, the first part of the unamended Article 31C is F constitutionally valid. In view of the fact that the first part of the unamended Article 31C was held to be constitutionally valid by the majority decision (7:6) in *Kesavananda Bharati's* case, the question of its constitutional validity cannot be again reopened. It is true, that the *ratio decidendi of Keshavananda Bharati's* case was that the amending power of Parliament is limited and Parliament cannot in exercise of the power of amendment alter the basic structure of the Constitution and the validity of every constitutional amendment has, there- G fore, to be judged by applying the test whether or not it alters the basic structure of the Constitution and this test was not applied by the six learned Judges, though their conclusion regarding constitutionality of the first part of the unamended Article 31C is valid. Irrespective of the reasons which weighed with each one of the Judges who upheld the validity of the first part of the unamended Article 31C, the reasons for reaching the said conclusion would certainly have a bearing on the determination of the *ratio decidendi* of the case H and the *ratio decidendi* would certainly be important for the decision of future cases where the validity of the first part of the unamended Article 31C is concerned, it was in so many terms determined by the majority decision in *Keshavananda Bharati's* case, and that decision binds. [300E-H, 301A-D, 302C]

What the first part of the unamended Article 31C does is merely to abridge the fundamental rights in Articles 14 and 19 by excluding the applicability to legislation giving effect to the policy towards securing the principles specified in clauses (b) and (c) of Article 39. The first part of the unamended Article 31C is basically of the same genre as Article 31A with only this difference that whereas Article 31A protects laws relating to certain subjects, the first part of the unamended Article 31C deals with laws having certain objectives. There is no qualitative difference between Article 31A and the first part of the unamended Article 31C in so far as the exclusion of Articles 14 and 19 is concerned. The fact that the provisions to the first part of the unamended Article 31C are more comprehensive and have greater width compared to those of Article 31A does not make any difference in principle. If Article 31A is constitutionally valid, the first part of the unamended Article cannot be held to be unconstitutional. The first part of the unamended Article 31C, in fact, stands on a more secure footing because it accords protection against infraction of Articles 14 and 19 to legislation enacted for giving effect to the Directive Principles set out in clauses (b) and (c) of Article 39. The legislature in enacting such legislation acts upon the constitutional mandate contained in Article 37 according to which the Directive Principles are fundamental in the governance of the country and it is the duty of the State to apply those principles in making laws. It is for the purpose of giving effect to the Directive Principles set out in clauses (b) and (c) of Article 39 in discharge of the constitutional obligation laid upon the State under Article 37 that fundamental rights in Articles 14 and 19 are allowed to be abridged. A constitutional amendment, therefore, making such a provision cannot be condemned as violative of the basic structure of the Constitution. [301E-H, 302A-C].

(9) Even if the Constitution (Fortieth Amendment) Act, 1976 is unconstitutional and void and the Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act, 1972 (Act II of 1975), the Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act, 1975, (Act XLVII of 1945) and the Maharashtra Lands (Ceiling on Holdings) Amendment Act, 1975, (Act II of 1976) have not been validly included in the Ninth Schedule so as to earn the protection of Article 31B, they are still saved from invalidation by Article 31A and so far as the Constitution (Forty Second Amendment) Act, 1976, is concerned, it is outside the constituent power of Parliament in so far as it seeks to include clauses (4) and (5) in Article 368. [302C-D, G-H].

It is clear on a plain natural construction of its language that under the proviso to Article 83(2) the duration of the Lok Sabha could be extended only during the operation of a proclamation of emergency and if, therefore, no proclamation of emergency was in operation at the relevant time, the House of People (Extension of Duration) Act, 1976 would be outside the competence of Parliament under the proviso to Article 83(2). Again the language of Article 352 (1) makes it clear that the President can take action under this clause only if he satisfies that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance. The satisfaction of the President "that a grave emergency exists whereby the security of India..... is threatened whether by war or external aggression or internal disturbance" is a condition precedent which must be fulfilled before the President can issue a proclamation under Article 352 clause (1). When this condition precedent is satisfied, the President may exercise the power under clause (1) of Article 352 and issue a proclamation of emergency. The constitutional implications of a

declaration of emergency under Article 352 clause (1) are vast and they are provided in Articles 83(2), 250, 353, 358 and 359. The emergency being an exceptional situation arising out of a national crisis certain wide and sweeping powers have been conferred on the Central Government and Parliament with a view to combat the situation and restore normal conditions. One such power is that given by Article 83(2) which provides that while a proclamation of emergency is in operation, Parliament may by law extend its duration for a period not exceeding one year at a time. Further several drastic consequences ensue upon the making of a declaration of emergency. The issue of a proclamation of emergency makes serious inroads into the principle of federalism and emasculates the operation and efficacy of the Fundamental Rights. The power of declaring an emergency is, therefore, a power fraught with grave consequences and it has the effect of disturbing the entire power structure under the Constitution. But it is a necessary power given to the Central Government with a view to arming it adequately to meet an exceptional situation arising out of threat to the security of the country on account of war or external aggression or internal disturbance or imminent danger of any such calamity. It is, therefore, a power which has to be exercised with the greatest care and caution and utmost responsibility. [303A-B—306E-H, 307E-G].

(10) There is no bar to the judicial review of the validity of a proclamation of emergency issued by the President under Article 352 clause (1). [308B-C].

If a question brought before the court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since the court is concerned only with adjudication of legal rights and liabilities. Merely because a question has a political colour the court cannot fold its hands in despair and declare "judicial hands off". So long as the question is whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so. The court is the ultimate interpreter of the Constitution and when there is manifestly unauthorised exercise of power under the Constitution, it is the duty of the court to intervene. In fact, to this Court as much as to other Branches of Government is committed the conservation and furtherance of constitutional values. The Court's task is to identify those values in the constitutional plan and to work them into life in the cases that reach the Court. "Tact and wise restraint ought to temper any power but courage and the acceptance of responsibility have their place too". The Court cannot and should not shirk this responsibility because it has sworn the oath of allegiance to the Constitution and is also accountable to the people of this country. It would not, therefore, be right for the Court to decline to examine whether in a given case there is any constitutional violation involved in the President issuing a proclamation of emergency under clause (1) of Article 352. [308D, F, 309A-C].

The constitutional jurisdiction of this Court does not extend further than saying whether the limits on the power conferred by the Constitution on the President have been observed or there is transgression of such limits. The only limit on the power of the President under Article 352 clause (1) is that the President should be satisfied that a grave emergency exists whereby the security of India or any part thereof is threatened whether by war or external aggression or internal disturbance. The satisfaction of the President is a subjective one and cannot be decided by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to

which he is to be satisfied is of such a nature that its decision must necessarily be left to the Executive Branch of Government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether there is a situation of grave emergency by reason of the security of the country being threatened by war or external aggression or internal disturbance. It would largely be a political judgment based on assessment of diverse and varied factors, fast changing situations, potential consequences and a host of other imponderables. It cannot, therefore, by its very nature, be a fit subject matter for adjudication by judicial methods and materials and hence it is left to the subjective satisfaction of the Central Government which is best in a position to decide it. The Court cannot go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based. That would be a dangerous exercise for the Court, both because it is not a fit instrument for determining a question of this kind and also because the Court would thereby usurp the function of the executive and in doing so enter the "political thicket" which it must avoid if it is to retain its legitimacy with the people. But, if the satisfaction is *mala fide* or is based on wholly extraneous and irrelevant ground, the Court would have jurisdiction to examine it because in that case there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Article 352 clause (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. [309C-H, 310A-B].

It is true that by reason of clause (5)(a) of Article 352, the satisfaction of the President is made final and conclusive and cannot be assailed on any ground, but, the power of judicial review is a part of the basic structure of the Constitution and hence this provision debarring judicial review would be open to attack on the ground that it is unconstitutional and void as damaging or destroying the basic structure. This attack against constitutionality can, however, be averted by reading the provision to mean that the immunity from challenge granted by it does not apply where the challenge is not that the satisfaction is improper or unjustified but that there is no satisfaction at all. In such a case it is not the satisfaction arrived at by the President which is challenged but the existence of the satisfaction itself. Where, therefore, the satisfaction is absurd or perverse or *mala fide* or based on a wholly extraneous and irrelevant ground it would be no satisfaction at all and it would be liable to be challenged before a court notwithstanding clause (5)(a) of Article 352. No doubt, in most cases it would be difficult if not impossible to challenge the exercise of power under Article 352 clause (1) even on this limited ground because the facts and circumstances on which the satisfaction is based would not be known, but where it is possible the existence of the satisfaction can always be challenged on the ground that it is *mala fide* or based on a wholly extraneous or irrelevant ground. [310C-F].

Gomallion v. *Lightfoot*, [1960] 364 US 339; *Baker* v. *Carr*, [1962] 369 US 186, quoted with approval.

State of Rajasthan v. *Union of India*, [1977] 3 SCC 592, followed.

Gulam Sarwant v. *Union of India*, [1967] 2 SCR 271; *Bhutnath Mato* v. *State of West Bengal*, [1974] 1 SCC 645, explained.

A (11) On a plain natural interpretation of the language of sub-clauses (a) to (c) of clause (2) that so long as the proclamation of emergency is not revoked by another proclamation under sub-clause (2)(a), it would continue to be in operation irrespective of change of circumstances. [312C].

Lakhan Pal v. *Union of India*, [1966] Supp. SCR 209, applied.

It is true that the power to revoke a proclamation of emergency is vested B only in the Central Government and it is possible that the Central Government may abuse this power by refusing to revoke a Proclamation of Emergency even though the circumstances justifying the issue of Proclamation have ceased to exist and thus prolong baselessly the state of emergency obliterating the Fundamental Rights and this may encourage totalitarian trend. But the primary and real safeguard of the citizen against such abuse of power lies in "the good sense of the people and in the system of representative and C responsible Government" which is provided in the Constitution. Additionally, it may be possible for the citizen in a given case to move the court for issuing a writ of mandamus for revoking Proclamation of Emergency, if he is able to show by placing clear and cogent material before the court that there is no justification at all for the continuance of the Proclamation of Emergency. But this would be a very heavy onus because it would be entirely for the Executive Government to be satisfied whether a situation has arisen D where the Proclamation of Emergency can be revoked. There would be so many facts and circumstances and such diverse considerations to be taken into account by the Executive Government before it can be satisfied that there is no longer any grave Emergency whereby the security of India is threatened by war or external aggression or internal disturbance. This is not a matter which is fit for judicial determination and the court would not interfere with the satisfaction of the Executive Government in this regard E unless it is clear on the material on record that there is absolutely no justification for the continuance of the Proclamation of Emergency and the Proclamation is being continued *mala fide* or for a collateral purpose. The court may in such a case, if satisfied, beyond doubt grant a writ of mandamus directing the Central Government to revoke the Proclamation of Emergency. But until that is done the Proclamation of Emergency would continue in operation and it cannot be said that though not revoked by another Proclama- F tion it has still ceased to be in force. In the present case, it was common ground that the first Proclamation of Emergency issued on 3rd December, 1971 was not revoked by another Proclamation under clause (2)(a) of Article 352 until 21st March, 1977 and hence at the material time when the House of People (Extension of Duration) Act, 1976, was passed the first Proclamation of Emergency was in operation. [312F-H, 313A-E].

G If the first Proclamation of Emergency was in operation at the relevant time it would be sufficient compliance with the requirement of the proviso to clause (2) of Article 83 and it would be unnecessary to consider whether the second Proclamation of Emergency was validly issued by the President. [313E-F].

(12) The House of People (Extension of Duration) Act, 1976, was enacted under the proviso to clause (2) of Article 83 for the purpose of extending H the duration of the Lok Sabha and it was a condition precedent to the exercise of this power by Parliament that there should be a Proclamation of Emergency in operation at the date when the Act was enacted. The words "while the Proclamation of Emergency issued on the 3rd day of December, 1971

and on the 25th day of June, 1975 are both in operation" were introduced merely by way of recital of the satisfaction of the condition precedent for justifying the exercise of the power under the proviso to clause (2) of Article 83 and they were not intended to lay down a condition for the operation of section 2 of the Act. Section 2 clearly and in so many terms extended the duration of the Lok Sabha for a period of one year and extension was not made dependent on both the Proclamations of Emergency being in operation at the date of the enactment of the Act. It was for a definite period of one year that the extension was effected and it was not co-extensive with the operation of both the Proclamations of Emergency. The extension for a period of one year was made once for all by the enactment of section 2 and the reference to both the Proclamations of Emergency being in operation was merely for the purpose of indicating that both the Proclamations of Emergency being in operation, Parliament had competence to make the extension. It was, therefore, not at all necessary for the efficacy of the extension that both the Proclamations of Emergency should be in operation at the date of enactment of the Act. Even if one Proclamation of Emergency was in operation at the material date it would be sufficient to attract the power of Parliament under the proviso to Article 83 clause (2) to enact the Act extending the duration of the Lok Sabha. No doubt, Parliament proceeded on the assumption that both the Proclamations of Emergency were in force at the relevant date and they invested Parliament with power to enact the Act, but even if this legislative assumption were unfounded it would not make any difference to the validity of the exercise of the power so long as there was one Proclamation of Emergency in operation which authorised Parliament to extend the duration of the Lok Sabha under the proviso to clause (2) of Article 83. It is true that the proviso to section 2 enacted that if both or either of the Proclamations of Emergency cease or ceases to operate before the expiration of the extended period of one year, the Lok Sabha shall continue until six months after the ceaser of operation of the said Proclamations or Proclamation, not going beyond the period of one year, but the opening part of this proviso can have application only in relation to a Proclamation of Emergency which was in operation at the date of enactment of the Act. If such a Proclamation of Emergency which was in operation at the material date ceased to operate before the expiration of the extended period of one year, then the term of the Lok Sabha would not immediately come to an end, but it would continue for a further period of six months but not so to exceed the extended period of one year. This provision obviously could have no application in relation to the second Proclamation of Emergency if it was void when issued. In such a case, the second Proclamation not being valid at all at the date of issue would not be in operation at all and it would not cease to operate after the date of enactment of the Act. The proviso would in that event have to be read as relating only to the first Proclamation of Emergency, and since the Proclamation of Emergency continued until it was revoked on 21st March, 1977, the duration of the Lok Sabha was validly extended for a period of one year from 18th March, 1976 and hence there was a validly constituted Lok Sabha on the dates when the Constitution (Fortieth Amendment) Act, 1976 and the Constitution (Forty-second Amendment) Act, 1976, were passed by Parliament. (314G-H, 315A-H, 316A-C].

(In view of the settled practice of the Supreme Court not to say any more than is necessary to get a safe resting place for the decision, His Lordship did not consider whether the second Proclamation of Emergency was validly issued.)

A ORIGINAL JURISDICTION : WRIT PETITION NOS. 356—361 OF 1977.
(Under Article 32 of the Constitution)

N. A. Palkhiwala, J. B. Dadachanji, Ravinder Narain, O. C. Mathur, H. P. Raina, S. Swarup, K. J. John, Talat Ansari, Mrs. A. K. Verma, S. Thakora, Shri Narain, Robinson, F. S. Nariman,
B *A. N. Haksar, J. S. Sinha* and *Manzal Kumar* for the Petitioners.

L. N. Sinha, Att. Genl., *K. K. Venugopal,* Addl. Sol. Genl., *R. N. Sachthey, Grish Chandra, S. Markendaya, Miss A. Subhashini* and *P. P. Singh for* RR. 1 & 4.

T.V.S. Narasimhachari, M. S. Ganesh and *Kailash Vasudeva* for
C RR 2 & 3.

L. N. Sinha, Att. Genl., *Miss A. Subhashini* for Attorney General of India.

M. N. Shroff for the Advocates General for State of Maharashtra

D *M. M. Abdul Khader* and *K. R. Nambiar* for the Advocates General for Kerala State.

N. Nettar for the Advocates General for State of Karnataka State.

Pranat Kumar Chatterjee, G. S. Chatterjee and *P. K. Chatterjee*
E for State of West Bengal.

B. M. Patnaik Advt. Genl. and *R. K. Mehta* for State of Orissa.

S. L. Garg, Adv. Genl and *S. K. Gambhir* for State of Madhya Pradesh.

R. K. Rastogi, Adv. Genl, *Badridas Sharma* and *Aruneshwar*
F *Gupta* for State of Rajasthan.

M. V. Goswami and *O. P. Rana* for State of U.P.

P. H. Parekh for the interveners, M/s. Domestic Cast Pvt. Ltd. and Ors. Gocul Gas Pvt. Ltd. and Ors. and Parel Investment Pvt. Ltd.
G and Ors.

M. N. Phadke and *N. M. Ghatate* for the Applicant interveners M/s. Waman Rao and Ors.

R. K. Garg and *V. J. Francis* for the Applicant Intervener Shyam Narain Tewari.

H *Chinta Subba Rao* Applicant intervener in person.

M. C. Bhandare and *M. N. Shroff* applicant intervener for State of Maharashtra.

Capt. Virendra Kumar applicant intervener in person. A

N. S. Grewal, B. P. Maheshwari and *Suresh Sethi* for G. S. Grewal applicant intervener.

H. K. Puri for the intervener M/s Shree Sitaram Sugar Co. Ltd.

The following Judgments were delivered : B

CHANDRACHUD, C. J.—In *Kesavananda Bharati*(1) this Court held by a majority that though by Article 368 Parliament is given the power to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure. The question for consideration in this C group of petitions under article 32 is whether sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 transgress that limitation on the amending power.

Petitioner No. 1 which is a limited company owned a textile undertaking called Minerva Mills situated in the State of Karnataka. D This undertaking was nationalised and taken over by the Central Government under the provisions of the Sick Textile Undertakings (Nationalisation) Act, 1974. Petitioners 2 to 6 are shareholders of Petitioner No. 1, some of whom are also unsecured creditors and some secured creditors.

E

Respondent 1 is the Union of India. Respondent 2 is the National Textile Corporation Limited in which the textile undertaking of Minerva Mills comes to be vested under section 3(2) of the Nationalisation Act of 1974. Respondent 3 is a subsidiary of the 2nd respondent.

F

On August 20, 1970, the Central Government appointed a Committee under section 15 of the Industries (Development and Regulation) Act, 1951 to make a full and complete investigation of the affairs of the Minerva Mills Ltd., as it was of the opinion that there had been or was likely to be substantial fall in the volume of production. The said Committee submitted its report to the Central G Government in January 1971, on the basis of which the Central Government passed an order dated October 19, 1971 under section 18A of the Act of 1951, authorising Respondent 2 to take over the management of the Minerva Mills Ltd. on the ground that its affairs were being managed in a manner highly detrimental to H public interest.

(1) [1973] Suppl. SCR 1.

A By these petitions, the petitioners challenge the constitutional validity of certain provisions of the Sick Textile Undertakings (Nationalisation) Act and of the order dated October 19, 1971. We are not concerned with the merits of that challenge at this stage. The petitioners further challenge the constitutionality of the Constitution (39th Amendment) Act which inserted the impugned Nationalisation B Act as Entry 105 in the 9th Schedule to the Constitution. That raises a question regarding the validity of article 31B of the Constitution with which we propose to deal in another batch of petitions. Finally, the petitioners challenge the constitutionality of sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 C and it is this contention alone with which we propose to deal in these petitions.

The challenge to the validity of section 4 and 55 of the 42nd Amendment rests on the ratio of the majority judgment in *Kesavananda Bharati* (Supra). The several opinions rendered in D that case have been discussed and analysed threadbare in texts and judgments too numerous to mention. All the same, we cannot avoid making a brief resume of the majority judgments since the petitioners must stand or fall by them. Those judgments, on the point now in issue, were delivered by Sikri, CJ., Shelat and Grover JJ., Hegde and Mukherjea JJ., Jaganmohan Reddy J. and Khanna J.

E

Sikri, CJ., held that the fundamental importance of the freedom of the individual has to be preserved for all times to come and that it could not be amended out of existence. According to the learned Chief Justice, fundamental rights conferred by Part III of the Constitution cannot be abrogated, though a reasonable abridgement F of those rights could be effected in public interest. There is a limitation on the power of amendment by necessary implication which was apparent from a reading of the preamble and therefore, according to the learned Chief Justice, the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours G of the preamble, made in order to carry out the basic objectives of the Constitution. Accordingly, every provision of the Constitution was open to amendment provided the basic foundation or structure of the Constitution was not damaged or destroyed.

Shelat and Grover, JJ. held that the preamble to the Constitution H contains the clue to the fundamentals of the Constitution. According to the learned Judges, Parts III and IV of the Constitution which respectively embody the fundamental rights and the directive principles

have to be balanced and harmonised. This balance and harmony between two integral parts of the Constitution forms a basic element of the Constitution which cannot be altered. The word 'amendment' occurring in Article 368 must therefore be construed in such a manner as to preserve the power of the Parliament to amend the Constitution, but not so as to result in damaging or destroying the structure and identity of the Constitution. There was thus an implied limitation on the amending power which precluded Parliament from abrogating or changing the identity of the Constitution or any of its basic features.

Hegde and Mukherjea, JJ. held that the Constitution of India which is essentially a social rather than a political document, is founded on a social philosophy and as such has two main features: basic and circumstantial. The basic constituent remained constant, the circumstantial was subject to change. According to the learned Judges, the broad contours of the basic elements and the fundamental features of the Constitution are delineated in the preamble and the Parliament has no power to abrogate or emasculate those basic elements or fundamental features. The building of a welfare State, the learned Judges said, is the ultimate goal of every Government but that does not mean that in order to build a welfare state, human freedoms have to suffer a total destruction. Applying these tests, the learned Judges invalidated Article 31C even in its unamended form.

Jaganmohan Reddy, J., held that the word 'amendment' was used in the sense of permitting a change, in contra-distinction to destruction, which the repeal or abrogation brings about. Therefore, the width of the power of amendment could not be enlarged by amending the amending power itself. The learned Judge held that the essential elements of the basic structure of the Constitution are reflected in its preamble and that some of the important features of the Constitution are justice, freedom of expression and equality of status and opportunity. The word 'amendment' could not possibly embrace the right to abrogate the pivotal features and the fundamental freedoms and therefore, that part of the basic structure could not be damaged or destroyed. According to the learned Judge, the provisions of Article 31C, as they stood then, conferring power on Parliament and the State Legislatures to enact laws for giving effect to the principles specified in clauses (b) and (c) of Article 39, altogether abrogated the right given by Article 14 and were for that reason unconstitutional. In conclusion, the learned Judge held that though the power of amendment was wide, it did not comprehend the power to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements of the basic structure of the Constitution or to

A destroy the identity of the Constitution. Subject to these limitations, Parliament had the right to amend any and every provision of the Constitution.

Khanna, J. broadly agreed with the aforesaid views of the six learned Judges and held that the word 'amendment' postulated that B the Constitution must survive without loss of its identity, which meant that the basic structure or framework of the Constitution must survive any amendment of the Constitution. According to the learned Judge, although it was permissible to the Parliament, in exercise of its amending power, to effect changes so as to meet the requirements of changing conditions it was not permissible to touch the foundation C or to alter the basic institutional pattern. Therefore, the words "amendment of the Constitution", in spite of the width of their sweep and in spite of their amplitude, could not have the effect of empowering the Parliament to destroy or abrogate the basic structure or framework of the Constitution.

D The summary of the various judgments in *Kesavananda Bharati* (Supra) was signed by nine out of the thirteen Judges. Paragraph 2 of the summary reads to say that according to the majority, "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution". Whether or not the summary is a legitimate part of the judgment, or is *per incuriam* for the scholarly E reasons cited by authors, it is undeniable that it correctly reflects the majority view.

The question which we have to determine on the basis of the majority view in *Kesavananda Bharati* (Supra) is whether the amendments introduced by sections 4 and 55 of the Constitution F (42nd Amendment) Act, 1976 damage the basic structure of the Constitution by destroying any of its basic features or essential elements.

Section 4 of the 42nd Amendment, which was brought into force with effect from January 3, 1977 amended Article 31C of the G Constitution by substituting the words and figures "all or any of the principles laid down in Part IV" for the words and figures "the principles specified in clause (b) or clause (c) of Article 39". Article 31C, as amended by the 42nd Amendment Act reads thus :

H "31C. Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes

away or abridges any of the rights conferred by article 14, article 19 or article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy :

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

Section 55 of the Constitution (Forty-second Amendment) Act, 1976, which was also brought into force with effect from January 3, 1977 inserted sub-sections (4) and (5) in Article 368 which read thus :

"(4) No amendment of this Constitution (including the povisions 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".

We will first take up for consideration the comparatively easier question as regards the validity of the amendments made by section 55 of the 42nd Amendment. It introduces two new clauses in Article 368, namely, clauses 4 and 5. Clause 5 speaks for itself and is self-explanatory. Its avowed purpose is the "removal of doubts" but after the decision of this Court in *Kesavananda Bharati* (Supra), there could be no doubt as regards the existence of limitations on the Parliament's power to amend the Constitution. In the context of the constitutional history of Article 368, the true object of the declaration contained in Article 368 is the removal of those limitations. Clause 5 confers upon the Parliament a vast and undefined power to amend the Constitution, even so as to distort it out of recognition. The theme song of the majority decision in *Kesavananda Bharati* (Supra) is : 'Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity'. The majority conceded to the Parliament the right to make alterations in the Constitution so long as they are within its basic framework. And

A what fears can that judgment raise or misgivings generate if it only means this and no more : The Preamble assures to the people of India a polity whose basic structure is described therein as a Sovereign Democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. B Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself : Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding C sense of 'Fraternity assuring the dignity of the individual and the unity of the Nation'. The newly introduced clause 5 of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever". No constituent power can conceivably go higher than the sky-high power conferred by clause (5), for it even D empowers the Parliament to "repeal the provisions of this Constitution", that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship E and by abjuring commitment to the magnificient ideal of a society of equals. The power to destroy is not a power to amend.

Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. F Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the G exercise of that power convert the limited power into an unlimited one.

The very 42nd Amendment which introduced clauses 4 and 5 in Article 368 made amendments to the preamble to which no exception can be taken. Those amendments are not only within the framework of the Constitution but they give vitality to its H philosophy; they afford strength and succor to its foundation. By the aforesaid amendments, what was originally described as a 'Sovereign Democratic Republic' became a "Sovereign Socialist Secular

Democratic Republic" and the resolution to promote the 'unity of the Nation' was elevated into a promise to promote the "unity and integrity of the Nation". These amendments furnish the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution. They offer promise of more; they do not scuttle a precious heritage.

In *Smt. Indira Nehru Gandhi* v. *Raj Narain*,(1) Khanna, J. struck down clause 4 of Article 329A of the Constitution which abolished the forum for adjucating upon a dispute relating to the validity of an election, on the ground that the particular Article which was introduced by a constitutional amendment violated the principle of free and fair elections which is an essential postulate of democracy and which, in its turn, is a part of the basic structure of the Constitution. Mathew, J. also struck down the Article on the ground that it damaged the essential feature of democracy. One of us, Chandrachud, J. reached the same conclusion by holding that the provisions of the Article were an outright negation of the right of equality conferred by Article 14, a right which, more than any other, is a basic postulate of the Constitution. Thus whereas amendments made to the preamble by the 42nd Amendment itself afford an illustration of the scope of the amending power, the case last referred to affords an illustration of the limitations on the amending power.

Since, for the reasons above mentioned, clause 5 of Article 368 transgresses the limitations on the amending power, it must be held to be unconstitutional.

The newly introduced clause 4 of Article 368 must suffer the same fate as clause 5 because the two clauses are inter-linked. Clause 5 purports to remove all limitations on the amending power while clause 4 deprives the courts of their power to call in question any amendment of the Constitution. Our Constitution is founded on a nice balance of power among the three wings of the State, namely the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Article 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law

(1) [1976] 2 S.C.R. 341.

A shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power.

If a constitutional amendment cannot be pronounced to be invalid even if it destroys the basic structure of the Constitution, a law passed
B in pursuance of such an amendment will be beyond the pale of judicial review because it will receive the protection of the constitutional amendment which the courts will be powerless to strike down. Article 13 of the Constitution will then become a dead letter because even ordinary laws will escape the scrutiny of the courts on the ground that they are passed on the strength of a constitutional amendment which
C is not open to challenge.

Clause 4 of Article 368 is in one sense an appendage of Clause 5, though we do not like to describe it as a logical consequence of Clause 5. If it be true, as stated in clause 5, that the Parliament has unlimited power to amend the Constitution, courts can have no
D jurisdiction to strike down any constitutional amendment as unconstitutional. Clause 4, therefore, says nothing more or less than what clause 5 postulates. If clause 5 is beyond the amending power of the Parliament, clause 4 must be equally beyond that power and must be struck down as such.

E The next question which we have to consider is whether the amendment made by section 4 of the 42nd Amendment to Article 31C of the Constitution is valid. Mr. Palkhiwala did not challenge the validity of the unamended Article 31C, and indeed that could not be done. The unamended Article 31C forms the subject matter of a
F separate proceeding and we have indicated therein that it is constitutionally valid to the extent to which it was upheld in *Kesavananda Bharati* (Supra).

By the amendment introduced by section 4 of the 42nd Amendment, provision is made in Article 31C saying that no law giving effect
G to the policy of the State towards securing "all or any of the principles laid down in Part IV" shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. It is manifest that the scope of laws which fall within Article 31C has been expanded vastly by the amendment. Whereas under the original
H Article 31C, the challenge was excluded only in respect of laws giving effect to the policy of the State towards securing "the principles specified in clause (b) or clause (c) of Article 39" under the amendment,

all laws giving effect to the policy of the State towards securing "all or any of the principles laid down in Part IV" are saved from a constitutional challenge under Articles 14 and 19. (The reference to Article 31 was deleted by the 44th Amendment as a consequence of the abolition of the right to property as a fundamental right). The question for consideration in the light of this position is whether section 4 of the 42nd Amendment has brought about a result which is basically and fundamentally different from the one arising under the unamended article. If the amendment does not bring about any such result, its validity shall have to be upheld for the same reasons for which the validity of the unamended article was upheld.

The argument of Mr. Palkhivala, who appears on behalf of the petitioners, runs thus : The amendment introduced by section 4 of the 42nd Amendment destroys the harmony between Parts III and IV of the Constitution by making the fundamental rights conferred by Part III subservient to the directive principles of State Policy set out in Part IV of the Constitution. The Constitution-makers did not contemplate a disharmony or imbalance between the fundamental rights and the directive principles and indeed they were both meant to supplement each other. The basic structure of the Constitution rests on the foundation that while the directive principles are the mandatory ends of government, those ends can be achieved only through permissible means which are set out in Part III of the Constitution. In other words, the mandatory ends set out in Part IV can be achieved not through totalitarian methods but only through those which are consistent with the fundamental rights conferred by Part III. If Article 31C as amended by the 42nd Amendment is allowed to stand, it will confer an unrestricted licence on the legislature and the executive, both at the Centre and in the States, to destroy democracy and establish an authoritarian regime. All legislative action and every governmental action purports to be related, directly or indirectly, to some directive principle of State policy. The protection of the amended article will therefore be available to every legislative action under the sun. Article 31C abrogates the right to equality guaranteed by Article 14, which is the very foundation of a republican form of government and is by itself a basic feature of the Constitution.

The learned counsel further argues that it is impossible to envisage that a destruction of the fundamental freedoms guaranteed by Part III is necessary for achieving the object of some of the directive principles like equal justice and free legal aid, organising village panchayats, providing living wages for workers and just and humane conditions of work, free and compulsory education for

A children, organisation of agriculture and animal husbandry, and protection of environment and wild life. What the Constituent Assembly had rejected by creating a harmonious balance between Parts III and IV is brought back by the 42nd Amendment.

Finally, it is urged that the Constitution had made provision B for the suspension of the right to enforce fundamental rights when an emergency is proclaimed by the President. Under the basic scheme of the Constitution, fundamental rights were to lose their supremacy only during the period that the proclamation of emergency is in operation. Section 4 of the 42nd Amendment has robbed the fundamental rights of their supremacy and made them subordinate to C the directive principles of State policy as if there were a permanent emergency in operation. While Article 359 suspends the enforcement of fundamental rights during the Emergency, Article 31C virtually abrogates them in normal times. Thus, apart from destroying one of the basic features of the Constitution, namely, the harmony between D Parts III and IV, section 4 of the 42nd Amendment denies to the people the blessings of a free democracy and lays the foundation for the creation of an authoritarian State.

These contentions were stoutly resisted by the learned Attorney General thus : Securing the implementation of directive principles E by the elimination of obstructive legal procedures cannot ever be said to destroy or damage the basic features of the Constitution. Further, laws made for securing the objectives of Part IV would necessarily be in public interest and will fall within Article 19(5) of the Constitution, in so far as clauses (d) and (e) of Article 19(1) are concerned. They would therefore be saved in any case. The history of the Constitution, F particularly the incorporation of Articles 31(4) and 31(6) and the various amendments made by Articles 31A, 31B and the unamended Article 31C, which were all upheld by this Court, establish the width of the amending power under Article 368. The impugned amendment therefore manifestly falls within the sweep of the amending power.

G The learned Attorney General further argues : A law which fulfils the directive of Article 38 is incapable of abrogating fundamental freedoms or of damaging the basic structure of the Constitution inasmuch as that structure itself is founded on the principle of justice, social, economic and political. Article 38, which contains a directive principle, provides that the State shall strive to promote the welfare H 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. A law which complies

with Article 38 cannot conceivably abrogate the fundamental freedoms except certain economic rights and that too, for the purpose of minimising inequalities. A law which will abrogate fundamental freedoms will either bring about social injustice or economic injustice or political injustice. It will thereby contravene Article 38 rather than falling within it and will for that reason be outside the protection of Article 31C. In any event, each and every violation of Article 14 or Article 19 does not damage the basic structure of the Constitution.

The learned Additional Solicitor General has submitted a carefully prepared chart of 11 decisions of this Court ranging from *Anwar Ali Sarkar*(1) to *Haji Kader Kutty*(2) in order to show the possible impact of amended Article 31C on cases where this Court had held provisions of certain statutes to be violative of Article 14. He urged on the basis of his tabulated analysis that there can be many cases which are not relatable to directive principles and will not therefore be saved by the amended article. Those cases are reported in *Anwar Ali Sarkar* (Supra), *Lachmandas Ahuja*,(3) *Habib Muhammad*,(4) *Moopil Nair*,(5) *Jialal*,(6) *Hazi Abdul Shakur*,(7) *Devi Das*,(8) *Osmania University*,(9) *New Manek Chowk*,(10) *Anandji Haridas*,(11) and *Haji Kader Kutty* (Supra). He has also submitted a chart of 13 cases involving laws relatable to directive principle in which the fundamental rights were abridged but not abrogated. Since abridgement of fundamental rights in public interest is permissible as it does not damage the basic structure, laws similar to those involved in the 13 cases will not have to seek the protection of the amended article. These illustrative cases are : *Ram Prasad Sahi*(12), *Rao Manohar Singhji*(13), *Kunhikaman*(14),

(1) [1952] SCR 284.
(2) [1969] 1 SCR 645.
(3) [1952] SCR 710.
(4) [1953] SCR 661.
(5) [1961] 3 SCR 77.
(6) [1963] 2 SCR 864.
(7) [1964] 8 SCR 217.
(8) [1967] 3 SCR 557.
(9) [1967] 2 SCR 211.
(10) [1967] 2 SCR 679.
(11) [1968] 1 SCR 661.
(12) [1958] SCR 1120.
(13) [1954] SCR 996.
(14) [1962] 1 SCR 319 (Supple.)

Orissa Cement(1), *Krishnaswami Naidu*(2), *Mukanchand*(3), *Nallaraja Reddy*(4), *Jallan Trading Co.*,(5), *Kamrup*(6), *Mizo District Council*(7), *Balammal*(8), *Rashbehari Pande*(9) and *R. C. Cooper*(10).

The argument of the learned Additional Solicitor General proceeds thus: For extracting the ratio of *Kesavananda Bharati* (Supra) one must proceed on the basis that there were as many cases as there were declarations sought for by the petitioners therein. The majority in regard to Article 368 is different from the majority in regard to the decision in respect of Article 31C. The binding ratio in regard to Article 368 as well as the ratio resulting in upholding the validity of the first part of the Article 31C will both sustain the validity of section 4 of the 42nd Amendment. In regard to fundamental rights, the ratio of the judgments of 12 out of 13 Judges, i.e., all excepting Jaganmohan Reddy J., will empower amendment of each one of the articles in part III, so long as there is no total abrogation of the fundamental rights which constitute essential features of the basic structure of the Constitution. Abrogation of fundamental rights which do not constitute essential features of the basic structure or abridgement of fundamental rights which constitute such essential features is within the permissible limits of amendment. The unamended Article 31C having been upheld by the majority in *Kesavananda Bharati* both on the ground of *stare decisis* and on the ground of 'contemporaneous practical exposition', the amended Article 31C must be held to be valid, especially since it has not brought about a qualitative change in comparison with the provisions of the unamended article. A harmonious and orderly development of constitutional law would require that the phrases 'inconsistent with' or 'take away' which occur in Articles 31A, 31B and 31C should be read down to mean 'restrict' or 'abridge' and not 'abrogate'. If two constructions of those expressions were reasonably possible, the Court should accept that construction which would render the constitutional amendment valid.

(1) [1962] Supp. 3 SCR 837.
(2) [1964] 7 SCR 82.
(3) [1964] 6 SCR 903.
(4) [1967] 3 SCR 28.
(5) [1967] 1 SCR 15.
(6) [1968] 1 SCR 561.
(7) [1967] 1 SCR 1012.
(8) [1969] 1 SCR 90.
(9) [1969] 3 SCR 374.
(10) [1970] 3 SCR 530.

The learned counsel further argues: The directive principles, including the one contained in Article 38, do not cover the exercise of each and every legislative power relatable to the Seventh Schedule of the Constitution. Besides, the directive principles being themselves fundamental in the governance of the country, no amendment of the Constitution to achieve the ends specified in the directive principles can ever alter the basic structure of the Constitution. If the unamended Article 31C is valid in reference to laws relatable to Articles 39(b) and (c), no dichotomy can be made between laws relatable to those provisions on the one hand and laws relatable to other directive principles. A value judgment is not permissible to the Court in this area.

It is finally urged by the learned Additional Solicitor General that judicial review is not totally excluded by the amended Article 31C because it will still be open to the Court to consider :

(i) whether the impugned law has 'direct and reasonable nexus' with any of the directive principles;

(ii) whether the provisions encroaching on fundamental rights are integrally connected with and essential for effectuating the directive principles or are at least ancillary thereto;

(iii) whether the fundamental right encroached upon is an essential feature of the basic structure of the Constitution; and

(iv) if so, whether the encroachment, in effect, abrogates that fundamental right.

Besides these contentions Mr. R. K. Garg has filed a written brief on behalf of the Indian Federation of Working Journalists, opposing the contentions of Mr. Palkhivala. So have the learned Advocates General of the State of Karnataka and Uttar Pradesh. Mr. Aruneshwar Gupta has filed a brief on behalf of the State of Rajasthan supporting the submissions of Mr. Palkhivala. So has the State of Rajasthan. The Advocates-General of Maharashtra, Kerala, West Bengal and Orissa appeared through their respective advocates.

Both the Attorney General and the Additional Solicitor General have raised a preliminary objection to the consideration of the question raised by the petitioners as regards the validity of Sections 4 and 55 of the 42nd Amendment. It is contended by them that the issue formulated for consideration of the court; "whether the provisions of the Forty-Second Amendment of the Constitution which deprived the Fundamental Rights of their Supremacy and, inter alia, made them subordinate to the directive principles of State Policy are

A ultra vires the amending power of Parliament?" is too wide and academic. It is urged that since it is the settled practice of the court not to decide academic questions and since property rights claimed by the petitioners under Arts. 19(1)(f) and 31 do not survive after the 44th Amendment, the court should not entertain any argument on the points raised by the petitioners.

B In support of this submission reliance is placed by the learned counsel on the decisions of the American Supreme Court in *Commonwealth of Massachusetts* v. *Andrew W. Mellon*(1), *George Ashwander* v. *Tennesee Valley Authority*(2), and on *Weaver's Constitutional Law*, 1946 *Edition*(3) and *American Jurisprudence*(4). C Reliance is also placed on certain decisions of this court to which it is unnecessary to refer because the Attorney-General and the Additional Solicitor General are right that it is the settled practice of this Court not to decide academic questions. The American authorities on which the learned counsel rely take the view that the constitutionality of a statute will not be considered and determined D by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly or in the manner of an academic discussion. In other words, the courts do not anticipate constitutional issues so as to assume in advance that a certain law may be passed in pursuance of a certain constitutional amendment which may offend against the provisions of the Constitution. Similarly, E our Court has consistently taken the view that we will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. It is only when the rights of persons are directly involved that relief is granted by this Court.

But, we find it difficult to uphold the preliminary objection because, the question raised by the petitioners as regards F the constitutionality of sections 4 and 55 of the 42nd Amendment is not an academic or a hypothetical question. The 42nd Amendment is there for any one to see and by its sections 4 and 55 amendments have been made to Articles 31C and 368 of the Constitution. An order has been passed against the petitioners under section 18A of G the Industries (Development and Regulation) Act, 1951, by which the petitioners are aggrieved.

Besides there are two other relevant considerations which must be taken into account while dealing with the preliminary objection. There is no constitutional or statutory inhibition against the decision

(1) 67 Lawyers' Edition, 1078, 1084.

H (2) 80 Lawyers' Edition, 688, 711.

(3) Weaver's Constitutional Law, 1946 Edn. p. 68, 69.

(4) American Jurisprudence. 2d, Vol. 16, pp. 299-301.

of questions before they actually arise for consideration. In view of the importance of the question raised and in view of the fact that the question has been raised in many a petition, it is expedient in the interest of Justice to settle the true position. Secondly, what we are dealing with is not an ordinary law which may or may not be passed so that it could be said that our jurisdiction is being invoked on the hypothetical consideration that a law may be passed in future which will injure the rights of the petitioners. We are dealing with a constitutional amendment which has been brought into operation and which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes. We, therefore, overrule the preliminary objection and proceed to determine the point raised by the petitioners.

A B C

The main controversy in these petitions centres round the question whether the directive principles of State policy contained in Part IV can have primacy over the fundamental rights conferred by Part III of the Constitution. That is the heart of the matter. Every other consideration and all other contentions are in the nature of by-products of that central theme of the case. The competing claims of parts III and IV constitute the pivotal point of the case because, Article 31C as amended by section 4 of the 42nd Amendment provides in terms that a law giving effect to any directive principle cannot be challenged as void on the ground that it violates the rights conferred by Article 14 or Article 19. The 42nd Amendment by its section 4 thus subordinates the fundamental rights conferred by Articles 14 and 19 to the directive principles.

D E

The question of questions is whether in view of the majority decision in *Kesavananda Bharati* it is permissible to the Parliament to so amend the Constitution as to give a position of precedence to directive principles over the fundamental rights. The answer to this question must necessarily depend upon whether Articles 14 and 19 which must now give way to laws passed in order to effectuate the policy of the State towards securing all or any of the principles of Directive Policy are essential features of the basic structure of the Constitution. It is only if the rights conferred by these two articles are not a part of the basic structure of the Constitution that they can be allowed to be abrogated by a constitutional amendment. If they are a part of the basic structure they cannot be obliterated out of existence in relation to a category of laws described in Article 31C or, for the matter of that, in relation to laws of any description whatsoever, passed in order to achieve any object or policy whatsoever. This will serve to bring out the point that a total emasculation of the essential features of the Constitution is, by the ratio in *Kesavananda Bharati,* not permissible to the Parliament.

F G H

A There is no doubt that though the courts have always attached very great importance to the preservation of human liberties, no less importance has been attached to some of the Directive Principles of State Policy enunciated in Part IV. In the words of Granville Austin, (The Indian Constitution: Corner Stone of a Nation, p. 50) the Indian Constitution is first and foremost a social document and the majority B of its provisions are aimed at furthering the goals of social revolution by establishing the conditions necessary for its achievement. Therefore the importance of Directive Principles in the scheme of our Constitution cannot ever be over-emphasized. Those principles project the high ideal which the Constitution aims to achieve. In fact Directive Principles of State policy are fundamental in C the governance of the country and the Attorney General is right that there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realisation of his aspirations. The promise of a better to-morrow must be fulfilled to-day; day after to-morrow it runs the risk of being conveniently forgotten. Indeed so many tomorrows have D come and gone without a leaf turning that today there is a lurking danger that people will work out their destiny through the compelled cult of their own "dirty hands". Words bandied about in marbled halls say much but fail to achieve as much.

But there is another competing constitutional interest which E occupies an equally important place in that scheme. That interest is reflected in the provisions of Part III which confer fundamental rights some on citizens as Articles 15, 16 and 19 do and some on all persons alike as Articles 14, 20, 21 and 22 do. As Granville Austin says : "The core of the commitment to the social revolution lies in Parts III and IV..... These are the conscience of the F Constitution."

It is needless to cite decisions which have extolled and upheld the personal freedoms—their majesty, and in certain circumstances, their inviolability. It may however be profitable to see how the American Supreme Court, dealing with a broadly comparable G Constitution, has approached the claim for those freedoms.

In *Barbara Elfbrandt* v. *Imogene Russell*(1) the U. S. Supreme Court was considering the constitutionality of an Arizona Statute requiring State employees to take a loyalty oath. Justice Douglas, speaking for the majority, observed while striking down the provision H that : "Legitimate Legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can

(1) 16 L. Ed. 2d. 321, 326.

be more narrowly achieved'..... "The objectionable quality of..... overbreadth" depends upon the existence of a statute "susceptible of sweeping and improper application..... These freedoms are delicate and vulnerable as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions". A

In *United States* v. *Herbet Guest*(1), though the right to travel freely throughout the territory of the United States of America does not find an explicit mention in the American Constitution, it was held that the right to travel from one State to another occupied a position fundamental to the concept of the Federal Union and the reason why the right was not expressly mentioned in the American Constitution though it was mentioned in the Articles of Confideration, was that "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created". B C

This position was reiterated in *Winfield Dunn* v. *James F. Blumstein.*(2) It was held therein that freedom to travel throughout the United States was a basic right under the Constitution and that the right was an unconditional personal right whose exercise may not be conditioned. Therefore, any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, was unconstitutional. D

In *New York Times Company* v. *United States*(3) the United States Government sought an injunction against the publication, by the New York Times, of the classified study entitled "History of U. S. Decision-Making Process on Viet Nam Policy". It was held by a majority of six Judges that any system of prior restraints of expression comes to the United States Supreme Court bearing a heavy presumption against its constitutional validity, and a party who seeks to have such a restraint upheld thus carries a heavy burden of showing justification for the imposition of such a restraint. E F

In *National Association for the Advancement of Coloured People* v. *State of Alabama*(4), a unanimous court while dealing with an attempt to oust the National Association of Coloured People from the State of Alabama held : G

> "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may

(1) 16 L. Ed. 2d. 239, 249. H
(2) 31 L. Ed. 2d. 274, 276.
(3) 29 L. Ed. 2d. 822, 824.
(4) 2 L. Ed. 2d, 1488, 1499.

A inevitably follow from varied forms of governmental action".

In *Frank Palko* v. *State of Connecticut*(1), Justice Cardozo delivering the opinion of the Court in regard to the right to freedom of thought and speech observed :

> "Of that freedom one may say that it is the matrix, the
> B indispensable condition, of nearly every other form of freedom".

In *Jesse Cantwell* v. *State of Connecticut*(2), Justice Roberts who delivered the opinion of the Court observed:

> "In the realm of religious faith, and in that of political belief,
> C sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbour. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the
> D light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this
> E shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise
> F of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish".

In *Arthur Terminiello* v. *City of Chicago*(3), Justice Douglas delivering the majority opinion of the Court, while dealing with the
G importance of the right to free speech, observed :

> "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge* v. *Oregon*(4), it is only through free debate and free

(1) 82 L. Ed. 239, 293.

H (2) 84 Ld. Ed. 1213, 1221.

(3) 93 L. Ed. 1131, 1134.

(4) 299 US 353, 365, 81 L. ed. 278, 284, 57 S. Ct. 255.

exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programmes is therefore one of the chief distinctions that sets us apart from totalitarian regimes. A

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute (*Chaplinsky* v. *New Hampshire*), (1) is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges* v. *California*(2); *Craig* v. *Horney*(3). There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." B C D

The history of India's struggle for independence and the debates of the Constituent Assembly show how deeply our people value their personal liberties and how those liberties are regarded as an indispensable and integral part of our Constitution. It is significant that though Parts III and IV appear in the Constitution as two distinct fasciculus of articles, the leaders of our independence movement drew no distinction between the two kinds of State's obligations—negative and positive. "Both types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself(4)". The demand for inalienable rights traces its origin in India to the 19th Century and flowered into the formation of the Indian National Congress in 1885. Indians demanded equality with their British rulers on the theory that the rights of the subjects cannot in a democracy be inferior to those of the rulers. Out of that demand grew the plants of equality and free speech. Those and other basic rights found their expression in Article 16 of The Constitution of E F G

(1) 315 US pp. 571, 572; 86 L. ed. 1034, 1035; 62 S. Ct. 766.

(2) 314 US 252, 262, 86 L. ed. 192, 202, 62 S. Ct. 190, 159 ALR 1346.

(3) 331 US 367, 373, 91 L. ed. 1546, 1550, 67 S. Ct. 1249. H

(4) The Indian Constitution : Cornerstone of a Nation by Granville Austin, p. 52.

A India Bill, 1895. A series of Congress resolutions reiterated that demand between 1917 and 1919. The emergence of Mahatma Gandhi on the political scene gave to the freedom movement a new dimension : it ceased to be merely anti-British; it became a movement for the acquisition of rights of liberty for the Indian Community. Mrs. Besan't Commonwealth of India Bill, 1925 and
B the Madras Congress resolution of 1928 provided a striking continuity for that movement. The Motilal Nehru Committee appointed by the Madras Congress resolution said at pp. 89-90 :

> "It is obvious that our first care should be to have our Fundamental Rights guaranteed in a manner which will not
> C 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 among those who look upon each other with distrust and suspicion. We could not better secure
> D the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the Constitution."

India represents a mosaic of humanity consisting of diverse religious, linguistic and caste groups. The rationale behind the insistence on fundamental rights has not yet lost its relevance, alas or not. The
E Congress session of Karachi adopted in 1931 the Resolution on Fundamental Rights as well as on Economic and Social change. The Sapru Report of 1945 said that the fundamental rights should serve as a "standing warning" to all concerned that :

> "what the Constitution demands and expects is perfect
> F 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 the freedom of religion, worship, and the pursuit of the ordinary applications of life". (p. 260).

The Indian nation marched to freedom in this background. The Constituent Assembly resolved to enshrine the fundamental rights
G in the written text of the Constitution. The interlinked goals of personal liberty and economic freedom then came to be incorporated in two separate parts, nevertheless parts of an integral, indivisible scheme which was carefully and thoughtfully nursed over half a century. The seeds sown in the 19th Century saw their fruition in 1950 under the leadership of Jawaharlal Nehru and Dr. Ambedkar.
H To destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure.

Fundamental rights occupy a unique place in the lives of civilized societies and have been variously described in our Judgments as "transcendental", "inalienable" and "primordial". For us, it has been said in *Kesavananda Bharati* (p. 991), they constitute the ark of the Constitution.

The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep undertsanding of the scheme of the Indian Constitution. Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.

This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice—social, economic and political. We, therefore, put part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV. Therefore, the rights conferred by Part III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms. One of the faiths of our founding fathers was the purity of means. Indeed, under our law, even a dacoit who has committed a murder cannot be put to death

A in the exercise of right of self-defence after he has made good his escape. So great is the insistence of civilised laws on the purity of means. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that B destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of our Constitution.

It is in this light that the validity of the amended Article 31C has to be examined. Article 13(2) says that the State shall not make any law which takes away or abridges the rights conferred by Part III C and any law made in contravention of that clause shall to the extent of the contravention be void. Article 31C begins with a non-obstante clause by putting Article 13 out of harm's way. It provides for a certain consequence notwithstanding anything contained in Article 13. It then denudes Articles 14 and 19 of their functional utility by providing that the rights conferred by these Articles will be no barrier D against passing laws for giving effect to the principles laid down in Part IV. On any reasonable interpretation, there can be no doubt that by the amendment introduced by section 4 of the 42nd Amendment, Articles 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31C. The startling consequence which the amendment has produced is that even if a law is in total E defiance of the mandate of Article 13 read with Articles 14 and 19, its validity will not be open to question so long as its object is to secure a directive principle of State Policy. We are disposed to accept the submission of the learned Solicitor General, considering the two charts of cases submitted by him, that it is possible to conceive of laws which will not attract Article 31C since they may not bear direct F and reasonable nexus with the provisions of Part IV. But, that, in our opinion, is beside the point. A large majority of laws, the bulk of them, can at any rate be easily justified as having been passed for the purpose of giving effect to the policy of the State towards securing some principle or the other laid down in Part IV. In respect of all G such laws, which will cover an extensive gamut of the relevant legislative activity, the protection of Articles 14 and 19 will stand wholly withdrawn. It is then no answer to say, while determining whether the basic structure of the Constitution is altered, that at least some laws will fall outside the scope of Article 31C.

H We have to decide the matter before us not by metaphysical subtlety, nor as a matter of semantics, but by a broad and liberal approach. We must not miss the wood for the trees. A total

deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. An author, who writes exclusively on foreign matters, shall have been totally deprived of the right of free speech and expression if he is prohibited from writing on foreign matters. The fact therefore that some laws may fall outside the scope of Article 31C is no answer to the contention that the withdrawal of protection of Articles 14 and 19 from a large number of laws destroys the basic structure of the Constitution.

It was repeatedly impressed upon us, especially by the Attorney General, that Article 38 of the Constitution is the king-pin of the directive principles and no law passed in order to give effect to the principle contained therein can ever damage or destroy the basic structure of the Constitution. That Article provides that the State shall 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. We are unable to agree that all the Directive Principles of State Policy contained in Part IV eventually verge upon Article 38. Article 38 undoubtedly contains a broad guideline, but the other directive principles are not mere illustrations of the principle contained in Article 38. Secondly, if it be true that no law passed for the purpose of giving effect to the directive principle contained in Article 38 can damage or destroy the basic structure of the Constitution, what was the necessity, and more so the justification, for providing by a constitutional amendment that no law which is passed for giving effect to the policy of the State towards securing any principle laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges the rights conferred by Articles 14 and 19 ? The object and purpose of the amendment of Article 31C is really to save laws which cannot be saved under Article 19(2) to (6). Laws which fall under those provisions are in the nature of reasonable restrictions on the fundamental rights in public interest and therefore they abridge but do not abrogate the fundamental rights. It was in order to deal with laws which do not get the protection of Article 19(2) to (6) that Article 31C was amended to say that the provisions of Article 19, inter alia, cannot be invoked for voiding the laws of the description mentioned in Article 31C.

Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of a democracy. They are universally so regarded, as is evident from the universal Declaration of Human Rights. Many countries in the civilised world have parted with their sovereignty in the hope and belief

A that their citizens will enjoy human freedoms. And they preferred to be bound by the decisions and decrees of foreign tribunals on matters concerning human freedoms. If Articles 14 and 19 are put out of operation in regard to the bulk of laws which the legislatures are empowered to pass, Article 32 will be drained of its life-blood. Article 32(4) provides that the right guaranteed by Article 32 shall not be B suspended except as otherwise provided for by the Constitution. Section 4 of the 42nd Amendment found an easy way to circumvent Article 32(4) by withdrawing totally the protection of Articles 14 and 19 in respect of a large category of laws, so that there will be no violation to complain of in regard to which redress can be sought under Article 32. The power to take away the protection of Article C 14 is the power to discriminate without a valid basis for classification. By a long series of decisions this Court had held that Article 14 forbids class legislation but it does not forbid classification. The purpose of withdrawing the protection of Article 14, therefore, can only be to acquire the power to enact class legislation. Then again, regional D chauvinism will have a field day if Article 19(1)(d) is not available to the citizens. Already, there are disturbing trends on a part of the Indian horizon. Those trends will receive strength and encouragement if laws can be passed with immunity, preventing the citizens from exercising their right to move freely throughout the territory of India. The nature and quality of the amendment introduced by section 4 of E the 42nd Amendment is therefore such that it virtually tears away the heart of basic fundamental freedoms.

Article 31C speaks of laws giving effect to the policy of the "State". Article 12 which governs the interpretation of Article 31C provides that the word "State" in Part III includes the Government F and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Wide as the language of Article 31C is, the definition of the word "State" in Article 12 gives to Article 31C an operation of the widest amplitude. Even if a State Legislature passes a law for the purpose of giving G effect to the policy by a local authority towards securing a directive principle, the law will enjoy immunity from the provisions of Articles 14 and 19. The State Legislatures are thus given an almost unfettered discretion to deprive the people of their civil liberties.

The learned Attorney General argues that the State is under an H obligation to take steps for promoting the welfare of the people by bringing about a social order in which social, economic and political justice shall inform all the institutions of the national life. He says that the deprivation of some of the fundamental rights for the purpose

of achieving this goal cannot possibly amount to a destruction of the basic structure of the Constitution. We are unable to accept this contention. The principles enunciated in Part IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like those conferred by Articles 14 and 19. Those are the most elementary freedoms without which a free democracy is impossible and which must therefore be preserved at all costs. Besides, as observed by Brandies, J., the need to protect liberty is the greatest when Government's purposes are beneficent. If the discipline of Article 14 is withdrawn and if immunity from the operation of that article is conferred, not only on laws passed by the Parliament but on laws passed by the State Legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment.

The learned Attorney General and the learned Solicitor General strongly impressed upon us that Article 31C should be read down so as to save it from the challenge of unconstitutionality. It was urged that it would be legitimate to read into that Article the intendment that only such laws would be immunised from the challenge under Articles 14 and 19 as do not damage or destroy the basic structure of the Constitution. The principle of reading down the provisions of a law for the purpose of saving it from a constitutional challenge is well-known. But we find it impossible to accept the contention of the learned counsel in this behalf because, to do so will involve a gross distortion of the principle of reading down, depriving that doctrine of its only or true rationale when words of width are used inadvertently. The device of reading down is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment.

Mr. Palkhivala read out to us an extract from the speech of the then Law Minister who, while speaking on the amendment to Article 31C, said that the amendment was being introduced because the government did not want the "let and hindrance" of the fundamental rights. If the Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of

A that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature. We suppose that in the history of the constitutional law, no constitutional amendment has ever been read down to mean the exact opposite of what it says and intends. In fact, to accept the argument that we should read down Article 31C, so as to make it B conform to the ratio of the majority decision in *Kesavananda Bharati*, is to destroy the avowed purpose of Article 31C as indicated by the very heading "Saving of certain laws" under which Articles 31A, 31B and 31C are grouped. Since the amendment to Article 31C was unquestionably made with a view to empowering the legislatures to C pass laws of a particular description even if those laws violate the discipline of Articles 14 and 19, it seems to us impossible to hold that we should still save Article 31C from the challenge of unconstitutionality by reading into that Article words which destroy the rationale of that Article and an intendment which is plainly contrary to its proclaimed purpose.

D A part of the same argument was pressed upon us by the learned Additional Solicitor General who contended that it would still be open to the Courts under Article 31C to decide four questions: (1) Does the law secure any of the directive principles of the State policy? (ii) Is it necessary to encroach upon fundamental rights in order to E secure the object of the directive principles? (iii) what is the extent of such encroachment, if any? and (iv) Does that encroachment violate the basic structure of the Constitution?

This argument is open to the same criticism to which the argument of the learned Attorney General is open and which we have just disposed of. Reading the existence of an extensive judicial review F into Article 31C is really to permit the distortion of the very purpose of that article. It provides expressly that no law of a particular description shall be deemed to be void on the ground that it violates Article 14 or Article 19. It would be sheer adventurism of a most extraordinary nature to undertake the kind of judicial enquiry which, according to the learned Additional Solicitor General, the courts are G free to undertake.

We must also mention, what is perhaps not fully realised, that Article 31C speaks of laws giving effect to the "Policy of the State", "towards securing all or any of the principles laid down in Part IV." In the very nature of things it is difficult for a court to determine H whether a particular law gives effect to a particular policy. Whether a law is adequate enough to give effect to the policy of the State towards securing a directive principle is always a debatable question

and the courts cannot set aside the law as invalid merely because, in their opinion, the law is not adequate enough to give effect to a certain policy. In fact, though the clear intendment of Article 31C is to shut out all judicial review, the argument of the learned Additional Solicitor General calls for a doubly or trebly extensive judicial review than is even normally permissible to the courts. Be it be remembered that the power to enquire into the question whether there is a direct and reasonable nexus between the provisions of a law and a directive principle cannot confer upon the courts the power to sit in judgment over the policy itself of the State. At the highest, courts can, under Article 31C, satisfy themselves as to the identity of the law in the sense whether it bears direct and reasonable nexus with a directive principle. If the court is satisfied as to the existence of such nexus, the inevitable consequence provided for by Article 31C must follow. Indeed, if there is one topic on which all the 13 Judges in *Kesavananda Bharati* were agreed, it is this : that the only question open to judicial review under the unamended Article 31C was whether there is a direct and reasonable nexus between the impugned law and the provisions of Article 39(b) and (c). Reasonableness is evidently regarding the nexus and not regarding the law. It is therefore impossible to accept the contention that it is open to the courts to undertake the kind of enquiry suggested by the Additional Solicitor General. The attempt therefore to drape Article 31C into a democratic outfit under which an extensive judicial review would be permissible must fail.

We should have mentioned that a similar argument was advanced in regard to the amendment effected by section 55 of the 42nd Amendment to Article 368, by the addition of clauses (4) and (5) therein. It was urged that we should so construe the word "amendment" in clause (4) and the word "amend" in clause 5 as to comprehend only such amendments as do not destroy the basic structure of the Constitution. That argument provides a striking illustration of the limitations of the doctrine of reading down. The avowed purpose of clauses (4) and (5) of Article 368 is to confer power upon the Parliament to amend the Constitution without any "limitation whatever". Provisions of this nature cannot be saved by reading into them words and intendment of a diametrically opposite meaning and content.

The learned Attorney General then contends that Article 31C should be upheld for the same reasons for which Article 31A(1) was upheld. Article 31A (1) was considered as a contemporaneous practical exposition of the Constitution since it was inserted by the very First Amendment which was passed in 1951 by the same body of persons who were members of the Constituent Assembly. We can understand

A that Article 31A can be looked upon as a contemporaneous practical exposition of the intendment of the Constitution, but the same cannot be said of Article 31C. Besides, there is a significant qualitative difference between the two Articles. Article 31A, the validity of which has been recognised over the years excludes the challenge under Articles 14 and 19 in regard to a specified category of laws. If by a B constitutional amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the constitution may remain unimpaired. But if the protection of those articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a 'parchment in a glass case' to be viewed as C a matter of historical curiosity.

An attempt was made to equate the provisions of Article 31C with those of Article 31A in order to lend plausibility to the contention that since Article 31A was also upheld on the ground of *stare decisis* Article 31C can be upheld on the same ground. We see no merit D in this contention. In the first place, as we have indicated above, the five matters which are specified in Article 31A are of such quality, nature, content and character that at least a debate can reasonably arise whether abrogation of fundamental rights in respect of those matters will damage or destroy the basic structure of the Constitution. Article 31C does not deal with specific subjects. The directive principles E are couched in broad and general terms for the simple reason that they specify the goals to be achieved. Secondly, the principle of *stare decisis* cannot be treated as a fruitful source of perpetuating curtailment of human freedoms. No court has upheld the validity of Article 31A on the ground that it does not violate the basic structure of the Constitution. There is no decision on the validity of Article 31A F which can be looked upon as a measuring rod of the extent of the amending power. To hark back to Article 31A every time that a new constitutional amendment is challenged is the surest means of ensuring a drastic erosion of the fundamental rights conferred by Part III. Such a process will insidiously undermine the efficacy of the ratio of the majority judgment in *Kesavananda Bharati* regarding the inviolability G of the basic structure. That ratio requires that the validity of each new constitutional amendment must be judged on its own merits.

Nor indeed are we impressed by a limb of the same argument that when Article 31A was upheld on the ground of *stare decisis*, what was upheld was a constitutional device by which a class of subject-oriented laws was considered to be valid. The simple ground on H which Article 31A was upheld, apart from the ground of contemporaneous practical exposition, was that its validity was accepted and recognised over the years and, therefore, it was not permissible

to challenge its constitutionality. The principle of *stare decisis* does not imply the approval of the device or mechanism which is employed for the purpose of framing a legal or constitutional provision.

It was finally urged by the learned Attorney General that if we uphold the challenge to the validity of Article 31C, the validity of clauses (2) to (6) of Article 19 will be gravely imperilled because those clauses will also then be liable to be struck down as abrogating the rights conferred by Article 19(1) which are an essential feature of the Constitution. We are unable to accept this contention. Under clauses (2) to (6) of Article 19, restrictions can be imposed only if they are reasonable and then again, they can be imposed in the interest of a stated class of subjects only. It is for the courts to decide whether restrictions are reasonable and whether they are in the interest of the particular subject. Apart from other basic dissimilarities, Article 31C takes away the power of judicial review to an extent which destroys even the semblance of a comparison between its provisions and those of clauses (2) to (6) of Article 19. Human ingenuity, limitless though it may be, has yet not devised a system by which the liberty of the people can be protected except through the intervention of courts of law.

Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.

These then are our reasons for the order which we passed on May 9, 1980 to the following effect:

> "Section 4 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution."
>
> "Section 55 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it removes all limitations on the power of the Parliament to

amend the Constitution and confers power upon it to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure."

There will be no order as to costs.

BHAGWATI, J. (His Lordship's Judgment is a common judgment for *Waman Rao's case* and *Minerva Mill's case*. The petitioners in Writ Petitions Nos. 656 to 660 of 1977—*Wamanrao & Others etc,* v. *The Union of India & Ors.* (hereinafter referred to as Wamanrao's case) and other allied petitions have challenged the constitutional validity of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act 1961 (hereinafter referred to as the principal Act) as amended by the Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act 1972 (hereinafter referred to as Act 21 of 1975) and the Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act 1975 (hereinafter referred to as Act 47 of 1975) and the Maharashtra Agricultural Lands (Ceiling on Holdings) Amendment Act 1975 (hereinafter referred to as Act 2 of 1976) on the ground that the amended provisions of the Act are violative of Articles 14, 19(1)(f), 31 and 31A of the Constitution. We shall hereafter for the sake of convenience refer to the principal Act as duly amended by the subsequent Acts 21 of 1975, 47 of 1975 and 2 of 1976 as "the impugned legislation". It is not necessary for the purpose of this opinion to set out the relevant provisions of the impugned legislation but it is sufficient to state that it imposed a maximum ceiling on the holding of agricultural land in the State of Maharashtra and provided for acquisition of land held in excess of the ceiling and for the distribution of such excess land to landless and other persons with a view to securing the distribution of agricultural land in a manner which would best subserve the common good of the people. The impugned legislation recognised two units for the purpose of ceiling on holding of agricultural land. One was 'person' which by its definition in section 2, sub-section (2) included a family and 'family' by virtue of section 2, sub-section (11) included a Hindu Undivided Family and in the case of other persons, a group or unit the members of which by custom or usage, are joint in—estate or possession or residence and the other was 'family unit' which according to its definition in section 2(11A) read with section 4, meant a person and his spouse and their minor sons and minor unmarried daughters. The impugned legislation created an artificial concept of a 'family unit' for the purpose of applicability of the ceiling and provided that all lands held by each member of the family unit whether jointly or separately shall be aggregated together and by a fiction of law deemed to be held by the family unit. There were also certain provisions in the impugned legislation which prohibited transfers and acquisitions

of agricultural land with a view to effectuating the social policy and economic mission of the law. The impugned legislation also contained provisions prescribing the machinery for implementation of its substantive provisions. Now plainly and unquestionably this was a piece of legislation relating to agrarian reform and was immunised against challenge under Articles 14, 19 and 31 by the protective cloak of Article 31A but even so; by way of abundant caution, it was given additional protection of Article 31B by including the Principal Act and the subsequent amending Acts in the 9th Schedule: vide the Constitution (Seventeenth Amendment) Act 1964 and the Constitution (Fortieth Amendment) Act, 1976. The drastic effect of the impugned legislation was to deprive many land holders of large areas of agricultural lands held by them. Some of them, therefore, preferred writ petitions in the High Court of Bombay at Nagpur challenging the constitutional validity of the impugned legislation and on the challenge being negatived by the High Court, they preferred appeals in this Court. The only contention advanced on behalf of the land holders in support of the appeals was that the impugned legislation in so far as it introduced an artificial concept of a 'family unit' and fixed ceiling on holding of land by such family unit was violative of the second proviso to cl. (1) of Article 31A and was not saved from invalidation by the protective armour of Article 31B. This contention was negatived by the Constitution Bench and it was held that the impugned legislation did not, by creating an artificial concept of a family unit and fixing ceiling on holding of land by such family unit, conflict with the second proviso to clause (1) of Article 31A and even if it did contravene that proviso, it was protected by Article 31B since the principal Act as well as the subsequent amending Acts were included in the 9th Schedules vide *Dattatraya Govind Mahajan* v. *State of Maharashtra*(1). Now at the time when this batch of cases was argued before the Court, the emergency was in operation and hence it was not possible for the land-holders to raise many of the contentions which they could otherwise have raised and, therefore, as soon as the emergency was revoked, the landholders filed review petitions in this Court against the decision in *Dattatraya Govind Mahajan's* case and also preferred direct writ petitions in this Court challenging once again the constitutional validity of the impugned legislation. Now, concededly, Article 31A provided complete immunity to the impugned legislation against violation of Articles 14, 19 and 31 and Article 31B read with the 9th Schedule protected the impugned legislation not only against violation of Articles 14, 19 and 31 but

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(1) [1977], 2 SCR 790.

A also against infraction of the second proviso to Clause (1) of Article 31A. Moreover, the impugned legislation being manifestly one for giving effect to the Directive Principles contained in Article 39 clauses (b) and (c), it was also protected against invalidation by Article 31C. The petitioners could not therefore successfully assail the constitutional validity of the impugned legislation unless they first pierced the B protective armour of Articles 31A, 31B and 31C. The petitioners sought to get Articles 31A, 31B and 31C out of the way by contending that they offended against the basic structure of the Constitution and were, therefore, outside the constituent power of Parliament under Article 368 and hence unconstitutional and void. The argument of the petitioners was that these constitutional amendments in the shape C of Articles 31A, 31B and 31C being invalid, the impugned legislation was required to meet the challenge of Articles 14, 19(1)(f), 31 and 31A and tested on the touchstone of these constitutional guarantees, the impugned legislation was null and void. The first and principal question which, therefore, arose for consideration in these cases was whether Articles 31A, 31B and 31C are *ultra vires* and void as D damaging or destroying the basic structure of the Constitution. We may point out here that we were concerned in these cases with the constitutional validity of Article 31C as it stood prior to its amendment by the Constitution (Forty-Second Amendment) Act, 1976, because it was the unamended Article 31C which was in force at the dates when the amending Acts were passed by the legislature amending the E principal Act. These cases were heard at great length with arguments ranging over a large areas and lasting for over five weeks and we reserved judgment on 8th March 1979. Unfortunately, we could not be ready with our judgment and hence on 9th May 1980 being the last working day of the Court before the summer vacation we made an order expressing our conclusion but stating that we would give our F reasons later. By this order we held that Article 31A does not damage any of the basic or essential features of the Constitution or its basic structure and is therefore valid and constitutional and so is Article 31C as it stood prior to its amendment by the Constitution (Forty-Second Amendment) Act, 1976 valid to the extent its constitutionality G was upheld in *Kesavananda Bharati's*(1) case. So far as Article 31B is concerned, we said that Article 31B as originally introduced was valid and so also are all subsequent amendments including various Acts and Regulations in the 9th Schedule from time to time upto 24th April, 1973 when *Kesavananda Bharati's* case was decided. We did not express any final opinion on the constitutional validity of the H amendments made in the 9th Schedule on or after 24th April 1973 but we made it clear that; these amendments would be open to

(1) [1973] Supp. SCR 1.

challenge on the ground that they or any one or more of them damage the basic or essential features of the Constitution or its basic structure, and are therefore, outside the constituent power of Parliament. This was the Order made by us on 9th May, 1980 and for reasons which I shall mention presently, I propose to set out in this Judgment my reasons for subscribing to this Order.

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So far as *Minerva Mills Case* is concerned, the challenge of the petitioners was directed primarily against an order dated 19th October, 1971 by which the Government of India, in exercise of the power conferred under Sec. 18A of the Industries (Development and Regulation) Act, 1951, authorised the taking over of the management of the industrial undertaking of the petitioners by the National Textile Corporation under the Sick Textile Undertakings (Nationalisation) Act 1974 (hereinafter referred to as the Nationalisation Act) by which the entire Industrial undertaking and the right, title and interest of the petitioners in it stood transferred to and vested in the Central Government on the appointed date. We are not concerned for the purpose of the present opinion with the challenge against the validity of the Order dated 19th October, 1971, for the question which has been argued before us arises only out of the attack against the constitutionality of the Nationalisation Act. The petitioners challenged the constitutional validity of the Nationalisation Act *inter alia* on the ground of infraction of Articles 14, 19(1)(f) and (g) and 31 Clause (2), but since the Nationalisation Act has been included in the 9th Schedule by the Constitution (Thirty-ninth Amendment) Act, 1975, the petitioners also attacked the constitutionality of the Constitution (Thirty-ninth Amendment) Act, 1975, for it is only if they could get the Nationalisation Act out from the protective wing of Article 31B by pursuading the Court to strike down the Constitution (Thirty-ninth Amendment) Act, 1975, that they could proceed with their challenge against the constitutional validity of the Nationalisation Act. Now clauses (4) and (5) which were introduced in Article 368 by section 55 of the Constitution (Forty-second Amendment) Act, 1976 and which were in force at the date of the filing of the writ petitions provided that no amendment of the Constitution made or purported to have been made whether before or after the commencement of that section shall be called in question in any Court on any ground and barred judicial review of the validity of a constitutional amendment. Obviously, if these two clauses were validly included in Article 368, they would stand in the way of the petitioners challenging the constitutional validity of the Constitution (Thirty-ninth Amendment) Act, 1975. The petitioners were, therefore, compelled to go further and impugn the constitutional validity of section 55 of the Constitution

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A (Forty-second Amendment) Act, 1976. This much challenge, as I shall presently point out, would have been sufficient to clear the path for the petitioners in assailing the constitutional validity of the Nationalisation Act, but the petitioners, not resting content with what was strictly necessary, proceeded also to challenge section 4 of the Constitution (Forty-second Amendment) Act, 1976 which amended B Article 31C. There were several grounds on which the constitutional validity of the Constitution (Forty-second Amendment) Act, 1976 was impugned in the writ petitions and I shall refer to them when I deal with the arguments advanced on behalf of the parties. Suffice it to state for the present, and this is extremely important to point out, that when the writ petitions reached hearing before us, Mr. Palkhiwala, learned C counsel appearing on behalf of the petitioners requested the Court to examine only one question, namely, whether the amendments made in Article 31C and Article 368 by section 4 and 55 of the Constitution (Forty-second Amendment) Act, 1976 were constitutional and valid and submitted that if these constitutional amendments were held D invalid, then the other contentions might be examined by the Court at a later date. He conceded before us, in the course of the arguments, that he was accepting the constitutional validity of Articles 31A, 31B and the unamended Article 31C and his only contention vis-a-vis Article 31C was that it was the amendment made in Article 31C which had the effect of damaging or destroying the basic structure of E the Constitution and that amendment was, therefore, beyond the constituent power of Parliament. The learned Attorney General on behalf of the Union of India opposed this plea of Mr. Palkhiwala and urged by way of preliminary objection that though the question of constitutional validity of clauses (4) and (5) of Article 368 introduced by way of amendment by section 55 of the Constitution (Forty-second F Amendment) Act, 1976 undoubtedly arose before the Court and it was necessary for the Court to pronounce upon it, the other question in regard to the constitutional validity of the amendment made in Article 31C did not arise on the writ petitions and the counter-affidavits and it was wholly academic and superfluous to decide it. This preliminary objection raised by the learned Attorney General G was in my opinion well founded and deserved to be sustained. Once Mr. Palkhiwala conceded that he was not challenging the constitutionality of Article 31A, Article 31B and the unamended Article 31C and was prepared to accept them as constitutionally valid, it became wholly unnecessary to rely on the amended Article 31C in support of the validity of the Nationalisation Act, because Article 31B would, H in any event, save it from invalidation on the ground of infraction of any of the Fundamental Rights. In fact, if we look at the counter-affidavit filed by Mr. T. S. Sahani, Deputy Secretary, Government of

India in reply to the writ petitions, we find that no reliance has been placed on behalf of the Government on the amended Article 31C. The case of the Union of India is and that is supported by the legislative declaration contained in section 39 of the Nationalisation Act, that this Act was enacted for giving effect to the policy of the State towards securing the principles specified in clause (b) of Article 39 of the Constitution. Neither the Union of India in its counter-affidavit nor the learned Attorney General in the course of his arguments relied on any other Directive Principle except that contained in Article 39 clause (b). Mr. Palkhiwala also did not make any attempt to relate the Nationalisation Act to any other Directive Principle of State Policy. Now either the Nationalisation Act was really and truly a law for giving effect to the Directive Principle set out in Article 39 clause (b) as declared in section 39 or it was not such a law and the legislative declaration contained in section 39 was a colourable device. If it was the former, then the unamended Article 31C would be sufficient to protect the Nationalisation Act from attack on the ground of violation of Articles 14, 19 and 31 and it would be unnecessary to invoke the amended Article 31C and if it was the latter, then neither the unamended nor the amended Article 31C would have any application. Thus, in either event, the amended Article 31C would have no relevance at all in adjudicating upon the constitutional validity of the Nationalisation Act. It is difficult to see how, in these circumstances, the Court could be called upon to examine the constitutionality of the amendment made in Article 31C: that question just did not arise for consideration and it was wholly unnecessary to decide it. Mr. Palkhiwala could reach the battle front for challenging the constitutional validity of the Nationalisation Act as soon as he cleared the road blocks created by the unamended Article 31C and the Constitution (Thirty-ninth Amendment) Act, 1975 bringing the Nationalisation Act within the protective wing of Article 31B and it was not necessary for him to put the amendment in Article 31C out of the way as it did not block his challenge against the validity of the Nationalisation Act. I am, therefore, of the view that the entire argument of Mr. Palkhiwala raising the question of constitutionality of the amendment in Article 31C was academic and the Court could have very well declined to be drawn into it, but since the Court did, at the invitation of Mr. Palkhiwala, embark upon this academic exercise and spent considerable time over it, and the issues raised are also of the gravest significance to the future of the nation, I think, I will be failing in my duty if I do not proceed to examine this question on merits.

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I may point out at this stage that the arguments on this question were spread over a period of about three weeks and considerable

A learning and scholarship were brought to bear on this question on both sides. The hearing of the arguments commenced on 22nd October 1979 and it ended on 16th November 1979. I hoped that after the completion of the arguments on questions of such momentous significance, there would be a 'free and frank exchange of thoughts' in a judicial conference either before or after the draft judgment was B circulated by my Lord the Chief Justice and I would either be able to share the views of my colleagues or if that was not possible, atleast try to persuade them to agree with my point of view. But, I find myself in the same predicament in which the learned Chief Justice found himself in *Keshavananda Bharti* v. *State of Kerala*(1). The learned C Chief Justice started his judgment in that case by observing "I wanted to avoid writing a separate judgment of my own but such a choice seems no longer open. We sat in full strength of 13 to hear the case and I hoped that after a free and frank exchange of thoughts, I would be able to share the views of someone or the other of my esteemed brothers, but we were over-taken by adventitious circumstances," D namely, so much time was taken up by counsel to explain their respective points of view that very little time was left to the Judges "after the conclusion of the arguments, for exchange of draft judgments". Here also, I am compelled by similar circumstances, though not adventitious, to hand down a separate opinion without having had an opportunity to discuss with my colleagues the reasons E which weighed with them in striking down the impugned constitutional amendments. Some how or other, perhaps owing to extraordinary pressure of work with which this Court is over-burdened, no judicial conference or discussion was held nor was any draft judgment circulated which could form the basis of discussion, though, as pointed out above, the hearing of the arguments concluded F as far back as 16th November, 1979. It was only on 8th May, 1980, just two days before the closing of the Court for the summer vacation, that I was informed by the learned Chief Justice that he and the other three learned Judges, who had heard this case along with me, had decided, to pass an Order declaring the impugned constitutional amendments *ultra vires* and void on the ground that they G violated the basic features of the Constitution and that the reasons for this Order would be given by them later. I found it difficult to persuade myself to adopt this procedure, because there had been no judicial conference or discussion amongst the Judges where there could be free and frank exchange of views nor was any draft judgment circulated and hence I did not have the benefit of knowing the reasons H why the learned Chief Justice and the other three learned judges were

(1) [1973] Supp. S.C.R. 1.

inclined to strike down the constitutional amendments. If there had been a judicial conference or discussion or the draft judgment setting out the reasons for holding the impugned constitutional amendments *ultra vires* and void had been circulated, it would have been possible for me, as a result of full and frank discussion or after considering the reasons given in the draft judgment, either to agree with the view taken by my Lord the Chief Justice and the other three learned judges or if I was not inclined so to agree, then persuade them to change their view and agree with mine. That is the essence of judicial collectivism. It is, to my mind, essential that a judgment of a Court should be the result of collective deliberation of the judges composing the Court and it would, in my humble opinion, not be in consequence with collective decision making, if one or more of the judges constituting the Bench proceed to say that they will express their individual opinion, ignoring their colleagues and without discussing the reasons with them and even without circulating their draft judgment so that the colleagues have no opportunity of participating in the collective decision-making process. This would introduce a chaotic situation in the judicial process and it would be an unhealthy precedent which this Court as the highest Court in the land—as a model judicial institution which is expected to set the tone for the entire judiciary in the country—should not encourage. Moreover, I felt that it was not right to pronounce an Order striking down a constitutional amendment without giving a reasoned judgment. Ordinarily, a case can be disposed of only by a reasoned judgment and the Order must follow upon the judgment. It is true that sometimes where the case involves the liberty of the citizen or the execution of a death sentence or where the time taken in preparing a reasoned judgment might pre-judicially affect the winning party, this Court, does, in the larger interests of justice, pronounce an order and give reasons later, but these are exceptional cases where the requirements of justice induces the Court to depart from the legally sanctioned course. But, there the court had in fact waited for about 5½ months after the conclusion of the arguments and there was clearly no urgency which required that an Order should be made though reasons were not ready; the delay of about 2½ months in making the Order was not going to injure the interests of any party, since the Order was not going to dispose of the writ petition and many issues would still remain to be decided which could be dealt only after the summer vacation. Thus there would have been no prejudice to the interests of justice if the Order had been made on the re-opening of the Court after the summer vacation supported by a reasoned judgment. These were the reasons which compelled me to make my Order dated 9th May, 1980 declining to pass an unreasoned order pronouncing on the validity of the impugned constitutional

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A amendments and stating that I would "prefer to pass a final order in this case when I deliver my reasoned judgment". This Order unfortunately led to considerable misunderstanding of my position and that is the reason why I have thought it necessary to explain briefly why I acted in the manner I did.

B There is also one other predicament from which I suffer in the preparation of this opinion. It is obvious that the decision of the questions arising in *Wamanrao's case* is closely and integrally connected with the decision of the questions in *Minerva Mill's case* and therefore, logically as also from the point of view of aesthetics and practical pragmatics, there should be one opinion dealing with the questions C in both the cases. But, unfortunately *Minerva Mill's case* was heard by a Bench of five judges different from the Bench which heard *Wamanrao's case. Wamanrao's case* was heard by a Bench consisting of the learned Chief Justice, myself, Krishna Iyer, J., Tulzapurkar, J. and A. P. Sen, J. while Krishna Iyer, J., Tulzapurkar, J. and A. P. Sen, J. were not D members of the Bench which heard the *Minerva Mill's case.* Since two different Benches heard these cases, there would ordinarily have to be two opinions, one in each case. I, however, propose to write a single opinion dealing with the questions arising in both cases, since that is the only way in which I think I can present an integrated argument in support of my view, without becoming unduly and E unnecessarily repetitive.

The principal question that arises for consideration in these two cases is whether Article 31A, Article 31B read with the 9th Schedule as amended from time to time and particularly by the Constitution (Seventeenth Amendment) Act, 1964 and the Constitution (Fortieth Amendment) Act, 1976, Article 31C as it stood prior to F its amendment by the Constitution (Forty-second Amendment) Act, 1976 and the amended Article 31C are constitutionally valid ; do they fall within the scope of the amending power of Parliament under Article 368. The determination of this question depends on the answer to the larger question as to whether there are any limits on G the amending power of Parliament under Article 368 and if so, what are the limits. This question came up for consideration before a Bench of 13 Judges of this Court—the largest Bench that ever sat—and after a hearing which lasted for 68 days—the longest hearing that ever took place—eleven judgments were delivered which are reported in *Keshavananda Bharti* v. *State of Kerala* (supra). H The earlier decision of this Court in *I.C. Golaknath & Ors.* v. *State of Punjab*[1] where, by a majority of six against five, the fundamental

(1) [1967] 2 SCR 762.

rights were held to be unamendable by Parliament under Article 368, was over-ruled as a result of the decision in *Keshavananda Bharti's case.* But, six out of the thirteen learned Judges (Sikri, C. J. Shelat, Grover, Hegde, Reddy and Mukharjea, JJ.) accepted the contention of the petitioners that though Article 368 conferred power to amend the Constitution, there were inherent or implied limitations on the power of amendment and therefore Article 368 did not confer power on Parliament to amend the Constitution so as to destroy or emasculate the essential or basic elements or features of the Constitution. The fundamental rights, according to the view taken by these six learned Judges, constituted basic or essential features of the Constitution and they could not be, therefore, abrogated or emasculated in the exercise of the amending power conferred by Article 368, though a reasonable abridgment of those rights could be effected in the public interest. Khanna, J. found it difficult in the face of the clear words of Article 368 to exclude from their operation Articles relating to fundamental rights and he held that "the word 'amendment' in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part II of the Constitution or whether it pertains to some other provision outside Part III of the Constitution." But proceeding to consider the meaning of the word 'amendment', the learned Judge held that the power to amend does not include the power to abrogate the Constitution, that the word 'amendment' postulates that the existing Constitution must survive without loss of identity, that it must be retained though in an amended form, and therefore, the power of amendment does not include the power to destroy or abrogate the basic structure or framework of the Constitution. The remaining six Judges took the view that there were no limitations of any kind on the power of amendment, though three of them seemed willing to foresee the limitation that the entire Constitution could not be abrogated, leaving behind a State without a Constitution. Now some scholars have expressed the view that from the welter of confusion created by eleven judgments running over a thousand pages, it is not possible to extract any ratio *decidendi* which could be said to be the law declared by the Supreme Court. It is no doubt true that the six judges led by Sikri. C.J., have read a limitation on the amending power of Parliament under Article 368 and so has Khanna, J., have employed the formulations "basic features" and "essential elements" while Khanna, J. has employed the formulation "basic structure and framework" to indicate what in each view is immune from the amendatory process and it is argued that "basic features" and "essential elements" cannot be regarded as synonymous with "basic structure and framework".

A These scholars have sought to draw support for their view from the following observation of Khanna, J. at page 706 of the Report :

> "It is then argued on behalf of the petitioners that essential features of the Constitution cannot be changed as a result of amendment. So far as the expression "essential features" means the basic structure or framework of the Constitution, I have already dealt with the question as to whether the power to amend the Constitution would include within itself the power to change the basic structure or framework of the Constitution. Apart from that, all provisions of the Constitution are subject to amendatory process and cannot claim exemption from that process by being described essential features."

Whatever be the justification for this view on merits, I do not think that this observation can be read as meaning that in the opinion of Khanna, J. "basic structure or frame work" as contemplated by him was different from "basic features" or "essential elements" spoken of by the other six learned judges. It was in the context of an argument urged on behalf of the petitioners that the "essential features" of the Constitution cannot be changed that this observation was made by Khanna, J. clarifying that if the "essential features" meant the "basic structure or framework" of the Constitution, the argument of the petitioners would be acceptable, but if the "essential features" did not form part of the "basic structure or framework" and went beyond it, then they would not be immune from the amendatory process. But it does appear from this observation that the six Judges led by Sikri C.J. on the one hand and Khanna, J. on the other were not completely *ad idem* as regards the precise scope of the limitation on the amendatory power of Parliament. This might have raised a serious argument as to whether there, any *ratio decidendi* at all can be culled out from the judgments in this case in so far as the scope and ambit of the amendatory power of Parliament is concerned. A debatable question would have arisen whether "basic and essential features" can be equated with "basic structure or framework" of the Constitution and if they cannot be, then can the narrower of these two formulations be taken to represent the common ratio. But it is not necessary to examine this rather difficult and troublesome question, because I find that in *Smt. Indira Gandhi* vs. *Raj Narain*(1) a Bench of five Judges of this Court accepted the majority view in *Keshavananda Bharti's case* to be that the amending power conferred under Article 368, though wide in its sweep and reaching every provision of the Constitution, does not enable Parliament to alter the basic structure or framework

(1) [1976] 2 SCR 347.

of the Constitution. Since this is how the judgments in *Keshavananda Bharti's case* have been read and a common ratio extracted by a Bench of five Judges of this Court, it is binding upon me and hence I must proceed to decide the questions arising in these cases in the light of the principle emerging from the majority decision that Article 368 does not confer power on Parliament to alter the basic structure or framework of the Constitution. I may mention in the passing that the summary of the judgments given by nine out of the thirteen Judges after the delivery of the judgments also states the majority view to be that "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution." Of course, in my view this summary signed by nine Judges has no legal effect at all and cannot be regarded as law declared by the Supreme Court under Article 141. It is difficult to appreciate what jurisdiction or power these nine Judges had to give a summary setting out the legal effect of the eleven judgments delivered in the case. Once the judgments were delivered, these nine Judges as also the remaining four became *functus officio* and thereafter they had no authority to cull out the ratio of the judgments or to state what, on a proper analysis of the judgments, was the view of the majority. What was the law laid down was to be found in the judgments and that task would have to be performed by the Court before whom the question would arise as to what is the law laid down in *Keshavananda Bharti's case*. The Court would then hear the arguments and dissect the judgments as was done in *Smt. Indira Gandhi's case* (supra) and then decide as to what is the true ratio emerging from the judgments which is binding upon the Court as law laid down under Art. 141. But here it seems that nine judges set out in the summary what according to them was the majority view without hearing any arguments. This was a rather unusual exercise, though well-intentioned. But quite apart from the validity of this exercise embarked upon by the nine judges, it is a little difficult to understand how a proper and accurate summary could be prepared by these judges when there was not enough time, after the conclusion of the arguments, for an exchange of draft judgments amongst the Judges and many of them did not even have the benefit of knowing fully the views of others. I may, therefore, make it clear that I am not relying on the statement of the majority view contained in the summary given at the end of the judgments in *Keshavananda Bharti's case*, but I am proceeding on the basis of the view taken in *Smt. Indira Gandhi's case* as regards the ratio of the majority decision in *Keshavananda Bharti's case*.

I may also at this stage refer to an argument advanced before us on the basis of certain observations in the judgment of Khanna, J.

A that he regarded fundamental rights as not forming part of the basic structure of the Constitution and therefore, according to him, they could be abrogated or taken away by Parliament by an amendment made under Article 368. If this argument were correct, the majority holding in *Keshavananda Bharti's case* would have to be taken to be that the fundamental rights could be abrogated or destroyed in B exercise of the power of amendment, because Ray, J., Palekar, J., Mathew, J., Beg, J., Dwivedi, J. and Chandrachud, J. took the view that the power of amendment being unlimited, it was competent to Parliament in exercise of this power to abrogate or emasculate the Fundamental Rights and adding the view of Khanna, J., there would C be 7 Judges as against 6 in holding that the Fundamental Rights could be abrogated or taken away by Parliament by a constitutional amendment. But we do not think that this submission urged on behalf of the respondents is well founded. It is undoubtedly true that there are certain observations in the judgment of Khanna, J. at the bottom of page 688 of the Report which seem into suggest that D according to the learned Judge, the fundamental rights could be abridged or taken away by an amendment under Article 368. For example, he says : "No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach in my opinion should hold good when we deal E with amendment relating to Fundamental Rights contained in Part III of the Constitution. It would be impermissible to differentiate between the scope and width of the power of amendment when it deals with Fundamental Rights and the scope and width of that power when it deals with provisions not concerned with Fundamental Rights." Then again at page 707 of the Report, the learned Judge F rejects the argument that the core and essence of a Fundamental Right is immune from the amendatory process. These observations might at first blush appear to support the view that, according to Khanna, J., the amendatory power under Article 368 was sufficiently wide to comprehend not only addition or alternation, but also repeal of a Fundamental Right resulting in its total abrogation. But if we G look at the judgment of Khanna, J. as a whole, we do not think this view can be sustained. It is clear that these observations were made by the learned Judge with a view to explaining the scope and width of the power of amendment under Article 368. The learned Judge held that the amendatory power of Parliament was wide enough to reach every provision of the Constitution including H the Fundamental Rights in Part III of the Constitution, but while so holding, he proceeded to make it clear that despite all this width, the amendatory power was subject to an overriding limitation,

namely, that it could not be exercised so as to alter the basic structure or framework of the Constitution. The learned Judge stated in so many words at page 688 of the Report that though "the power of amendment is plenary and would include within itself, the power to add, alter or repeal the various articles including those relating to fundamental rights", it is "subject to the retention of the basic structure or framework of the Constitution." The same reservation was repeated by the learned Judge in cl. (vii) of the summary of his conclusions given at the end of his judgment. It will, therefore, be seen that according to Khanna, J. the power of amendment can be exercised by Parliament so as even to abrogate or take away a fundamental right, so long as it does not alter the basic structure or framework of the Constitution. But if the effect of abrogating or taking away such fundamental right is to alter or affect the basic structure or framework of the Constitution, the amendment would be void as being outside the amending power of Parliament. It is precisely for this reason that the learned Judge proceeded to consider whether the right to property could be said to appertain to the basic structure or framework of the Constitution. If the view of Khanna, J. where that no fundamental right forms part of the basic structure or framework of the Constitution and it can therefore be abrogated or taken away in exercise of the amendatory power under Article 368, it was totally unnecessary for the learned Judge to consider whether the right to property could be said to appertain to the basic structure or framework of the Constitution. The very fact that Khanna, J. proceeded to consider this question shows beyond doubt that he did not hold that fundamental rights were not a part of the basic structure. The only limited conclusion reached by him was that the right to property did not form part of the basic structure, but so far as the other fundamental rights were concerned, he left the question open. Therefore, it was that he took pains to clarify in his judgment in *Smt. Indira Gandhi's case* (supra) that what he laid down in *Keshavananda Bharati's case* was "that no Article of the Constitution is immune from the amendatory process because of the fact that it relates to fundamental right and is contained in Part III of the Constitution", and that he did not hold in that case that "fundamental rights are not a part of the basic structure of the Constitution". Now if this be so, it is difficult to understand how he could hold the Constitution (Twenty-ninth Amendment) Act, 1972 unconditionally valid. Consistently with his view, he should have held that the Constitution (Twenty-ninth Amendment) Act 1972 would be valid only if the protection afforded by it to the Kerala Acts included in the 9th Schedule was not violative of the basic structure or

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framework of the Constitution. But merely because the learned Judge wrongly held the Constitution (Twenty-ninth Amendment) Act, 1972 to be unconditionally valid and did not uphold its validity subject to the scrutiny of the Kerala Acts added in the 9th Schedule, it cannot follow that he regarded the fundamental rights as not forming part of the basic structure of the Constitution. If the law was correctly laid down by him, it did not become incorrect by being wrongly applied. It is not customary to quote from the writing of a living author, but departing from that practice which, I believe, is no longer strictly adhered to or followed, I may point out that what I have said above finds support from the comment made by Mr. Seervai in the 3rd Volume of his book on Constitutional Law, where the learned author says: "The conflict between Khanna, J.'s views on the amending power and on the unconditional validity of the Twenty Ninth Amendment is resolved by saying that he laid down the scope of the amending power correctly, but misapplied that law in holding Article 31B and Schedule 9 unconditionally valid." I entirely agree with this perceptive remark of the learned author.

The true ratio emerging from the majority decision in *Keshavananda Bharati's case* being that the Parliament cannot in the exercise of its amendatory power under Article 368 alter the basic structure or framework of the Constitution, I must proceed to consider whether Article 31A, Article 31B read with 9th Schedule, Article 31C as it stood prior to its amendment and the amended Article 31C are violative of the basic structure or framework of the Constitution, for if they are, they would be unconstitutional and void. Now what are the features or elements which constitute the basic structure of framework of the Constitution or which, if damaged or destroyed, would rob the Constitution of its identity so that it would cease to be the existing Constitution but would become a different Constitution. The majority decision in *Keshavananda Bharati's case* no doubt evolved the doctrine of basic structure or framework but it did not lay down that any particular named features of the Constitution formed part of its basic structure or framework. Sikri, C.J. mentioned supremacy of the Constitution, republican and democratic form of government, secular character of the Constitution, separation of powers among the legislature, executive and judiciary, federalism and dignity and freedom of the individual as essential features of the Constitution. Shelat and Grover, JJ. added to the list two other features; justice—social, economic and political and unity and integrity of the nation. Hegde and Mukherjea, JJ. added sovereignty of India as a basic feature of the Constitution. Reddy, J. thought that sovereign

democratic republic, parliamentary form of democracy and the three organs of the State formed the basic structure of the Constitution, Khanna, J. held that basic structure indicated the broad contours and outlines of the Constitution and since the right to property was a matter of detail, it was not a part of that structure. But he appeared to be of the view that the democratic form of government, the secular character of the State and judicial review formed part of the basic structure. It is obvious that these were merely illustrations of what each of the six learned Judges led by Sikri, C.J. thought to be the essential features of the Constitution and they were not intended to be exhaustive. Shelat and Grover, JJ. Hegde and Mukherjea JJ., and Reddy, J. in fact said in their judgments that their list of essential features which form the basic structure of the Constitution was illustrative or incomplete. This enumeration of the essential features by the six learned Judges had obviously no binding authority; first, because the Judges were not required to decide as to what features or elements constituted the basic structure or framework of the Constitution and what each of them said in this connection was in the nature of obiter and could have only persuasive value; secondly, because the enumeration was merely by way of illustration and thirdly, because the opinion of six Judges that certain specified features formed part of the basic structure of the Constitution did not represent the majority opinion and hence could not be regarded as law declared by this Court under Article 141. Therefore, in every case where the question arises as to whether a particular feature of the Constitution is a part of its basic structure, it would have to be determined on a consideration of various factors such as the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequence of its denial on the integrity of the Constitution as a fundamental instrument of country's governance. Vide the observations of Chandrachud, J. (as he then was) in *Smt. Indira Gandhi's case* at page 658 of the Report.

This exercise of determining whether certain particular features formed part of the basic structure of the Constitution had to be undertaken by this Court in *Smt. Indira Gandhi's case* (supra) which came up for consideration within a short period of four years after the delivery of the Judgments in *Keshavananda Bharti's case*. The constitutional amendment which was challenged in that case was the Constitution (Thirty-ninth Amendment) Act, 1975, which introduced Article 329A and the argument was that clause (4) of this newly added article was constitutionally invalid on the ground that it violated the basic structure or framework of the Constitution. This challenge was unanimously upheld by a Constitution Bench which consisted of

A the Chief Justice and four senior most Judges of this Court. It is not necessary for our purpose to analyse the judgments given by the five Judges in this case as they deal with various matters which are not relevant to the questions which arise before us. But it may be pointed out that two of the learned Judges, namely, Khanna and Mathew, JJ. held that democracy was an essential feature forming part of the basic B structure and struck down clause (4) of Article 329A on the ground that it damaged the democratic structure of the Constitution. Chandrachud, J. (as he then was) emphatically asserted that, in his opinion, there were four unamendable features which formed part of the basic structure, namely, "(i) India is a sovereign democratic republic; (ii) Equality of status and opportunity shall be secured to C all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to process, practise and propagate religion and (iv) The nation shall be governed by a government of laws, not of men." These, according to him, were "the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution." He D then proceeded to hold that clause (4) of Article 329A was "an outright negation of the right of equality conferred by Article 14, a right which more than any other is a basic postulate of our Constitution" and on that account declared it to be unconstitutional and void, Mathew, J. however, expressed his dissent from the view taken by Chandrachud, J. E as regards the right of equality conferred by Article 14 being an essential feature of the Constitution and stated *inter alia* the following reason :

> "The majority in *Bharati's case* did not hold that Article 14 pertains to the basic structure of the Constitution. The Majority upheld the validity of the first part of Article 31C; this would F show that a constitutional amendment which takes away or abridges the right to challenge the validity of an ordinary law for violating the fundamental right under that Article would not destroy or damage the basic structure. The only logical basis for supporting the validity of Article 31A, 31B and the first part of 31C is that Art. 14 is not a basic structure." G

I shall have occasion to discuss later the concept of equality under the Constitution and whether it forms part of the basic structure. But, one position of a basic and fundamental nature I may make clear at this stage, and there I agree with Mathew, J., that whether a particular feature forms part of the basic structure has necessarily to H be determined on the basis of the specific provisions of the Constitution. To quote the words of Mathew, J. in *Smt. Indira Gandhi's case* (supra) "To be a basic structure it must be a terrestrial concept having its

habitat within the four corners of the Constitution." What Constitutes basic structure is not like "a twinkling star up above the Constitution." "It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The Preamble no doubt enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type or democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which they aimed to realise, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven.(1)"

Now, in *Wamanrao's case* the broad argument of Mr. Phadke on behalf of the petitioners founded on the doctrine of basic structure was, and this argument was supported by a large number of other counsel appearing in the allied petitions, that the fundamental rights enshrined in Articles 14 and 19 form part of the basic structure of the Constitution and therefore Article 31A, Article 31B read with 9th Schedule and the unamended Article 31C in so far as they exclude the applicability of Articles 14 and 19 to certain kinds of legislation emasculate those fundamental rights and thereby damage the basic structure of the Constitution and they must accordingly be held to be outside the amending power of Parliament and hence unconstitutional and void. I have not made any reference here to Article 31 and treated the argument of Mr. Phadke as confined only to Articles 14 and 19, because, though Article 31 was very much in the Constitution when the arguments in *Wamanrao's case* were heard, it has subsequently been deleted by the Constitution (Forty-Fourth Amendment) Act, 1978 and reference to it has also been omitted in Articles 31A, 31B and 31C and we are therefore concerned with the constitutional validity of these Articles only in so far as they grant immunity against challenge on the ground of infraction of Articles 14 and 19. Mr. Phadke on behalf of the petitioners also challenged

(1) Mathew, J. in *Smt. Indira Gandhi* v. *Raj Narain*, [1976] 2 SCR 526.

A the constitutional validity of the Constitution (Fortieth Amendment) Act, 1976 which included the amending Acts 21 of 1975, 41 of 1975 and 2 of 1976 in the 9th Schedule, on the ground that the Lok Sabha was not in existence at the date when it was enacted. But obviously, in view of clauses (4) and (5) introduced in Article 368 by section 55 of the Constitution (Forty-second Amendment) Act, 1976, it was not B possible for Mr. Phadke on behalf of the petitioners to assail the constitutional validity of Article 31A, Article 31B read with the 9th Schedule as amended by the Constitution (Fortieth Amendment) Act, 1976 and the unamended Article 31C, since these two clauses of Article 368 barred challenge to the validity of a constitutional amendment on any ground whatsoever and declared that there shall C be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal, any provision of the Constitution. He therefore, as a preliminary step in his argument challenged the constitutional validity of clauses (4) and (5) of Article 368 on the ground that these clauses damaged the basic structure of the Constitution and were outside the amending power of Parliament. D The argument of Mr. Palkhiwala on behalf of the petitioners in the *Minerva Mills' case* was a little different. He too attacked the vires of clauses (4) and (5) of Article 368 since they barred at the threshold any challenge against the constitutional validity of the amendment made in Article 31C, but so far as Article 31A, Article 31B and the unamended Article 31C were concerned, he did not dispute their E validity and, as pointed out by me earlier, he conceded and in fact gave cogent reasons showing that they were constitutionally valid. His only attack was against the validity of the amendment made in Article 31C by section 4 of the Constitution (Forty-second Amendment) Act, 1976 and he contended that this amendment, by making the Directive F Principles supreme over the fundamental rights, damaged or destroyed the basic structure of the Constitution. He urged that the basic structure of the Constitution rests on the foundation that while the Directive Principles are the mandatory ends of government, those ends have to be achieved only through the permissible means set out in the Chapter on fundamental rights and this balance and harmony G between the fundamental rights and the Directive Principles was destroyed by the amendment in Article 31C by making the fundamental rights subservient to the Directive Principles and in consequence, the basic structure of the Constitution was emasculated. A passionate plea was made by Mr. Palkhiwala with deep emotion and feeling that if Article 31C as amended was allowed to stand, it would be an H open licence to the legislature and the executive, both at the Centre and in the States, to destroy democracy and establish an authoritarian or totalitarian regime, since almost every legislation could be related,

directly or indirectly, to some Directive Principle and would thus be able to earn immunity from the challenge of Articles 14 and 19 and the fundamental rights enshrined in these two Articles would be rendered meaningless and futile and would become mere rope of sand. Mr. Palkhiwala vehemently urged that Justice, liberty and equality were the three pillars of the Constitution and they were embodied in Articles 14 and 19 and therefore if the supremacy of the fundamental rights enshrined in these Articles was destroyed and they were made subservient to the Directive Principles, it would result in the personality of the Constitution being changed beyond recognition and such a change in the personality would be outside the amending power of Parliament. Mr. Palkhiwala likened the situation to a permanent state of emergency and pointed out by way of contrast that whereas under an emergency the people may be precluded from enforcing their fundamental rights under Articles 14 and 19 for the duration of the emergency, here the people were prevented from moving the court for enforcement of these fundamental rights for all time to come even without any emergency where a law was passed purporting to give effect to any of the Directive Principles. The amendment in Article 31C was thus, according to Mr. Palkhiwala, outside the amending power of Parliament and was liable to be struck down as unconstitutional and void.

Logically I must first consider the challenge against the constitutional validity of clauses (4) and (5) of Art. 368, because it is only if they can be put out of the way that Mr. Phadke and Mr. Palkhiwala can proceed further with their respective challenges against the validity of the other constitutional provisions impugned by them. Both these clauses were inserted in Article 368 by section 55 of the Constitution (Forty-second Amendment), Act, 1976 with a view to overcoming the effect of the majority decision in *Keshavananda Bharati's* case. Clause (4) enacted that no amendment of the Constitution "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" while clause (5), which begins with the words "For the removal of doubts", 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." The question is whether these two clauses transgress the limitations on the amending power of Parliament and are therefore void. I will first take up for consideration clause (4) which seeks to throw a cloak of protection on an amendment made or purporting to have been made in the

A Constitution and makes it unchallengeable on any ground. It is rather curious in its wording and betrays lack of proper care and attention in drafting. It protects every amendment made or purporting to have been made "whether before or after the commencement of section 5 of the Constitution (Forty-second Amendment) Act, 1976." But would an amendment made by any other section of the Constitution (Forty-
B second Amendment) Act, 1976 such as section (4), which would be neither before nor after the commencement of section 55, but simultaneous with it, be covered by this protective provision? This is purely a problem of verbal semantics which arises because of slovenliness in drafting that is becoming rather common these days and I need not dwell on it, for there are more important questions
C which arise out of the challenge to the constitutional validity of clause (4) and they require serious consideration. I will proceed on the basis that the protection sought to be given by clause (4) extends to every amendment whatsoever and that the parenthetical words "whether before or after the commencement of section 55 of the Constitution
D (Forty-second Amendment) Act, 1976" were introduced merely by way of abundant caution with a view to indicating that this protection was intended to cover even amendments made or purporting to have been made before the enactment of the Constitution (Forty-second Amendment) Act, 1976. Now even a cursory look at the language of clause (4) is sufficient to demonstrate that this is a case of zeal over-
E running discretion. Clause (4) provides that no amendment to the Constitution made or purporting to have been made under Article 368 shall be called in question in any court on any ground. The words 'on any ground' are of the widest amplitude and they would obviously cover even a ground that the procedure prescribed in clause (2) and its proviso has not been followed. The result is that even if
F an amendment is purported to have been made without complying with the procedure prescribed in sub-clause (2) including its proviso, and is therefore unconstitutional, it would still be immune from challenge. It was undisputed common ground both at the Bar and on the Bench, in *Keshavananda Bharati's* case that any amendment of the Constitution which did not conform to the procedure prescribed by sub-clause
G (2) and its proviso was no amendment at all and a court would declare it invalid. Thus if an amendment were passed by a simple majority in the House of the People and the Council of States and the President assented to the amendment, it would in law be no amendment at all because the requirement of clause (2) is that it should be passed by a majority of each of the two Houses separately and by not less than
H two-thirds of the members present and voting. But if clause (4) were valid, it would become difficult to challenge the validity of such an amendment and it would prevail though made in defiance of a

mandatory constitutional requirement. Clause (2) including its proviso would be rendered completely superfluous and meaningless and its prescription would become merely a paper requirement. Moreover, apart from nullifying the requirement of clause (2) and its proviso, clause (4) has also the effect of rendering an amendment immune from challenge even if it damages or destroys the basic structure of the Constitution and is therefore outside the amending power of Parliament. So long as clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in *Keshavananda Bharati's* case, would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would from a practical point of view, become non-existent and it would not be incorrect to say that, covertly and indirectly, by the exclusion of judicial review, the amending power of Parliament would stand enlarged contrary to the decision of this Court in *Keshavananda Bharati's* case. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers. I shall immediately proceed to state the reasons why I think that these two features form part of the basic structure of the Constitution.

It is clear from the majority decision in *Keshavananda Bharati's* case that our Constitution is a controlled Constitution which confers powers on the various authorities created and recognised by it and defines the limits of those powers. The Constitution is *suprema lex*, the paramount law of the land and there is no authority, no department or branch of the State, which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of such authority. Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the Constitution, it cannot have such inherent power, but the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament cannot in exercise of this power so

A amend the Constitution as to alter its basic structure or to change its identity. Now, if by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally B changing its identity. It will therefore be seen that the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment were enlarged into an unlimited power, the entire character of the Constitution would be changed. It must follow as a necessary corollary that any amendment of the Constitution which C seeks, directly or indirectly, to enlarge the amending power of Parliament by freeing it from the limitation of unamendability of the basic structure would be violative of the basic structure and hence outside the amendatory power of Parliament.

It is a fundamental principle of our constitutional scheme, and D I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed E or exceeded. Now there are three main departments of the State amongst which the powers of Government are divided; the Executive, the Legislature and the Judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is F inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J. (as he then was) in *Smt. Indira Gandhi's* case (supra) "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged." Take for example, a case where the executive G which is in charge of administration acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First, the decision of the question H would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional

and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution. Speaking about draft Article 25, corresponding to present Article 32 of the Constitution, Dr. Ambedkar, the principal architect of our Constitution, said in the Constituent Assembly on 9th December, 1948 :

> "If I was asked to name any particular article in this Constitution as the most important—an article without which this Constitution would be a nullity—I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance". (CAD debates, Vol. VII, p. 953).

It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority however lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which *inter alia* requires that "the exercise of powers by the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law". The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our

Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that however effective alternative institutional mechanisms or arrangements for *judicial review* cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a Constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the Legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of sub-version of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therefore inevitably follow that clause (4) of Article 368 is unconstitutional and void as damaging the basic structure of the Constitution.

That takes us to clause (5) of Article 368. This clause opens with the words "For the removal of doubts" and proceeds to declare that there shall be no limitation whatever on the amending power of Parliament under Article 368. It is difficult to appreciate the meaning of the opening words "For the removal of doubts" because the majority decision in *Keshavananda Bharati's* case clearly laid down and left no doubt that the basic structure of the Constitution was outside the competence of the mandatory power of Parliament and in *Smt. Indira Gandhi's* case all the Judges unanimously accepted theory of the basic structure as a theory by which the validity of the amendment impugned before them, namely, Article 329A(4) was to be judged. Therefore, after the decisions in *Keshavananda Bharati's* case and *Smt. Indira Gandhi's* case, there was no doubt at all that the amendatory power of Parliament was limited and it was not competent to Parliament to alter the basic structure of the Constitution

and clause (5) could not remove the doubt which did not exist. What clause (5) really sought to do was to remove the limitation on the amending power of Parliament and convert it from a limited power into an unlimited one. This was clearly and indubitably a futile exercise on the part of Parliament. I fail to see how Parliament which has only a limited power of amendment and which cannot alter the basic structure of the Constitution can expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basic structure. That would clearly be in excess of the limited amending power possessed by Parliament. The Constitution has conferred only a limited amending power on Parliament so that it cannot damage or destroy the basic structure of the Constitution and Parliament cannot by exercise of that limited amending power convert that very power into an absolute and unlimited power. If it were permissible to Parliament to enlarge the limited amending power conferred upon it into an absolute power of amendment, then it was meaningless to place a limitation on the original power of amendment. It is difficult to appreciate how Parliament having a limited power of amendment can get rid of the limitation by exercising that very power and convert it into an absolute power. Clause (5) of Article 368 which sought to remove the limitation on the amending power of Parliament by making it absolute must therefore be held to be outside the amending power of Parliament. There is also another ground on which the validity of this clause can be successfully assailed. This clause seeks to convert a controlled Constitution into an uncontrolled one by removing the limitation on the amending power of Parliament which, as pointed out above, is itself an essential feature of the Constitution and it is therefore violative of the basic structure. I would in the circumstances hold clause (5) of Article 368 to be unconstitutional and void.

With clauses (4) and (5) of Article 368 out of the way, I must now proceed to examine the challenge against the constitutional validity of Article 31A, Article 31B read with the 9th Schedule and the unamended Article 31C. So far as Article 31A is concerned, Mr. Phadke appearing on behalf of the petitioners contended that, tested by the doctrine of basic structure, Art. 31A was unconstitutional and void, since it had the effect of abrogating Articles 14 and 19 in reference to legislation falling within the categories specified in the various clauses of that Article. He argued that the Fundamental Rights enshrined in Articles 14 and 19 were part of the basic structure of the Constitution and any constitutional amendment which had the effect of abrogating or damaging these Fundamental Rights was outside the amendatory power of Parliament. While considering this

A argument, I may make it clear that I am concerned here only with constitutional validity of clause (a) of Article 31A since the protection of Article 31A has been claimed in respect of Maharashtra Land Ceiling Acts only under clause (a) of that Article and I need not enter upon a discussion of the constitutional validity of clauses (b) to (e) of Article 31A. I do not think that the argument of Mr. B Phadke challenging the constitutional validity of clause (a) of Article 31A is well-founded. I shall have occasion to point out in a later part of this judgment that where any law is enacted for giving effect to a Directive Principle with a view to furthering the constitutional goal of social and economic justice, there would be no violation of the basic structure, even if it infringes *formal* equality before the law C under Art. 14 or any Fundamental Right under Article 19. Here clause (a) of Article 31A protects a law of agrarian reform which is clearly, in the context of the socio-economic conditions prevailing in India, a basic requirement of social and economic justice and is covered by the Directive Principles set out in clauses (b) and (c) of Article 39 and it is difficult to see how it can possibly be regarded D as violating the basic structure of the Constitution. On the contrary, agrarian reform leading to social and economic justice to the rural population is an objective which strengthens the basic structure of the Constitution. Clause (a) of Article 31A must therefore be held to be constitutionally valid even on the application of the basic E structure test.

But, apart from this reasoning on principle which in our opinion clearly sustains the constitutional validity of clause (a) of Article 31A, we think that even on the basis of the doctrine of *stare decisis*, the whole of Article 31A must be upheld as constitutionally valid. The question as to the constitutional validity of Article 31A first came F up for consideration before this Court in *Shankari Prasad* v. *Union of India*(1). There was a direct challenge levelled against the constitutionality of Article 31A in this case on various grounds and this challenge was rejected by a Constitution Bench of this Court. The principal ground on which the challenge was based was that if a constitutional amendment takes away or abridges any of the G Fundamental Rights conferred by Part III of the Constitution, it would fall within the prohibition of Article 13(2) and would therefore be void. Patanjali Shastri, J., speaking on behalf of the Court, did not accept this contention and taking the view that in the context of Article 13, 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the H Constitution made in exercise of constituent power, be held that

(1) [1952] SCR 89.

Article 13(2) does not affect constitutional amendments. This view in regard to the interpretation of the word 'law' in Article 13(2) has now been affirmed by this Court sitting as a full Court of 13 Judges in *Keshavananda Bharati's* case and it is no longer possible to argue the contrary proposition. It is true that in this case, the constitutional validity of Article 31A was not assailed on the ground of infraction of the basic feature since that was a doctrine which came to be evolved only in *Keshavananda Bharati's* case, but the fact remains that whatever be the arguments advanced or omitted to be advanced, Article 31A was held to be constitutionally valid by this Court. Nearly 13 years after this decision was given in *Shankari Prasad's* case, a strong plea was made before this Court in *Sajjan Singh* v. *State of Rajasthan*(1) that *Shankari Prasad's* case should be reconsidered, but after a detailed discussion of the various arguments involved in the case, the Constitution Bench of this Court expressed concurrence with the view expressed in *Shankari Prasad's* case and in the result, upheld the constitutional validity of Article 31A, though the question which arose for consideration was a little different and did not directly involve the constitutional validity of Article 31A. Thereafter, came the famous decision of this Court in *Golak Nath's case*(2) where a full Court of 11 Judges, while holding that the Constitution (First Amendment) Act exceeded the constituent power of Parliament, still categorically declared on the basis of the doctrine prospective overruling that the said amendment, and a few other like amendments subsequently made, should not be disturbed and must be held to be valid. The result was that even the decision in *Golak Nath's* case accepted the constitutional validity of Article 31A. The view taken in *Golak Nath's* case as regards the amending power of Parliament was reversed in *Keshavananda Bharati's* case where the entire question as to the nature and extent of the constituent power of Parliament to amend the Constitution was discussed in all its dimensions and aspects uninhibited by any previous decisions, but the only constitutional amendments which were directly challenged in that case were the Twenty-fourth and Twenty-fifth and Twenty-ninth Amendments. The constitutional validity of Art. 31A was not put in issue in *Keshavananda Bharati's* case and the learned Judges who decided that case were not called upon to pronounce on it and it cannot therefore be said that this Court uphold the vires of Article 31A in that Case. It is no doubt true that Khanna, J. held Article 31A to be valid on the principle of *stare decisis*, but that was only for the purpose of upholding the validity of Article 31C.

(1) [1965] 1 SCR 933.
(2) [1967] 2 SCR 762.

A bcause he took the view that Article 31C was merely an extension of the principle accepted in Article 31A and "the ground which sustained the validity of clause (1) of Article 31A, would equally sustain the validity of the first part of Article 31C". So far as the other learned Judges were concerned, they did not express any view specifically on the constitutional validity of Article 31A, since that was not in issue B before them. Ray, J., Palekar, J., Mathew, J., Beg, J., Dwiwedi, J. and Chandrachud, J., held Article 31C to be valid and if that view be correct, Article 31A must *a fortiorari* be held to be valid. But it must be said that there is no decision of the Court in *Keshavananda Bharati's* case holding Art. 31A as constitutionally valid. and C logically, therefore, it should be open to the petitioners in the present case to contend that, tested by the basic structure doctrine, Article 31A is constitutional. We have already pointed out that on merits this argument has no substance and even on an application of the basic structure doctrine. Article 31A cannot be condemned as invalid. But in any event, I do not think that it would be proper to reopen the D question of constitutional validity of Article 31A which has already been decided and silenced by the decisions of this Court in *Shankari Prasad's* case, *Sajjan Singh's* case and *Golak Nath's* case. Now for over 28 years, since the decision in *Shankari Prasad's* case Article 31A has been recognised as valid and on this view, laws of several States relating to agrarian reform have been held to be valid and as E pointed out by Khanna, J. in *Keshavananda Bharati's* case "millions of acres of land have changed hands and millions of new titles in agricultural lands have been created". If the question of validity of Article 31A were reopened and the earlier decisions upholding its validity were reconsidered in the light of the basic structure doctrine, these various agrarian reform laws which have brought about a near F socio-economic revolution in the agrarian sector might be exposed to jeopardy and that might put the clock back by setting at naught all changes that have been brought about in agrarian relationships during these years and create chaos in the lives of millions of people who have benefitted by these laws. It is no doubt true that this Court has power to review its earlier decisions or even depart from G them and the doctrine of *stare decisis* cannot be permitted to perpetuate erroneous decisions of this Court to the detriment of the general welfare of the public. There is indeed a school of thought which believes with Cardozo that "the precedents have turned upon us and they are engulfing and annihilating us, engulfing and annihilating the very devotees that worshipped at their shrine" and H that the Court should not be troubled unduly if it has to break away from precedents in order to modify old rules and if need be to fashion new ones to meet the challenges and problems thrown upon

by a dynamic society. But at the same time, it must be borne in mind that certainty and continuity are essential ingredients of rule of law. Certainty in applicability of law would be considerably eroded and suffer a serious set-back if the highest court in the land were readily to overrule the view expressed by it in earlier decisions even though that view has held the field for a number of years. It is obvious that when constitutional problems are brought before this Court for its decision, complex and difficult questions are bound to arise and since the decision on many of such questions may depend upon choice between competing values, two views may be possible depending upon the value judgment or the choice of values made by the individual Judge. Therefore, if one view has been taken by the Court after mature deliberation, the fact that another Bench is inclined to take another view would not justify the Court in reconsidering the earlier decision and overruling it. The law laid down by this Court is binding on all Courts in the country and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the decision given by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the faith of which numerous cases have been decided and many transactions have taken place is held to be not the correct law after a number of years. The doctrine of *stare decisis* has evolved from the maxim "*stare decisis et non quita movere*" meaning "adhere to the decision and do not unsettle things which are established", and it is a useful doctrine intended to bring about certainty and uniformity in the law. But when I say this, let me make it clear that I do not regard the doctrine of *stare decisis* as a rigid and inevitable doctrine which must be applied at the cost of justice. There may be cases where it may be necessary to rid the doctrine of its petrifying rigidity. "*Stare decisis*" as pointed out by Brandeis "is always a desideratum, even in these constitutional cases, but in them, it is never a command". The Court may in an appropriate case overrule a previous decision taken by it, but that should be done only for substantial and compelling reasons. The power of review must be exercised with due care and caution and only for advancing the public well-being and not

merely because it may appear that the previous decision was based on an erroneous view of the law. It is only where the perpetuation of the earlier decision would be productive of mischief or inconvenience or would have the effect of deflecting the nation from the course which has been set by the Constitution makers or to use the words of Krishna Iyer, J. in *Ambika Prasad Misra* v. *State of U.P. & Ors.*(1) "where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake or the basic direction of the nation itself is in peril of a shake-up" that the Court would be justified in reconsidering its earlier decision and departing from it. It is fundamental that the nation's Constitution should not be kept in constant uncertainty by judicial review every now and then, because otherwise it would paralyse by perennial suspense all legislative and administrative action on vital issues. The Court should not indulge in judicial stabilisation of State action and a view which has been accepted for a long period of time in a series of decisions and on the faith of which millions of people have acted and a large number of transactions have been effected, should not be disturbed. Let us not forget the words of Justice Roberts of the United States Supreme Court—words which are equally applicable to the decision making process in this Court:

> "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted rail road ticket good for this day and train only..... It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of out institutions."

Here the view that Article 31A is constitutionally valid has been taken in atleast three decisions of this Court, namely, *Shankari Prasad's* case, *Sajjan Singh's* case and *Golak Nath's* case and it has held the field for over 28 years and on the faith of its correctness, millions of acres of agricultural land have changed hands and new agrarian relations have come into being, transforming the entire rural economy. Even though the constitutional validity of Article 31A was not tested in these decisions by reference to the basic structure doctrine, I do not think the Court would be justified in allowing the earlier decisions to be

(1) [1980] 3 S.C.R. 1159.

reconsidered and the question of constitutional validity of Article 31A re-opened. These decisions have given a quietus to the constitutional challenge against the validity of Article 31A and this quietus should not now be allowed to be disturbed. I may point that this view which I am taking is supported by the decision of this Court in *Ambika Prasad Misra* v. *State of U.P. and Ors.* (supra).

I may now turn to consider the constitutional challenge against the validity of Article 31B read with the 9th Schedule. This Article was introduced in the Constitution alongwith Article 31A by the Constitution (First Amendment) Act, 1951. Article 31A as originally introduced was confined only to legislation for acquisition of an estate or extinguishment or modification of any rights in an estate and it saved such legislation from attack under Articles 14, 19 and 31. Now once legislation falling within this category was protected by Art. 31A, it was not necessary to enact another saving provision in regard to the same kind of legislation. But, presumably, having regard to the fact that the constitutional law was still in the stage of evolution and it was not clear whether a law, invalid when enacted, could be revived without being re-enacted, Parliament thought that Article 31A, even if retrospectively enacted, may not be sufficient to ensure the validity of a legislation which was already declared void by the courts as in *Kameshwar Singh's case*(1), and therefore considered it advisable to have a further provision in Article 31B to specifically by-pass judgments striking down such legislation. That seems to be the reason why Article 31B was enacted and statutes falling within Article 31A were included in the 9th Schedule. Article 31B was conceived together with Article 31A as part of the same design adopted to give protection to legislation providing for acquisition of an estate or extinguishment or modification of any rights in an estate. The 9th Schedule of Article 31B was not intended to include laws other than those covered by Article 31A. That becomes clear from the speeches of the Law Minister and the Prime Minister during the discussion on the Constitution (First Amendment) Act, 1951. Dr. Ambedkar admitted of the 9th Schedule that *prima facie* "it is an unusual procedure" but he went on to add that "all the laws that have been saved by this Schedule are laws that fall under Article 31." Jawaharlal Nehru also told Parliament: "It is not with any great satisfaction or pleasure that we have produced this long Schedule. We do not wish to add to it for two reasons. One is that the Schedule consists of a particular type of legislation, generally speaking, and *another type should not come in.....*" (emphasis supplied). Articles 31A and

(1) [1952] S.C.R. 889.

A 31B were thus intended to serve the same purpose of protecting legislation falling within a certain category. It was a double barelled protection which was intended to be provided to this category of legislation, since it was designed to carry out agrarian reform which was so essential for bringing about a revolution in the socio-economic structure of the country. This was followed by the Constitution
B (Fourth Amendment) Act, 1956 by which the categories of legislation covered by Article 31A were sought to be expanded by adding certain new clauses after clause (a). Originally, in the draft bill in addition to these clauses, there was one more clause, namely, clause (d) which sought to give protection to a law providing for the acquisition or
C requisitioning of any immovable property for the rehabilitation of displaced persons and, as a corollary to the proposed amendment of Art. 31A, it was proposed in Clause (5) of the Bill to add in the 9th Schedule two more State Acts and four Central Acts which fell within the scope of clauses (d) and (f) of the revised Article 31A. Vide cl. (4) of the Statement of Objects and Reasons—The two State
D Acts which were proposed to be included in the 9th Schedule were the Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 and the United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948. The West Bengal Land Development and Planning Act, 1948, which was struck down by this Court in *State of West Bengal* v. *Bela Banerjee*(1), and the invalidity of which really
E started the entire exercise of the Constitution (Fourth Amendment) Act, 1955, was however, left-out of the 9th Schedule in the draft Bill because it included certain purposes of acquisition which fell outside the proposed clause (d) of Article 31A. But, while the Constitution (Fourth Amendment) Act, 1955 was being debated, an Ordinance was issued by the Governor of West Bengal omitting with retrospective
F effect all the items in the definition of "public purpose" except the settlement of displaced persons who had migrated into the State of West Bengal, with the result that the West Bengal Act as amended by the Ordinance came within the category of legislation specified in the proposed clause (d) of Art. 31A. In view of this amendment, the West Bengal Act was included in the 9th Schedule by way of
G amendment of the draft Bill. It is significant to note that similar Orissa Statute which provided for acquisition of land for purposes going beyond the proposed clause (d) of Article 31A and which was not amended in the same manner as the West Bengal Act, was not included in the 9th Schedule. A Central Act, namely, the Resettlement
H of Displaced Persons (Land Acquisition) Act, 1948 fell within the proposed clause (d) of Art. 31A and it was therefore included in the

(1) [1954] S.C.R. 550.

9th Schedule in the draft Bill. The link between Articles 31A and 31B was thus maintained in the draft Bill, but when the draft Bill went before the Joint Committee, the proposed clause (d) of Aricle 31A was deleted and the Bihar, U.P. and West Bengal Acts as also the above-mentioned Central Act which were originally intended to be within the scope and ambit of Article 31A, became unrelated to that Article. Even so, barring these four Acts, all the other statutes included in the 9th Schedule fell within one or the other clause of the amended Art. 31A. Subsequent to this amendment, several other statutes dealing with agrarian reform were included in the 9th Schedule by the Constitution (Seventeenth Amendment) Act, 1964 and no complaint can be made in regard to such addition, because all these statutes partook of the character of agrarian reform legislation and were covered by clause (a) of Article 31A in view of the extended definition of "estate" substituted by the same amending Act. The validity of the Constitution (Seventeenth Amendment) Act, 1964 was challenged before this Court in *Golak Nath's case* (supra) and though the Court by a majority of six against five took the view that Parliament has no power to amend any fundamental right, it held that this decision would not affect the validity of the Constitution (Seventeenth Amendment) Act, 1964 and other earlier amendments to the Constitution and thus recognised the validity of the various constitutional amendments which included statutes in the 9th Schedule from time to time upto that date. Then came the Constitution (Twenty Ninth Amendment) Act, 1972 by which two Kerala agrarian reform statutes were included in the 9th Schedule. The validity of the Twenty Ninth Amendment Act was challenged in *Keshavananda Bharati's* case, but by a majority consisting of Khanna, J. and the six learned Judges led by Ray, C.J., it was held to be valid. Since all the earlier constitutional amendments were held valid on the basis of unlimited amending power of Parliament recognised in *Shankari Prasad's* case and *Sajjan Singh's* case and were accepted as valid in *Golak Nath's* case and the Twenty Ninth Amendment Act was also held valid in *Keshavananda Bharati's* case, though not on the application of the basic structure test, and these constitutional amendments have been recognised as valid over a number of years and moreover, the statutes intended to be protected by them are all falling within Article 31A with the possible exception of only four Acts referred to above, I do not think, we would be justified in re-opening the question of validity of these constitutional amendments and hence we hold them to be valid. But, all constitutional amendments made after the decision in *Keshavananda Bharati's* case would have to be tested by reference to the basic structure doctrine, for Parliament would then have no excuse for saying that it did not know the limitation

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on its amending power. It may be pointed out that quite a large number of statutes have been included in the 9th Schedule by the subsequent constitutional amendments and strangely enough, we find for the first time that statutes have been included which have no connection at all with Article 31A or 31C and this device of Article 31B which was originally adopted only as a means of giving a more definite and assured protection to legislation already protected under Article 31A, has been utilised for the totally different purpose of excluding the applicability of Fundamental Rights to all kinds of statutes which have nothing to do with agrarian reform or Directive Principles. This is rather a disturbing phenomenon. Now out of the statutes which are or may in future be included in the 9th Schedule by subsequent constitutional amendments, if there are any which fall within a category covered by Article 31A or 31C, they would be protected from challenge under Articles 14 and 19 and it would not be necessary to consider whether their inclusion in the 9th Schedule is constitutionally valid, except in those rare cases where protection may be claimed for them against violation of any other fundamental rights. This question would primarily arise only in regard to statutes not covered by Article 31A or 31C and in case of such statutes, the Court would have to consider whether the constitutional amendments including such statutes in the 9th Schedule violate the basic structure of the Constitution in granting them immunity from challenge of the fundamental rights. It is possible that in a given case, even an abridgement of a fundamental right may involve violation of the basic structure. It would all depend on the nature of the fundamental right, the extent and depth of the infringement, the purpose for which the infringement is made and its impact on the basic values of the Constitution. Take for example, right to life and personal liberty enshrined in Article 21. This stands on an altogether different footing from other fundamental rights. I do not wish to express any definite opinion, but I may point out that if this fundamental right is violated by any legislation, it may be difficult to sustain a constitutional amendment which seeks to protect such legislation against challenge under Art. 21. So also where a legislation which has nothing to do with agrarian reform or any Directive Principles infringes the equality clause contained in Article 14 and such legislation is sought to be protected by a constitutional amendment by including it in the 9th Schedule, it may be possible to contend that such constitutional amendment is violative of the egalitarian principle which forms part of the basic structure. But these are only examples which I am giving by way of illustration, for other situations may arise where infraction

of a fundamental right by a statute, if sought to be constitutionally protected, might affect the basic structure of the Constitution. In every case, therefore, where a constitutional amendment includes a statute or statutes in the 9th Schedule, its constitutional validity would have to be considered by reference to the basic structure doctrine and such constitutional amendment would be liable to be declared invalid to the extent to which it damages or destroys the basic structure of the Constitution by according protection against violation of any particular fundamental right.

I will now turn to consider the challenge against the constitutional validity of the unamended Art. 31C. This article was introduced in the Constitution by the Constitution (Twenty-fifth Amendment) Act, 1971 and it provided in its first part that "Notwithstanding anything contained in Art. 13, no law giving effect to the policy of the State towards securing the principles specified in Cl. (b) or (c) of Art. 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Art. 14, Art. 19 or Art. 31". It is not necessary to reproduce here the second part of the unamended Art. 31C because that was declared unconstitutional by the majority decision in *Keshavananda Bharti's* case and must consequently be treated as *non-est.* The argument of Mr. Phadke against the constitutional validity of the unamended Art. 31C was the same as in case of Art. 31A, namely, that it emasculated the fundamental rights in Articles 14 and 19 and was, therefore, destructive of the basic structure of the Constitution. I shall presently examine this argument on merits and demonstrate that it is unsustainable, but before I do so, I may point out at the outset that it is wholly unnecessary to embark upon a discussion of the merits of this argument, because the first part of the unamended Art. 31C was held to be constitutionally valid by the majority decision in *Keshavananda Bharti's* case and that decision being binding upon as, it is not open to Mr. Phadke to reagitate this question. Out of the thirteen Judges who sat on the Bench in *Keshavananda Bharti's* case, Ray, J., as he then was, Palekar, J., Dwivedi, J., Khanna, J., Mathew, J., Beg, J., and Chandrachud, J., (as he then was) took the view that the first part of the unamended Art. 31C was constitutionally valid, because the amending power of Parliament was absolute and unlimited. Khanna, J. did not subscribe to the theory that Parliament had an absolute and unlimited right to amend the Constitution and his view was that the power of amendment conferred on Parliament was a limited power restricting Parliament from so amending the Constitution as to alter its basic structure, but even on the basis of this limited power, he upheld the constitutional validity of the first part of the unamended Article 31C. There were thus seven

A out of thirteen Judges who held that the first part of the unamended Art. 31C was constitutionally valid, though the reasons which prevailed with Khanna, J. for taking this view were different from those which prevailed with the other six learned Judges. The issue as regards the constitutional validity of the first part of the unamended Art. 31C
B which directly arose for consideration before the Court was accordingly answered in favour of the Government and the law laid down by the majority decision was that the first part of the unamended Art. 31C was constitutional and valid and this declaration of the law must be regarded as binding on the court in the present writ petitions. Mr.
C Phadke, however, disputed the correctness of this proposition and contended that what was binding on the court was merely the *ratio decidendi* of *Keshavananda Bharati's* case and not the conclusion that the first part of the unamended Article 31C was valid. The *ratio decidendi* of *Keshavananda Bharti's* case, according to Mr. Phadke,
D was that the amendatory power of Parliament is limited and it cannot be exercised so as to alter the basic structure of the Constitution and it was this *ratio decidendi* which was binding upon us and which we must apply for the purpose of determining whether the first part of the unamended Article 31C was constitutionally valid. It is no doubt
E true, conceded Mr. Phadke that the six learned Judges headed by Ray, J. (as he then was) held the first part of the unamended Article 31C to be constitutionally valid but that was on the basis that Parliament had absolute and unrestricted power to amend the Constitution, which basis was, according to the majority decision, incorrect. It was impossible to say, argued Mr. Phadke, what would have been the decision of
F the six learned Judges headed by Ray, J. (as he then was) if they had applied the correct test and examined the constitutional validity of the first part of the unamended Article 31C by reference to the yardstick of the limited power of amendment, and their conclusion upholding the validity of the first part of the unamended Article 31C
G by applying the wrong test could not therefore be said to be binding on the Court in the present writ petitions. This argument of Mr. Phadke is, in my opinion, not well founded and cannot be accepted. I agree with Mr. Phadke that the *ratio decidendi* of *Keshavananda Bharati's* case was that the amending power of Parliament is limited and Parliament cannot in exercise of the power of amendment alter the basic structure of the Constitution and the validity of every constitutional amendment has therefore to be judged by applying the test whe-
H ther or not it alters the basic structure of the constitution and this test was not applied by the six learned Judges headed by Ray, J. (as he

then was), but there my agreement ends and I cannot accept further argument of Mr. Phadke that for this reason, the conclusion reached by the six learned Judges and Khanna, J., as regards the constitutionality of the first part of the unamended Article 31C has no validity. The issue before the court in *Keshavananda Bharti's* case was whether the first part of the unamended Article 31C was constitutionally valid and this issue was answered in favour of the Government by a majority of seven against six. It is not material as to what were the reasons which weighed with each one of the Judges who upheld the validity of the first part of the unamended Article 31C. The reasons for reaching this conclusion would certainly have a bearing on the determination of the *ratio decidendi* of the case and the *ratio decidendi* would certainly be important for the decision of future cases where the validity of some other constitutional amendment may come to be challenged, but so far as the question of validity of the first part of the unamended Article 31C is concerned, it was in so many terms determined by the majority decision in *Keshavananda Bharati's* case and that decision must be held binding upon us. Mr. Phadke cannot therefore be allowed to reopen this question and I must refuse to entertain the challenge against the Constitutional validity of the unamended Art. 31C preferred by Mr. Phadke.

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But even if it were open to Mr. Phadke to dispute the decision in *Keshavananda Bharati's* case and to raise a challenge against the constitutional validity of the first part of the unamended Article 31C, I do not think the challenge can succeed. What the first part of the unamended Article 31C does is merely to abridge the Fundamental Rights in Articles 14 and 19 by excluding their applicability to legislation giving effect to the policy towards securing the principles specified in clauses (b) and (c) of Article 39. The first part of the unamended Article 31C is basically of the same genre as Article 31A with only this difference that whereas Article 31A protects laws relating to certain subjects, the first part of the unamended Article 31C deals with laws having certain objectives. There is no qualitative difference between Article 31A and the first part of the unamended Article 31C in so far as the exclusion of Articles 14 and 19 is concerned. The fact that the provisions to the first part of the unamended Article 31C are more comprehensive and have greater width compared to those of Article 31A does not make any difference in principle. If Article 31A is constitutionally valid, it is indeed difficult to see how the first part of the unamended Article 31C can be held to be unconstitutional. It may be pointed out that the first part of the unamended Article 31C in fact stands on a more secure footing because it accords protection against infraction of Articles 14 and 19 to legislation enacted for giving effect to the Directive Principles set out in clauses (b) and (c) of Article 39.

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A The legislature in enacting such legislation acts upon the constitutional mandate contained in Article 37 according to which the Directive Principles are fundamental in the governance of the country and it is the duty of the State to apply those principles in making laws. It is for the purpose of giving effect to the Directive Principles set out in clauses B (b) and (c) of Art. 39 in discharge of the constitutional obligation laid upon the State under Article 37 that Fundamental Rights in Articles 14 and 19 are allowed to be abridged and I fail to see how a constitutional amendment making such a provision can be condemned as violative of the basic structure of the Constitution. Therefore even on C first principle, I would be inclined to hold that the first part of the unamended Article 31C is constitutionally valid.

That takes us to the next ground of challenge against the constitutional validity of the Constitution (Fortieth Amendment) Act, 1956 in so far as it included the amending Acts 21 of 1975, 47 of 1975 and D 2 of 1976 in the 9th Schedule and the Constitution (Forty-second Amendment) Act, 1976 in so far as it introduced cls. (4) and (5) in Art. 368. The petitioners contended under this head of challenge that the Constitution (Fortieth Amendment) Act, 1976 was passed by the Lok Sabha on 2nd April, 1976 and the Constitution (Forty-Second Amendment) Act, 1976 sometime in November, 1976, but on these E dates the Lok Sabha was not validly in existence because it automatically dissolved on 18th March, 1976 on the expiration of its term of 5 years. It is no doubt true that the House of People (Extension of Duration) Act, 1976 was enacted by Parliament under the Proviso to Art. 83(2) extending the duration of the Lok Sabha for a period of one year, but the argument of the petitioners was that this Act was F *ultra vires* and void, because the duration of the Lak Sabha could be extended under the proviso to Art. 83(2) only during the operation of a Proclamation of an Emergency and, in the submission of the petitioners, there was no Proclamation of Emergency in operation at the time when the House of People (Extension of Duration) Act, 1976 was passed. It may be conceded straight away that, strictly speaking, G it is superfluous and unnecessary to consider this argument because, even if the Constitution (Fortieth Amendment) Act, 1976 is unconstitutional and void and the Amending Acts 21 of 1975, 47 of 1975 and 2 of 1976 have not been validly included in the 9th Schedule so as to earn the protection of Art. 318, they are still as pointed out earlier, saved from invalidation by Art. 31A and so far as the Constitution H (Forty-second Amendment) Act, 1976 is concerned, I have already held that it is outside the constituent power of Parliament in so far as it seeks to include clauses (4) and (5) in Art. 368. But since a

long argument was addressed to us seriously pressing this ground of challenge, I do not think I would be unjustified in dealing briefly with it. A

It is clear on a plain natural construction of its language that under the Proviso to Art. 83(2), the duration of the Lok Sabha could be extended only during the operation of a Proclamation of Emergency and if, therefore, no Proclamation of Emergency was in operation at the relevant time, the House of People (Extension of Duration) Act, 1976 would be outside the competence of Parliament under the Proviso to Art. 83(2). The question which thus requires to be considered is whether there was a Proclamation of Emergency in operation at the date when the House of People (Extension of Duration) Act, 1976 was enacted. The learned Solicitor General appearing on behalf of the Union of India contended that not one but two Proclamations of Emergency were in operation at the material date; one Proclamation issued by the President on 3rd December, 1971 and the other Proclamation issued on 25th June, 1976. By the first Proclamation, the President in exercise of the powers conferred under cl. (1) of Art. 352 declared that a grave emergency existed whereby the security of India was threatened by external aggression. This Proclamation was approved by Resolutions of both the Houses of Parliament on 4th December, 1971 as contemplated under cl. 2(c) of Art. 352 and it continued in operation until 21st March, 1977 when it was revoked by a Proclamation issued by the President under clause 2(a) of Art. 352. The first Proclamation of Emergency was thus in operation at the date when the House of People (Extension of Duration) Act, 1976 was enacted by Parliament. The second Proclamation of Emergency was issued by the President under Art. 352 cl. (1) and by this Proclamation, the President declared that a grave emergency existed whereby the security of India was threatened by internal disturbance. This Proclamation was also in operation at the date of enactment of the House of People (Extension of Duration) Act, 1976 since it was not revoked by another Proclamation issued under cl. 2(a) of Art. 352 until 21st March, 1977. The argument of the petitioners however, was that, though the first Proclamation of Emergency was validly issued by the President on account of external aggression committed by Pakistan against India, the circumstances changed soon thereafter and the emergency which justified the issue of the Proclamation ceased to exist and consequently the continuance of the Proclamation was malafide and colourable and hence the Proclamation, though not revoked until 21st March, 1972, ceased in law to continue in force and could not be said to be in operation at the material date, namely, 16th February, 1976. So far as the second Proclamation of Emergency is concerned, the petitioners contended that it was illegal and void on B C D E F G H

three grounds, namely; (1) whilst the first Proclamation of Emergency was in operation, it was not competent to the President under Art. 352 clause (1) to issue another Proclamation of Emergency; (2) the second Proclamation of Emergency was issued by the President on the advice of the Prime Minister and since this advice was given by the Prime Minister without consulting the Council of Ministers, which alone was competent under the Government of India (Transaction of Business) Rules, 1961 to deal with the question of issue of a Proclamation of Emergency, the second Proclamation of Emergency could not be said to have been validly issued by the President; and (3) there was no threat to the security of India on account of internal disturbance, which could justify the issue of a Proclamation of Emergency and the second Proclamation was issued, not for a legitimate purpose sanctioned by clause (1) of Art. 352 but with a view to perpetuating the Prime Minister in power and it was clearly malafide and for collateral purpose and hence outside the power of the President under Art. 352 cl. (1). The petitioners had to attack the validity of both the Proclamations of Emergency, the continuance of one and the issuance of another, because even if one Proclamation of Emergency was in operation at the relevant time, it would be sufficient to invest Parliament with power to enact the House of People (Extension of Duration) Act, 1976. Obviously, therefore, if the first Proclamation of Emergency was found to continue in operation at the date of enactment of the House of People (Extension of Duration) Act, 1976, it would be unnecessary to consider whether the second Proclamation of Emergency was validly issued by the President. I will accordingly first proceed to examine whether the first Proclamation of Emergency which was validly issued by the President ceased to be in force by reason of the alleged change in circumstances and was not operative at the relevant time. It is only if this question is answered in favour of the petitioners that it would become necessary to consider the question of validity of the second Proclamation of Emergency.

I think it is necessary to emphasize even at the cost of repetition that it was not the case of the petitioners that the first Proclamation of emergency when issued, was invalid. It is a historical fact which cannot be disputed that Pakistan committed aggression against India on 3rd December, 1971 and a grave threat to the security of India arose on account of this external aggression. The President was, therefore, clearly justified in issuing the first Proclamation of Emergency under cl. (1) of Art. 352. The petitioners, however, contended that the circumstances which warranted the issue of the first Proclamation of Emergency ceased to exist and put forward various facts such as the termination of hostilities with Pakistan on 16th December, 1971, the signing of the Simla Pact on 2nd June, 1972, the resumption of postal and

tele-communication links on 4th November, 1974 and the conclusion of trade agreement between India and Pakistan on 24th November, 1974 as also several statements made by the Prime Minister and other Ministers from time to time to show that the threat to the security of India on account of external aggression ceased long before 1975 and there was absolutely no justification whatsoever to continue the Proclamation and hence the continuance of the Proclamation was mala-fide and in colourable exercise of power and it was liable to be declared as unconstitutional and void. I do not think this contention of the petitioners can be sustained on a proper interpretation of the provisions of Art. 352. This Article originally consisted of three clauses, but by section 5 of the Constitution (Thirty-eighth Amendment) Act, 1975, clauses (4) and (5) were added in this Article and thereafter, by a further amendment made by sec. 48 of the Constitution (Forty-second Amendment) Act, 1976, another clause (2A) was introduced after cl. (2). The whole of this Article is not relevant for our purpose but I shall set out only the material provisions thereof which have a bearing on the controversy between the parties ;

352(1) : "If the President is satisfied that a grave emergency exists hereby the Security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect (in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation).

(2) A Proclamation issued under cl. (1)—

(a) may be revoked (or varied) by a subsequent Proclamation;

(b) shall be laid before each House of Parliament ;

(c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.

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(2A) .....

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(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is

A imminent danger thereof.

(4) The power conferred on the President by this article shall include the power to issue different Proclamations on different grounds, being war or external aggression or internal disturbance or imminent danger of war or external aggression or internal B disturbance whether or not there is a Proclamation already issued by the President under cl. (1) and such Proclamation is in operation.

(5) Notwithstanding anything in this Constitution :—

(a) the satisfaction of the President mentioned in clauses C (1) and (3) shall be final and conclusive and shall not be questioned in any Court on any ground;

(b) subject to the provisions of cl. (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of—

D (i) a declaration made by Proclamation by the President to the effect stated in clause (1); or

(ii) the continued operation of such Proclamation."

Now it is obvious on a plain natural construction of the language of cl. (1) of Art. 352 that the President can take action under this clause E only if he is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance. The satisfaction of the President "that a grave emergency exists whereby the security of India.....is threatened whether by war or external aggression or internal disturbance" is a condition precedent which F must be fulfilled before the President can issue a Proclamation under Art. 352 cl. (1). When this condition precedent is satisfied, the President may exercise the power under cl. (1) of Art. 352 and issue a Proclamation of Emergency. The constitutional implications of a declaration of emergency under Art. 352 cl. (1) are vast and they are provided in Articles 83(2), 250, 353, 354, 358 and 359. The emergency G being an exceptional situation arising out of a national crisis certain wide and sweeping powers have been conferred on the Central Government and Parliament with a view to combat the situation and restore normal conditions. One such power is that given by Art. 83 (2), which provides that while a Proclamation of Emergency is in operation, Parliament may by law extend its duration for a period not H exceeding one year at a time. Then another power conferred is that under Art. 250 which says that, while a Proclamation of Emergency is in operation, Parliament shall have the power to make laws for the

whole or any part of the territory of India with respect to any of the matters enumerated in the State List. The effect of this provision is that the federal structure based on separation of powers is put out of action for the time being. Another power of a similar kind is given by Art. 353 which provides that during the time when a Proclamation of Emergency is in force, the executive powers of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised. This provision also derogates from the federal principle which forms the basis of the Constitution. Then we come to Art. 354 which confers power on the President, during the operation of a Proclamation of Emergency, to direct that provisions relating to distribution of revenues under Arts. 268 to 270 shall have effect subject to such modifications or exceptions as he thinks fit. Another drastic consequence of the Proclamation of Emergency is that provided in Article 358 which suspends the operation of the Fundamental Rights guaranteed under Art. 19 while a Proclamation of Emergency is in operation. Art. 359 cl. (1) empowers the President during the operation of a Proclamation of Emergency to make an Order suspending the enforcement of any of the Fundamental Rights conferred by Part III and cl. (1A) introduced by the Constitution (Thirty Eighth Amendment) Act, 1975 suspends the operation of those Fundamental Rights of which the enforcement has been suspended by the President by an Order made under clause (1). These are the drastic consequences which ensue upon the making of a declaration of emergency. The issue of a Proclamation of Emergency makes serious inroads into the principle of federalism and emasculates the operation and efficacy of the Fundamental Rights. The power of declaring an emergency is therefore a power fraught with grave consequences and it has the effect of disturbing the entire power structure under the Constitution. But it is a necessary power given to the Central Government with a view to arming it adequately to meet an exceptional situation arising out of threat to the security of the country on account of war or external aggression or internal disturbance or imminent danger of any such calamity. It is therefore a power which has to be exercised with the greatest care and caution and utmost responsibility.

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It will be convenient at this stage to consider the question as to whether and if so to what extent, the Court can review the constitutionality of a Proclamation of Emergency issued under Article 352 cl. (1). There were two objections put forward on behalf of the respondents against the competence of the Court to examine the question of validity of a Proclamation of Emergency. One objection was that the question whether a grave emergency exists whereby the security of India or any part thereof is threatened by war or external aggression

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A or internal disturbance is essentially a political question entrusted by the Constitution to the Union Executive and on that account, it is not justiciable before the court. It was urged that having regard to the political nature of the problem, it was not amenable to judicial determination and hence the court must refrain from inquiring into it. The other objection was that in any event by reason of clauses (4 and 5) B of Article 352, the Court had no jurisdiction to question the satisfaction of the President leading to the issue of a Proclamation of Emergency or to entertain any question regarding the validity of the Proclamation of Emergency or its continued operation. Both these objections are in my view unfounded and they do not bar judicial review C of the validity of a Proclamation of Emergency issued by the President under Article 352 cl. (1). My reasons for saying so are as follows:

It is axiomatic that if a question brought before the court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since D the court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the court should shrink from performing its duty under the Constitution, if it raises an issue of constitutional determination. There are a large number of decisions in the United States where the Supreme Court has entertained actions having a poli- E tical complexion because they raised constitutional issue. Vide *Gomallion* v. *Lightfoot*(1) and *Baker* v. *Carr*(2). The controversy before the court may be political in character, but so long as it involves determination of a constitutional question, the court cannot decline to entertain it. This is also the view taken by Gupta, J. and myself in *State of Rajasthan* v. *Union of India*(3). I pointed out in F my judgment in that case and I still stand by it, that merely because a question has a political colour, the court cannot fold its hands in despair and declare "Judicial hands off". So long as the question is whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so. I have said G before I repeat again that the Constitution is *suprema lex*, the paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority and whether it has done so or not is for the Court to decide. The Court is H

(1) [1960] 364 U.S. 339.
(2) [1962] 369 U.S. 186.
(3) [1977] 3 SCC 592.

the ultimate interpreter of the Constitution and when there is manifestly unauthorised exercise of power under the Constitution, it is the duty of the Court to intervene. Let it not be forgotten, that to this Court as much as to other branches of government, is committed the conservation and furtherance of constitutional values. The Court's task is to identify those values in the constitutional plan and to work them into life in the cases that reach the court. "Tact and wise restraint ought to temper any power but courage and the acceptance of responsibility have their place too." The Court cannot and should not shirk this responsibility, because it has sworn the oath of allegiance to the Constitution and is also accountable to the people of this country. It would not therefore, be right for the Court to decline to examine whether in a given case there is any constitutional violation involved in the President issuing a Proclamation of Emergency under cl. (1) of Article 352.

But when I say this, I must make it clear that the constitutional jurisdiction of this Court does not extend further than saying whether the limits on the power conferred by the Constitution on the President have been observed or there is transgression of such limits. Here the only limit on the power of the President under Article 352 cl. (1) is that the President should be satisfied that a grave emergency exists whereby the security of India or any part thereof is threatened whether by war or external aggression or internal disturbance. The satisfaction of the President is a subjective one and cannot be decided by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the Executive branch of Government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether there is a situation of grave emergency by reason of the security of the country being threatened by war or external aggression or internal disturbance. It is not a decision which can be based on what the Supreme Court of the United States has described as "judiciably discoverable and manageable standards". It would largely be a political judgment based on assessment of diverse and varied factors, fast-changing situations, potential consequences and a host of other imponderables. It cannot therefore, by its very nature, be a fit subject matter for adjudication by judicial methods and materials and hence it is left to the subjective satisfaction of the Central Government which is best in a position to decide it. The court cannot go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based. That would be a dangerous exercise for the Court, both because it is not a fit instrument for determining a question of this kind and also because the court would thereby usurp

A the function of the executive and in doing so, enter the "political thicket" which it must avoid, if it is to retain its legitimacy with the people. But one thing is certain that if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the court would have jurisdiction to examine it, because in that case there would be no satisfaction of the President in regard to the matter on which he B is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Art. 352 cl. (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. It is true that by reason of clause (5)(a) of Article 352, the satisfaction of the President is made final and conclusive, and cannot be assailed on any C ground, but, as I shall presently point out, the power of judicial review is a part of the basic structure of the Constitution and hence this provision debarring judicial review would be open to attack on the ground that it is unconstitutional and void as damaging or destroying the basic structure. This attack against constitutionality can, however, D be averted by reading the provision to mean and that is how I think it must be read that the immunity from challenge granted by it does not apply where the challenge is not that the satisfaction is improper or unjustified but that there is no satisfaction at all. In such a case, it is not the satisfaction arrived at by the President which is challenged but the existence of the satisfaction itself. Where therefore the E satisfaction is absurd or perverse or mala fide or based on a wholly extraneous and irrelevant ground, it would be no satisfaction at all and it would be liable to be challenged before a court, notwithstanding clause (5)(a) of Article 352. It must, of course, be conceded that in most cases it would be difficult if not impossible, to challenge the exercise of power under Article 352 clause (1) even on this limited F ground, because the facts and circumstances on which the satisfaction is based would not be known, but where it is possible, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on a wholly extraneous or irrelevant ground.

It is true that so far there is no decision of this court taking the view that the validity of a Proclamation of Emergency can be exa- G mined by the court though within these narrow limits. But merely because there has been no occasion for this Court to pronounce on the question of justiciability of a Proclamation of Emergency no inference can be drawn that a Proclamation of Emergency is immune from judicial scrutiny. The question whether or not a Proclamation of Emergency can be judicially reviewed on the ground that it is mala H fide or an abuse of power of the President did arise before this Court in *Gulam Sarwai* v. *Union of India*(1), but the court declined to

(1) [1967] 2 SCR 271.

express any opinion on this question since no material was placed before the Court making out a case of mala fides or abuse of power. Undoubtedly, in the subsequent decision of this Court in *Bhutnath Mato* v. *State of West Bengal*(1) there are one or two observations which might seem to suggest at first blush that a Proclamation of Emergency being a political matter is "*de hors* our ken", but if one looks closely at the judgment of Krishna Iyer, J. in that case, it will be apparent that he does not lay down that a Proclamation of Emergency cannot be reviewed by the judiciary even on a limited ground and leaves that question open and rejects the contention of the petitioner challenging the continuance of Emergency only on the ground that "the onus of establishing the continuation of Emergency and absence of any ground whatever for the subjective satisfaction of the President, heavy as it is, has hardly been discharged, "and consequently it would be an academic exercise in constitutional law to pronounce on the question of judicial reviewability of a Proclamation of Emergency. There is thus no decision of this court holding that a Proclamation of Emergency is beyond the judicial ken and I am not fettered by any such decision compelling me to take a view different from the one which I have expounded in the preceding paragraph of this opinion. In fact, the judgment of Gupta, J. and myself in *State of Rajasthan* v. *Union of India* (supra) completely supports me in the view I am taking. A Proclamation of Emergency is undoubtedly amenable to judicial review though on the limited ground that no satisfaction as required by Article 352 was arrived at by the President in law or that the satisfaction was absurd or perverse or mala fide or based on an extraneous or irrelevant ground.

Now the question arises whether the continuance of a Proclamation of Emergency valid when issued can be challenged before the court on the ground that the circumstances which necessitated or justified its issuance have ceased to exist. Can the court be asked to declare that the Proclamation of Emergency has ceased to exist and is no longer in force or does the Proclamation continue to be in force until it is revoked by another Proclamation under clause 2(a) of Article 352. The answer to this question depends on the interpretation of clause (2) of Article 352. That clause says in sub-clause (a) that a Proclamation of Emergency issued under clause (1) may be revoked by a subsequent Proclamation. Sub-clause (b) of that clause requires that a Proclamation issued under clause (1) shall be laid before each House of Parliament and under sub-clause (c) such a Proclamation ceases to operate at the expiration of two months, unless it has been approved by both Houses of Parliament before the expiration of two

(1) [1974] 1 S.C.C. 645.

A months. It is clear from this provision that a Proclamation of Emergency validly issued under clause (1) would continue to operate at least for a period of two months and if before the expiration of that period, it has been approved by resolutions of both Houses of Parliament, it would continue to operate further even beyond the period of two months, and the only way in which it can be brought to an end B is by revoking it by another Proclamation issued under clause 2(a). There is no other way in which it can cease to operate. Neither Article 352 nor any other Article of the Constitution contains any provision saying that a Proclamation of Emergency validly issued under clause (1) shall cease to operate as soon as the circumstances warranting its issuance have ceased to exist. It is, therefore, clear on a plain natural C interpretation of the language of sub-clauses (a) to (c) of clause (2) that so long as the Proclamation of Emergency is not revoked by another Proclamation under sub-clause (2) (a), it would continue to be in operation irrespective of change of circumstances. It may be pointed out that this interpretation of the provision of clause (2) of Article D 352 is supported by the decision of this Court in *Lakhan Pal* v. *Union of India*[1] where dealing with a similar contention urged on behalf of the petitioner that the continuance of the emergency which was declared on 26th October, 1962 was a fraud on the Constitution, this Court speaking through Sarkar, C. J. pointed out that "the only way a proclamation ceases to have effect is by one of the events mentioned in E this clause" and since neither had happened, the Proclamation must be held to have continued in operation. The petitioner urged in that case that armed aggression which justified the issue of the Proclamation of Emergency had come to an end and the continuance of the Proclamation was therefore unjustified. But this contention was negatived on the ground that the Proclamation having been approved by the F two Houses of Parliament within a period of two months of its issuance, it could cease to have effect only if revoked by another Proclamation and that not having happened, the Proclamation continued to be in force. It is true that the power to revoke a Proclamation of Emergency is vested only in the Central Government and it is possible that the Central Government may abuse this power by refusing to re- G voke a Proclamation of Emergency even though the circumstances justifying the issue of Proclamation have ceased to exist and thus prolong baselessly the state of emergency obliterating the Fundamental Rights and this may encourage a totalitarian trend. But the Primary and real safeguard of the citizen against such abuse of power lies in "the good sense of the people and in the system of representative and H responsible Government" which is provided in the Constitution. Additionally, it may be possible for the citizen in a given case to move

(1) [1966] Supp. SCR 209.

the court for issuing a writ of mandamus for revoking the Proclamation of Emergency if he is able to show by placing clear and cogent material before the court that there is no justification at all for the continuance of the Proclamation of Emergency. But this would be a very heavy onus because it would be entirely for the executive Government to be satisfied whether a situation has arisen where the Proclamation of Emergency can be revoked. There would be so many facts and circumstances and such diverse considerations to be taken into account by the executive Government before it can be satisfied that there is no longer any grave emergency whereby the security of India is threatened by war or external aggression or internal disturbance. This is not a matter which is a fit subject matter for judicial determination and the court would not interfere with the satisfaction of the executive Government in this regard unless it is clear on the material on record that there is absolutely no justification for the continuance of the Proclamation of Emergency and the Proclamation is being continued mala fide or for a collateral purpose. The court may in such a case, if satisfied beyond doubt, grant a writ of mandamus directing the Central Government to revoke the Proclamation of Emergency. But until that is done, the Proclamation of Emergency would continue in operation and it cannot be said that, though not revoked by another Proclamation, it has still ceased to be in force. Here, in the present case it was common ground that the first Proclamation of Emergency issued on 3rd December 1971 was not revoked by another Proclamation under clause 2(a) of Article 352 until 21st March 1977 and hence at the material time when the House of People (Extension of Duration) Act, 1976 was passed, the first Proclamation of Emergency was in operation.

Now if the first Proclamation of Emergency was in operation at the relevant time, it would be sufficient compliance with the requirement of the proviso to clause (2) of Article 83 and it would be unnecessary to consider whether the second Proclamation of Emergency was validly issued by the President. But, contended the petitioners, the House of People (Extension of Duration) Act, 1976 on a proper interpretation of section 2 postulated the operational existence of both the Proclamations of Emergency and if either of them was not in existence at the material date, the Act would be inoperative and would not have the effect of extending the duration of the Lok Sabha. It was therefore not enough for the respondents to establish that the first Proclamation of Emergency was in operation at the relevant date, but it was further necessary to show that the second Proclamation of Emergency was also in operation and hence it was necessary to consider whether the second Proclamation of Emergency was validly issued by the President. The respondents sought to answer this contention

A of the petitioners by saying that on a proper construction of the language of section 2, it was not a condition precedent to the operation of the House of People (Extension of Duration) Act, 1976 that both the Proclamations of Emergency should be in operation at the date when the Act was enacted. The House of People (Extension of Duration) Act, 1976 no doubt referred to both the Proclamations of Emergency B being in operation but that was merely, said the respondents, by way of recital and it was immaterial whether this recital was correct or incorrect, because so long as it could be objectively established that one Proclamation of Emergency at least was in operation, the requirement of the proviso to Article 83 clause (2) would be satisfied and the Act would be within the competence of Parliament to enact. These C rival contentions raised a question of construction of section 2 of the House of People (Extension of Duration) Act, 1976. It is a simple question which does not admit of much doubt or debate and a plain grammatical reading of section 2 is sufficient to answer it. It would be convenient to reproduce section 2 which co-incidentally happens to be the only operative section of the Act :

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> "Sec. 2 : The period of five years (being the period for which the House of the People may, under clause (2) of Article 83 of the Constitution, continue from the date appointed for its first meeting) in relation to the present House of the People shall, while the Proclamations of Emergency issued on the 3rd day of E December, 1971 and on the 25th day of June, 1975, are both in operation, be extended for a period of one year :
>
> Provided that if both or either of the said Proclamations cease or ceases to operate before the expiration of the said period of one year, the present House of the People shall, unless previously dissolved under clause (2) of Article 83 of the Constitution, F continue until six months after the cesser of operation of the said Proclamations or Proclamation but not beyond the said period of one year."

While interpreting the language of this section, it is necessary to bear in mind that the House of People (Extention of Duration) Act, 1976 G was enacted under the proviso to clause (2) of Article 83 for the purpose of extending the duration of the Lok Sabha and it was a condition precedent to the exercise of this power by Parliament that there should be a Proclamation of Emergency in operation at the date when the Act was enacted. Now according to Parliament there were two Proclamations of Emergency which were in operation at the material date, H one issued on 3rd December 1971 and the other on 25th June 1975 and the condition precedent for the exercise of the power under the proviso to cl. (2) of Article 83 to enact the House of People (Extension

of Duration) Act, 1976 was satisfied. It was, from the point of view of legislative drafting, not necessary to recite the fulfilment of this condition precedent, but the draftsman of the Act, it seems, thought it advisable to insert a recital that this condition precedent was satisfied and he, therefore, introduced the words "while the Proclamations of Emergency issued on the 3rd day of December, 1971 and on the 25th day of June, 1975 are both in operation" before the operative part in sec. 2 of the Act. These words were introduced merely by way of recital of the satisfaction of the condition precedent for justifying the exercise of the power under the proviso to clause (2) of Article 83 and they were not intended to lay down a condition for the operation of sec. 2 of the Act. Section 2 clearly and in so many terms extended the duration of the Lok Sabha for a period of one year and this extension was not made dependent on both the Proclamations of Emergency being in operation at the date of the enactment of the Act. It was for a definite period of one year that the extension was effected and it was not co-extensive with the operation of both the Proclamations of Emergency. The extension for a period of one year was made once and for all by the enactment of section 2 and the reference to both the Proclamations of Emergency being in operation was merely for the purpose of indicating that both the Proclamations of Emergency being in operation, Parliament had competence to make the extension. It was therefore not at all necessary for the efficacy of the extension that both the Proclamations of Emergency should be in operation at the date of enactment of the Act. Even if one Proclamation of Emergency was in operation at the material date, it would be sufficient to attract the power of Parliament under the proviso to Art. 83 clause (2) to enact the Act extending the duration of the Lok Sabha. Of course, it must be conceded that Parliament proceeded on the assumption that both the Proclamations of Emergency were in force at the relevant date and they invested Parliament with power to enact the Act, but even if this legislative assumption were unfounded, it would not make any difference to the validity of the exercise of the power, so long as there was one Proclamation of Emergency in operation which authorised Parliament to extend the duration of the Lok Sabha under the proviso to clause (2) of Article 83. It is true that the proviso to sec. 2 enacted that if both or either of the Proclamations of Emergency cease or ceases to operate before the expiration of the extended period of one year, the Lok Sabha shall continue until six months after the cesser of operation of the said Proclamations or Proclamation, not going beyond the period of one year, but the opening part of this proviso can have application only in relation to a Proclamation of Emergency which was in operation at the date of enactment of the Act. If such a Proclamation of Emergency which was in operation at the

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material date ceased to operate before the expiration of the extended period of one year, then the term of the Lok Sabha would not immediately come to an end, but it would continue for a further period of six months but not so to exceed the extended period of one year. This provision obviously could have no application in relation to the second Proclamation of Emergency if it was void when issued. In such a case, the second Proclamation not being valid at all at the date of issue would not be in operation at all and it could not cease to operate after the date of enactment of the Act. The proviso would in that event have to be read as relating only to the first Proclamation of Emergency, and since that Proclamation of Emergency continued until it was revoked on 21st March, 1977, the duration of the Lok Sabha was validly extended for a period of one year from 18th March, 1976 and hence there was a validly constituted Lok Sabha on the dates when the Constitution (Fortieth Amendment) Act, 1976 and the Constitution (Forty-second Amendment) Act, 1976 were passed by Parliament. On this view it is not at all necessary to consider whether the second Proclamation of Emergency was validly issued by the President. It is the settled practice of this Court not to say more than is necessary to get a safe resting place for the decision and I do not think that any useful purpose will be served by examining the various grounds of challenge urged against the validity of the second Proclamation of Emergency, particularly since clause (3) has been introduced in Art. 352 by the Constitution (Forty-Fourth Amendment) Act, 1978 requiring that a Proclamation of Emergency shall not be issued by the President unless the decision of the Union Cabinet recommending the issue of such Proclamation has been communicated to him in writing and clause (9) of Article 352 introduced by the Constitution (Thirty-eighth Amendment) Act, 1975 and renumbered by the Constitution (Forty-Fourth Amendment) Act, 1978 empowers the President to issue different Proclamations on different grounds. I would, therefore, reject the challenge against the validity of the Constitution (Fortieth Amendment) Act, 1976 and the Constitution (Forty-second Amendment) Act, 1976 based on the ground that on the dates when these Constitutor Amending Acts were enacted, the Lok Sabha was not validly in existence.

That takes me to the challenge against the constitutional validity of the amendment made in Article 31C by section 4 of the Constitution (Forty-second Amendment) Act, 1976. This amendment substitutes the words "all or any of the principles laid down in Part IV" for the words "the principles specified in clause (b) or clause (c) of Article 39" and so amended; Article 31C provides that "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall

be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or Article 19". The amended Article 31C gives primacy to Directive Principles over Fundamental Rights in case of conflict between them and the question is whether this amendment is in any way destructive of the basic structure of the Constitution. To answer this question satisfactorily, it is necessary to appreciate the inter-relationship between Fundamental Rights and Directive Principles and for this purpose it would be useful to trace briefly the history of their enactment in the Constitution. The genesis of Fundamental Rights and Directive Principles is to be found in the freedom struggle which the people of India waged against the British rule under the aegis of the Indian National Congress led by Mahatma Gandhi, Jawaharlal Nehru and other national leaders. These great leaders realised the supreme importance of the political and civil rights of the individual, because they knew from their experience of the repression under the British rule as also from the recent events of history including the two World Wars that these rights are absolutely essential for the dignity of man and development of his full personality. But, at the same time, they were painfully conscious that in the socio-economic conditions that prevailed in the country, only an infinitesimal fraction of the people would be able to enjoy these civil and political rights. There were millions of people in the country who were steeped in poverty and destitution and for them, these civil and political rights had no meaning. It was realised that to the large majority of people who are living an almost sub-human existence in conditions of object poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberty, though representing some of the most charished values of free society, would sound as empty words bandied about only in the drawing rooms of the rich and well-to-do and the only solution for making these rights meaningful to them was to re-make the material conditions and usher in a new social order where socio-economic justice will inform all institutions of public life so that the pre-conditions of fundamental liberties for all may be secured. It was necessary to create socio-economic conditions in which every citizen of the country would be able to exercise civil and political rights and they will not remain the preserve of only a fortunate few. The national leaders, therefore, laid the greatest stress on the necessity of bringing about socio-economic regeneration and ensuring social and economic justice. Mahatma Gandhi, the father of the nation, said in his inimitable style in words, full of poignancy :

> "Economic equality is the master key to non-violent independence. A non-violent system of Government is an impossibility so long as the wide gulf between the rich and the hungry

A millions persists. The contrast between the palaces of New Delhi and the miserable hovels of the poor labouring class cannot last one day in a free India in which the poor will enjoy the same power as the rich in the land. A violent and bloody revolution is a certainty one day, unless there is voluntary abdication of riches and the power that riches give and sharing them for common
B good".

Jawaharlal Nehru also said in the course of his presidential address to the Lahore Congress Session of 1929:

"The philosophy of socialism has gradually permeated the entire structure of the society, the world over and almost the only
C point in dispute is the phase and methods of advance to its full realisation. India will have to go that way too if she seeks to end her poverty and inequality, though she may evolve her own methods and may adapt the ideal to the genius of her race."

Then again, emphasising the intimate and inseverable connection between political independence and social and economic freedom, he said:
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"If an indigenous Government took the place of the foreign Government and kept all the vested interests intact, this would not be even the shadow of freedom..... ..... India's
E immediate goal can only be considered in terms of the ending of the exploitation of her people. Politically, it must mean independence and cession of the British connection; economically and socially, it must mean the ending of all special class privileges and vested interests."

The Congress Resolution of 1929 also emphasised the same theme of
F socio-economic reconstruction when it declared:

"The great poverty and misery of the Indian people are due, not only to foreign exploitation in India, but also to the economic structure of society, which the alien rulers support so that their exploitation may continue. In order therefore to remove
G this poverty and misery and to ameliorate the condition of the Indian masses, it is essential to make revolutionary changes in the present economic and social structure of society and to remove the gross inequalities."

The Resolution passed by the Congress in 1931 proceeded to declare that in order to end the exploitation of masses, political free-
H dom must include social and economic freedom of the starving millions. The Congress Election Manifesto of 1945 also reiterated the same thesis when it said that "the most vital and urgent of India's

problems is how to remove the curse of poverty and raise the standard of masses" and for that purpose it is "necessary..... to prevent the concentration of wealth and power in the hands of individuals and groups and to prevent vested interests inimical to society from "growing". This was the socio-economic philosophy which inspired the framers of the Constitution to believe that the guarantee of individual freedom was no doubt necessary to be included in the Constitution, but it was also essential to make provisions for restructuring the socio-economic order and ensuring social and economic justice to the people. This was emphasized by Jawaharlal Nehru when, speaking on the resolution regarding the aims and objectives before the Constituent Assembly, he said:

> "The first task of this Assembly is to free India through a new Constitution, to feed the starving people and clothe the naked masses and give every Indian fullest opportunity to develop himself according to his capacity."

In fact, as pointed out by K. Santhanan, a prominent southern member of the Constituent Assembly, there were three revolutions running parallel in India since the end of the first World War. The political revolution came to an end on 15th August, 1947 when India became independent but clearly political freedom cannot be an end in itself, it can only be a means to an end, "that end being" as eloquently expressed by Jawaharlal Nehru "the raising of the people..... to higher levels and hence the general advancement of humanity." It was therefore necessary to carry forward and accomplish the social and economic revolutions. The social revolution was meant to get India "out of the mediavalism based on birth, religion, custom and community and reconstruct her social structure on modern foundations of law, individual merit and secular education," while the economic revolution was intended to bring about "transition from primitive rural economy to scientific and planned agriculture and industry." Dr. Radhakrishnan who was a member of the Constituent Assembly and who later became the President of India also emphasized that India must have a socio-economic revolution designed not only to bring about the real satisfaction of the fundamental needs of the common man but to go much deeper and bring about "a fundamental change in the structure of Indian society." It was clearly realised by the framers of the Constitution that on the achievement of this great social and economic change depended the survival of India. "If we cannot solve this problem soon", Jawaharlal Nehru warned the Constituent Assembly "all our paper Constitutions will become useless and purposeless." The Objectives Resolution which set out the aims and

objectives before the Constituent Assembly in framing the Constitution and which was passed by the Constituent Assembly in January 1947 before embarking upon the actual task of Constitution making, therefore, expressed the resolve of the Constituent Assembly to frame a Constitution "wherein shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status and of opportunity before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and public morality and wherein adequate safeguards shall be provided for minority, backward and tribal areas and depressed and other backward classes." These objectives were incorporated by the Constitution makers in the Preamble of the Constitution and they were sought to be secured by enacting Fundamental Rights in Part III and Directive Principles in Part IV.

It is not possible to fit Fundamental Rights and Directive Principles in two distinct and strictly defined categories, but it may be stated broadly that Fundamental Rights represent civil and political rights while Directive Principles embody social and economic rights. Both are clearly part of the broad spectrum of human rights. If we look at the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 18th December 1948, we find that it contains not only rights protecting individual freedom (See Articles 1 to 21) but also social and economic rights intended to ensure socio-economic justice to every one (See Articles 22 to 29). There are also two International Covenants adopted by the General Assembly for securing human rights, one is the International Covenant on Civil and Political Rights and the other is the International Covenant on Economic, Social and Cultural Rights. Both are international instruments relating to human rights. It is therefore not correct to say that Fundamental Rights alone are based on human rights while Directive Principles fall in some category other than human rights. The socio-economic rights embodied in the Directive Principles are as much a part of human rights as the Fundamental Rights. Hegde and Mukherjea, JJ. were, to my mind, right in saying in *Keshavananda Bharati's* case at page 312 of the Report that "the Directive Principles and the Fundamental Rights mainly proceed on the basis of human Rights." *Together*, they are intended to carry out the objectives set out in the Preamble of the Constitution and to establish an egalitarian social order informed with political, social and economic justice and ensuring dignity of the individual not only to a few privileged persons but to the entire people of the country including the have-nots and the handicapped, the lowliest and the lost.

Now it is interesting to note that although Fundamental Rights and Directive Principles appear in the Constitution as distinct entities, there was no such demarcation made between them during the period prior to the framing of the Constitution. If we may quote the words of Granville Austin in his book; "Both types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself". They were both placed on the same pedestal and treated as falling within the same category compendiously described as "Fundamental Rights". The Sapru Committee in its Constitutional Proposals made in 1945, recommended that the declaration of Fundamental Rights in its wider sense was absolutely necessary and envisaged these rights as falling in two classes; one justiciable and the other non-justiciable—the former being enforceable in Courts of law and the latter, not. The Committee however, felt difficulty in dividing the Fundamental Rights into these two classes and, left the whole issue to be settled by the Constitution-making body with the observation that though the task was difficult, it was by no means impossible. This suggestion of the Sapru Committee perhaps drew its inspiration from the Irish Constitution of 1937, which made a distinction between justiciable and non-justiciable rights and designated the former as Fundamental Rights and the latter as Directive Principles of Social Policy. Dr. Lauter-pacht also made a similar distinction between justiciable and non-justiciable rights in his "International Bill of the Rights of Men". The substantial provisions of this Bill were in two parts; Part I dealt with personal or individual rights enforceable in Courts of Law while Part II set out social and economic rights incapable of or unsuitable for such enforcement. Sir B. N. Rau, who was the Constitutional Adviser to the Government of India, was considerably impressed by these ideas and he suggested that the best way of giving effect to the objectives set out in the Objectives Resolution was to split-up the objectives into Fundamental Rights and Fundamental Principles of State Policy, the former relating to personal and political rights enforceable in Courts of Law and the latter relating to social and economic rights and other matters, not so enforceable and proposed that the Chapter on Fundamental Rights may be split-up into two parts; Part A dealing with the latter kind of rights under the heading "Fundamental Principles of Social Policy" and Part B dealing with the former under the heading "Fundamental Rights". The Fundamental Rights Sub-Committee also recommended that "the list of fundamental rights should be prepared in two parts, the first part consisting of rights enforceable by appropriate legal process and the second consisting of Directive Principles of Social Policy". A week later, while moving for consideration, the Interim Report of Fundamental Rights, Sardar Vallabhbhai Patel said:

A "This is a preliminary report or an interim report because the Committee when it sat down to consider the question of fixing the fundamental rights and its incorporation into the Constitution, came to the conclusion that the Fundamental Rights should be divided into two parts—the first part justiciable and the other non-justiciable."

B This position was reiterated by Sardar Vallabhbhai Patel when he said while presenting the Supplementary Report:

"There were two parts of the Report; one contained Fundamental Rights which were justiciable and the other part of the Report referred to Fundamental Rights which were not justiciable but were directives....."

C It will, therefore, be seen that from the point of view of importance and significance, no distinction was drawn between justiciable and non-justiciable rights and both were treated as forming part of the rubric of Fundamental Rights, the only difference being that whereas the former were to be enforceable in Courts of Law, the latter were

D not to be so enforceable. This proposal of dividing the fundamental rights into two parts, one part justiciable and the other non-justiciable, was however not easy of adoption, because it was a difficult task to decide in which category a particular fundamental right should be included. The difficulty may be illustrated by pointing out that at one time the right to primary education was included in the draft list of

E Fundamental Rights, while the equality clause figured in the draft list of Fundamental Principles of Social Policy. But ultimately a division of the Fundamental Rights into justiciable and non-justiciable rights was agreed-upon by the Constituent Assembly and the former were designated as "Fundamental Rights" and the latter as "Directive Principles of State Policy". It has sometimes been said that the

F Fundamental Rights deal with negative obligations of the State not to encroach on individual freedom, while the Directive Principles impose positive obligations on the State to take certain kind of action. But, I find it difficult to subscribe to this proposition because, though the latter part may be true that the Directive Principles require positive action to be taken by the State, it is not wholly correct to say that the

G Fundamental Rights impose only negative obligations on the State. There are a few fundamental rights which have also a positive content and that has been, to some extent, unfolded by the recent decisions of this Court in *Hussainara Khatoon* v. *State of Bihar*,(1) *Madhav Hayawadanrao Hoskot* v. *State of Maharashtra*(2) and *Sunil Batra etc.* v. *Delhi Administration & Ors. etc.*(3). There are new dimensions of

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(1) [1979] 3 SCR 160.
(2) [1979] 1 SCR 192.
(3) [1979] 1 SCR 392.

the Fundamental Rights which are being opened-up by this Court and the entire jurisprudence of Fundamental Rights is in a stage of resurgent evolution. Moreover, there are three Articles, namely, Art. 15(2), Art. 17 and Art. 23 within the category of Fundamental Rights which are designed to protect the individual against the action of other private citizens and seem to impose positive obligations on the State to ensure this protection to the individual. I would not, therefore, limit the potential of the Fundamental Rights by subscribing to the theory that they are merely negative obligations requiring the State to abstain as distinct from taking positive action. The only distinguishing feature, to my mind, between Fundamental Rights and Directive Principles is that whereas the former are enforceable in a Court of Law, the latter, are not. And the reason for this is obvious; it has been expressed succinctly by the Planning Commission in the following words:

> "The non-justiciability clause only provides that the infant State shall not be immediately called upon to account for not fulfilling the new obligations laid upon it. A State just awakened to freedom with its many pre-occupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them."

The social and economic rights and other matters dealt with in the Directive Principles are by their very nature incapable of judicial enforcement and moreover, the implementation of many of those rights would depend on the state of economic development in the country, the availability of necessary finances and the Government's assessment of priority of objectives and values and that is why they are made non-justiciable. But merely because the Directive Principles are non-justiciable, it does not follow that they are in any way subservient or inferior to the Fundamental Rights.

The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the socio-economic revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renascence, says Granville Austin, "the core of the commitment to the social revolution lies.....in the Fundamental Rights and the Directive Principles of State Policy."(1) These are the conscience of the Constitution and, according to Granville Austin, "they are designed to be the Chief instruments in bringing

(1) Granville Austin; "The Indian Constitution, Corner-stone of a Nation, p. 50.

about the great reforms of the socio-economic revolution and realising the constitutional goals of social, economic and political justice for all. The Fundamental Rights undoubtedly provide for political justice by conferring various freedoms on the individual, and also make a significant contribution to the fostering of the social revolution by aiming at a society which will be egalitarian in texture and where the rights of minority groups will be protected. But it is in the Directive Principles that we find the clearest statement of the socio-economic revolution. The Directive Principles aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the object physical conditions that had prevented them from fulfilling their best salves.(1) The Fundamental Rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to the common man and to create socio-economic conditions in which there can be social and economic justice to every one, is the theme of the Directive Principles. It is the Directive Principles which nourish the roots of our democracy, provide strength and vigour to it and attempt to make it a real participatory democracy which does not remain merely a political democracy but also becomes social and economic democracy with Fundamental Rights available to all irrespective of their power, position or wealth. The dynamic provisions of the Directive Principles fertilise the static provisions of the Fundamental Rights. The object of the Fundamental Rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate. There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. Can there be any individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system ? Would their individual liberty not come in conflict with the liberty of the socially and economically more powerful class and in the process, get mutilated or destroyed ? It is axiomatic that the real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few which is in conflict with the liberty of the many. The Directive Principles therefore, impose an obligation on the State to take positive action

(1) Granville Austin ; "The Indian Constitution, Corner-stone of a Nation, page 51.

for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have even the bare necessities of life and who are living below the poverty level.

The Directive Principles are set out in Part IV of the Constitution and this Part starts with Article 37 which, to my mind, is an Article of crucial importance. It says: "The provisions contained in this Part shall not be enforceable in any court but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." It is necessary, in order to appreciate the full implications of this Article, to compare it with the corresponding provision in the Irish Constitution which, as pointed out above, provided to some extent the inspiration for introducing Directive Principles in the Constitution. Article 45 of the Irish Constitution provides:

> "The principles of social policy set forth in this Article are intended for the general guidance of the Directives. The application of those principles in the making of laws shall be the care of the Direchtas exclusively and shall not be cognizable for any court under any of the provisions of this Constitution."

It is interesting to note that our Article 37 makes three significant departures from the language of Article 45; first whereas Article 45 provides that the application of the principles of social policy shall not be cognizable by any court, Article 37 says that the Directive Principles *shall not be enforceable* by any court; secondly whereas Article 45 provides that the principles of social policy are intended for the general guidance of the Direchtas, Article 37 makes the Directive Principles *fundamental in the governance of this country;* and lastly, whereas Article 45 declares that the application of principles of social policy in the making of laws shall be the care of the Direchtas exclusively, Article 37 enacts that *it shall be the duty of the State* to apply the Directive Principles in making laws. The changes made by the framers of the Constitution are vital and they have the effect of bringing about a total transformation or metamorphosis of this provision, fundamentally altering its significance and efficacy.

A It will be noticed that the Directive Principles are not excluded from the cognizance of the court, as under the Irish Constitution: they are merely made non-enforceable by a court of law for reasons already discussed. But merely because they are not enforceable by the judicial process does not mean that they are of subordinate importance to any other part of the Constitution. I have already said B this before, but I am emphasizing it again, even at the cost of repetition, because at one time a view was taken by this Court in *State of Madras* v. *Champkan Dorairajan*(1) that because Fundamental Rights are made enforceable in a court of law and Directive Principles are not, "the Directive Principles have to conform to and run as subsidiary C to the Chapter on Fundamental Rights." This view was patently wrong and within a few years, an opportunity was found by this Court in the *Kerala Education Bill,* 1959 SCR 995 to introduce a qualification by stating that: "Nevertheless in determining the scope and ambit of the Fundamental Rights relied on by or on behalf of any person or body, the court may not entirely ignore these Directive Principles D of State Policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible." But even this observation seemed to give greater importance to Fundamental Rights as against Directive Principles and that was primarily because the Fundamental Rights are enforceable by the Judicial process while the Directive E Principles are expressly made non-enforceable. I am however, of the opinion, and on this point I agree entirely with the observation of Hegde, J. in his highly illuminating Lectures on the "Directive Principles of State Policy" that:

> "Whether or not a particular mandate of the Constitution is enforceable by court, has no bearing on the importance of that F mandate. The Constitution contains many important mandates which may not be enforceable by the courts of law. That does not mean that those Articles must render subsidiary to the Chapter on Fundamental Rights ..... it would be wrong to say that those positive mandates", that is the positive mandates contained in the Directive Principles, "are of lesser significance G than the mandates under Part III."

Hegde, J. in fact pointed out at another place in his Lectures that:

> "Unfortunately an impression has gained ground in the organs of the State not excluding judiciary that because the Directive Principles set out in Part IV are expressly made by Article 37 H non-enforceable by courts, these directives are mere pious hopes

(1) [1951] SCR 525.

not deserving immediate attention. I emphasize *again that no part of the Constitution is more important than Part IV*..... To ignore Part IV is to ignore the sustenance provided for in the Constitution, the hopes held out to the nation and the very ideals on which our Constitution is built up." (Emphasis supplied).

I wholly endorse this view set forth by Hegde, J. and express my full concurrence with it.

I may also point out that simply because the Directive Principles do not create rights enforceable in a court of law, it does not follow that they do not create any obligations on the State. We are so much obsessed by the Hohfeldian Classification that we tend to think of rights, liberties, powers and privileges as being invariably linked with the corresponding concept of duty, no right, liability and immunity. We find it difficult to conceive of obligations or duties which do not create corresponding rights in others. But the Hohfeldian concept does not provide a satisfactory analysis in all kinds of jural relationships and breaks down in some cases where it is not possible to say that the duty in one creates an enforceable right in another. There may be a rule which imposes an obligation on an individual or authority and yet it may not be enforceable in a court of law and therefore not give rise to a corresponding enforceable right in another person. But it would still be a legal rule because it prescribes a norm of conduct to be followed by such individual or authority. The law may provide a mechanism for enforcement of this obligation, but the existence of the obligation does not depend upon the creation of such mechanism. The obligation exists prior to and independent of the mechanism of enforcement. A rule imposing an obligation or duty would not therefore cease to be a rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Such a rule would exist despite of any problem relating to its enforcement. Otherwise the conventions of the Constitution and even rules of International Law would no longer be liable to be regarded as rules of law. This view is clearly supported by the opinion of Professor A. L. Goodhart who, while commenting upon this point, says :

> "I have always argued that if a principle is recognised as binding on the legislature, then it can be correctly described as a legal rule even if there is no court that can enforce it. Thus most of Dicey's book on the British Constitution is concerned with certain general principles which Parliament recognises as binding on it."

It is therefore, to my mind, clear beyond doubt that merely because the Directive Principles are not enforceable in a court of law, it does not mean that they cannot create obligations or duties binding on the

A State. The crucial test which has to be applied is whether the Directive Principles impose any obligations or duties on the State ; if they do, the State would be bound by a constitutional mandate to carryout such obligations or duties, even though no corresponding right is created in any one which can be enforced in a court of law.

B Now on this question Article 37 is emphatic and makes the point in no uncertain terms. It says that the Directive Principles are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." There could not have been more explicit language used by the Constitution makers to make the Directive Principles binding on the State C and there can be no doubt that the State is under a constitutional obligation to carry out this mandate contained in Article 37. In fact, non-compliance with the Directive Principles would be unconstitutional on the part of the State and it would not only constitute a breach of faith with the people who imposed this constitutional obligation on the State but it would also render a vital part of the Con- D stitution meaningless and futile. Now it is significant to note that for the purpose of the Directive Principles, the "State" has the same meaning as given to it under Article 13 for the purpose of the Fundamental Rights. This would mean that the same State which is injuncted from taking any action in infringement of the Fundamental Rights is told in no uncertain terms that it must regard the Directive E Principles as fundamental in the governance of the country and is positively mandated to apply them in making laws. This gives rise to a paradoxical situation and its implications are for reaching. The State is on the one hand, prohibited by the constitutional injunction in Article 13 from making any law or taking any executive action which would infringe any Fundamental Right and at the same time F it is directed by the constitutional mandate in Article 37 to apply the Directive Principles in the governance of the country and to make laws for giving effect to the Directive Principles. Both are constitutional obligations of the State and the question is, as to which must prevail when there is a conflict between the two. When the State makes a law for giving effect to a Directive Principle, it is carrying G out a constitutional obligation under Article 37 and if it were to be said that the State cannot make such a law because it comes into conflict with a Fundamental Right, it can only be on the basis that Fundamental Rights stand on a higher pedesteal and have precedence over Directive Principles. But, as we have pointed out above, it is not correct to say that under our constitutional scheme, Fundamental H Rights are superior to Directive Principles or that Directive Principles must yield to Fundamental Rights. Both are in fact equally *fundamental* and the courts have therefore in recent times tried to

harmonise them by importing the Directive Principles in the construction of the Fundamental Rights. It has been laid down in recent decisions of this Court that for the purpose of determining the reasonableness of the restriction imposed on Fundamental Rights, the Court may legitimately take into account the Directive Principles and where executive action is taken or legislation enacted for the purpose of giving effect to a Directive Principle, the restriction imposed by it on a Fundamental Right may be presumed to be reasonable. I do not propose to burden this opinion with reference to all the decided cases where this principles has been followed by the Court, but I may refer only to one decision which, I believe, is the latest on the point, namely, *Pathumma* v. *State of Kerala*(1), where Fazal Ali, J. summarised the law in the following words: "One of the tests laid down by this Court is that in judging the reasonableness of the restrictions imposed by clause (5) of Art. 19, the Court has to bear in mind the Directive Principles of State Policy". So also in the *State of Bihar* v. *Kameshwar Singh*(2), this Court relied upon the Directive Principle contained in Art. 39 in arriving at its decision that the purpose for which the Bihar Zamindary Abolition legislation had been passed was a public purpose. The principle accepted by this Court was that if a purpose is one falling within the Directive Principles, it would definitely be a public purpose. It may also be pointed out that in a recent decision given by this Court in *M/s Kasturi Lal Lakshmi Reddy etc.* v. *The State of Jammu & Kashmir & Anr.*(3), it has been held that every executive action of the Government, whether in pursuance of law or otherwise, must be reasonable and informed with public interest and the yardstick for determining both reasonableness and public interest is to be found in the Directive Principles and therefore, if any executive action is taken by the Government for giving effect to a Directive Principle, it would *prima facie* be reasonable and in public interest. It will, therefore, be seen that if a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a Fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving effect to a Directive Principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before the law, but it would almost always conform to the principle of equality before the law in its total magnitude and dimension, because the equality clause in the Constitution does not speak of more formal equality before the law but embodies the concept of real and

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(1) [1978] 2 SCR 537.

(2) [1952] SCR 889.

(3) [1980] 3 SCR 1338.

A substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice. The dynamic principle of egalitarianism fertilises the concept of social and economic justice; it is one of its essential elements and there can be no real social and economic justice where there is a breach of the egalitarian B principle. If, therefore, there is a law enacted by the legislature which is really and genuinely for giving effect to a Directive Principle with a view to promoting social and economic justice, it would be difficult to say that such law violates the principle of egalitarianism and is not in accord with the principle of equality before the law as understood not in its strict and formalistic sense, but in its dynamic and activist C magnitude. In the circumstances, the Court would not be unjustified in making the presumption that a law enacted really and genuinely for giving effect to a Directive Principle in furtherance of the cause of social and economic justice, would not infringe any Fundamental Right under Article 14 or 19. Mr. C. H. Alexandrowick, an eminent D jurist, in fact, says: "Legislation implementing Part IV must be regarded as permitted restrictions on Part III". Dr. Ambedkar, one of the chief architects of the Constitution, also made it clear while intervening during the discussion on the Constitution (First Amendment) Bill in the Lok Sabha on 18th May 1951 that in his view "So far as the doctrine of implied powers is concerned, there is ample E authority in the Constitution itself, namely, in the Directive Principles to permit Parliament to make legislation, although it will not be specifically covered by the provisions contained in the Part on Fundamental Rights". If this be the correct interpretation of the constitutional provisions, as I think it is, the amended Article 31C does no more than codify the existing position under the constitutional scheme F by providing immunity to a law enacted really and genuinely for giving effect to a Directive Principle, so that needlessly futile and time-consuming controversy whether such law contravenes Article 14 or 19 is eliminated. The amended Article 31C cannot in the circumstances be regarded as violative of the basic structure of the Constitution.

G But I may in the alternative, for the purpose of argument, assume that there may be a few cases where it may be found by the court, perhaps on a narrow and doctrinaire view of the scope and applicability of a Fundamental Right as in *Karimbil Kunhikoman* v. *State of Kerala*(1) where a law awarding compensation at a lower rate to holders of larger blocks of land and at higher rate to holders of smaller H blocks of land was struck down by this Court as violative of the equality clause, that a law enacted really and genuinely for giving effect to a Directive Principle is violative of a Fundamental Right under Article 14 or 19. Would such a law enacted in discharge of the

(1) [1962] (Supp.) 1 SCR 319.

constitutional obligation laid upon the State under Article 37 be invalid, because it infringes a Fundamental Right ? If the court takes the view that it is invalid, would it not be placing Fundamental Rights above Directive Principles, a position not supported at all by the history of their enactment as also by the constitutional scheme already discussed by me. The two constitutional obligations, one in regard to Fundamental Rights and the other in regard to Directive Principles, are of equal strength and merit and there is no reason why, in case or conflict, the former should be given precedence over the latter. I have already pointed out that whether or not a particular mandate of the Constitution is justiciable has no bearing at all on its importance and significance and justiciability by itself can never be a ground for placing one constitutional mandate on a higher pedestal than the other. The effect of giving greater weightage to the constitutional mandate in regard to Fundamental Rights would be to relegate the Directive Principles to a secondary position and emasculate the constitutional command that the Directive Principles shall be *fundamental* in the governance of the country and it shall be the duty of the State to apply them in making laws. It would amount to refusal to give effect to the words "fundamental in the governance of the country" and a constitutional command which has been declared by the Constitution to be *fundamental* would be rendered non-fundamental. The result would be that a positive mandate of the Constitution commanding the State to make a law would be defeated by a negative constitutional obligation not to encroach upon a Fundamental Right and the law made by the legislature pursuant to a positive constitutional command would be delegitimised and declared unconstitutional. This plainly would be contrary to the constitutional scheme because, as already pointed out by me, the Constitution does not accord a higher place to the constitutional obligation in regard to Fundamental Rights over the constitutional obligation in regard to Directive Principles and does not say that the implementation of the Directive Principles shall only be within the permissible limits laid down in the Chapter on Fundamental Rights. The main thrust of the argument of Mr. Palkhiwala was that by reason of the amendment of Article 31C, the harmony and balance between Fundamental Rights and Directive Principles are disturbed, because Fundamental Rights which had, prior to the amendment, precedence over Directive Principles are now, as a result of the amendment, made subservient to Directive Principles. Mr. Palkhiwala picturesquely described the position emerging as a result of the amendment by saying that the Constitution is now made to stand on its head instead of its legs. But in my view the entire premise on which this argument of Mr. Palkhiwala is based is fallacious because it is not correct to say, and I have in the preceding portions

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A of this opinion, given cogent reasons for this view, that prior to the amendments Fundamental Rights had a superior or higher position in the constitutional scheme than Directive Principles and there is accordingly no question at all of any subversion of the constitutional structure by the amendment. There can be no doubt that the intention of the Constitution makers was that the Fundamental Rights should B operate within the socio-economic structure or a wider continuum envisaged by the Directive Principles, for then only would the Fundamental Rights become exercisable by all and a proper balance and harmony between Fundamental Rights and Directive Principles secured. The Constitution makers therefore never contemplated that C a conflict would arise between the constitutional obligation in regard to Fundamental Rights and the constitutional mandate in regard to Directive Principles. But if a conflict does arise between these two constitutional mandates of equal fundamental character, how is the conflict to be resolved ? The Constitution did not provide any answer because such a situation was not anticipated by the Constitution D makers and this problem had therefore to be solved by Parliament and some *modus operandi* had to be evolved in order to eliminate the possibility of conflict howsoever remote it might be. The way was shown in no uncertain terms by Jawaharlal Nehru when he said in the Lok Sabha in the course of discussion on the Constitution (First Amendment) Bill:

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> "The Directive Principles of State Policy represent a dynamic move towards a certain objective. The Fundamental Rights represent something static, to preserve certain rights which exist. Both again are right. But somehow and sometime it might so happen that that dynamic movement and that static standstill do F not quite fit into each other.
>
> The dynamic movement towards a certain objective necessarily means certain changes taking place: that is the essence of movement. Now it may be that in the process of dynamic movement certain existing relationships are altered, varied or G affected. In fact, they are meant to affect those settled relationships and yet if you come back to the Fundamental Rights they are meant to preserve, not indirectly, certain settled relationships. There is a certain conflict in the two approaches, not inherently, because that was not meant, I am quite sure. But there is that slight difficulty and naturally when the courts of the land have to H consider these matters they have to lay stress more on the Fundamental Rights than on the Directive Principles. The result is that the whole purpose behind the Constitution, which was meant to be a dynamic Constitution leading to a certain goal step

by step, is somewhat hampered and hindered by the static element being emphasized a little more than the dynamic element..... If in the protection of individual liberty you protect also individual or group inequality, then you come into conflict with that Directive Principle which wants, according to your own Constitution, a gradual advance, or let us put it in another way, not so gradual but more rapid advance, whenever possible to a State where there is less and less inequality and more and more equality. If any kind of an appeal to individual liberty and freedom is construed to mean as an appeal to the continuation of the existing inequality, then you get into difficulties. Then you become static, unprogressive and cannot change and you cannot realize the ideal of an egalitarian society which I hope most of us aim at."

Parliament took the view that the constitutional obligation in regard to Directive Principles should have precedence over the constitutional obligation in regard to the Fundamental Rights in Articles 14 and 19, because Fundamental Rights though precious and valuable for maintaining the democratic way of life, have absolutely no meaning for the poor, down trodden and economically backward classes of people who unfortunately constitute the bulk of the people of India and the only way in which Fundamental Rights can be made meaningful for them is by implementing the Directive Principles, for the Directive Principles are intended to bring about a socio-economic revolution and to create a new socio-economic order where there will be social and economic justice for all and every one, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the Fundamental Rights. Parliament therefore amended Article 31C with a view to providing that in case of conflict Directive Principles shall have precedence over the Fundamental Rights in Articles 14 and 19 and the latter shall yield place to the former. The positive constitutional command to make laws for giving effect to the Directive Principles shall prevail over the negative constitutional obligation not to encroach on the Fundamental Rights embodied in Articles 14 and 19. Parliament in making this amendment was moved by the noble philosophy eloquently expressed in highly inspiring and evocative words, full of passion and feeling, by Chandrachud, J. (as he then was) in his judgment in *Keshavananda Bharati's* case at page 991 of the Report. I may quote here what Chandrachud, J. (as he then was) said on that occasion, for it sets out admirably the philosophy which inspired Parliament in enacting the amendment in Article 31C. The learned Judge said:

"I have stated in the earlier part of my judgment that the Constitution accords a place of pride to Fundamental Rights and

A a place of permanence to the Directive Principles. I stand by what I have said. The Preamble of our Constitution recites that the aim of the Constitution is to constitute India into a Sovereign Democratic Republic and to secure to "all its citizens", Justice—Social, economic and political—liberty and equality. Fundamental Rights which are conferred and guaranteed by Part III of the B Constitution undoubtedly constitute the ark of the Constitution and without them a man's reach will not exceed his grasp. But it cannot be overstressed that, the Directive Principles of State Policy are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an C individual. That one is justiciable and the other not may show the intrinsic difficulties in making the latter enforceable through legal processes but that distinction does not bear on their relative importance. An equal right of men and women to an adequate means of livelihood; the right to obtain humane conditions of work ensuring a decent standard of life and full enjoyment of D leisure; and raising the level of health and nutrition are not matters for compliance with the Writ of a Court. As I look at the provisions of Parts III and IV, I feel no doubt that the basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in Part IV. A circumspect use E of the freedoms guaranteed by Part III is bound to subserve the common good but voluntary submission to restraints is a philosopher's dream. Therefore, article 37 enjoys the State to apply the Directive Principles in making laws. The freedom of a few have them to be abridged in order to ensure the freedom of all. It is in this sense that Parts III and IV, as said by Granville F Austin(1), together constitute "the conscience of the Constitution". The Nation stands today at the cross-roads of history and exchanging the time honoured place of the phrase, may I say that the Directive Principles of State Policy should not be permitted to become "a mere rope of sand." If the State fails to create conditions in which the Fundamental freedoms could be enjoyed G by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it."

This is precisely what Parliament achieved by amending Article 31C. Parliament made the amendment in Article 31C because it realised that "if the State fails to create conditions in which the fundamental H freedoms could be enjoyed by all, the freedom of the few will be at

(1) The Indian Constitution-Cornerstone of a Nation, Ed. 1966.

the mercy of the many and then all freedoms will vanish" and "in order, therefore, to preserve their freedom, the privileged few must part with a portion of it." I find it difficult to understand how it can at all be said that the basic structure of the Constitution is affected when for evolving a *modus vivandi* for resolving a possible remote conflict between two constitutional mandates of equally fundamental character, Parliament decides by way of amendment of Article 31C that in case of such conflict, the constitutional mandate in regard to Directive Principles shall prevail over the constitutional mandate in regard to the Fundamental Rights under Articles 14 and 19. The amendment in Article 31C far from damaging the basic structure of the Constitution strengthens and re-enforces it by giving fundamental importance to the rights of the members of the community as against the rights of a few individuals and furthering the objective of the Constitution to build an egalitarian social order where there will be social and economic justice for all, every one including the low visibility areas of humanity in the country will be able to exercise Fundamental Rights and the dignity of the individual and the worth of the human person which are cherished values will not remain merely the exclusive privileges of a few but become a living reality for the many. Additionally, this question may also be looked at from another point of view so far as the protection against violation of Article 14 is concerned. The principle of egalitarianism, as I said before, is an essential element of social and economic justice and, therefore, where a law is enacted for giving effect to a Directive Principle with a view to promoting social and economic justice, it would not run counter to the egalitarian principle and would not therefore be violative of the basic structure, even if it infringes equality before the law in its narrow and formalistic sense. No law which is really and genuinely for giving effect to a Directive Principle can be inconsistent with the egalitarian principle and therefore the protection granted to it under the amended Article 31C against violation of Article 14 cannot have the effect of damaging the basic structure. I do not therefore see how any violation of the basic structure is involved in the amendment of Article 31C. In fact, once we accept the proposition laid down by the majority decision in *Keshavananda Bharati's* case that the unamended Article 31C was constitutionally valid, it could only be on the basis that it did not damage or destroy the basic structure of the Constitution and moreover in the order made in *Waman Rao's case* on 9th May, 1980 this Court expressly held that the unamended Article 31C "does not damage any of the basic or essential features of the Constitution or its basic structure," and if that be so, it is difficult to appreciate how the amended

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A Article 31C can be said to be violative of the basic structure. If the exclusion of the Fundamental Rights embodied in Articles 14 and 19 could be legitimately made for giving effect to the Directive Principles set out in clauses (b) and (c) of Article 39 without affecting the basic structure. I fail to see why these Fundamental Rights cannot be excluded for giving effect to the other Directive Principles. If the B constitutional obligation in regard to the Directive Principles set out in clauses (b) and (c) of Article 39 could be given precedence over the constitutional obligation in regard to the Fundamental Rights under Articles 14 and 19, there is no reason in principle why such precedence cannot be given to the constitutional obligation in regard to the other Directive Principles which stand on the same footing. It C would, to my mind, be incongruous to hold the amended Article 31C invalid when the unamended Article 31C has been held to be valid by the majority decision in *Keshavananda Bharati's case* and by the Order made on 9th May, 1980 in *Waman Rao's case.*

Mr. Palkhiwala on behalf of the petitioners however contended D that there was a vital difference between Article 31C as it stood prior to its amendment and the amended Article 31C, inasmuch as under the unamended Article 31C only certain categories of laws, namely, those enacted for the purpose of giving effect to the Directive Principles set out in clauses (b) and (c) of Article 39 were protected against challenge under Articles 14 and 19, while the position under the E amended Article 31C was that practically every law would be immune from such challenge because it would be referable to one Directive Principle or the other and the result would be that the Fundamental Rights in Articles 14 and 19 would become meaningless and futile and would, for all practical purposes, be dead letter in the Constitution. The effect of giving immunity to laws enacted for the purpose of F giving effect to any one or more of the Directive Principles would, according to Mr. Palkhiwala, be in reality and substance to wipe out Articles 14 and 19 from the Constitution and that would affect the basic structure of the Constitution. Mr. Palkhiwala also urged that the laws which were protected by the amended Article 31C were G laws for giving effect to the policy of the State towards securing any one or more of the Directive Principles and every law would be comprehended within this description since it would not be competent to the court to enter into questions of policy and determine whether the policy adopted in a particular law is calculated to secure any Directive Principle as claimed by the State. The use of the words H "law giving effect to the policy of the State", said Mr. Palkhiwala, introduced considerable uncertainty in the yardstick with which to decide whether a particular law falls within the description in the

amended Article 31C and widened the scope and applicability of the amended Article so as to include almost every law claimed by the State to fall within such description. This argument was presented by Mr. Palkhiwala with great force and pursuasiveness but it does not appeal to me and I cannot accept it. It is clear from the Language of the amended Article 31C that the law which is protected from challenge under Articles 14 and 19 is law giving effect to the policy of the State towards securing all or any of the Directive Principles. Whenever, therefore, any protection is claimed for a law under the amended Article 31C, it is necessary for the court to examine whether the law has been enacted for giving effect to the policy of the State towards securing any one or more of the Directive Principles and it is only if the court is so satisfied as a result of judicial scrutiny, that the court would accord the protection of the amended Article 31C to such law. Now it is undoubtedly true that the words used in the amended Article are "law giving effect to the policy of the State", but the policy of the State which is contemplated there is the policy towards securing one or more of the Directive Principles. It is the constitutional obligation of the State to secure the Directive Principles and that is the policy which the State is required to adopt and when a law is enacted in pursuance of this policy of implementing the Directive Principles and it seeks to give effect to a Directive Principle, it would, both from the point of view of grammar and language, be correct to say that it is made for giving effect to the policy of the State towards securing such Directive Principle. The words "law giving effect to the policy of the State" are not so wide as Mr. Palkhiwala would have it, but in the context and collocation in which they occur, they are intended to refer only to a law enacted for the purpose of implementing or giving effect to one or more of the Directive Principles. The Court before which protection for a particular law is claimed under the amended Article 31C would therefore have to examine whether such law is enacted for giving effect to a Directive Principle, for then only it would have the protection of the amended Article 31C. Now the question is what should be the test for determining whether a law is enacted for giving effect to a Directive Principle. One thing is clear that a claim to that effect put forward by the State would have no meaning or value; it is the court which would have to determine the question. Again it is not enough that there may be some connection between a provision of the law and a Directive Principle. The connection has to be between the law and the Directive Principle and it must be a real and substantial connection. To determine whether a law satisfies this test, the court would have to examine the pith and substance, the true

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A nature and character of the law as also its design and the subject matter dealt with by it together with its object and scope. If on such examination, the court finds that the *dominant object* of the law is to give effect to the Directive Principle, it would accord protection to the law under the amended Article 31C. But if the court finds that the law though passed seemingly for giving effect to a Directive B Principle, is, in pith and substance, one for accomplishing an unauthorised purpose—unauthorised in the sense of not being covered by any Directive Principle, such law would not have the protection of the amended Article 31C. To take the illustration given by Khanna, J. in *Keshavananda Bharati's* case at page 745 of the Report, "a law might be made that as the old residents in the State C are economically backward and those who have not resided in the State for more than three generations have an affluent business in the State or have acquired property in the State, they shall be deprived of their business and property with a view to vest the same in the old residents of the State." It may be possible, after performing D what I may call an archaeological operation, to discover some remote the tenuous connection between such law and some Directive Principle, but the dominant object of such law would be, as pointed out by Mr. H. M. Seervai at Page 1559 of the second Volume of his book on "Constitutional Law of India", to implement "the policy of the State to discriminate against citizens who hail from E another State, and in a practical sense, to drive them out of it", and such law would not be protected by the amended Article 31C. Many such examples can be given but I do not wish to unnecessarily burden this opinion. The point I wish to emphasize is that the amended Article 31C does not give protection to a law which has merely some remote or tenuous connection with a Directive Principle. F What is necessary is that there must be a real and substantial connection and the dominant object of the law must be to give effect to the Directive Principle, and that is a matter which the court would have to decide before any claim for protection under the amended Article 31C can be allowed.

G There is also one other aspect which requires to be considered before protection can be given to a law under the amended Article 31C. Even where the dominant object of a law is to give effect to a Directive Principle, it is not every provision of the law which is entitled to claim protection. The words used in the amended Article 31C are : "Law giving effect to the policy of the State towards H securing all or any of the principles laid down in Part IV" and these words, on a plain natural construction, do not include all the provisions of the law but only those which give effect to the Directive

Principle. But the question is how to identify these provisions giving effect to the Directive Principle in order to accord to them the protection of the amended Article 31C. The answer to this question is analogically provided by the decision of this Court in *Akadasi Padhan* v. *State of Orissa*(1). There the question was as to what was the precise connotation of the expression "a law relating to" a State monopoly which occurs in Article 19(6). This Court held that "a law relating to" a State monopoly cannot include all the provisions contained in such law but it must be construed to mean, "the law relating to the monopoly in its absolutely essential features" and it is only those provisions of the law "which are basically and essentially necessary for creating the State monopoly" which are protected by Article 19(6). This view was reiterated in several subsequent decisions of this Court which include *inter alia Rashbihari Pande etc.* v. *State of Orissa*(2), *Vrajlal Manilal & Co. & Ors.* v. *State of Madhya Pradesh & Ors.*(3) and *R. C. Cooper* v. *Union of India*(4). I would adopt the same approach in the construction of Article 31C and hold that it is not every provision of a statute, which has been enacted with the dominant object of giving effect to a Directive Principle, that it entitled to protection, but only those provisions of the statute which are basically and essentially necessary for giving effect to the Directive Principles are protected under the amended Article 31C. If there are any other provisions in the statute which do not fall within this category, they would not be entitled to protection and their validity would have to be judged by reference to Articles 14 and 19. Where, therefore, protection is claimed in respect of a statute under the amended Article 31C, the court would have first to determine whether there is real and substantial connection between the law and a Directive Principle and the predominant object of the law is to give effect to such Directive Principle and if the answer to this question is in the affirmative, the court would then have to consider which are the provisions of the law basically and essentially necessary for giving effect to the Directive Principle and give protection of the amended Article 31C only to those provisions. The question whether any particular provision of the law is basically and essentially necessary for giving effect to the Directive Principle, would depend, to a large extent, on how closely and integrally such provision is connected with the implementation of the Directive Principle. If the court finds that a particular provision is subsidiary

(1) [1963] 2 Supp. SCR 691.
(2) [1969] 3 SCR 374.
(3) [1970] 1 SCR 400.
(4) [1970] 3 SCR 530.

A or incidental or not essentially and integrally connected with the implementation of the Directive Principle or is of such a nature that, though seemingly a part of the general design of the main provisions of the statute, its dominant object is to achieve an unauthorised purpose, it would not enjoy the protection of the amended Article 31C and would be liable to be struck down as invalid if it violates B Article 14 or 19.

These considerations which I have discussed above completely answer some of the difficulties raised by Mr. Palkhiwala. He said that if the amended Article 31C were held to be valid, even provisions like Section 23(e) and 24(1)(a) of the Bombay Prohibition Act, 1949 C which were struck down in *State of Bombay* v. *F. N. Balsari*[1] as violating freedom of speech guaranteed under Article 19(1)(a), would have to be held to be valid. I do not think that freedom and democracy in this country would be imperilled if such provisions were held valid. In fact, after the amendment of Article 19(2) by the Constitution (First Amendment) Act, 1951, it is highly arguable that D both such provisions would fall within the protection of Article 19(2) and would be valid. And even otherwise, it is difficult to see how any violation of the basic structure is involved if a provision of a law prohibiting a person from commending any intoxicant, the consumption or use of which is forbidden by the law (except under a licence issued by the State Government) is protected against infraction of Article E 19(1)(a). The position would perhaps be different if a provision is introduced in the Prohibition Act saying that no one shall speak against the prohibition policy or propagate for the repeal of the Prohibition Act or plead for removal of Article 47 from the Directive Principles. Such a provision may not and perhaps would not be F entitled to the protection of the amended Article 31C, even though it finds a place in the Prohibition Act, because its dominant object would not be to give effect to the Directive Principle in Article 47 but to stifle freedom of speech in respect of a particular matter and it may run the risk of being struck down as violative of Article 19(1)(a). If the Court finds that even in a statute enacted for giving effect to G a Directive Principle, there is a provision which is not essentially and integrally connected with the implementation of the Directive Principle or the dominant object of which is to achieve an unauthorised purpose, it would be outside the protection of the amended Article 31C and would have to meet the challenge of Articles 14 and 19.

H Lastly, I must consider the argument of Mr. Palkhiwala that almost any and every law would be within the protection of the

(1) [1951] SCR 682.

amended Article 31C because it would be referable to some Directive Principle or the other. I think this is an argument of despair. Articles 39 to 51 contain Directive Principles referring to certain specific objectives and in order that a law should be for giving effect to one of those Directive Principles, there would have to be a real and substantial connection between the law and the specific objective set out in such Directive Principle. Obviously, the objectives set out in these Directive Principles being specific and limited, every law made by a legislature in the country cannot possibly have a real and substantial connection with one or the other of these specific objectives. It is only a limited number of laws which would have a real and substantial connection with one or the other of specific objectives contained in these Directive Principles and any and every law would not come within this category. Mr. Palkhiwala then contended that in any event, the Directive Principle contained in Article 38 was very wide and it would cover almost any law enacted by a legislature. This contention is also not well founded. Article 38 is a general article which stresses the obligation of the State to establish a social order in which justice—social, economic and political shall inform all the institutions of national life. It no doubt talks of the duty of the State to promote the welfare of the people and there can be no doubt that standing by itself this might cover a fairly wide area but it may be noted that the objective set out in the Article is not merely promotion of the welfare of the people, but there is a further requirement that the welfare of the people is to be promoted by the State, not in any manner it likes, not according to its whim and fancy, but for securing and protecting a particular type of social order and that social order should be such as would ensure social, economic and political justice for all. Social, economic and political justice is the objective set out in the Directive Principle in Article 38 and it is this objective which is made fundamental in the governance of the country and which the State is laid under an obligation to realise. This Directive Principle forms the base on which the entire structure of the Directive Principles is reared and social, economic and political justice is the signature tune of the other Directive Principles. The Directive Principles set out in the subsequent Articles following upon Article 38 merely particularise and set out facets and aspects of the ideal of social, economic and political justice articulated in Article 38. Mr. Palkhiwala's complaint was not directed against the use of the words 'political justice' in Article 38 but his contention was that the concept of social and economic justice referred to in that Article was so wide that almost any legislation could come within it. I do not agree. The concept

A B C D E F G H

A of social and economic justice may not be very easy of definition but its broad contours are to be found in some of the provisions of the Fundamental Rights and in the Directive Principles and whenever a question arises whether a legislation is for giving effect to social and economic justice, it is with reference to these provisions that the question would have to be determined. There is nothing so vague B or indefinite about the concept of social or economic justice that almost any kind of legislation could be justified under it. Moreover, where a claim for protection is made in respect of a legislation on the ground that it is enacted for giving effect to a Directive Principle, the Directive Principle to which it is claimed to be related would C not ordinarily be the general Directive Principle set out in Article 38, but would be one of the specific Directive Principles set out in the succeeding Articles, because as I said before, these latter particularise the concept of social and economic justice referred to in Article 38. I cannot therefore subscribe to the proposition that if the Amendment in Article 31C were held valid, it would have the effect of protecting D every possible legislation under the sun and that would in effect and substance wipe out Articles 14 and 19 from the Constitution. This is a tall and extreme argument for which I find no justification in the provisions of the Constitution.

I would therefore declare Section 55 of the Constitution (Forty-E second Amendment) Act, 1976 which inserted sub-sections (4) and (5) in Article 368 as unconstitutional and void on the ground that it damages the basic structure of the Constitution and goes beyond the amending power of Parliament. But so far as Section 4 of the Constitution (Forty-second Amendment) Act, 1976 is concerned. I F hold that, on the interpretation placed on the amended Article 31C by me, it does not damage or destroy the basic structure of the Constitution and is within the amending power of Parliament and I would therefore declare the amended Article 31C to be constitutional and valid.

I have also given my reasons in this judgment for subscribing G to the Order dated 9th May, 1980 made in *Waman Rao's* case and this judgment in so far as it sets out those reasons will be formally pronounced by me when *Waman Rao's* case is set down on board for judgment.

S. R.

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