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JUDICIAL ACTIVISM

S. P. Sathe

This Paper is about judicial review and its role in democracy. The makers of the Indian Constitution had envisioned a limited scope for judicial review. They did not cherish the idea of an unelected, elitist Court sitting in judgment over the wisdom of the Legislature which represented the people. But the Constitution provided for a bill of rights which was essentially counter-majoritarian. A constitutional Court cannot interpret a Constitution merely with the help of a dictionary. Constitutional interpretation has to sustain the ideals of a democracy in which minority opinion and individual liberty are protected even against the majority. This Paper traces the evolution of the Supreme Court of India from a passive, positivistic Court into an activist Court articulating counter-majoritarian checks on democracy. The Paper also refutes the claim that judicial review is undemocratic. The Court has to continuously sustain the legitimacy of its power through its principled decisions.

I. HISTORICAL PERSPECTIVE

Judicial activism has become a subject of controversy in India. Attempts were made recently to curb the power as well as access to courts [Sathe, 1997, p. 443]. In the past, several indirect methods of disciplining the judiciary, such as supersession of the judges [Palkhivala, 1973] or transfers of inconvenient judges[1] were used. It has been often said that the courts usurped the functions allotted to the other organs of government. On the other hand, the defenders of judicial activism say that the courts have performed their legitimate function. According to the former Chief Justice of India, A. H. Ahmadi, judicial activism is a necessary adjunct to the judicial function since the protection of public interest as opposed to private interest happens to be its main concern [Ahmadi, 1996, Pp. 1-10]. No court can interpret a statute, much less a constitution, in a mechanistic manner. In the case of a statute, a court has to find what was really intended by the authors and in the case of a constitution, a court has to sustain its relevance to changing social, economic and political scenarios and, in the words of Cardozo, give to the words of the constitution 'a continuity of life and expression' [Cardozo, 1968, Pp. 92-94]. An apex court, besides laying down the law binding on all courts subordinate to it,[2] has also to make the ideals, which otherwise might be silenced, 'vocal and audible' [Cardozo, 1968, p. 92-94]. A constitutional court is not bound by what was originally intended by the founding fathers but can interpret the Constitution in terms of what would have been intended under the circumstances which exist at the time of such interpretation. In the absence of such judicial activism, a constitution would become stultified and devoid of any inner strength to survive and provide normative order for the changing times.

How one understands judicial activism depends upon one's conception of the role of a constitutional court in democracy. Those who conceive it narrowly, as being restricted to mere application of the pre-existing legal rules to the given situation, tend to consider even a liberal or dynamic interpretation of a statute as activism. Those who conceive a wider role for a constitutional court and expect it to perform the function of providing meanings to various open-textured expressions in a written constitution and giving them new meanings as required by the changing times are bound to consider judicial activism, not as an aberration but as a normal judicial function. My purpose in this paper is to examine the Indian experience of judicial review during the last 47 years and trace the vicissitudes of judicial activism and the changing role perception of the judiciary in the Indian democracy. I shall try to understand what kind of a role was envisioned by our Constitution for the judiciary and what has been the perception of the Supreme Court of India of its own role under the Constitution. How did it transform itself from a positivist court to an activist court? What is meant by activism? What is the difference between activism and excessivism? Has the Court been adventurist? How do we draw lines between activism, excessivism and adventurism?.

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Is the present judicial activism a temporary phenomenon? Have the courts really overreached themselves? Have they usurped the functions of the other coordinate organs of the State? What are the limits within which judicial review must operate? How far has the Court's jurisprudence of the last decade departed from its jurisprudence during the first decade of the Constitution? In order to answer these questions, we ought to know what role the founding fathers expected the apex court to play while providing for judicial review, to what extent the Supreme Court has departed from such conception of its role and how does it perceive its own role in Indian democracy?

JUDICIAL PROCESS: NATURE

We must first understand the nature of the judicial function in general and of judicial review in particular. The Austinian jurisprudence gives a very narrow view of the judicial function. Since Austin defined law as a command of the political sovereign and his sovereignty was indivisible and absolute, only the legislature could make law. The function of the courts was to merely declare the pre-existing law or to interpret the statutory law. The entire Common Law is the creation of the English courts but is posited on the myth that the judges merely found the law. Even with such self-negating perception of their own role, the English judges not only made the law but also changed it to suit the entirely new conditions created by the industrial revolution. *Ryland* v. *Fletcher* [L.R.,* 1868, 3 H.C. p. 330] and *Donough* v. *Stevenson* [A.C., 1932, p. 562] are the Common Law examples of judicial law-making. In these cases, the English Courts extended the common law concept of negligence which had essentially evolved in relation to an agricultural society to meet the needs of an industrial society. The judges, however, sustained the myth that they did not make any law.

In England, there was judicial review of administrative action but the courts do not have the power to review the Acts of Parliament, since Parliament is supreme. Dicey's theory of Parliamentary sovereignty [Dicey, 1952] was an English constitutional incarnation of Austin's theory of sovereignty. The low profile of the judicial role in England was consistent with the theory of Parliamentary sovereignty. However, underneath such self-negation lay the creative effort of the courts to protect individual liberty and strengthen the rule of law. In England, for a long time there has been resistance against a written bill of rights because the English people are brought up on the faith that the liberty of the subject is sacrosanct and the courts will allow its infraction only if it is supported by a provision of law. The following celebrated quote from Judge Atkin amply demonstrates such faith. He said in *Eshugbayi* v. *Government of Nigeria* [L.R., 1931, p. 670 (C.A.)]:

> In accordance with British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.

The English people felt quite secure with an omnipotent Parliament because they had full faith in the strength of their democracy. Over the years, even in England, Parliamentary sovereignty has been considerably eroded in practice as well as in law. England has joined the European Convention on Human Rights and has accepted the jurisdiction of the European Court on Human Rights. Further, the courts in England have also lately held that a European Community law would prevail over an Act of British Parliament.[3]

Judicial review means scrutiny of the acts of other organs of government by the courts to make sure that they act within the limits of their competence as drawn by the constitution. Judicial review is to be found in England and in countries such as Canada, Australia, South Africa, New Zealand, Sri Lanka, Pakistan and Bangladesh besides India. It originated in England where the courts reviewed the acts of the Executive to ensure that they lay within the limits of its competence drawn by Parliament through statutes. The fundamental principles of individual liberty were laid

* Long forms of all abbreviations are given at the end.

down through the decisions of the courts. Although in England, the courts did not hold the Acts of Parliament invalid, in the colonies, judicial review of legislative Acts has always been in vogue. Colonial legislatures were, unlike British Parliament, not supreme and their powers were circumscribed by the provisions of the constituent Acts enacted by British Parliament. The courts in India, therefore, began exercising judicial review of legislation right since the first Act of British Parliament was enacted in 1858. In *Empress* v. *Burah and Book Singh* [I.L.R. 3 Cal. Pp. 63, 87-88] the Calcutta High Court enunciated the principle of judicial review as follows:

> The theory of every government with a written Constitution forming the fundamental and paramount law of the nation must be that an Act of legislature repugnant to the Constitution is void. If void, it cannot bind the courts, and oblige them to give effect; for this would be to overthrow in fact what was established in theory and make that operative in law which was not law.

Where a court interprets a statutory provision, it tries to give effect to the intention of the legislature. Since the legislature is supposed to have expressed itself through the language of the statute, the court adopts an interpretation giving effect to the language. But no language and no words are entirely unambiguous. Words carry different meanings and sometimes the concepts lying behind the statutory language need to be uncovered. This involves liberal interpretation as well as choice of one of the plausible interpretations. Where a judge interprets a constitution, which is an organic law, the scope of choice is much wider. A constitution often contains expressions which are open-textured and conceptual. A court giving meanings to the expressions such as 'equality before the law and equal protection of law' or 'freedom of speech and expression' or 'inter-state trade and commerce' is discoursing on political philosophy but, unlike a philosopher, he is constrained by the practical limits of the need to operationalise his philosophy. A judge who wants to do justice to his work of justicing, particularly if he is participating in judicial review of legislative action, is bound to be creative. He cannot take recourse to mechanistic interpretation. A written constitution, according to Cardozo, 'states or ought to state not rules for the passing hour but principles for an expanding future' [Cardozo, 1968, p. 83]. A judge who interprets a written constitution cannot, therefore, merely apply the law to the facts that come before him. The scope for judicial creativity is bound to be much greater when a constitution contains a bill of rights. It is one thing to consider whether a legislature has acted within its powers and another to consider whether its acts even though within its plenary powers are violative of any of the basic rights of the people. A judge who interprets a bill of rights has to expound the philosophy and ideology that underlies such a bill of rights.

Where a judge interprets the law or the constitution, not merely by giving effect to the literal meaning of its words, but also by trying to give such meaning as he thinks is in consonance with the spirit of that statute or the constitution, he is said to be an activist judge. In this sense, the judges who developed the Common Law were also activist. The doctrine of negligence in torts or the doctrine of public policy in contract are obvious examples of judicial activism under the Common Law. Even statutory interpretation often involves choice of an interpretation from among the multiple possible interpretations. Such choice of interpretation is based upon the choice of principles, value judgments and the role perception. An obvious illustration of such factors influencing the interpretation is to be found in *Liversidge* v. *Anderson* [A.C., 1942, p. 206]. Defence (General) Regulations 1939, Regulation XVIII B of the Defence of the Realm Acts Consolidation, 1914, gave power to the Home Secretary to detain a person who in his opinion was an enemy alien. The regulation said that if the Home Secretary had reasonable grounds to believe that a person was of hostile origin, he could order his detention. Judge Atkin, dissenting, held that the words 'reasonable grounds to believe' must be interpreted to make the satisfaction of the Home Secretary justiciable. The majority judges were not oblivious to the long standing tradition of construing statutes in favour

of the subject but they were honestly concerned about the situation created by the War and did not want to embarrass the Executive which was engaged in the prosecution of the War. Judge Atkin was of the view that they could even then uphold the executive action if they were satisfied that the Home Secretary had acted on reasonable grounds. The cleavage of interpretation was between the majority judges who held that their function was to construe the statute in a literal manner and equip the Executive with the power necessary for meeting the challenge of War and Judge Atkin who held that judicial function included the envisioning of long term consequences of an interpretation on individual liberty and democracy. Both, the majority as well as minority judges took into consideration the political implications of their statutory interpretation. The judges justices were concerned about the survival of England as a nation and democracy as a system both of which were threatened by War. Judge Atkin was no less concerned about those issues but he felt that even in such critical times, the Court must establish that 'amidst the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace' [*Liversidge* v. *Anderson,* A.C., 1942, p. 206]. The typical apolitical role model of a judge which the black letter law* tradition eulogizes is really a myth. Cardozo rightly says that 'the great tides and currents that engulf the rest of men do not turn aside and pass the judges by' [Cardozo, 1968, p. 158].

There are of course limits to judicial creativity in England. In England, Parliament being supreme, the courts cannot declare a law of Parliament as void. An attempt was made by Judge Coke in 1610 in *Bonham's* case [Co. Rep., 1610, Vol. 8, p. 1142; Wade and Phillips, 1978, p. 54, p. 64] to assert the power to hold an Act of Parliament void if it was inconsistent with the Common Law. Having miserably failed in securing such power for the courts, no judge again made such a claim. Judicial activism, was therefore, essentially directed against the Executive and very subtly and indirectly against Parliament without challenging its authority to legislate. In administrative law, more and more actions were required to be taken after hearing the affected party [*Ridge* v. *Baldwin* A.C., 1964, p. 40] The exercise of administrative discretion was subjected to the strictest scrutiny in *Padfield* v. *Ministry of Agriculture, Fisheries and Food* [A.C., 1968, p. 997] and statutory efforts to oust the jurisdiction of the courts was frustrated by converting every error of law into error of jurisdiction [*Anisminic Lt.* v. *Foreign Compensation Commission* A.C. 1969, Vol. 2, p. 147]. These were Common Law methods of dealing with the ouster clauses. The courts do not hold a legislative Act invalid but construe it in such a way as not to give effect to the legislative intention of excluding the jurisdiction of the courts [Dhavan, 1977, Pp. 63-67].

Judicial review becomes much more controversial when it includes review of the Acts of the legislature. While England never had it, she provided for it in the constitutions which she made for her former colonies on their attaining the status of dominions. Both Australia and Canada have judicial review of legislation. India had judicial review of legislation since the colonial rule. The courts, however, observed maximum restraint in dealing with the Acts of the legislatures. The Privy Council had laid down that although the Indian legislature's powers were circumscribed by the restrictions drawn upon them by the constituent Act, within such limited sphere, it was as sovereign as the imperial Parliament [*Queen* v. *Burah,* A.C., 1878, Vol. 3, p. 889; Sathe, 1998, p. 33]. Very few statutes were struck down by the courts during the colonial period. Allen Gledhill observed that instances of invalidation of laws by courts were so rare that 'even the Indian lawyer generally regarded the legislature as sovereign and it was not until the Government of India Act, 1935 came into force that avoidance of laws by judicial pronouncement was commonly contemplated' [Gledhill, 1960, p. 40]. But the courts construed the legislative Acts strictly and applied the English Common Law methods for safeguarding individual liberty.

For elucidation of the concept of black letter law please see p. 408.

JUDICIAL REVIEW IN THE UNITED STATES

Judicial review of legislation became the most significant aspect of the American constitutional law. Although the Constitution nowhere mentions that the Supreme Court of the United States has power to invalidate Acts of Congress if they are contrary to the provisions of the Constitution, Chief justice Marshall held in *Marbury* v. *Madison* [*The Federalist,* 1837, p. 102] that such power was implied in a written constitution. This assertion of power was criticized severely. The critics said that it amounted to usurpation of power by the Court. The main thrust of the criticism was that an unelected court was to censor the legislation enacted by an elected legislature. In fact, both Hamilton as well as Jefferson seem to have assumed that the Court would have such power. Hamilton had defended it in the following words [*The Federalist,* 1837, p. 102]:

> Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

While speaking on the inclusion of the Bill of Rights in the Constitution, Jefferson said [p. 462]:

> In the arguments in favour of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary. This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity.

Although the assertion of the power of judicial review by the United States Supreme Court became controversial, over a period of time, its legitimacy as well as desirability came to be accepted. Judicial review of legislative Acts was acknowledged by one writer as a 'product of American law' [Willoughby, 1929, p. 7] and another author has described the United States as the 'home of judicial review' [Marshall, 1959, p. 16].

The debate on whether the courts should have the power to decide questions of policy has always been fought vehemently. Judicial activism has always evoked varying types of responses. When the Court took series of objections to the regulation of the economy undertaken by President Roosevelt in the thirties, the liberals criticized it as being reactionary. When the Warren Court expanded the rights of the Blacks, the Court was criticized by the rightists as being adventurist.

After the decision of the Supreme Court in *Brown* v. *Board of Education* [U.S., 1964, Vol. 360, p. 201] the conservatives threatened to impeach the judges and effigies of Chief justice Warren were burnt. Such responses have come because of the disapproval of the judicial policies by the respective groups of people. The liberals disapproved of the Court's anti State intervention policy during the thirties and the conservatives had liked the same policy. On the other hand, the liberals welcomed the decisions of the Warren Court because they concurred with the policies of desegregation, liberalization of the rights of the accused criminal, and concern for freedom of speech and freedom of religion, which were the main themes of the Warren court decisions. Various American scholars have, however, raised objections to the decisions of the Warren Court on the ground that they tended to legislate [Black, 1962].

JUDICIAL REVIEW IN INDIA

Unlike in the United States, in India, judicial review was provided expressly in the Constitution. Article 13, clause (1) says that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions containing the fundamental rights, shall, to the extent of such inconsistency, be void. Clause (2) of that article further says that the State shall not make any law which takes away or abridges any of the fundamental rights and any law made in contravention of the above mandate shall, to the extent of the contravention, be void. The Constitution also divides the legislative power between the center and the states and forbids either of them to encroach upon the power given to the other. Who

is to decide whether a legislature or an executive has acted in excess of its powers or in contravention of any of the restrictions imposed by the Constitution on its power? Obviously, such function was assigned to the courts. The Constitution was criticised by some members of the Constituent Assembly for being a potential lawyers' paradise. B. R. Ambedkar defended the provisions of judicial review as being absolutely necessary and rejected the above criticism [Government of India, Vol. 7, p. 700]. According to him, the provisions for judicial review and particularly for the writ jurisdiction which gave quick relief against the abridgment of fundamental rights constituted the heart of the Constitution, the very soul of it [Government of India, Vol. 7, p. 953; Shiva Rao, 1968, p. 311].

In India, the national movement for independence was enamoured of a constitutional bill of rights, which could act as a bulwark against State authoritarianism. It was also looked upon as a convenient way of assuaging the fears of the religious minorities. The Nehru committee which gave its report on the fundamental rights in 1928 strongly recommended that the future constitution of India should contain a declaration of fundamental rights [Shiva Rao, 1968, p. 173]. The British government, however, rejected the Indian demand and did not incorporate a declaration of fundamental rights in the Government of India Act, 1935. The British rejection was based on the traditional British distrust of such declarations. The Simon Commission while turning down the Indian request observed [Government of India, 1934, Part I, Para 366]:

> We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the War. Experience however has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective.

The Joint Committee on Indian Constitutional Reform reiterated that view again as follows [Government of India, 1934, Part I, Para 366]:

> Either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restriction on the power of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the courts because of the inconsistency with one or other of the rights so declared.

It is interesting to note that in the alternative draft submitted by Atlee to the Committee, the incorporation of the declaration of fundamental rights was recommended. Atlee became the prime minister of England later at the time when India won Independence. Ramswami [1946] had suggested in his book,[4] that large scale invalidation of the laws by the courts could be avoided, if the declaration was framed precisely.

CONSTITUENT ASSEMBLY ON THE SCOPE OF JUDICIAL REVIEW:

Right to Property

Fear of large scale invalidation of the laws seems to have been shared by the makers of the Indian Constitution also. Although the Constituent Assembly unanimously agreed to incorporate the fundamental rights into the Constitution, and expressly provided through Article 13 (1) and (2), that a law inconsistent with any of those fundamental rights would be void, maximum care was taken to avoid making judicial review censorial of legislative policy as it had been in the United States of America.

In the United States, the Supreme Court of the United States had given many reactionary decisions. It had held a law abolishing slavery as unconstitutional on the ground that it violated the slave owner's right to property. It meant that the Court regarded slaves as property of the owner [*Dred Scot* v. *Sandford* U.S., 1857, Vol. 60, p. 393]. A legislation against child labour was struck down as being against the doctrine of freedom of contract [*Lochner* v. *New York* U.S., 1905, Vol. 198, p. 45]. It had also invalidated several laws enacted under President Roosevelt's New Deal programme. The memories of such judicial decisions were fresh in the minds of the makers of the Constitution. India had to bring about a

massive programme of land reforms and change in property relations. The state governments had already embarked upon such programmes under which big estates of lands known as *zamindaris* created under the Permanent Settlement were to be eliminated and tenancy reforms were to be pushed through. During the debate on the right to property, Nehru wanted acquisition of private property for public purpose on payment of compensation. But the quantum of compensation or the principles in accordance with which such compensation would be payable were to be decided by Parliament. While deciding the amount of compensation, or the principles in accordance with which compensation was to be paid, the legislature wanted the freedom to take into consideration various factors such as unearned increment, neglect of the lands over the years, injustice of absentee landlordism and the resources of the State as well as those who were to benefit from such reforms. The members of the Constituent Assembly were apprehensive of the negative judicial attitude which might have prevented legislation on socio-economic reforms. Specific provisions were, therefore, made to exclude from the protection of the fundamental right to property, the legislation enacted eighteen months prior to the coming into force of the Constitution and any legislation that was pending and would be enacted within six months from the commencement of the Constitution for the purpose of acquiring large estates or implementing the land reforms.[5]

It was during these debates that the Constitution makers spelt out what model of judicial review they wanted for India. They obviously did not want the American model under which courts could examine whether a law was just or fair and what was liberty and equality, but wanted the British model of judicial review, which ascertained whether the legislature acted within its limits and vigilantly scrutinised the acts of the executive to make sure that they were according to the law. While speaking on the right to property, Nehru said [Government of India, Vol. 9, p. 1,159].

> Within limits, no judge and no Supreme Court will be allowed to constitute themselves into a third chamber (of the legislature). No Supreme Court and no judiciary will sit in judgment over the sovereign will of the Parliament which represents the will of the entire community. If we go wrong here and there, they can point it out; but in the ultimate analysis, where the future of the community is concerned, no judiciary must come in the way. Ultimately, the whole Constitution is a creature of Parliament.

Every attempt was made to make the Constitution specific and detailed so that not enough leeways could be found by the courts to impose further restrictions on the legislature.

Due Process of Law VS Procedure Established by Law

The 'due process' clause, as found in the fifth and fourteenth amendments of the Constitution of the United States, was avoided purposely and another phrase 'procedure established by law' was preferred by the Constitution makers in Article 21 which guarantees that no one shall be deprived of his life and personal liberty. The 'due process' clause was avoided on the advice of several persons including Justice Frankfurter of the Supreme Court of the United States [Shiva Rao, 1968, p. 235]. Article 21 was confined to life and personal liberty and did not include property. But even with regard to liberty, the makers of the Constitution were apprehensive of extensive judicial review. They had provided for preventive detention, which till then had been used only during emergencies such as war or rebellion. The words 'procedure established by law' were specific and it was hoped that they would not give any scope for judicial veto against such legislation. While doing so, they unknowingly made the valuable fundamental right of life and liberty entirely dependent on the goodwill of the legislature. Intervening in this debate, B.R. Ambedkar had said [Government of India, Vol. 7, p. 1,000]:

> The question of 'due process' raises, in my judgment, the question of the relationship between the legislature and the judiciary. In a federal constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is *ultra vires* or *intra vires* in reference to the powers of legislation which are granted by the Constitution to the particular legislature. ... The 'due process clause', in my judgment, would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law apart from the question of the powers of the legislature making the law. . The question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles.

Ambedkar expressed the dilemma of all constitutional lawyers. Is it desirable to leave the question of liberty to the majority in Parliament, which is often motivated by partisan political considerations? Is it desirable to leave it to a few judges? Ambedkar further reflected [Government of India, Vol. 7, p. 1,000]:

> We are therefore placed in two difficult positions. One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite conclusion. There are dangers on both sides. For myself, I cannot altogether omit the possibility of a Legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of the own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad.

Although Ambedkar's above quoted speech reflects the dilemma of the makers of the Constitution regarding the scope of judicial review, the opinion seems to have been equally divided between those who preferred supremacy of Parliament and those who wanted Parliament's laws to be subject to judicial review. The very fact that the Constituent Assembly incorporated a declaration of fundamental rights in Part III and gave to the Supreme Court the special responsibility to protect those rights was a clear evidence of the Constitution's preference for judicial review with reference to fundamental principles of freedom, equality and justice. It is interesting that while Nehru opted for a restricted scope for judicial review, Ambedkar was not free from doubts about the wisdom of giving to Parliament freedom to lay down any procedure and any law restricting liberty. Obviously, Nehru represented those elements who had fought against colonial rule with great patriotism and had hoped that once colonial rule was eliminated, there would be no threat to freedom of the individual because democracy would take care of it. He was brought up on the British notions of the rule of law and, therefore, felt secure with a sovereign Parliament. Ambedkar, who had fought against not only the colonial rule but also against the tyranny of the majority, felt that there was need to protect individual liberty and the minority rights from the majoritarian rule which may set in after the disappearance of the colonial regime. Ambedkar's fight was not only against the foreign rule but it was also against the tyranny of the caste Hindus and social injustice which the pre-British indigenous regimes had perpetrated. He was, therefore, bound to be skeptical of the Legislative supremacy and wanted a counter-majoritarian safeguard like judicial review. Even the British

distrust of judicial review of legislation and, particularly in regard to a bill of right, seems to have softened when England's former colonies adopted bills of rights in their constitutions after gaining freedom. According to de Smith [1961, Pp. 215, 235-36]:

> The long standing presumption against including them in a Commonwealth Constitution has been replaced by a presumption against excluding them, if they are asked for. The United Kingdom Government has a responsibility for doing its utmost to see that the transfer of power is pacific, that the new order will not dissolve into a Congolese nightmare, that independence will not be accompanied by mass emigration or a flight of capital, and that there is a reasonable prospect of stability under a non-authoritarian regime. ... Judicial review tends to make for uncertainty and to give rise to a long drawn out, expensive and, often, trivial litigation; but on great issues it may well be found that (as in the United States at the present time) basic rights of individuals receive firmer protection from the courts than from the legislatures.

SUPREME COURT OF INDIA: ROLE PERCEPTION BY JUDGES

The Supreme Court of India faced its first case of judicial review in *A.K. Gopalan* v. *State of Madras* [AIR, 1950, SC, p. 27]. A full bench of the Supreme Court consisting of seven judges sat to hear that case. The Court asserted that the power of judicial review was inherent in a written constitution and therefore the provision in Article 13 (2) which said that a law inconsistent with fundamental rights would be void was made by way of *abunda cautela* (abundant caution) and that the Court would have had such power, even if the above provision were absent [AIR, 1950, SC, p. 34]. Having asserted its power of judicial review, the Court set limits to the scope of judicial review. Gopalan had been arrested under the law of preventive detention. It was said on behalf of Gopalan that the law of preventive detention violated two provisions of the Constitution; (1) it violated the right to move within the territory of India guaranteed by Article 19 (1) (d), and (2) it violated the guarantee of procedure established by law, in so far as the procedure prescribed under that Act violated the principles of natural justice, which had always been recognised in all civilised countries as the irreducible norms of fairness. The interpretation adopted by all judges except Fazl Ali (dissenting Judge) was that each article of the Constitution had to be construed separately. Article 19 would be attracted only to a person who was free. If this freedom of the person was taken away, by arresting him or detaining him, such action could be challenged only with reference to the provisions of Article 21 and not with reference to the rights guaranteed by Article 19. Further, the Court held that the words 'procedure established by law' meant such procedure as was laid down by the legislature in a statute. When it was argued that the provisions of the Constitution needed to be interpreted in the context of the spirit of the Constitution, the Court's answer was most emphatically positivist. The Court said [AIR, 1950, SC, p. 42]:

> There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in express terms or by necessary implication, the general powers conferred upon the Legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the Constitution. ... (I)t is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of the Courts of justice to declare void any legislative enactment.

Edward McWhinney in his *Judicial Review* had observed that the Supreme Court of India had adopted a highly positivist attitude towards constitutional interpretation. McWhinney [1969, p. 139] had predicted:

> (I)t seems likely that the Indian Constitution will be subjected to some stress and strain in the future unless the Indian Supreme Court is prepared to adopt a more consciously creative role.

Another English commentator had observed that the Supreme Court of India had not departed from the well-established rules of law followed by courts in England [Green, 1950, Pp. 304, 309]. The courts in England for a long time denied that they made law. Judicial function was confined to mere interpretation of the statutes. Although Common Law was made by the judges and it is known as judge-made law, the judges adopted the fiction that they merely found the law. The judges found the law which was already in existence. With such a restricted view of the judicial function, the courts were bound to adopt a strict construction of the law. Such construction was strictly in terms of what was said through the words of the statute. This is known as legal positivism. Legal positivism has been defined by Dworkin as 'a theory which holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else' [Dworkin, 1977, p. vii] Rajiv Dhavan has described the black letter law tradition, which gives rise to legal positivism, in the following words [Dhavan, 1997, p. xvii]: The 'black letter law' tradition seeks to interpret law as a distinct, relatively autonomous reality. Within this tradition 'law' is separated from morality. It is understood and interpreted by esoteric rules known only to the initiated and critiqued on the basis of self-constituted legal principles and concepts .

Where courts interpret the law not strictly according to its letter but in the light of its spirit and taking into account the changing social conditions, it is supposed to entertain a broader conception of judicial function. It conceives its own role in wider terms as not only the upholder of the law but as the upholder of justice. The English legal education, which for a long time belittled philosophy of law and emphasised the importance of authority and underplayed the importance of sociological study of law was bound to promote such technocratic role model of a lawyer and a judge. The Indian legal education imbibed all the evil characteristics of the English legal education. Therefore lawyers and judges in general were prone to interpret law including the Constitution in a mechanistic manner. The interpretational strategy of the Supreme Court of India in *Gopalan* was positivist because the Court refused to give wider meaning to the words 'procedure established by law' or 'personal liberty' in Article 21 of the Constitution. When a court takes into account the philosophy of law and interprets a statute in terms of not only what it is but also how it ought to be, it is said to have moved towards judicial activism.

Although the interpretation given by the Supreme Court in *Gopalan* was consistent with the intention of the *Constituent Assembly*, the Court adopted the typical English judicial methods of strict interpretation of the constitutional provisions with a view to providing maximum possible protection to the individual from arbitrary State actions. In a typical English judicial way, the Court interpreted the provisions contained in Article 22 liberally, so as to expand the content of the safeguards against arbitrary detention. The Supreme Court held that the grounds to be given must be specific and clear enough to enable the detenue to make a representation against it [Tripathi, 1972, p. 187], and they should be given without any delay.

The Supreme Court of India, however, does not seem to have been totally unconscious of its constitutional role. At the time of the inauguration of the Supreme Court, Chief Justice Kania said [Kania, 1948, p. 13]:

> In view of the fact however, that the opposition is negligible, the position of the judiciary becomes all the more important. In the Legislative Assembly, a Bill could be passed and made into an Act without much difficulty. Having regard to this position of the Legislature, if the Executive which is now held responsible to the Legislature does acts which encroach upon the liberty of the subjects, the only thing which can give redress against irregular action of the Legislature is the courts.

This shows that the first Chief Justice had placed the function of constitutional review in proper perspective. He was conscious of the political dimensions of the judicial function. However, the apolitical role-model of a court, which the black

letter law tradition prescribes had been internalised in the minds of the lawyers and the judges in general, and was not likely to change overnight. That role-model was quite active when they decided the *Gopalan* case. At the same time, the written Constitution and the new responsibilities which it imposed on the Court through the declaration of fundamental rights and a federal government could not be ignored. They had to acknowledge that the Court was not a mere legal court. It had also to play a political role. Therefore the Chief Justice said that in the absence of an effective political opposition, he visualised a more vigilant judicial scrutiny of the legislative acts. The Court was thus destined to perform a function more than of merely considering whether a law was within the powers of the legislature. It had to examine the validity from the standpoint of the liberty of the citizens. This is quite distinct from the positivist stand the Court took in *Gopalan*. There the Court gave a blank cheque of power to the legislature in respect of the restrictions on life and liberty and the procedure in accordance with which such restrictions were to be imposed. Such a positivistic stance remained with the Court for a long time, the latest example of it being its decision during the 1975 emergency in *A. D. M. Jubbulpore* v. *Shiv Kant Shukla* [AIR, 1976, SC, p. 1,207]. In that case, the Court held by majority of four against one that during the proclamation of emergency under Article 352 of the Constitution, a court was powerless to protect an individual from the action of the State even if such an action was contrary to the law and resulted in total negation of his/her right to life or liberty. Even Seervai, who had approved of the Court's positivism in *Gopalan* was vociferous in condemning the Court's self-abnegation in *Shukla* [Seervai, 1979, Pp. 1,635-40].

The Indian judges brought up in British tradition seldom admitted that they made the law. Even a creative judge like Hidayatullah defined the judicial function in restrictive terms in one of his out of court public speeches. He said, 'The judiciary as a rule is not interested in the policy underlying a legislative measure. The Court is only concerned with jurisdiction and constitutionality' [Hidayatullah, 1966, p. 70].[6] Even the Constitution makers seem to have envisioned the law-making role of the judiciary. They said in Article 141 of the Constitution that 'the law declared by the Supreme Court shall be binding on all courts within the territory of India'. This was of course not an acknowledgment of judicial law-making in the sense in which that term is understood in American constitutional law. It was merely a rule of judicial discipline which incorporated expressly the principle of *stairre decisis*. The principle of *stairre decisis* means that every lower court is bound by the decision of the court superior to itself. Another doctrine is the doctrine of precedents, which requires a court to follow the principles laid down by it or by a superior court in previous decisions. Both the rules tend to circumscribe the discretion of the judges. Creativity has to be constrained in the interest of predictability and certainty. Where creativity must prevail over consistency, the highest court may depart from its previous decision.

A more explicit acknowledgment of judicial law-making was found in Article 19 of the Constitution. Article 19 guarantees several rights, such as the right to freedom of speech and expression, right to freedom of assembly, right to freedom of association, right to move within the territory of India, right to reside and settle in any part of the territory of India, right to hold, dispose of and acquire property, and the right to practise any profession or to carry on any occupation, trade or business. The State can impose reasonable restrictions upon the exercise of these freedoms on the grounds mentioned in the respective clauses of that article. (Clauses 2 to 6) The courts have to decide whether a restriction falls within the permissible grounds on which the freedoms can be restricted and whether such a restriction is a reasonable restriction. It is under this provision that the Constitution makers vested enormous power of law-making in the Supreme Court. During the initial year itself, the Court held that prior censorship on the press was *per se* unconstitutional and void [*Ramesh Thappar* v. *Madras*, AIR, 1951, SC, p. 124]. Freedom of the press was a valuable right implicit in the freedom of speech

and expression guaranteed by Article 19 (1) (a). It could be restricted by law in the interests of security of the State, morality, decency and in relation to defamation and contempt of court. The original clause did not contain the word 'reasonable'. In *Ramesh Thappar,* the Court held that restriction could not be imposed except for combating a threat to the security of the State. Mere threat to public order would not justify restriction upon freedom of the press. Parliament amended the Constitution and the Constitution (First Amendment Act) 1951 provided that restrictions could be imposed in the interests of public order and friendly relations with foreign states. While Clauses (3) to (6) of Article 19 contained the word 'reasonable' Clause (2) did not contain that word. That word was, added by the Constitution (First Amendment) Act, 1951. The power to decide the reasonableness of a restriction was not new to the Court. It had been part of the Common Law tradition, and the Court had used it in several situations. Reasonable man, reasonable care were concepts which had been judicially well-articulated. Reasonableness of a restriction on fundamental rights, however, necessarily involved a judgment of a political nature. The Court had to balance the competing interests in liberty and social control, while coming to a conclusion whether a restriction was reasonable. While speaking on this aspect of judicial review, Justice Patanjali Sastri said [*State of Madras* v. *V. G. Row,* AIR, 1952, SC, Pp. 186, 200]:

> In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and the majority of elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

The above statement of Patanjali Sastri shows that even the first generation Supreme Court judges were conscious of the activist role, which the Court was destined to play under the Constitution. The above statement reflects the philosophy of judicial restraint towards another organ of the State, namely, the legislature, which is supposed to be a popular body consisting of the representatives chosen by the people through a free and fair election. The judge also conceded that while making decisions, such as regarding the reasonableness of a restriction upon a valuable fundamental right, 'the social philosophy and the scale of values of the judges participating in the decision' were bound to play a significant role. This was quite at variance with the black letter law tradition of judicial process, to which most of the Indian lawyers and judges were exposed through their legal education.

PROPERTY RIGHTS JURISPRUDENCE: COURT-PARLIAMENT CONFRONTATION

Parliament and the Supreme Court clashed on their contradictory interpretations of the provisions on the right to property. In spite of the fact that the Constituent Assembly had taken utmost care to avoid judicial interference with the programme of economic reforms to which the Congress party had been committed since the days of the national movement, the courts did hold the laws authorising changes in property relations unconstitutional. The High Courts were moved on behalf of the landlords, whose lands had been taken away at much less than their prevailing market value. Although because of Clauses (4) and (6) of Article 31, the validity of such laws could not be challenged on the ground of their alleged violation of the right to property guaranteed by Article 31, it was challenged on the ground of their alleged violation of the right to equality guaranteed by Article 14. In *Kameshwar* v. *Bihar* [AIR, 1951, Patna, p. 91], the Patna High Court upheld the objection that the differential rates of compensation provided under the land reform legislation whereby the rates of compensation tapered down as the value of the land went up, were discriminatory. This decision was a clear example of legal positivism with a hidden class bias [Sathe, 1998, Chapter 6.1].

Parliament responded to that decision by amending the Constitution by following the procedure laid down under Article 368 of the Constitution. The Constitution (First Amendment) Act, 1951 inserted two new articles in the Constitution, namely, Articles 31-A and 31-B, the purpose of both being to exclude judicial review of certain types of legislations which abolished certain types of property interests on the ground of their alleged violation of certain fundamental rights. Article 31-A excluded from judicial review, with reference to the right to equality contained in Article 14, rights to various freedoms contained in Article 19 and right to property contained in Article 31, such legislations as dealt with the abolition of certain types of estates and their acquisition by the State. Article 31-B conferred immunity on the laws included in the Ninth Schedule from being challenged with reference to any of the fundamental rights guaranteed by Part III of the Constitution.

The Supreme Court held in *State of West Bengal* v. *Bela Bannerji* [AIR, 1954, SC, p. 170] that compensation payable on acquisition of property in exercise of the power of eminent domain must be equivalent to the market value of such property. In *State of West Bengal* v. *Subodh Gopal* [AIR, 1954, SC, p. 92], the Court held that compensation was payable even where the property did not vest in the State but was merely regulated or its use restricted, thereby causing deprivation of property to the owner. By the Constitution (Fourth Amendment) Act, 1954, determination of the adequacy of compensation was excluded from judicial review, and further provided that where a law did not provide for transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for compulsory acquisition or requisitioning of the property, notwithstanding that it deprives any person of his property.[7]

The Supreme court neutralised the effect of those constitutional amendments through the following decisions.

(1) In *K. K. Kochuni* v. *Madras and Kerala* [AIR, 1960, SC, p. 1,080], the Supreme Court held that any law causing deprivation of property must stand the test of Clause (5) of Article 19 which permitted only 'reasonable restrictions' to be imposed on the right to hold, possess and dispose of property. Earlier in *Gopalan's case* [AIR, 1950, SC, p. 27] the Court had held that Articles 19 and 21 had to be construed separately. By analogy, till then it was the law that Articles 19 and 31 were also to be construed separately. Therefore, a law causing deprivation of property could not be challenged under Article 19. The Court now made Article 19 applicable even to deprivation of property obviously because the protection available against such a law by virtue of the earlier judicial view held in *Subodh Gopal* no longer survived after the Fourth Amendment.

(2) In *Vajravelu Mujumdar* v. *Sp. Deputy Commissioner* [AIR, 1965, SC, p. 850] the Supreme Court held that although adequacy of compensation was not justiciable according to the Fourth Amendment, the very fact that the word 'compensation' was retained meant that the equivalent in value of the property acquired must be given. The Court said that compensation should not be illusory, and though a court could not go into the question of the adequacy of compensation, it could go into the question whether what was provided was compensation. This was a direct judicial attempt to frustrate the effort of Parliament to exclude judicial review of compensation. In England, the court, took advantage of the silence of the statute to import the principle that private property could not be acquired without payment of compensation [*Attorney General* v. *De Keyser's Royal Hotel*, AC, 1920, p. 508]. In India, the Supreme Court read the liability to pay market value equivalent of the property acquired, despite an express constitutional provision which forbade judicial determination of the adequacy of compensation. Although in *Shantilal Mangaldas* v. *Gujarat* [AIR, 1969, SC, p. 634], the Court tried to disown the previous decision in *Vajravelu*, liability to pay compensation was reiterated in *R. C. Cooper* v. *India*, popularly known as the *Bank Nationalisation* case [AIR, 1970, SC, p. 564].

The Constitution (Twenty-Fifth Amendment) Act, 1971 deleted the word 'compensation' and substituted in its place a more innocuous expression 'amount'. However, the Court persisted with the view that the word 'amount' also meant an amount which was a fair return of the value of the property acquired by the State [*Kesavanand Bharati* v. *Kerala,* AIR, 1973, SC, p. 1460]. Certain types of land tenures were also included within the definition of the word 'estates' in Article 31-A, so as to bring them within the protection of that article. A number of other statutes were added to the Ninth Schedule which contained a list of statutory enactments whose constitutionality could not be challenged on the ground of violation of any of the fundamental rights. Additions to the Ninth Schedule continued to be made by subsequent constitutional amendments. At present there are 258 statutes in the Ninth Schedule. Originally there were only 13 statutes [Sathe, 1989, p. 83].

We would like to revisit the debate on the right to property which went on during the late fifties and the sixties. Since the Congress party was headed by a leader of the stature of Jawaharlal Nehru, who was the Prime Minister of India, and the sincerity of the government to bring about social justice was never doubted, the property rights decisions of the Court appeared to most of the people as reactionary and obstructive of social change. It was felt that the Court construed the provisions of the Constitution narrowly and legalistically and, thereby, protected the rights the property owners. Ultimately Parliament had to use its power of constitutional amendment to nullify the interpretations of the constitutional provisions given by the judiciary.

We cannot find fault with the Court's view that fair and just compensation should be given when private property was acquired by the State. But fair and just compensation need not always mean the equivalent of the market value. Fairness and justness ought to be assessed by taking into consideration the unearned increment derived by the landlord, social costs of the outdated land ownership system, and the capacity of the State or the beneficiaries of such measures to pay compensation. The idealism which informed the earlier legislation particularly during Nehru years, however, dissipated in later years. Judicial review was excluded and the Parliament was armed with adequate powers for bringing in the land revolution. That however did not take place, though the green revolution did take place and it further strengthened the hold of the big landlords. It was fashionable to deride the right to property and call it the villain. This ultimately resulted in the deletion of that right from the chapter on fundamental rights. Today we are witnessing that right to property is being asserted not by the rich but by the poor. Now it is being asserted on behalf of those who are evicted from their lands in order to bring about development. Lands are acquired for construction of dams and the evictees are resisting government's action by invoking their right to their habitat. Is this not their fundamental right? Even Article 300-A of the Constitution, which is a new incarnation of the right to property asserts that no one shall be deprived of his property, except by authority of 'law'. Should such a 'law' not be a fair law? Should such a 'law' be non-discriminatory? The right to property was not needed only by the rich. Even the poor needed it. The colonial law called the Land Acquisition Act, 1894 gave powers to the State to acquire private property for a public purpose on payment of compensation. The only objection an individual property-owner can take against acquisition of property is regarding the amount of compensation. The state is the final authority to decide whether an acquisition is for a public purpose and also what is the public purpose. Further, even the little protection which the Act gives is available only to the owners of the lands, not to those who are mere tenants of landless labourers. But when the inhabitants of the lands to be submerged by a dam or to be acquired for any other development project refuse to be so displaced, are they not asserting their right to property? Should the State have power to acquire any property on payment of any compensation, particularly when such acquisition results in utter impoverishment of the displaced people? How should such compensation be determined? Why should different principles of compensation apply

when a land is acquired under the Land Acquisition Act than when it is acquired under the Town Planning Act? Why should it be even more meagre when it is acquired because it forms the excess land under the Urban Land Ceiling Act? Was the power which the constitutional amendments gave to the State used for really bringing in social justice or was it used to treat different property interests differently without any justification? Did the constitutional amendments, which took away judicial review with reference to right to property, empower the poor against the rich or did they empower the State against the individual? Considering class interests which dominate the State, can we say that ultimately such emasculation of the right to property has promoted the cause of social justice?

Justice K. Subba Rao was considered to be a pro-property judge because of his various decisions. In a personal interview to this writer he had explained that he was not in favour of protecting the rich. What he was insistent upon was that such social engineering could be achieved by more lawful means [Sathe, 1970, p. 99]. The State power was used discriminatorily against the poor and the politically vulnerable sections of society. What the courts did in those days was not to protect the vested interests but to protect the rule of law. One author has said that the legislators and judges did not have different notions on the right to property. Both wanted to protect the right to property but the legislators adopted particularistic approach and sacrificed only certain property interests, which could not be legitimised by courts as it offended their notion of rule of law [Sudarshan, 1994, p. 55].

ECONOMIC REGULATION

Barring a few cases on the right to property, which we have discussed above, the Supreme Court of India generally followed the policy of maximum deference to the will of the legislature on economic issues. Article 19 (1) (g) of the Constitution gives to the citizen the fundamental right to carry on any trade or business or profession. This right is subject to reasonable restrictions that might be imposed by law in the interests of the general public. The Indian Constitution which visualizes a welfare state was bound to undertake extensive regulation of industry, trade or business. The Supreme Court of India has not come in the way of such regulation. The courts have held presumption of constitutionality and they have often deferred heavily in favour of the legislature. The instances of laws being held unconstitutional on the ground of violation of the right to carry on trade or business have been very few. In *Ram Krishna Dalmia* v. *Justice Tendolkar* [AIR, 1958, SC, Pp. 538, 548], the Court said that in sustaining the presumption that a restriction is in the interest of the general public, it would take judicial notice of matters of common knowledge, the history of the times, and assume every state of facts which could be conceived at the time of the legislation. Where a statute, on the face of it, is found to restrict the right to freedom of trade or business and the State argues that such restriction is in the interest of the general public, the Court usually accepts the legislative judgment regarding the necessity and desirability of such restriction because, according to the Court, 'the legislature understands and appreciates the need of the people' and the laws it enacts are directed to problems which are 'manifest by experience' [*Hamdard Dawakhana* v. *India*, AIR, 1960, SC, Pp. 554, 560].

In *Saghir Ahmed* v. *Uttar Pradesh* [AIR, 1954, SC, Pp. 728, 738], the Court held that total monopoly of public transport, thereby excluding private operators from that business, was *per se* an unreasonable restriction on freedom to carry on trade or business. The Constitution was therefore amended and Clause (6) as amended made it clear that a law providing for nationalisation of a trade or a business would be presumed to be in the interest of the general public. Accordingly, in *Akadasi* v. *Orissa* [AIR, 1963, SC, p. 1,047], the Court held that the state monopoly in respect of any trade or business would be presumed to be a reasonable restriction in the interest of the general public on the right to carry on trade or business.

JUDICIAL ACTIVISM: SHIFT FROM PROPERTY RIGHTS TO CIVIL LIBERTIES

The activism of the Supreme Court of India during the fifties and the sixties was confined to few cases on right to property. On personal liberty, the Court had been extremely positivist. Article 21 of the Constitution as interpreted by the Court in *Gopalan* [AIR, 1950, SC, p. 27], gave finality to the law enacted by the legislature. Some exceptional judicial utterances sought to liberally interpret the words 'personal liberty, in Article 21. For example, in *Kharak Singh* v. *Uttar Pradesh* [AIR, 1963, SC, p. 1,295], it was unanimously held that the right to personal liberty included the right to privacy and, therefore, unregulated domiciliary visits on an ex-convict violated Article 21. In that case, in his dissenting judgment Justice K. Subba Rao, had expressed his preference for a wider meaning to the words 'personal liberty' as well as 'procedure established by law' and for not treating the rights under Articles 19(1)(d) (right to move freely within the territory of India) and Article 21 (the right to personal liberty) as being mutually exclusive. This indicated a shift in judicial policy which finally articulated in 1978 in *Maneka Gandhi* v. *India* [AIR, 1978, SC, p. 597].

Since the seventies, we do not find judicial activism on the right to property because that right was removed from the list of the fundamental rights. But from the late fifties, the Court had started perceiving larger dimensions of its constitutional role. This movement from a positivist court to an activist court was slow and imperceptible and came to notice only when during the eighties it manifested itself through what is popularly known as public interest litigation, but for which according to Upendra Baxi, the proper term is social action litigation [Baxi, 1985, p. 289]. In *Basheshar Nath* v. *Commissioner, Income Tax,* Justice Subba Rao had held that persons could not even voluntarily waive their fundamental rights. In support of such a proposition, he defined the role of the Court in a positive manner in the following words [AIR, 1959, SC, Pp. 149, 183]:

> A large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the State organizations and institutions, nor can they meet them on equal terms. In such circumstances, it is the duty of this Court to protect their rights against themselves.

This was really the beginning of the pro-poor judicial activism in India, though the actual decision did not have any thing to do with the poor. It was a petition by a tax-payer to obtain exemption from paying the tax because the law imposing it had been held invalid in an entirely different case. The above decision came in reply to the plea of waiver which the Income Tax Department had put forward in support of their claim to recover the tax in accordance with a settlement made by the petitioner. What the above observation, however, showed was that s the Court was now willing to shoulder greater responsibilities. While it continued to defer to the judgment of the legislature in matters of economic regulation, it brought greater vigilance while examining restrictions on other fundamental rights. The welfare State obviously needed more powers of economic regulation but such powers must not be exercised at the cost of those fundamental rights which formed the core of the democratic process. Similarly, the Court was called upon to mediate between rival claims made by different sections of the plural society.

Freedom of The Press As A Preferred Freedom

It was in *Sakal Newspapers (Private) Ltd* v. *India* [AIR, 1962, SC, p. 305], that the Court assumed a more principle-enunciating role. The issue was the constitutionality of an Act which regulated the number of pages according to the price charged, prescribed the number of supplements to be published by a newspaper establishment, and prohibited the publication and sale of newspapers in contravention of the provisions of the Act. The Act also regulated the size and area of advertising matter in relation to other matters contained in a newspaper. The result was that a newspaper had either to increase its price or

reduce the number of pages. If it increased the price, its circulation would be reduced and, if it decreased the number of pages, it would not be able to give as much reading matter as it would like to give to its readers. Under the garb of economic regulation this was a restriction on the freedom of the press, which is included in the freedom of speech and expression. It could be a thin end of the wedge to curtail the freedom of expression. Although the purpose of the Act was to protect the smaller newspapers, could it not have been achieved through other means? In order to protect the smaller newspapers, what was being compromised was the freedom of the press, which was the most important right in democracy.

Justice Mudholkar, speaking on behalf of the Court, pointed out that the Constitution made a subtle distinction between the right to freedom of speech and expression and the right to carry on trade or business. The right to carry on trade or business could be restricted in the interest of the general public whereas the right to freedom of speech and expression could be restricted only in the interest of the specific grounds mentioned in clause (2) of Article 19, such as sovereignty and integrity of India, security of the State, friendly relations with foreign states, public order, decency, morality, defamation or contempt of court. While considering whether a restriction was in the interest of the general public, a court would give maximum deference to the will of the legislature, but in respect of the grounds on which the freedom of speech could be restricted, a court would construe these grounds strictly. Justice Mudholkar, pointed out that freedom of speech could not be restricted in the interest of the general public, whereas freedom to do business could be so restricted. This was the first instance of judicial activism by the Supreme Court of India because it held that certain fundamental rights, the existence of which was a pre-condition to the operation of the democratic process needed to be given greater judicial protection than other fundamental rights, like the right to carry on trade or business, which would be protected by the democratic process itself.

In *United States* v. *Carolene Products Co.*, Chief Justice Stone had enunciated the doctrine of preferred freedoms in the following words [U.S., 1952, Vol. 304, Pp. 144, 152, foot note 4]:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be within the Fourteenth.
>
> It is unnecessary to consider whether legislation which restricts those political processes, which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more searching judicial scrutiny under the general prohibition of the Fourteenth Amendment than are most other types of legislation.

Unlike the Constitution of the United States, which does not provide for such preferred treatment to any rights, the Constitution of India contains preference for such freedoms in the text itself. But certainly, a mere textual or literary construction of Clauses (2) and (6) of Article 19 would not have made this possible. In holding that a Court would lend stronger presumption of constitutionality to the restrictions on proprietary rights than to the restrictions on personal freedoms, the Court doubtless acted in pursuance of the role perception it had expressed in an earlier decision that the Court was the sentinel on the *qui vive* as regards the fundamental rights [*State of Madras* v *V. G. Rao*, AIR, 1952, SC, Pp. 196, 200]. The *Sakal case* established that the press had to be treated not merely as a business of publishing newspapers but essentially as a means of giving information to the people and educating the people in the art of democracy. Not only the proprietors of newspapers had a stake in it but also the readers had a stake. The Court tacitly acknowledged that where a newspaper was compelled to raise its price or to reduce the number of pages, it was the reader who also suffered and his suffering was most crucial. The right of the reader to information was recognized later by the Court in *Bennet Coleman* v. *India* [AIR, 1973, SC, p. 106].

In recent years, the Supreme Court has observed in *Tata Press Ltd.* v. *Telephone Nigam Ltd* [AIR, 1995, SC, p. 2,438] that while the State monopoly of any trade or business was presumed to be a reasonable restriction on the right to carry on any trade, business or profession, the monopoly of the press would not be so treated because it has a direct bearing on the freedom of the press. The Supreme Court has in another decision held that even electronic media was entitled to the freedom guaranteed by Article 19 (1) (a) and, therefore, could not be monopolised. The Court has insisted that a regulatory authority which distributes airwaves between the public corporation, called the Prasar Bharati, and the private channels has to be a public but not a government authority [*Secretary, Ministry of Information and Broadcasting, Government of India* v. *Cricket Association of India* SCC, 1995, Vol. 2, p. 161].

MEDIATING BETWEEN COMPETING INTERESTS

Judicial review came to play a role of an umpire between competing political claims. Such role is inevitable in a pluralistic society. In *Hanif Qureshi* v. *Bihar* [AIR, 1958, SC, p. 731], the Court had to deal with a controversy about a legal ban on cow slaughter. The traditional Hindu opinion was in favor of passing a law to ban the slaughter of cows, which are considered to be holy by the Hindus. The makers of the Constitution were reluctant to incorporate a provision which in their opinion would have been inconsistent with the secular state model. Why should slaughter of cows be banned just to assuage the sentiments of the majority community? However, they could not totally dismiss the demand for such a provision. Therefore, they couched it in secular language and directed the State to organise agriculture and animal husbandry on modern and scientific lines and take steps for preserving and improving the breeds, and prohibiting the slaughter of cows, calves and other milch and drought cattle (Article 48, Constitution). While the centre did not legislate, some states governments enacted legislations for banning the slaughter of cows in those states. Bihar was one of the states to legislate. This legislation was challenged in the Supreme Court on behalf of the petitioners who were Muslim by religion and butchers by profession. They said that the impugned law was violative of their right to freedom of religion and the right to carry on any occupation, trade or business. The Supreme Court was aware of the political nature of the dispute that came to it dressed as a legal suit. Chief justice Das observed [AIR, 1958, SC p. 734]:

> The controversy concerning the slaughter of cows has been raging in this country for a number of years and in the past it generated considerable ill will amongst the two major communities resulting even in riots and civil commotion in some places. We are, however, happy to note that the rival contentions of the parties to these proceedings have been urged before us without importing into them the heat of communal passion and in a rational and objective way, as a matter involving constitutional issues should be.

The Court held invalid the total ban on the slaughter of cows. The Court pointed out that the presence of so many useless animals tended to deteriorate the breed and involved a wasteful drain on the nation's cattle feed. A total ban on the slaughter of cattle, useful or otherwise, was calculated to bring about a serious dislocation, though not complete stoppage of the business of a considerable section of the people who were butchers, hide merchants, and so on, and was therefore, an unreasonable restriction on their right to carry on their occupation. The Court, however, upheld the legislation in so far as it imposed a ban on the slaughter of cows and other milch cattle. The decision of the Court to save prohibition of slaughter of cows, irrespective of their milk giving capacity was, in the opinion of this writer, a result of the narrow construction of the above provision. Prohibition of slaughter of cows should also have been read along with the objectives, such as organisation of agriculture and animal husbandry on modern and scientific lines and saving the cattle population which was useful for yielding milk or for insemination. Why should the Court uphold prohibition of slaughter of cows *in toto* [Sathe, 1967]?

The *Cow Slaughter* case was the first case in which a lot of socio-economic data was used by the petitioners in support of their claims. The judgments also reflect the use of what is called *Brandeis Brief* in the United States.[8] Another significant aspect of that litigation was that the contesting parties were willing to submit to the Court their rival claims, which had political overtones, and where conflict-resolution demanded evaluation of a legislative policy by the Court. The Court's decision, howsoever flawed, was received without any protest.

This was a tacit acknowledgment of the political role of the Court as an institution which could depoliticise a political issue, and resolve a conflict through the judicial balancing of competing interests. Whether a ban on the slaughter of cows was a restriction on freedom of religion of the Muslims or freedom of profession or trade of the butchers were questions political in nature but dressed in legal garb.

Another socially sensitive issue, which the Court resolved during the sixties, was regarding the legitimacy and extent of the compensatory discrimination for the backward classes. The Court had adopted a very rigid attitude in *Madras* v. *Champakam Dorairajan* decided in 1951 [AIR, 1951, SC, p. 226]. In the state of Madras, as it was then called admissions to medical colleges were governed by a communal government order which divided the total number of seats community-wise. The Court while striking down the communal order took a position that in view of a clear prohibition of discrimination on the ground of religion or caste contained in Article 15(2), no community-wise allocation of seats in an educational institution could be made. It was argued that since a directive principle of state policy contained in Article 46 of the Constitution enjoined upon the State to promote with special care the educational and economic interests of the weaker sections of the people and, particularly the Scheduled Castes and the Scheduled Tribes, reservation of seats in favour of such weaker sections was constitutionally valid. While rejecting that argument, the Court observed that the directive principles of state policy 'have to conform to and run as subsidiary to the chapter of Fundamental Rights' [AIR, 1951, SC, Pp. 226, 228].

Champakam is a good example of formal equality and it was consistent with the positivistic view of the Supreme Court of the fifties [*A. K. Gopalan* v. *Madras*, AIR, 1950, SC, p. 27]. Since the government definitely wanted to provide reservation of seats for persons belonging to the Scheduled Castes, Scheduled Tribes and backward classes in educational institutions, the Constitution was amended. The First Constitution Amendment Act inserted Clause (4) in Article 15 which read as follows:

> Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

The Constitution thus allowed the State to provide additional opportunities for the weaker sections of society to obtain equitable share in the resources of the community. Such additional opportunities could be provided through a variety of affirmative actions including reservations. There was a similar provision in clause (4) of Article 16 which was applicable to government jobs. Since the Constitution did not lay down any limitations on the extent of such reservations and also the criteria for determining who came within the term 'backward class', the provisions could be used for winning political mileage. The backward class could be consolidated into a vote bank by offering sops, which could in the long run not only do harm to other sections but also to the very sections who were chosen for preferred treatment. Vested interests could grow in backwardness and indiscriminate reservations could lead to total erosion of meritocracy as a value. In some states, the state government bowed to the local pressures and classification of backwardness was done on arbitrary and manifestly casteist considerations. In *Balaji* v. *Mysore* [AIR, 1963, SC, p. 649], Chief Justice Gajendragadkar filled in the gaps which the Constitution had left. Gajendragadkar held that (a) caste could not be

the exclusive criterion for determining the backwardness of a class; (b) reservation should remain an exception to the generality of equal protection and, therefore, it should never exceed 50 per cent of the total number of seats in an educational institution. In *Chitralekha* v. *Mysore* [AIR, 1964, SC, p. 1,823] Justice K. Subba Rao extended the above principles to job reservation under Article 16(4) also. These two principles laid down in the early sixties have stood the test of time, and they were once again reaffirmed by the Supreme Court in *Indra Sawhney* v. *India* [AIR, 1993, SC, p. 477]. Not only did the Court merely reiterate those principles but extended them further to exclude the creamy layers of the backward classes from the benefit of reservations. *Indra Sawhney* v. *India* came to be decided after the issue of reservations had been taken to the streets and some persons belonging to the higher classes had immolated themselves in protest against the extension of reservations to the backward classes in accordance with the recommendations of the Mandal commission. In fact, the issue had become so contentious and acrimonious that even the government as well as those opposed to the extension of reservations preferred to diffuse the conflict by taking it to the Court. The Court itself was conscious of how heated the controversy had been. Justice Jeevan Reddy observed [AIR, 1993, SC, Pp. 477, 518]:

> The questions arising herein are not only of great moment and consequence, they are also extremely delicate and sensitive. They represent complex problems of Indian society, wrapped and presented to us as constitutional and legal questions.

The judgments in *Indra Sawhney* contain learned discourses on the philosophy as well as methodology of protective discrimination for backward classes. The Court has tried to arrive at conclusions which reflected the national consensus. It has carefully balanced the competing interests of efficiency of administration and social justice The fact that all political parties left the questions of policy to the Court shows that they wanted an umpire who could adjudicate their contentious issues, according to certain principles.

JUDICIAL ACTIVISM 1950 TO 1975: FIRST TWENTY FIVE YEARS OF THE CONSTITUTION

During the first two decades of the Constitution, judicial activism rarely took up cudgels against the legislature, except on the question of right to property. The courts deferred to the will of the legislature on matters concerning economic regulation. The Supreme court was activist in expanding the rights of the labour and the entire labour jurisprudence developed by the Court, was complimentary to the welfare state philosophy [Sathe, 1973]. During Nehru's years, the Court did not cross sword with the executive but, on the contrary, legitimised State intervention for regulating the economy and doing social justice, except in a few cases on the right to property. On matters such as freedom of speech and protective discrimination, it legislated interstitially, i.e., to fill up gaps in statutes On personal liberty, it adopted various techniques of administrative law to protect the liberty of the individual. Wherever the Court thought that the executive should not be embarrassed, particularly where questions of national security were involved, the Court treaded very cautiously. Therefore, Chief Justice Gajendragadkar held in *Makhan Singh Tarasikka* v. *Punjab* [AIR, 1964, SC, p. 310] that on the declaration of the emergency, the Presidential order issued under Article 359 had the effect of suspending totally the right to move any court for the enforcement of the fundamental rights. Justice Subba Rao in his dissenting judgment took a more activist stance and construed the provisions more liberally so as to leave access to court partially open. In those days, judicial activism which was pro-State intervention was welcomed. Since the later fifties, we find that the Court began to perceive that it had a larger role to play in umpiring the Indian democracy. But even in these cases, the Court felt bound by the limitations of the text of the Constitution. Whenever it got an opportunity to fill in the interstices, it did. But it did not overtly claim that it had the authority to give such construction as would challenge the original understanding given by the Constitution makers. *Gopalan* therefore held the field until 1978. The Court fought against the constitutional amendments which restricted judicial review in

protection of right to property through British judicial method of statutory interpretation which narrowly construes the ouster clauses, without claiming that it sat in judgment over legislative policy. It brought in the doctrine of preferred freedoms in *Sakal* case by inferring it from the subtle distinctions between Clauses (2) and (6) of Article 19 and developed the jurisprudence of protective discrimination for backward classes by taking advantage of the silence of the Constitution. Barring the cases on right to property, the Supreme Court's activism was supportive of the policies pursued by Parliament. The right to property cases brought a head-on confrontation between the Court and the Parliament but that could be overcome since Parliament had the last word on what the Constitution should be. The Court's legalism in property cases was considered to be legitimate but since legalism presupposes narrow role for the Court, it did not anger the political establishment. It was considered as an aberration, which one meets with in a democracy. During the entire period, the Court did not challenge the narrow legalistic role which the makers of the Constitution had assigned to it. That challenge came in the late sixties and continued till the late eighties. That will be the story of the next part.

II. IMPOSING RESTRICTIONS ON THE CONSTITUENT POWER

POWER OF CONSTITUTIONAL AMENDMENT

In any written constitution, there has to be a provision for its amendment. The power of amendment is often vested in a popular, representative body. Such power is necessary to avoid the stagnation of a constitution. If a constitution is unchangeable, it is bound to become unsuitable or incapable of satisfying the aspirations of a changing society. Therefore, there has to be a provision for its amendment. The process of constitutional amendment is essentially counter majoritarian. It prevents sudden and impulsive changes in a constitution and entrenches certain provisions making them unamendable.[9] A constitutional amendment requires a special majority, two-thirds or three-fourths for its passing. This means that even a minority of the members whose number exceeds one third or one fourth of the total number of members of a House can veto an amendment. The power of constitutional amendment is considered to be *sui juris* (which means that it generates its own validity and does not have to meet the test of validity with reference to any higher norm) and its product therefore cannot be subjected to judicial review except on the ground that proper procedure for constitutional amendment as prescribed by the constitution has not been followed.

The Constitution of India contains a provision for its amendment in Article 368. The Constitution can be amended by Parliament by passing a bill for such amendment in each of its two Houses with the support of two-thirds of its members present and voting and absolute majority of the total membership of such House. Provisions of the Constitution which have bearing on the federal structure of the Constitution, however, can be amended only when an amendment bill after being passed by the two Houses in the above manner is ratified by not less than half the legislatures of the states. The makers of the Constitution provided for a flexible process of constitutional amendment. The Constitution being detailed and specific, any change in it required an amendment. That is one reason why there have been as many as 79 constitutional amendments in the last 50 years. The most controversial amendments were those by which judicial review in relation to the right to property was restricted. The propertied interests, disappointed by such amendments, challenged the validity of the constitutional amendments which excluded judicial review, on the ground that they curbed the rights which were called fundamental by the original Constitution. Could Parliament use the power of constitutional amendment to withdraw the fundamental rights which the people of India had conferred upon themselves? The Preamble of the Constitution talks in the name of the people of India. Politically speaking, the question was whether a bill of rights which had been settled after long negotiations between various sections of society and was based on a consensus reflected in the Constituent Assembly could be altered and abrogated through the process of constitutional amendment?

Fundamental Rights are contained in Part III of the Constitution. Before enumerating various fundamental rights, a prefatory article states the legal status of those rights. That article is Article 13 of the Constitution. Article 13 declares that all laws in force in the territory of India before the commencement of the Constitution shall to the extent of their repugnancy with the fundamental rights be void from the date on which the Constitution comes into force. Clause (2) of that article further commands that the State shall make no law which takes away or abridges the fundamental rights. The word 'law' has been defined in Sub-clause (a) and the word 'laws in force' has been defined in Sub-clause (b) of Clause (3) of Article 13. In the definition of the word 'law', a constitutional amendment has not been mentioned though other species of law, such as ordinance, order, bye-law, rule, regulation, notification, custom or usage, have been mentioned. In *Shankari Prasad* v. *Union of India* [AIR, 1951, SC, p. 458], it was argued that a constitutional amendment was 'law' for the purpose of Article 13 and, therefore, it had to be tested on the anvil of the above article. If it violated any of the fundamental rights, it should be void.

However, Chief Justice Patanjali Sastri, speaking on behalf of a bench of five judges in a unanimous judgment rejected outright that argument and held that the word 'law' in that article did not include a constitutional amendment. That challenge was not renewed since then for more than a decade. During Nehru's times, the Constitution went through 17 amendments. The Seventeenth Amendment, which brought *ryotwari* estates within the definition of the word 'estate'' in Article 31-A became controversial for many reasons. It was, however, after Nehru's death that the challenge to the constituent power of Parliament was renewed. In *Sajjan Singh* v. *Rajasthan* [AIR, 1965, SC, p. 845] the Court consisting of five judges was divided. While Chief Justice Gajendragadkar held on behalf the majority of three judges including himself, that a constitutional amendment was not covered by the prohibition of Article 13 (2), two judges, namely Justice Mudholkar and Justice Hidayatullah expressed serious reservations about the above interpretation. Justice Hidayatullah observed that if our fundamental rights were to be really fundamental, they should not become 'the plaything of a special majority' [AIR, 1965, SC, p. 862]. These two dissents opened the door for future attempts to bring the exercise of the power of constitutional amendment under judicial scrutiny. A thought which persuaded the majority of judges to stick to the previous ruling of the Court was that since the Court had upheld Parliament's power to amend the Constitution without any consideration for the fundamental rights in 1951 and, in pursuance of that decision, 17 amendments had been enacted, any reversal of judicial view in 1965 would not only severely jeopardise India's land reforms and other economic programmes but would also create problems in reverting back to the pre-amendments position in respect of the property relations. A. R. Blackshield in his path-breaking article had shown how the Supreme Court, if it wanted to change the legal position, could do so without upsetting the previously enacted constitutional amendments by prospectively over-ruling the previous decision [Blackshield, 1966].

In 1967, the Supreme Court held in *Golaknath* v. *Punjab* [AIR, 1967, SC, p. 1,643] that an amendment passed in accordance with the procedure laid down by Article 368 was 'law' within the meaning of that word as used in Article 13 (2) of the Constitution. The Court by a majority of six against five judges held that Parliament had no power to pass any constitutional amendment which would have the effect of abridging or taking away any of the fundamental rights guaranteed by the Constitution. The petitioner had challenged the validity of the First, Fourth and the Seventeenth Amendment Acts, which had foreclosed judicial review of the laws pertaining to property. Chief Justice K. Subba Rao speaking on behalf of five judges invoked the doctrine of prospective over-ruling to save the existing constitutional amendments (First, Fourth and Seventeenth) from infirmity while mandating Parliament not to pass any constitutional amendment which would take away or abridge any of the fundamental rights in future. While doing so, the Chief Justice

promised that the Court would interpret the provisions of the fundamental rights liberally so as not to jeopardise the implementation of the directive principles of state policy. Justice Hidayatullah, in a separate concurring judgment reached the same result but by an independent reasoning. Instead of prospective over-ruling, he conceived the principle of acquiescence to legitimise the First, Fourth and Seventeenth Constitutional Amendments. In his view, since the Court had acquiesced in the validity of those Amendment Acts through its previous decisions, it was estopped from declaring them invalid. The doctrine of acquiescence was the doctrine of estoppel against the Court itself. The doctrine of estoppel originated in equity, which means that if a person promises another person to do or not to do an act and in pursuance of such a promise the other person acts and, if the promise is not complied with, would be put to severe detriment, the promisor is not allowed to resile from his promise. Such a person is estopped (prevented) from refusing to fulfil the promise.

Golaknath was judicial activism of the late sixties. For the legal fraternity brought up in the British tradition of legal positivism, the decision appeared to be shocking. Therefore it evoked severe reactions from almost all constitutional pundits. However, in order to reach the policy premise that Parliament's power of constitutional amendment must be checked, the judges had taken recourse to interpretational methods which were traditional and positivist. For example, the interpretation that a constitutional amendment was 'law' for the purpose of Article 13 or that Article 368 of the Constitution, which provided for amendment of the Constitution did not contain the power of amendment but merely prescribed the procedure and the power was to be located in the plenary legislative power of Parliament contained in the residuary clause (Article 248 and Entry 97 of List I of the VII Schedule) were exercises in legal positivism. Against the context of the Court-Parliament confrontation on right to property, the *Golaknath* decision appeared to be a judicial upmanship to claim finality to the Court's decisions. It flew in the face of the theory that a Constitution was a *grundnorm* (the highest norm) and did not have to be valid. Its validity was *sui juris* [Tripathi, 1972]. The distinction between ordinary legislation and constitutional legislation had been the basis of judicial review as originally conceived in *Marbury* v. *Madison* [L.Ed., Vol. 2, p. 60].

Golaknath stirred a great controversy regarding the scope of judicial review. For the first time, the judges had openly taken a political position. They had held that it was not desirable that Parliament's power to amend the Constitution should be unlimited. And that the fundamental rights should be at the mercy of the special majority of members of Parliament required for constitutional amendment. *Golaknath* was an open rejection of the view that the Court merely interpreted the Constitution, and that it had no concern with the consequences of its interpretation. *Golaknath* decision was, moreover, an assertion by the Court of its role as the protector and preserver of the Constitution. Till then the Court had not taken such a bold position on its constitutional role. Its decisions on the right to property were doubtless a negation of what Parliament stood for but it was done under the cover of judicial neutrality and by using presumptions which were often used by courts in England. *Golaknath* marks a watershed in the history of the Supreme Court of India's evolution from a positivist Court to an activist Court. In the majority judgment of Chief Justice Subba Rao as well as in the separate, concurring judgment of Justice Hidayatullah one could find concern about what would happen if the fundamental rights were made entirely dependent upon the whims of the legislative majority. The judges did not merely interpret the Constitution as it was but interpreted it from the vantage point of what it should be. They brought in the natural law concept in understanding the position of fundamental rights in the Constitution. The theory of natural law emphasizes the ideal element in the law and has always served as a scale for the evaluation of the positive (enacted) law. Following the natural law theory, these judges held that fundamental rights were inalienable rights of the people. This decision had political implications because it changed the distribution of power between the Court and the Parliament. The word

'political' is used here not in the usual pejorative sense in which it is used. By being political we mean being part of the structure of governance.

Another event which further 'politicised' the Court was that immediately after the decision in *Golaknath,* Chief Justice Subba Rao resigned his post and became a candidate supported by the Opposition for the election to the office of the President of India. He, however, did not get elected. Subsequently, the Supreme Court held invalid the Ordinance by which fourteen banks were nationalised by the government [*R. C. Cooper* v. *India* AIR, 1970, SC, p. 564], and the executive order whereby the privy purses given to the Indian princes as consideration for the accession of their states to India were sought to be abolished through the device of de-recognition of those princes [*Madhavrao Scindia* v. *India* AIR, 1971 SC, p. 530]. These two decisions came at a time when the Congress party had suffered a split and Indira Gandhi's government had survived with the outside support of the Communist Party of India (CPI). The decisions of the Court appeared to be supporting Indira Gandhi's opponents. Since her opponents consisted of the old guard in the Congress party and the right wing parties such as the Swatantra and the Jan Sangh, the Court also came to be identified as an ally of the anti Indira Gandhi lobby. Through actions such as nationalisation of 14 major banks and de-recognition of princess with a view to abolishing the privy purses of the former rulers of Indian states which had merged in the Indian Union, Indira Gandhi had radicalized the politics. In a common man's mind, the situation was comparable to the one which existed during the period of President Roosevelt in the United States. The Supreme Court of the United States had opposed President Roosevelt's New Deal legislative programme and the President had thought of packing the Court after getting elected to the White House for the second term. Indira Gandhi re-enacted that history by casting herself in the role of Roosevelt and the Indian Supreme Court in the role of the Supreme Court of the United States. In the general elections held in 1971 for the Lok Sabha, one of the items in the Congress party's manifesto was that, if elected to office, it would make basic changes in the Constitution. Gandhi's Congress won landslide victory in those elections and her party secured more than two-thirds of the seats in the Lok Sabha. This could clearly be considered as a mandate for amending the Constitution. The government therefore introduced the Constitution (Twenty-Fourth Amendment) Act, 1971 the purpose of which was to restore to Parliament the unqualified power of constitutional amendment, which it had possessed until the decision of the Court in *Golaknath* [Sathe, 1971].

Parliament passed several constitutional amendments such as the Twenty-Fifth Amendment which further restricted the right to property and the twenty-sixth which abolished the privy purses. These amendments along with the Twenty Fourth Amendment were challenged in the Supreme Court. If according to *Golaknath,* Parliament did not have the power to amend the Constitution so as to take away or abridge the fundamental rights, how could it empower itself for doing that through a constitutional amendment? This came up for hearing before the Supreme Court in *Kesavanand Bharati* v. *Kerala* [AIR, 1973, SC, p. 1,461]. A bench of thirteen judges sat to hear this case. The strength of the bench was two more than that of the bench which decided *Golaknath.* While arguing their cases on behalf of the State, the Attorney General as well as the Advocate Generals of most of the states (including H. M. Seervai who was the Advocate General of Maharashtra) contended that Parliament's power to amend the Constitution was unlimited. When the judges asked to elaborate whether it could be used for changing India from democracy to a dictatorship or from a secular state to a theocratic state, the answer had to be in the affirmative Chief Justice Sikri summarised those arguments as follows [AIR, 1973, SC, p. 1,490]:

> The respondents (meaning the Attorney General and the Advocate Generals who represented the Union of India), on the other hand, claim that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claim that democracy can even be replaced and one party

rule established. Indeed short of total repeal of the Constitution, any form of Government with no freedom to the citizen can be set up by Parliament by exercising its powers under Article 368.

Justice Shelat also reproduced those arguments in his judgment as follows [AIR, 1973, SC, p. 1,566]:

The respondents, on the other hand, claim an unlimited power for the amending body. ... It is claimed that democracy can be replaced by any other form of government which may be wholly undemocratic, the federal structure can be replaced by a unitary system ... and the right to judicial review can be completely taken away. That contention was in the spirit of Dicey's assertion that Parliament of England was so supreme that it could go to the extent of declaring that all men were women or that all blue-eyed babies should be massacred. That argument was hypothetical and made to convince the Court that there could not be any legal restrictions on the constituent power of Parliament. But that argument seemed to have an adverse effect on the judges. All the judges, except Chief Justice Sikri and Justice Shelat, held that *Golaknath* had been wrongly decided. Chief justice Sikri said that it was not necessary to decide whether *Golaknath* had been rightly decided and according to Justice Shelat, the *Golaknath* decision had become academic 'because even on the assumption that the majority decision in that case was not correct, the result on the questions now raised ... would just be the same' [AIR, 1973, SC, p. 1,566]. Both Chief Justice Sikri and Justice Shelat had been parties to the *Golaknath* majority. Therefore they avoided saying that it was wrong. The Supreme Court held by a majority of seven judges against six that, while *Golaknath* stood overruled, the power of amendment, yet, was not unlimited. Seven out of thirteen judges held that Parliament's constituent power under Article 368 was constrained by the inviolability of the basic structure of the Constitution, or the basic features of the Constitution. The basic structure or the basic features of the Constitution could not be destroyed or altered beyond recognition by a constitutional amendment. These seven judges were Chief Justice Sikri, and Shelat, Hegde, Grover, Mukherjea, Jaganmohan Reddy and Khanna. Six judges, Ray, Mathew, Beg, Dwivedi, Palekar and Chandrachud held that Parliament had unlimited power of constitutional amendment [Sathe, 1974, Pp. 870-84].

REACTIONS TO *KESAVANAND BHARATI*

Kesavanand Bharati decision was doubtless an attempt to rewrite the Constitution by the Supreme Court. Such limitations on the constituent power were unheard of till then. Tripathi saw in it an attempt by the Court to wrest finality to itself and asked 'Who wins?' [Tripathi, 1974, Pp. 3-43]. Seervai, who had argued in favour of the supremacy of Parliament reacted critically and said that there was no *ratio* in that decision [Seervai, 1973, Pp. 47-88]. In no democratic country could a court say that the Constitution itself could not be amended so as to alter its basic structure when there was absolutely no such mention in the Constitution. What was basic structure was unknown and was to be articulated by the Court from time to time. It meant that the Court would decide which constitutional amendment was destructive of the basic structure and what constituted the basic structure. The former Additional Solicitor General T. R. Andhyarujina said that the 'exercise of such a power by the judiciary is not only anti-majoritarian but inconsistent with constitutional democracy' [Andhyarujina, 1992, p. 10]. P.K. Tripathi observed that the function of the courts in democratic countries was to ensure that all subordinate legal action complied with the law. They can interpret the highest law in accordance with which all legislative and executive acts must be done. But can they decide what should be the highest law? In his opinion 'that determination must be left with the freely elected representatives of the people' [Tripathi, 1975, Pp. 17-33]. The basic structure doctrine appeared to be most unsustainable in 1973 when it was laid down in *Kesavanand Bharati*.

Some scholars, however, supported the basic structure doctrine. A.R. Blackshield in his second article written after *Golaknath* had pointed out the doctrinal inadequacies of the *Golaknath* judgment and suggested a more elastic approach, which would preserve the basic structure of the Constitution from destruction [Blackshield, 1968, p. 1]. This article was the precursor to the basic structure doctrine which emerged in *Kesavanand Bharati*. In an article written after Kesavanand Bharati, Upendra Baxi suggested that the constituent power was shared between Parliament and the Supreme Court [Baxi, 1978, p. 122; Baxi, 1974, p. 45]. Although these views appeared to be reflecting a minority opinion at that time, they have been vindicated by the events that took place thereafter.

SUPERSESSION OF THE JUDGES: POLITICISATION OF THE JUDICIARY

When *Kesavanand Bharati* was being argued, the political atmosphere in the country had undergone radical change from what it was in 1967 when Golaknath was decided. *Golaknath* decision came four days before the results of the elections to the Fourth Lok Sabha had started trickling in. Those results showed the decline in the strength of the Congress party at the Centre. The combination of various non-Congress parties came to rule in several states. It seemed that amendment of the Constitution would be politically difficult. Although Nath Pai, a Socialist Member of Parliament, had introduced a bill to amend the Constitution to restore to Parliament the unlimited power to amend the Constitution, it did not make much progress because the ruling party was not sure of getting enough support for it. Moreover, it was hoped that the Court would in future read the Constitution more dynamically so that there would not arise any need for amending the Constitution to take away or abridge the fundamental rights.[10] But with the decisions of the Court on bank nationalisation [*R. C. Cooper* v. *Union of India,* AIR, 1970, SC, p. 564] and privy purse abolition [*Madhavrao Scindia* v. *Union of India,* AIR 1971, SC, p. 530] where the Court took a very legalistic stand on right to property, that hope was belied. Those decisions revealed that the Court would neither allow Parliament to amend the Constitution nor itself interpret the provisions of the fundamental rights with a view to accommodating legitimate aspirations reflected in the directive principles of state policy. When *Kesavanand Bharati* was being decided, the Congress party led by Indira Gandhi had an overwhelming majority in the new Parliament Indira Gandhi's popularity was at the highest and her party was committed to making radical changes in the Constitution. Perhaps the judges were apprehensive of such changes. The argument of fear, which sounded imaginary in 1967 had acquired greater poignancy. Therefore the majority justices wanted to restrain Parliament from further mutilating the Constitution. They wanted to ensure greater stability to the Constitution. The Indian Constitution was going to complete its first twenty-five years of existence. This was not a small achievement considering the fact that most of the countries which had earned independence from their colonial masters after the Second World War had either wound up their democratic governments or changed their constitutions. But the ruling party interpreted *Kesavanand Bharati* as a coup by the judges to wrestle supremacy from Parliament to the Court. The government therefore retaliated decisively. Its first strategy was to dissolve the *Kesavanand Bharati* majority.

Chief Justice Sikri was to retire within a few days from the day the decision in *Kesavanand Bharati* was rendered. Till then the practice had been to appoint the senior most judge of the Supreme Court as the Chief Justice. If that rule were to be followed, Justice Shelat would have been appointed as the Chief Justice. He, however, would have had a brief tenure and would have been succeeded by Justice Hegde. But the government surprised everybody by appointing Justice A. N. Ray as the Chief Justice, in preference to three judges senior to him, namely, Shelat, Hegde and Grover. These three judges resigned in protest. *Kesavanand* majority was, therefore, reduced by four judges. Justice Mukherjea died and Justice Reddy was to retire soon. Out of the seven judges who subscribed to the basic structure doctrine, only Justice Khanna remained.

EMERGENCY OF 1975 AND THE BASIC STRUCTURE DOCTRINE

The intervention of the Emergency of 1975, proclaimed by the President under Article 352 of the Constitution and followed by several constitutional amendments enacted during that period, revealed the importance of the counter-majoritarian nature of judicial review. When *Kesavanand* decision was given, the basic structure doctrine appeared to be unsustainable because of its elitist and anti-majoritarian stance. When during the Emergency, the government passed amendments to the Constitution with the help of a captive majority and in the absence of the opposition party members who had been imprisoned, and those amendments sought to do away with the checks and balances implicit in the Constitution, the basic structure doctrine became the rallying point for those who wanted to preserve the Constitution. Those who till then criticised the Constitution as being alien or elitist or anti-people realised that the Constitution including its basic structure gave great strength to various anti-establishment people's movements [Sathe, 1998, Pp. 22-36]. That doctrine came to be tested when the Constitution Thirty-Ninth Amendment Act was challenged in the Supreme Court on the ground of its alleged violation of the basic structure of the Constitution.

INDIRA GANDHI V. *RAJ NARAIN*: THE PRIME MINISTER'S ELECTION CASE

One event, which indirectly precipitated the declaration of 1975 Emergency, was the decision of the Allahabad High Court by which Indira Gandhi's election to the Lok Sabha was set aside as being invalid on the ground of her having been guilty of having taken recourse to a corrupt practice, as defined in the Representation of the People Act, 1951, known as the Election Law. Her opponents put pressure on her to resign. She had appealed to the Supreme Court against the Allahabad High Court's judgment and the Supreme Court had admitted her appeal and stayed the execution of the High Court's decree subject to certain conditions [*Indira Gandhi* v. *Raj Narain*, AIR, 1975, SC, p. 1,590]. Nani Palkhivala, who had been the architect of the theory of basic structure and who argued in favour of limitations on the constituent power of Parliament, first in *Golaknath* and later in *Kesavanand*, was appointed on behalf of Indira Gandhi. He might have represented her at the final appeal also if the repressive order of the Proclamation of the Emergency had not been issued under Article 352 of the Constitution on June 25, 1975. There was already a Proclamation of Emergency in operation, which had been made in 1971 when India fought a war with Pakistan for the liberation of Bangladesh. While the previous proclamation was for meeting the threat of external aggression, the 1975 Emergency was for meeting the situation created by the threat of an internal disorder. Several members of Parliament belonging to the opposition political parties were arrested. Parliament passed several constitutional amendments during that period [Sathe, 1989]. One of those amendments was the Thirty-Ninth Amendment, which said that all disputes regarding the elections to Parliament of the persons holding the offices of the Prime Minister and the Speaker shall be referred to a body to be appointed by Parliament and this was to apply even to those matters which had been pending or disposed of by the courts according to the law, as it stood before the coming into force of the Thirty-Ninth Amendment. Clause (4) of Article 329-A inserted by the Thirty-Ninth Amendment said that no law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person who was holding the office of the Prime Minister or the Speaker to either Houses of Parliament, and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or had before the commencement of that amendment, been declared to be void under any law. The clause further said that:

> Notwithstanding any order made by any court before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and

any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

That amendment was obviously passed with a view to preventing scrutiny of Gandhi's election to the Lok Sabha by the Court. It declared that the law, which governed elections to the Lok Sabha, would not apply to her election and her election would not be invalid on the ground that she had committed breach of any of the provisions of the law. Further, it said that notwithstanding any decision of any court, her election would continue to be valid. The clause not only substituted a new law which made her free from liability with retrospective effect but also provided that her election would continue to be valid, even if a contrary decision was given by a court in accordance with the law as it prevailed before the coming into force of the Thirty Ninth Amendment. Although Indira Gandhi had filed appeal against the decision of the Allahabad High Court and her appeal had been admitted and the decision of the Allahabad High Court had been stayed on certain conditions, the government did not wish to take any chances. Instead of keeping her fate hanging on the outcome of the decision of the Supreme Court on the appeal, it was thought better to quash the entire decision of the High Court through legislative process. The hurry with which the Bill was passed showed the anxiety that lay beneath its enactment. It was introduced in the Lok Sabha on August 7 and was passed in that House on the same day; it was passed by the Rajya Sabha on August 8, ratified by half the legislatures of states on August 9, and obtained the President's assent on August, 10. The appeal of Indira Gandhi was to come up before the Supreme Court for hearing on August 11 [Seervai, 1976, p. 1,519].[11]

When Indira Gandhi's appeal came up for hearing before the Supreme Court, the Attorney General argued that in view of the above provision of the Thirty-Ninth Amendment, the Court had nothing to hear since the original decision itself had been wiped out. Replying to this Shanti Bhushan, appearing for the respondent, challenged the validity of the above provision of the Thirty-Ninth Amendment on the ground that it destroyed the basic structure of the Constitution. In *Indira Gandhi* v. *Raj Narain* [AIR, 1975, SC, p. 2,299], the Supreme Court was required to examine the validity of that provision of the Thirty Ninth Amendment with reference to the basic structure limitation upon the power of constitutional amendment.

The *Prime Minister's Election* case was heard by a bench of five judges. They were Chief Justice Ray, and Khanna, Beg, Mathew and Chandrachud. All the above judges except Justice Khanna had held in *Kesavanand Bharati* that there were no limitations upon the power of constitutional amendment. It was only Justice Khanna who had subscribed to the basic structure doctrine. With such a bench, it might have been hoped that either the basic structure doctrine would be ignored by treating it as not binding (a mere *obiter dictum*) or the impugned provision might have been held as not offending the basic structure of the Constitution. After all, what was basic structure had to be decided by the Court and it could very well kill the basic structure doctrine by upholding any constitutional amendment as being not violative of the basic structure of the Constitution. That hope was, however, belied.

Chief Justice Ray and Justice Mathew did not uphold the impugned amendment because in their opinion the constituent power could not be employed to exercise judicial power. Justice Beg used the traditional English law technique used to frustrate the ouster clauses, by holding that judicial review on appeal against the Allahabad High Court judgment was not excluded. Justice Mathew, Justice Khanna and Justice Chandrachud held the impugned amendment invalid on the ground of its incompatibility with the basic structure of the Constitution. Although the Court unanimously held that the impugned amendment was unconstitutional and void, three judges unequivocally said that the amendment violated the basic structure of the Constitution.

Upendra Baxi has critically analysed the decision in his book, *The Indian Supreme Court and Politics*. According to him, the Court had three options: ((i)) It could have upheld the amendment and consequently upheld Indira Gandhi's election

without going into the merits of that election; (ii) it could have struck down the amendment and also held Gandhi's election to be void; and (iii) it could have struck down the amendment but after examining the validity of the election on merits, upheld it. If it had chosen the first option, it would have cost it its prestige as a Court. It might have led to erosion of its social esteem. The second option might have led to the destabilisation of the Court itself because the Executive had the power to appoint the judges. The judges had seen how the Executive had superseded three senior judges who had decided against the government in *Kesavanand Bharati*. Perhaps this instinct of self-preservation might have persuaded them not to tread that path [Baxi, 1980, p. 46]. They therefore opted for the third alternative of upholding the election but striking down the impugned amendment. This helped the Court to assert its power of judicial review over the constituent power of Parliament avoiding the immediate confrontation with the political establishment. The ruling establishment was happy that the Court had lent moral legitimacy to Gandhi's election by dismissing Raj Narain's petition on merits. Saving her election because of the immunity granted by the Thirty-Ninth Amendment would have been a lesser joy than getting it held valid by the Court on merit. Because of the euphoria generated by the decision holding the election valid on merit, the ruling elite connived at the undesirable aspect of that decision, which was the Court's assertion of its power to review constitutional amendments.

This decision was given during the Emergency and Seervai applauded it as being the finest hour in the life of the Supreme Court [Seervai, 1978, p. 4]. In the opinion of this writer, the *Indira Gandhi* case provided social legitimacy to the basic structure doctrine. When that doctrine was laid down in *Kesavanand Bharati*, it was judged in the context of the Court-Parliament competition for finality which had been going on since *Golaknath*. But the *Prime Minister's Election* case presented it in an entirely different context. The Thirty Ninth Amendment was reminiscent of the Bill of Attainder, which had acquired notoriety in English constitutional history. A Bill of Attainder was a means of punishing a person by using legislative process and was considered to be a high watermark of autocratic arbitrariness. Those, who felt that the argument that if you give unlimited power to Parliament to amend the Constitution such power might be abused, was an argument of fear, had before them a concrete evidence of how majoritarian partisanship could cause total demise of the rule of law. That also provided legitimacy to the basic structure limitation upon the constituent power of Parliament [Sathe, 1978, p. 179].

BASIC STRUCTURE DOCTRINE ACQUIRES ACCEPTANCE AMONG JURISTS

Even the most bitter critique of the *Golaknath* decision, H. M. Seervai, came round to support the basic structure doctrine in the second edition of his celebrated book *Constitutional Law of India* [Seervai, 1976]. He, however, never explained how such metamorphosis in his stand took place. He continued to say that *Golaknath* was full of public mischief and should be overruled but supported that the power of constitutional amendment conferred by Article 368 did not contain the power to destroy the Constitution. Seervai's dilemma was in fact representative of the dilemma of all those lawyers who had been brought up in the English positivist tradition. Both *Golaknath* and *Kesavanand* were posited on the wider role of a constitutional court. Both the decisions were based on the premise that unlimited power of constitutional amendment should not vest in a special majority of Parliament. In fact, the basic structure doctrine propounded by the Court in *Kesavanand* was a continuum of the doctrine of unamendability of the fundamental rights put forward in *Golaknath*. If one was right, the other also has to be right. The basic structure doctrine is an improvement over the *Golaknath* doctrine in so far as it is not located in any specific provision like Article 13 (2). Therefore, it becomes difficult for Parliament to override it through another constitutional amendment. Since it is not located in any specific constitutional provision but is ingrained in the very structure of the Constitution, it gives greater freedom to the Court to use it in a political manner. Both *Golaknath* and *Kesavanand* were premised on the hypothesis that the constituent power of Parliament under Article 368 of the Constitution could not be as unrestricted as the original constituent power possessed by the Constituent Assembly. While rejecting the majority view in *Golaknath* that Article 13 (2) constrained the

power under Article 368, the *Kesavanand* majority was liberating itself from the constraint on its activism which the location of the limitation in a specific provision implied. On the other hand, it derived legal justification for its basic structure doctrine from Article 368 itself, which said that after an amendment 'the Constitution shall stand amended'. If the Constitution is to stand amended, obviously it cannot be totally repealed or disfigured. It must retain its basic structure. This conclusion could not have been drawn unless the Court had taken a teleological view of the Constitution. Even a totally changed constitution would have been a constitution and might have served the purpose of the words 'the Constitution shall stand amended'. When the *Kesavanand* majority said that in order that the Constitution shall stand amended, it must be a Constitution which has a definite identity, that identity was its basic structure, e.g., Justice Shelat and Grover, in their joint judgment said [AIR, 1973, SC, p. 1,609]:

> (T)hough the power to amend cannot be narrowly construed and extends to all the Articles, it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features.

Justice Jaganmohan Reddy said [AIR, 1973, SC, p. 1860]:

> The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution.

What is basic structure would be articulated through the future decisions of the Court. This was a heavy responsibility which the *Kesavanand* decision imposed on the Court. There was one more difference between *Golaknath* and *Kesavanand*. In *Golaknath*, Chief Justice Subba Rao had applied the doctrine of prospective overruling to save the constitutional amendments which had been enacted prior to the decision in that case. These were the First, Fourth and the Seventeenth Amendments, which had imposed curbs on fundamental rights to equality and property guaranteed by Articles 14 and 31, respectively. Justice Hidayatullah reached the same result by arguing that the Court had acquiesced in the validity of those amendments through the previous decisions in which they were held to be valid. In *Kesavanand* the Court did not take recourse to any such doctrine for upholding the previously enacted constitutional amendments. On the other hand, the Court upheld all those amendments after examining them on the touchstone of the basic structure doctrine. In respect of Article 31-B, the Court took the position that all amendments by which the new Acts were added to Schedule IX prior to the decision in *Kesavanand* were valid [*Wamanrao* v *State of Maharashtra* AIR, 1981, SC, p. 271; Sathe, 1989, Pp. 80-81]. However, the Court would examine all post-*Kesavanand* constitutional amendments by which new Acts would be added to Schedule IX on the touchstone of the basic structure doctrine.

We have said above that in 1973, when *Kesavanand* decision was given, there were few who supported it. It sounded rather too presumptuous on the part of the judges to say that they would decide ultimately what future changes should be made in the Constitution. Those decisions ought to be taken by a popularly elected body and not by the appointed judges. The conflict was between democracy and judicial review. In fact, such a conflict is inherent since judicial review is essentially counter-majoritarian. It allows the judges to examine the decisions of the popularly elected legislature to find whether they infringe any of the rights given to the people. A written constitution must have judicial review and where a constitution contains a bill of rights, such judicial review is bound to acquire larger dimensions. Democracy means rule by majority but does it mean rule of the majority? Democracy has to be a just rule. Justice is essentially a value and has to be preserved for its own sake. It cannot be a means to any thing but has to be an end in itself. Justness of a decision cannot be determined by the number of people who are in favour of it. It does not depend upon utilitarian considerations

also. It may be argued that if you allow the police to torture the suspects, investigation of crime might be more efficient and crime might go down. Even then no law of a civilised society can permit such torture because it is unjust to do so. Speaking in terms of Rawlsian concept of justice [Rawls, 1978], human rights are part of the original understanding which the people who made a hypothetical contract had agreed to preserve and protect against the majority. Human rights are essentially counter-majoritarian. According to Ronald Dworkin, major concern of a bill of rights is to protect the unpopular or minority rights [Dworkin, 1977]. In England, Parliamentary supremacy is posited on the notion that democracy will prevent the violations of individual liberty. But the British constitutional law is based essentially on the Hohfeldian notion of liberty [Hohfeld, 1966] as against the Dworkinian notion of right.

'Liberty', as distinguished from 'right', is freedom to do what one likes as long as it does not violate any law or freedom of other people to do what they like. I have no right to drive by the right side because such liberty of mine will imperil the liberty of other drivers or pedestrians. In Hohfeldian sense, I do not have 'right' to drive by the left but only the 'liberty' to do so. The correlative of 'liberty' is 'no right' on the part of others. I have liberty to sing in my bath room and nobody has a right to stop me unless, of course, my liberty to sing obstructs other people's liberty to enjoy their quietude. I have liberty to speak, the correlative of which is that you have no right to stop me. But when I have right to freedom of speech as is given by the Constitution, there is a corresponding duty on the State not to impose restrictions other than those which are reasonable upon my right. The State has also a duty to protect my freedom of speech by preventing others from imposing constraints, which are illegal. 'Liberty' is a negative concept which requires others not to interfere with it. The right is a positive concept, which imposes duty on others to do something to fulfil that right. According to Dworkin's conception of right, rights essentially impose restrictions on the power of the majority. Power in Hohfeldian sense means capacity to create rights or liabilities for others. Right therefore has duty as a correlative and fundamental rights impose restrictions on the power of the State. Therefore, where Parliament is supreme, as in England, people have liberties but no rights but under written constitutions with a bill of rights, people have rights as distinguished from liberties and these rights essentially impose restrictions on the power of the legislative majority. A person has liberty to do what pleases him as long as the State does not restrict it by law. So liberty always depends upon the will of the majority. But a bill of rights essentially restricts the majority from encroaching upon the rights of the individuals. Such rights may be of freedom of speech or freedom of religion. Some rights are essentially against the majority. For example, the Constitution says that untouchability is abolished. Even if large number of people think that untouchability is good or racial segregation is good, since it is against the principle of equal protection of law, it must be outlawed. This shows the counter-majoritarian character of the human rights. Human rights all over the world have been counter-majoritarian. In times of crisis, even mature democracies have practised majoritarianism. The majority justices in the United Kingdom in *Liversidge* v. *Anderson* [A.C. 1942, p. 206] were willing to let individual liberty be curbed by the fiat of the Executive because they honestly felt that such vigilance against the persons of German origin was necessary and desirable. The American Supreme Court did not behave differently in respect of the Japanese Americans.[12] But the Supreme Court of the United States under the leadership of Chief Justice Warren established the counter-majoritarian character of judicial review during the post-Second World War period. Its jurisprudence was marked by its counter-majoritarian decisions in protecting three types of minorities, viz, (a) political dissenters, i.e. the communists; (b) socially condemned persons, i.e. an accused criminal; and (c) racial minority, i.e. the black Americans [Bickel, 1962; Black, 1960]. Judicial review is therefore essentially a counter-majoritarian device for protecting the unpopular or minority rights.

In *West Virginia State Board of Education* v. *Barnette,* Justice Jackson expressed seminal thought on a bill of rights. He said [U.S., Vol. 319, Pp. 624, 638]:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of the majorities and officials, and to establish them as legal principles to be applied by courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend upon the outcome of no elections.

Where traditions of individual liberty are strong, as in England, judicial review of legislation may not be considered necessary. Even this statement now needs to be qualified in view of the fact that England has signed the European Convention on Human Rights and has accepted the jurisdiction of the European Court on Human Rights. In the United States, judicial review catalyzed the building up of strong traditions of individual liberty. In India, the Court adopted a low profile in the fifties because the British model of parliamentary democracy was held as an ideal by the political elite as well as the judges. Therefore counter-majoritarian restrictions on the exercise of the constituent power by Parliament was not considered necessary and desirable. But since the late sixties, when the traditions of the national movement were seen to be weakening, and halo of sacrifice in the cause of national freedom began to fade away with the passing away of that generation of politicians who fought for freedom and the emergence of the new generation of professional politicians, judicial review of the exercise of the constituent power was felt to be necessary.

How to sustain the basic structure doctrine without sacrificing democracy is a question which the Court and Parliament will have to solve by cooperation. The only way to do is to entrust matters of policy to Parliament and matters of principles to the Supreme Court. Ronald Dworkin [1977] has suggested an ideal division of responsibilities between judicial review and legislative supremacy. He says that while judicial review is concerned with sustenance of principles of constitutionalism and particularly the basic rights of the people, the legislature is concerned with policy. This means that the court should not interfere with the choice of policy unless such a choice is against a fundamental right or is against the basic structure of the Constitution. For example, a court has never interfered with the policies adopted in a budget. What should be the exemption limit for liability to pay income tax, what items should be exempted from excise duty or what should be the rates of taxation have never been questioned by courts. But if a legislature imposes tax in a discriminatory manner, it will be struck down not because the Court disapproves of the policy of the legislature but because such discriminatory taxation is violative of the right to equality guaranteed by the Constitution. Or if the there is 100 per cent tax on an income, it may be challenged as being expropriatory. Although Article 300-A, which guarantees right to property, does not mention anything about compensation, it says that no person shall be deprived of his property, save by authority of law. It could therefore be argued that expropriation even enjoined by a statute cannot be by authority of law since the word 'law' has been interpreted in Article 21 as a just and fair law. Protective discrimination for backward classes is provided in the Constitution as an enabling provision and the courts have said that it is to be read as part of the right to equality. Whether to provide for reservation, how much reservation to be provided, and for whom reservation is to be provided are questions of policy but if the extent of reservation is determined without regard to the effect of such extent on the right to equality, the court intervenes not because it does not agree with the policy but because such a policy is violative of the constitutional right to equality. Similarly, if the question for whom the reservation is to be provided is determined exclusively on the basis of caste, the Court intervenes not because it disagrees with the policy but because such a policy violates the constitutional right not to be discriminated on the ground of caste. This 'policy'-'principle' dichotomy could be applied

to the use of the basic structure doctrine. The Court would not interfere if there is a change of policy. It would interfere only if there is change in the basic structure of the Constitution. If Parliament wants to substitute the present law of anti-defection by another law which provides that a member who changes his party after getting elected on its ticket ceases to be a member of the Legislature and shall be disqualified for holding any office of a minister for a period of five years since his disqualification, it would not be violation of the basic structure of the Constitution. The Fifty-Second Amendment, which brought the anti-defection law into the Constitution was a major constitutional reform but it was not held to be against the basic structure of the Constitution. If, instead of the parliamentary system, the Constitution incorporates the presidential system, it would not be considered as a change in the basic structure of the Constitution because what constitutes the basic structure is democracy and not any particular democracy. It is only through a judicial policy of giving maximum deference to the will of the legislature that the basic structure doctrine could be sustained without impairing democracy. In India, the Supreme Court has invoked the doctrine of basic structure as a counter-majoritarian device to sustain the liberal and counter-majoritarian spirit of the Constitution. The basic structure doctrine need not be seen as a device for judicial supremacy as against parliamentary supremacy. It has to be seen as supremacy of the people as against the ruling elite. The Court acts as the guardian of the people and tries to sustain the Constitution in its true spirit. 'Basic structure', therefore, must remain as the inarticulate premise of the Supreme Court of India. It will become delegitimised if the Court over-exercises it or does not exercise it. The Court will have to steer clear of trigger-happy activism as well as judicial passivism.

Judicial review, however, under such configuration cannot remain a mere legalistic exercise. It inevitably becomes political. Not mere legalism but considerations of propriety, vision and knowledge of the dynamics of social change figure in judicial assessment of legality.

ATTEMPTS TO BURY THE BASIC STRUCTURE DOCTRINE

The government made several attempts to have the basic structure doctrine reversed. One attempt was to intimidate the judges by taking recourse to court packing. We have already described above how attempt was made to dissolve the *Kesavanand* majority by superseding three judges who resigned in protest after Chief Justice Sikri retired. When even the dissenting judges in *Kesavanand* struck down a clause in the Constitution (Thirty-Ninth Amendment) Act, 1976 as being violative of the basic structure of the Constitution in the *Prime Minister's Election* case, another attempt was made to have the basic structure doctrine overruled by the Court itself.

Chief Justice Ray was persuaded to constitute a special bench of 13 judges to reconsider the majority decision in *Kesavanand Bharati* The new bench consisted of Ray himself, and Justices Khanna, Beg, Mathew, Chandrachud, Bhagwati, Krishna Iyer, Sarkaria, Goswami, Gupta, Singhal, Fazl Ali and Untwalia. Khanna alone had committed himself to the basic structure doctrine. Others were not committed. So the Chief Justice might have hoped that it would not be difficult to get at least seven judges to vote against the basic structure doctrine. After all, numerically, a larger number of the judges had voted against the basic structure doctrine, taking all the four cases decided until then. In *Shankari Prasad* five (unanimous), in *Sajjan Singh* three, in *Golaknath* five and in *Kesavanand* six judges had held against any limits to the Parliament's power of constitutional amendment under Article 368. Thus 19 judges had held in favour of the unlimited power of Parliament to amend the Constitution. As against this, two judges in *Sajjan singh*, six judges in *Golaknath* and seven judges in *Kesavanand* had voted in favour of restrictions upon Parliament's power of constitutional amendment. This number came to 15. It was therefore not unrealistic to hope that the new bench would overturn the basic structure doctrine and proclaim that Parliament's power to amend the Constitution under Article 368 was without any limits.

When the Court asked the Attorney General to establish *prima facie* that the basic structure limitation on Parliament's power of constitutional amendment would come in the way of social progress, no satisfactory evidence of such an eventuality was produced and, ultimately, the Chief Justice had to dissolve the special bench [Seervai, 1984, Vol. 2, p. 1,672; Baxi, 1980, Pp. 70-76]. Having failed to get the basic structure doctrine overruled judicially, another attempt was made to kill it through a constitutional amendment. The Constitution (Forty-Second Amendment) Act, 1976 contained following provisions in Clauses (4) and (5) which were added to Article 368 of the Constitution. These provisions read as follows: (4) No amendment of the Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty-Second Amendment) Act, 1976) shall be called in question in any court on any ground. (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

The validity of these two clauses was challenged before the Supreme Court in *Minerva Mills* v. *India* [AIR, 1980, SC, p. 1,789] and the Court unanimously (five judges, namely, Chief Justice Chandrachud, Justice Bhagwati, Justice Gupta, Justice Untwalia and Justice Kailasam) held that Clause (4) was violative of the basic structure of the Constitution and was therefore void. The Court read down Clause (5) to mean that as long as Parliament did not violate the basic structure of the Constitution, its constituent power was subject to no limitation [Sathe, 1989, Pp. 68-95].

Article 31-C was introduced by the Constitution (Twenty Fifth Amendment) Act, 1971 to provide immunity to the laws enacted in pursuance of the directive principles of state policy contained in Clauses (b) or (c) of Article 39. The last proviso of that article provided that the certificate of the President that a law subserved either of those clauses of Article 39 would be conclusive and no judicial review of such a law on the ground that it did not subserve either of those clauses would be admissible. In *Kesavanand*, the Court upheld Article 31-C but struck down the last proviso as being violative of the basic structure of the Constitution. Article 31-C amended by the Forty Second Amendment Act, 1976 provided that no law enacted in pursuance of any of the directive principle of state policy could be challenged on the ground that it violated any of the rights guaranteed by Articles 14, 19 or 31. In *Minerva Mills*, the validity of the above amendment was questioned. The Supreme Court by majority held that the impugned amendment was destructive of the basic structure of the Constitution. Justice Bhagwati, dissented [Sathe, 1989, Pp. 75-80]. Justice Bhagwati observed that the primacy of the directive principles of state policy over fundamental rights which the impugned article established was an integral part of the basic structure of the Constitution.[13]

JUDICIAL RESTRAINT ON BASIC STRUCTURE DOCTRINE

Since *Minerva Mills*, which was decided in 1980, the Supreme Court has exercised maximum restraint in using the basic structure doctrine against constitutional amendments. Since then no effort was made on behalf of the government to overturn the basic structure doctrine. The Court has also been most reticent in using the basic structure doctrine to strike down a constitutional amendment. Although the Court had asserted that it would review constitutional amendments which added new Acts to the IX Schedule, it has not held any of the additions invalid. Till the *Kesavanand* decision, Schedule IX contained only 64 Acts. Since then the total number of Acts in that Schedule has swollen to 257-A. Out of these Entry 87 (The Representation of the People Act 1951 and its amendments in 1974 and 1975), Entry 92 (The Maintenance of Internal Security Act, 1971), and Entry 130 (The Prevention of Publication of Objectionable Matter Act, 1976) were omitted from Schedule IX by the Constitution (Forty-Fourth Amendment) Act, 1978. In the last seventeen years, the Court has struck down constitutional amendments only twice. It struck down Clause (5) of Article 371-D, which

was inserted by the Constitution (Thirty-Second Amendment) Act, 1973 because it said that an order of the administrative tribunal appointed to adjudicate disputes arising out of matters mentioned therein would be effective after its confirmation by the state government. Since the tribunal had been set up to deal with all disputes regarding the services and excluded the jurisdiction of the High Court, it was held that unless it was as independent as a High Court, the basic structure of the Constitution could not remain intact. This was the decision in *P. Sambamurthy* v. *Andhra Pradesh* [AIR, 1987, SC, p. 663]. In *S.P. Sampath Kumar* v. *Union of India*, [AIR, 1987, SC. p. 386] the Supreme Court had upheld Articles 323-A and 323-B of the Constitution inserted by the Constitution (Forty-Second Amendment) Act, 1976. Those articles gave power to Parliament to pass laws providing for tribunals to deal with matters mentioned in those articles and to exclude the jurisdiction of the High Courts over such matters as were entrusted to the tribunals. The Supreme Court observed that such specialised tribunals could reduce the burden on the High Courts and would provide effective alternative fori of adjudication. However, since those tribunals were intended to be the substitutes for High Courts, they had to possess independence and expertise similar to those as possessed by a High Court. The Supreme Court scrutinised the Administrative Tribunals Act enacted under Article 323-A, which provided for the establishment of administrative tribunals to deal with the service matter, and objected to the provisions for the appointment of the members and chairmen of those tribunals. The Court gave elaborate suggestions as to how they should be appointed. One of the essential requisites of such appointments would be that they should be made in consultation with the Chief Justice of India. The Act was amended in accordance with those suggestions. Subsequently however, doubts were expressed regarding the competence of the tribunals to become substitutes for the High Court. Further, the experience showed that by making the decisions of the tribunals final and subject only to an appeal to the Supreme Court, the redressal of grievances had become more expensive and dilatory. Since the Act provided that an appeal lay only to the Supreme court, the litigants in service matters, who were government employees, were put to a great hardship. The question was reopened and the Supreme Court overruling its decision in *S. P. Sampath Kumar* v. *India* [AIR, 1987, SC. p. 386] held in *L. Chandra Kumar* v. *India* [SCC, 1997, Vol. 3, p. 266] that Article 323-A (2) (d) of the Constitution in so far as it permitted Parliament to exclude the jurisdiction of the High Court under Article 226 of the Constitution over the administrative tribunals was violative of the basic structure of the Constitution. The Court held that an administrative tribunal could never be equivalent to a High Court. The power of a High Court under Article 226 of the Constitution was part of the basic structure of the Constitution. Therefore, the Court observed that an aggrieved party should be entitled to move a High Court under Article 226 against the decision of a tribunal. The Court observed [SCC, 1997, Vol. 3, p. 301, para 78]:

> We, therefore, hold that the power of judicial review over legislative action vested in the High Court under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

Since its inception in 1973 in *Kesavanand Bharati*, the basic structure doctrine has been successfully invoked only in five cases to strike down the following provisions of the constitutional amendments: (i) the last part of Article 31-C as inserted by Section 3 of the Constitution (Twenty-Fifth Amendment) Act, 1972 [*Kesavanand Bharati* v. *Kerala*] ; (ii) the last part of Clause (4) of Article 329-A inserted by Section 4 (4) of the Constitution (Thirty-Ninth Amendment) Act, 1975 [*Indira Gandhi* v. *Raj Narain*]; (iii) Article 31-C as amended by Section 4 of the Constitution (Forty-Second Amendment) Act, 1976; Section 55 of the same Act [*Minerva Mills* v. *India*]; (iv) Clause (5) of Article 371-D inserted by Section 3 of the Constitution (Thirty -Second Amendment) Act, 1973 [*P. Sambamurthy* v. *Andhra Pradesh*]; and (v) Sub-Clause (d) of

clause (2) of Article 323-A inserted by Section 46 of the Constitution (Forty-Second Amendment) Act, 1976 [*L. Chandra Kumar* v. *India*].

KIHOTA HOLLOHON V. *ZACHILHU* AND OTHERS

The Supreme Court has used the power derived from the basic structure doctrine most sparingly. This judicial restraint became manifest in *Kihota Hollohon* v. *Zachilhu and Others* [SCC, 1992, Vol. 1, p. 309]. In this case, the Supreme Court was asked to examine the constitutional validity of the Constitution (Fifty-Second Amendment) Act, 1985. That amendment inserted X Schedule in the Constitution which contained deterrent provisions against defection of members of legislatures. The Schedule defined what was meant by defection and described the consequences of defection. Clause 2 (1) (d) provides that if a member of a political party on whose symbol he was elected to the House changes his party, he loses his seat in the legislature. If a member votes or abstains from voting contrary to the direction of his party or without the permission of the party or without such voting or abstention from voting been condoned by the party, he shall be disqualified from continuing to be a member of the House.

Article 105 (1) of the Constitution guarantees freedom of speech in Parliament and Article 194 (1) guarantees freedom of speech in the Legislature of every state. Clause (2) of each of the above articles confers immunity upon each member of the legislature from judicial proceedings in respect of anything said or any vote given by him in the House. It was contended that clause 2 (1) (d) of the Tenth Schedule curbed the freedom of speech of a member of the House of Legislature in so far as voting or abstention from voting contrary to the direction given by the party or without permission of the party or without such voting or abstention from voting being condoned by the party was made a ground for disqualification for membership of the House. The right to vote , it was asserted, was a concomitant of the right to free speech guaranteed by Article 105 of the Constitution. It was further contended that freedom of speech in the House was part of the basic structure of the Constitution and the above provision of the Constitution Fifty-Second Amendment Act in so far as it curtailed such freedom violated the basic structure of the Constitution. And was therefore void.

These were formidable objections but it seems the Court did not find them strong enough to make the amendment invalid. The challenge was examined by a bench of five judges. The Supreme Court did not express opinion about the validity of the provisions which imposed severe curbs on the freedom of a member to express himself in the House. In our opinion, the restrictions on the right to vote which the X Schedule imposed were the most objectionable ones. Freedom of speech of a member guaranteed by Article 105 (1) and the immunity against civil and criminal action for the acts arising out of the exercise of that freedom are the most valuable possessions of a member of the legislature in democracy. Such freedom and such immunity are granted to a member of the legislature to enable him to discharge his responsibility towards the people whom he represents. In order to eliminate unprincipled defections, if you restrict the freedom of a member to vote as he likes within the House, you are throwing the baby with the bath water. In *P.V. Narsimha Rao* v. *State (CBI/SPE)* [SCC, 1998, Vol. 4, p. 626], the Supreme Court by majority held that freedom under Article 105(1) and immunity under Article 105(2) are wide enough to even immunise a member from investigation into whether he took bribe for voting this way or that way. It is submitted that the majority decision is wrong. The freedom is given to a member of the legislature in his capacity as a representative of the people. He can neither barter it away for a bribe nor be deterred from exercising it, due to fear of expulsion from the party. Prosecution for taking bribe does not restrict his freedom, on the contrary it enhances it because the freedom and immunity given to him by Article 105 of the Constitution are given not in his own interest but in the interest of those whom he represents. Freedom of speech given by Article 19 (1) (a) of the Constitution is given to every citizen and is primarily to allow him to speak freely. There, the primary interest is of the individual and the consequential interest is of the society. In the case

of Article 105, which gives freedom of speech to a member of the legislature, the primary interest is of the society and the consequential interest is of a member. By taking bribe, he commits disloyalty towards the people who have elected him. The Court observed that freedom of a member to speak or vote freely was part of the basic structure of the Constitution. In the light of such observations, it is submitted that the provisions of the Tenth Schedule, which make voting in the House contrary to the directions of the party to which the member belongs a ground for disqualification, are clearly violative of the basic structure of the Constitution.

It seems that the judges were more concerned over the provisions which made the Speaker's/ Chairman's decisions final and excluded judicial review. Para 7 of the X Schedule provided that 'notwithstanding anything contained in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under the Schedule'. Para 6 of the Schedule conferred finality on the decisions of the Speaker/ Chairman of the House regarding disqualifications of members on the ground of defection as defined in the Schedule. Both of these paras were attacked as being against the basic structure of the Constitution. So far as Para 6 is concerned, the Court applied the administrative law method of interpretation of the ouster clauses and held that in spite of such finality, the decisions of the Speaker /Chairman would be subject to judicial review in so far as they lay beyond their jurisdiction or were based on erroneous determination of law [*Anisminic Ltd.* v. *Foreign Compensation* Commission, A.C. 1969, Vol. 2, p. 147; Sathe, 1998, Pp. 239-46]. So far as Para 7 is concerned, the Court chose to strike it down not on the ground of it being violative of the basic structure of the Constitution but on the ground that since it affected those provisions mentioned in the proviso to Clause (2) of Article 368, it had to be ratified by not less than half the legislatures of states and, since the amendment had not been so ratified, that clause was invalid. The majority consisting of Justice M.N. Venkatchallaih, Justice K. Jayachandra Reddy and Justice Agarwal held that Para 7 was severable from the rest of the Schedule and, therefore, the rest of the Schedule was not invalid. The rule of severability is that if an invalid part of a statute can be separated from the valid part and such valid part can be sustained without its invalid component as a viable and reasonable rule of conduct, it is saved from invalidity and enforced. The minority judges, Justice Sharma and Justice Verma, held that the entire Schedule suffered from constitutional infirmity. They held that Para 7 could not be saved by applying the principle of severability.

We find here that the judges were reluctant to strike down the impugned amendment on the ground of the basic structure limitation. They preferred to strike down Clause (7) on the ground that proper procedure for its enactment had not been followed. It is submitted that the majority was wrong in applying the principle of severability to save Para 7 from voidness. The doctrine of severability is invoked only where the valid part of a law can be separated from its invalid part and on separation such valid part survives on its own. This principle applies only when there is substantive invalidity of a part of the law because of lack of the plenary power on the part of the legislature or its inconsistency with a fundamental right. Where a law imposes unreasonable restrictions along with reasonable restrictions on a fundamental right guaranteed by Article 19, the law in so far as it imposes reasonable restrictions can be saved if it is severable from the other part of the law which imposes unreasonable restrictions [*Chintamanrao* v. *State of Madhya Pradesh* AIR, 1951, SC, p. 118]. When a law is not enacted in accordance with the prescribed procedure, it must fall as a whole. It is as good as a law which is still-born. The majority invoked the doctrine of severability because it did not wish to strike down the constitutional amendment on the ground of its inconsistency with the basic structure of the Constitution. They could have struck down Clause (7) on the ground that it violated the basic structure of the Constitution. But they wanted to use maximum judicial restraint in the use of the basic structure doctrine. In fact, we submit, that

this was the most deserving case for using the basic structure doctrine and the judicial restraint was misplaced.

The basic structure doctrine ought to be preserved only for combating majoritarian tyranny. Democracy means majority rule and counter majoritarianism must remain an exception. The overuse as well as under-use of the power to invalidate a constitutional amendment is likely to delegitimate it. A Court should never appear to be acting as a super-legislature, but it should also not appear to be trivializing the basic structure doctrine. It must act as a censor of the exercise of the constituent power for the preservation of the most enduring values of constitutionalism. The Court must give maximum scope to majoritarian democracy and the basic structure doctrine must be used only to protect those aspects of the Constitution, which constitute its basic principles. Judicial invalidation of a constitutional amendment on the ground of alleged violation of the basic structure of the Constitution must remain a rarest of rare phenomenon. If the Court tries to dictate to Parliament by making every provision as part of the basic structure, judicial review on the ground of basic structure will lose its legitimacy. The Supreme Court has been describing many aspects of the Constitution as basic structure. These are mere *obiter dictas* and we hope that the Court will not stagnate the Constitution by invoking the basic structure doctrine too often. It is often suggested that the Court should enumerate what constitutes the basic structure of the Constitution. In our submission, such enumeration can come in the form of a policy statement. The judges have from time to time given illustrations of what constitutes the basic structure of the Constitution. But these utterances are not binding decisions. In *L. Chandra Kumar* v. *Union of India,* Chief Justice Ahmadi said [SCC, 1997, Vol. 3, Pp. 266, 300]:

> The doctrine of basic structure was evolved in *Kesavanand Bharati* case. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of the Constitution. Indeed, in the judgments of Shelat, and Grover, JJ. (Justices), Hegde and Mukherjea JJ. and Jaganmohan Reddy J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In *Indira Gandhi* case, Chandrachud J. held that the proper approach for a judge who is confronted with the question, whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country.

POLITICAL LIMITATIONS ON THE BASIC STRUCTURE DOCTRINE

In *Indra Sawhney* v. *India* [ATC, 1992, Vol. 22, p. 385], the Supreme court held that reservation of jobs in public service under Article 16 (4) of the Constitution should never exceed 50 per cent of the total number of jobs to be recruited. The Court further held that there should be no reservation in promotion. Both of these rules have been rejected by Parliament through the constitutional amendments enacted in recent years. More than 50 per cent reservation was provided for by Tamil Nadu and the law providing for it was put in the IX Schedule by constitutional amendment.[14] The IX Schedule contains the laws which cannot be assailed in any court on the ground of their inconsistency with any of the fundamental rights. By another constitutional amendment, Clause 4A was added to Article 16 which permits reservation in promotion also (The Constitution (Seventy-Eighth Amendment) Act, 1995). If these amendments are challenged, how will the Court deal with the situation? So far the matter has not been heard. Will the Court hold them to be violative of the basic structure of the Constitution? The Court has already proceeded on the presumption that they are valid. In *Ashok Kumar Gupta* v. *State of Uttar Pradesh* [SCC, 1997, Vol. 5, p. 201], the Supreme Court held that Clause (4-A) inserted by the Constitution (Seventy-Eighth Amendment) Act, 1995 has converted reservation into a fundamental right; it was held that reservation of posts applies not only to initial recrutment but to promotion also and was not

reviewable on the ground of violation of fandamental rights in *Commissioner of Commercial Taxes, Hyderabad* v. *G. Sethumadhava Rao* [AIR, 1996, SC, p. 1,915].[15] These amendments were passed with the unanimous support of all the parties (there was a lone dissenting vote of a Shiv Sena member). Where a constitutional amendment was passed with such overwhelming support, the Court would not interfere with it. The Court has used the basic structure doctrine to invalidate those amendments which had been passed by the Emergency regime of 1975-77. Many of the provisions of the Forty-Second Amendment, which had acquired notoriety were repealed through legislative process.[16] The provisions such as Article 31-C as amended by that amendment and a provision of that amendment which made Parliament's power of constitutional amendment unlimited could not be repealed because the ruling party did not have majority in the Council of States (Rajya Sabha), and they were struck down by the Court in *Minerva Mills*.

Since the above amendments have been passed unanimously, they have the support of all the parties. Legally, it might be difficult to say that the rulings in *Indra Sawhney* that reservation should not exceed 50 per cent or that there should not be reservation in promotion, constitute the basic structure of the Constitution. The provisions for protective discrimination for backward classes are also as much part of the basic structure as the right to equality. In fact, it might be said that protective discrimination is an integral part of the package on the right to equality. How much protective discrimination will negate the right to equality is a question that could be answered only with reference to the confirmed data regarding the socio-economic conditions of the backward sections. The negation point is not fixed and can change with the times. This is an instance of the political nature of the decision-making. There cannot be any cut and dry test for determining what is basic structure and when it is violated.

Politically, the scenario has changed radically. Gone are the days when a party possessed ready support of a majority that was required for getting the Constitution amended. Since 1989, there have been minority governments in office. Even during the last 10 years, there have been about 16 amendments to the Constitution and all of them have been by consensus. The Constitution (Seventy-Third Amendment) Act, 1992 and the Constitution (Seventy Fourth Amendment) Act, 1992 made radical changes in providing for the panchayats and municipalities as being, more or less, the third tier of the federal government. These two amendments also brought in the concept of reservation of seats for women. These amendments were passed by consensus. Their validity was not challenged in court. Political resistance to constitutional amendment is now becoming stronger and perhaps judicial review as a counter majoritarian device may not be required to be used very often. Further, various political parties also seem to have accepted the basic structure norm for constitutional amendment. Recently when the Bharatiya Janata Party (BJP)-led government at the Centre announced in their national agenda that a review of the Constitution would be made to find out what changes were necessary, it was made clear on behalf of the government that such revision would be within the framework of the basic structure of the Constitution. Similarly, the parties in the opposition, which criticised the BJP-led government's intention to review the Constitution, made it clear that they would not permit any amendment which would whittle down the basic structure of the Constitution. From this, it is clear that the basic structure limitation has now been agreed upon among the chief political players also. That, however, does not mean that the use of the basic structure doctrine has outlived its purpose. By declaring from time to time that secularism [*S. R. Bommai* v. *India*, SCC, 1994, Vol. 3, p. 1] or independence of the judiciary [*Supreme Court Advocates on Record Association* v. *India*, SCC, 1993, Vol. 4, p. 441] or the provisions for judicial power contained in Articles 136 or 142 [*Delhi Judicial Service Association* v. *Gujarat*, SCC, 1991, Vol. 4, Pp. 406, 452] or parliamentary democracy [*P. V. Narsimha Rao* v. *State (CBI/SPE)*, SCC, 1998, Vol. 4, Pp. 626, 673 (Per Justice Agrawal)] form part of the basic structure

of the Constitution, the Court has been stabilizing the Constitution and deepening the people's commitment to the basic structure doctrine. These utterances are made by individual judges in their judgments and cannot be called even *obiter dictas.* They are not decisions of the Court. A decision strictly speaking comes only when a constitutional amendment enacted by Parliament is challenged in Court on the ground of its alleged violation of the basic structure of the Constitution. The above utterances have not come in cases in which issues of constitutional validity of any constitutional amendments were raised.

In *Bommai,* the issue was regarding the validity of the President's order issued under Article 356 of the Constitution. After the demolition of the Babri mosque at Ayodhya, the President acting on the advice of the Council of Ministers had dismissed the state governments in Madhya Pradesh, Rajasthan and Himachal Pradesh which were presided over by the Bharatiya Janata Party. The Court observed that those state governments were not likely to carry out the orders of the Central Government regarding the bans on several communal organisations. It was held that the dismissal of those state governments was valid. One of the considerations which weighed upon the minds of the judges was that the act of demolition of the Babri mosque and other acts that followed from it posed a threat to the principle of secularism. The judges therefore observed that since secularism was an aspect of the basic structure of the Constitution, the Presidential action in furtherance of the protection of secularism was justified. Here saving the basic structure was considered to be a good reason for the Presidential action under Article 356. In *Kesavanand Bharati,* the Court had said that the basic structure doctrine would be invoked only against a constitutional amendment and not against an ordinary statute. But in Bommai, the Court invoked the saving of the basic structure as a justification for the President's action under Article 356. There is a difference. Where a constitutional amendment is challenged, the question for the Court's determination is whether it destroys the basic structure. Where the Presidential action under Article 356 is examined, the Court considers whether such action was necessary for saving the basic structure. Do we conclude that the basic structure doctrine could now be pressed into service even for challenging the validity of an Executive act? It means that the President can dismiss a state government if its conduct results in the destruction of the basic structure of the Constitution. Article 356 says that such an action can be taken only when the President is satisfied that the government of a state cannot be carried on in accordance with the provisions of the Constitution. What amounts to a government being not carried on in accordance with the Constitution? If a government is not functioning in accordance with the principles of secularism, it is, plainly speaking, not functioning according to the provisions of the Constitution. The fact that secularism is part of the basic structure of the Constitution is not relevant to the validity of the action of dismissal of the state government. The announcement that secularism is part of the basic structure of the Constitution comes only with a view to pointing out how grave is the failure of the state government to govern according to the Constitution. But obviously, in declaring that secularism was part of the basic structure, the Court was playing a political role. It was giving a warning to the BJP and its like minded parties, who entertained the idea of a majoritarian Hindu state, that any move in that direction towards constitutional amendment would be considered as violation of the basic structure of the Constitution.

Similarly, in other cases also, the words 'basic structure 'were used to determine the validity of the Acts which had adverse effect on the independence of the judiciary or on the access to the judicial remedies, merely to describe their importance in the scheme of the Constitution. The words 'basic structure' were not used in the same sense in which they are used in determining the validity of a constitutional amendment.

CONCLUDING REMARKS

This shows that in future, the Court may observe maximum judicial restraint in invoking the doctrine of basic structure in respect of an impugned constitutional amendment. But the doctrine may be used for judging the validity of the act of the Executive under Article 356 or Article 359, under which the right to move any court or the enforcement of any of the fundamental rights other than those guaranteed by Articles 20 and 21, can be suspended by the parliament or under Article 352 under which a proclamation of emergency can be made. By the Constitution (Forty-Fourth Amendment) Act, many safeguards against the use of this power were incorporated. The Court may, however, undertake greater scrutiny of the proclamation of emergency and the actions taken thereunder with reference to the basic structure of the Constitution. So it seems that while the horizon of the basic structure doctrine may expand to include legislative as well as executive actions, its use for considering the validity of a constitutional amendment may become rare.

The basic structure doctrine is the highest point of judicial activism. The Indian Supreme Court alone enjoys such power. It has also been claimed by the Supreme Court of Bangladesh. Such power imposes a very onerous burden on the Court. The Court has to allow legitimate changes in the Constitution but prevent the erosion of more enduring values which constitute the essence of the Constitution. Justice Jackson's oft-quoted aphorism that the Court is not final because it is infallible but it is infallible because it is final, is most apt [*Brown* v. *Allen,* U.S., 1953, Vol. 344, p. 450; Agresto, 1986, p. 103]. The people live with the Court's infallibility as long as they believe that its erroneous decisions can be corrected and that even its errors are not because of its lack of impartiality or lack of objectivity. There is therefore greater need to examine to whom the Supreme Court is accountable and how such accountability is reinforced.

NOTES

1. *S.H. Sheth* v. *India* G.L.R., 1976, Vol. 17, p. 1,017. Appeal against that decision went to the Supreme Court. See *India* v. *Sankalchand* AIR, 1977, SC, p. 2,328. See *H. M. Seervai,* 1978, Pp. 119-29, (Independence of the Judiciary).

2. Article 141, Constitution of India.

3. *R.* v. *Secretary of State for Transport, ex. p. Facortame* (No. 2), A.C., 1991, p. 603. See Wade, 1996, Pp. 185-87.

4. Maurice Gwyer, the Chief Justice of the Federal Court of India who wrote a foreword to the book, agreed with the author's view.

5 Clause (44) and Clause (5) of Article 31 as originally enacted. This article was repealed by the Constitution (Forty-fourth Amendment Act, 1978 [Merrilat, 1970].

6. The judges found it difficult to reconcile their inherited positivist conception of the judicial role with the expansionist role, the Court was called upon to play. Therefore, they suffered from inner contradiction. Hidayatullah in his dissenting judgment in *Sajjan Singh* v. *Rajasthan* [AIR, 1965, SC, Pp. 845, 862], said that our fundamental rights should not become the plaything of the majority. But 15 years later, he scoffed at the newly emerging public interest litigation in another of his public speech delivered at Pune [Hidayatullah, 1983].

7. See Clause (2) of Article 31 as amended by the Constitution (Fourth Amendment Act, 1951 [Sathe, 1989, Appendix, p. 102].

8. Brandeis was a judge of the Supreme Court who used such data in his judgments and, therefore, they came to be known after him as *Brandeis Briefs.*

9. Article V of the Constitution of the United States of America provides that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

10. Therefore, this author had pleaded that the Nath Pai bill be deferred until the Supreme Court clarified its position in the future cases [Sathe, 1969, Pp. 33-42].

11. For criticism of Seervai, see Baxi, 1985, Pp. 66-67.

12. *Korematsu* v. *U.S.* [U.S., 1944, Vol. 323, p. 214]; *Hirabayashi* v. *U.S.* [U.S., 1943, Vol. 320, p. 81]. For criticism of these decisions see, Dembitz 1945, p. 175].

13. For a criticism of Justice Bhagwati's viewpoint, see Sathe, 1989, Pp. 79-81.

14. The Constitution (Seventy-Sixth Amendment) Act, 1994 added Entry 257-A to the IX Schedule which reads as follows: 'The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 (Tamil Nadu Act 45 of 1994)'.

15. Also see *Superintending Engineer, Public Health, Chandigarh* v. *Kuldeep Singh* [AIR, 1997, SC, p. 2, 133].

16. The Constitution (Forty-Third Amendment) Act, 1978 and the Constitution (Forty-Fourth Amendment) Act, 1978 repealed most of the objectionable provisions inserted by the Constitution (Forty-Second Amendment Act, 1976. See Sathe, 1989.

ABBREVIATIONS

A.C.	*Appeal Cases*
AIR	*All India Reporter*
ATC	*Administrative Tribunal Cases*
Cal.	Calcutta High Court
Co. Rep.	*Coke's Reports*
G.L.R.	*Gujarat Law Reporter*
H.C.	High Court
I.L.R.	*Indian Law Reports*

L.Ed.	*United States Supreme Court Reports, Lawyers' Edition*
L.R.	*Law Reports*
Patna	Patna High Court
SC	Supreme Court
SCC	*Supreme Court Cases*
U.S.	*United States Supreme Court Reports*

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A PERSPECTIVE ON LAND-USE PLANNING FOR EASTERN INDIA

Samar K. Datta and Milindo Chakrabarti

Of all the natural resources endowed upon mankind, soil-cover on Mother Earth has been one of the most important basic resources, which plays a strategic role in determining the living standards of human beings. Given the multitude of possible uses of land and the fact that often there are possibilities of emergence of a new use out-competing the existing uses and consequent conflicts, land-use planning is to be considered an important exercise. The present paper is an attempt to provide a perspective on the multitude of uses land is put to in the eastern states of India, i.e., West Bengal, Orissa and Bihar. It tries to argue that plans should involve minimum reliance on centralised decision-making bodies and their budgetary provisions, on the one hand, and nothing should be left to be decided by the unconstrained functioning of the existing market forces, on the other. Self-governing and self-sustaining decentralised user group institutions at local levels with appropriate higher tier organisations should perform the land-use planning exercise and look into its implementation as part of their regular business.

I. INTRODUCTION

1. Of all the natural resources endowed upon mankind, soil cover on Mother Earth has been one of the most important basic resources which plays a strategic role in determining the living standards of human beings. Soil, in fact, is the base for all sorts of productive activities. Any type of transformation - be it quantitative, qualitative or spatial - requires soil in varying degrees. Historically, soil has been put to increasing number of varied uses. Given the fixed amount of land available on Mother Earth and the simultaneous increase in population as well as both quantitative and qualitative changes in the goods and services demanded over time, the pressure on land has been increasing tremendously. In earlier days when economic activities were mainly concentrated around agricultural activities and the population of the world was not as high as it is today, land was not considered to be scarce. Forests were felled to make land available for agriculture as well as for human settlement. In course of time, man started industrial production which necessitated further diversion of land from agriculture and/or forests to meet the requirement of industries as well as that for urbanisation. Simultaneously, the agricultural sector grabbed further forest land to make up for the loss caused by such diversion. Thus we have gradually shifted from slash and burn agriculture to multiple cropping, on the one hand, and on the other, land meant for agricultural production is getting diverted to non-agricultural use at a very alarming rate. Under such circumstances, it is necessary that a proper planning is undertaken in allocating the available land in an optimal manner among different possible uses to balance the requirements of all types of economic activities.

2. Conceptually, perspective land-use planning involves altering the land area allocations over alternative uses through suitable technological and institutional devices, so that

* the supplies of various commodities and services which follow from the stipulated land-use pattern broadly conform to the projected demand for such items,
* the uses are sustainable in the sense that the current uses by one group do not jeopardize the uses of another group or those of the future generation, and
* the bio-mass production, i.e., the streams of output which follow from the stipulated land-use pattern (and even income and employment following from the streams of output), is maximised.

3. From an earth covered only with forests and rivers with patches of deserts here and there, even

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a few thousand years ago, we have arrived today at a level of 'development' where land is to be used for the following purposes:

* maintenance of forest cover up to a certain specific level for ensuring ecological stability;
* production of cereals and other food crops for ensuring food security;
* production of fodder for the live stock that ensures supply of other food stuffs necessary for human consumption;
* maintenance of water bodies for inland fisheries, irrigation and supply of water for drinking and even for protection of bio-diversity;
* cultivation of commercial crops for use as inputs by manufacturing enterprises;
* provision of shelter to the world's population both in rural and urban areas;
* extraction of minerals; and
* establishing industrial enterprises.

4. Considering the multitude of possible uses of land, coupled with the fact that very often there are possibilities of emergence of a new use out-competing the existing ones, and the consequent conflicts, land-use planning *per se* is to be treated as an important exercise facing the policy makers and planners in an economy. The present paper is an attempt at identifying the issues and suggesting possible remedial measures *vis-a-vis* the land-use patterns in the three eastern states of India, namely, West Bengal, Bihar and Orissa. The paper is divided into five sections. The first one, as usual, is introductory in nature. The second section gives a perspective of land-use pattern of the region under study in comparison with the country as a whole, using data bases from the National Remote Sensing Agency (NRSA). The detailed land-use characteristics under particular categories are taken up for a thorough scrutiny in the third section. The fourth section identifies the emerging land-use issues in the context of the eastern states. In the absence of detailed NRSA data, disggaregated analyses in Sections 3 an 4 have depended almost exclusively on state source data as accessed through the Agro-climatic Regional Planning Unit (ARPU) at Ahmedabad. The last section is set aside for suggestions and concluding remarks.

II. STYLISED FEATURES OF LAND-USE PATTERN IN THE EASTERN STATES

5. In terms of varieties, land can be put under the following broad use categories:

* Built up area, i.e., area used up for construction of dwelling and business units, industrial sheds and roads;
* Agricultural area, i.e., land engaged in agricultural activities;
* Forest area;
* Pure wastelands;
* Water bodies; and
* Mineral and industrial estates.

6. In terms of the above-stated categories, the data available from NRSA (Table A-2) reveals the following features:

* In all the three states, the built up area as percentage of the total geographical area is higher than the Indian average (4.34 per cent). Among the states, the highest proportion of land going to such use is recorded in Bihar (10.19 per cent), followed by Orissa (6.90 per cent) and West Bengal (5.28 per cent) in a descending order.
* West Bengal has set aside the highest proportion of land for agricultural activities (73.05 per cent), being followed by Bihar (64.90 per cent) and Orissa (51.06 per cent). Both West Bengal and Bihar are a notch above the national average of 51.57 per cent, with Orissa almost following the national level.
* The relatively greater allocation of land for agricultural use in West Bengal and Bihar seems to be at the expense of lesser proportional area being available for forests. Whereas West Bengal has a share of only 9.11 per cent of its total geographical area under forests, that for Bihar stands at 15.34 per cent. On the other hand, Orissa is observed to be putting a larger share (29.51 per cent) of its available land mass under forests, a proportion which is significantly higher than the national average of 20.51 per cent (although well below the suggested norm of one-third of the land area).

* Compared to the situation that obtains at the national level (13.85 per cent), the extent of wasteland is observed to be significantly less in the states under the present study. Whereas the least is observed in West Bengal (3.52 per cent), the highest proportion is recorded in Orissa (8.75 per cent).
* West Bengal has the highest proportion of its area under water bodies among the eastern states and, incidentally, its share of water bodies (7.67 per cent) is observed to be well above the national average (3.31 per cent). The other two states record a, more or less, similar proportion of land under water bodies 2.46 per cent and 2.33 per cent for Orissa and Bihar, respectively, which are considerably less than the national figure.
* Regarding area diverted to mining and industrial activities, unfortunately, Bihar (0.21 per cent) and West Bengal (0.10 per cent) record a proportion that is quite higher than the national average (0.04 per cent), with Orissa (0.05 per cent) almost keeping track with the national average.

7. So far the discussion was restricted only to broad categories of land-uses. Under every category, one can differentiate among several sub-categories. For example, land under agriculture may be used for:

* Kharif Crops;
* Rabi Crops (inclusive of summer); and
* Agricultural Plantations.

8. Some lands are also left fallow. The intensity of land-use under agriculture is indicated by the extent of double-cropped area. We present below the main features regarding distribution of agricultural land under different such sub-categories (Table A-3):

* A higher percentage of agricultural land is devoted to kharif crops in all the three eastern states as compared to the national average, and the allocation is higher too in respect of *rabi* crops for West Bengal and Bihar. This explains the higher incidence of double cropping in West Bengal (21.25 per cent) and Bihar (23.50 per cent) in comparison to the country's average of 16.58 per cent.
* A considerable amount of area is lying fallow in West Bengal (5.67 per cent) - a feature fortunately not so prominent in the other two states, Bihar (3.16 per cent) and Orissa (0.05 per cent).
* In view of the concentration of tea gardens in the northern part of West Bengal, a considerable proportion of land is devoted to plantations (11.99 per cent) in that state.

9. The forests in the eastern region of the country are mostly deciduous with patches of evergreen forests spread over West Bengal and Bihar. So far as the distribution of forest resources is concerned (Table A-4), the broad features are:

* A significantly higher proportion of forest land is observed to be degraded in Bihar (7.88 per cent), while Orissa (4.39 per cent) and West Bengal (1.37 per cent) show a comparatively better position against the national average standing at 5.08 per cent.
* West Bengal seems to have earned the dubious distinction of nurturing the highest share in forest blanks (0.59 per cent) among the three states, although the share is more or less identical to the national average (0.57 per cent).
* The states of West Bengal (0.21 per cent) and Orissa (0.25 per cent) are lagging behind the national scenario in terms of forest plantations (0.35 per cent), with Bihar (0.50 per cent) showing a better performance. About 2.24 per cent of the total geographical area of West Bengal falls under mangrove forests, with Orissa chipping in with about 0.14 per cent of its land under this category against the national average of 0.16 per cent.

10. As we concentrate on the situation that obtains in these states in respect of wastelands (Table A-5), the following pattern is observed:

* Bihar is the worst sufferer from waterlogging with 0.72 per cent of its land coming under such category, whereas the national average is around 0.38 per cent;
* West Bengal has a larger share of marshy/swampy land (0.56 per cent); and
* Orissa features the highest proportional area under land with or without scrubs.

11. It is further observed that West Bengal enjoys a higher share of water bodies (7.67 per cent) compared to the national average (3.31 per cent), although most of them are constituted of riverain or stream areas with a negligible proportion of land under lakes, reservoirs or canals. On the other hand, the presence of the Chilika Lake in Orissa shows a considerable proportion of its land under the second category in comparison with the national average (Table A-6).

12. So far we looked into the percentage shares of land under different uses in the states. However, the arguments made solely on the basis of such figures may be misleading unless we also look into the states' share in a particular use of land in respect of the total land put under such use in the country as a whole. While carrying out such an exercise (with reference to Table A-7), we observe the following:

* In spite of sharing a lesser proportion of the total geographical area of the country, both Bihar (5.43 per cent) and Orissa (4.86 per cent) have a considerably higher built up area (12.73 per cent and 7.72 per cent, respectively). In case of West Bengal, even though it enjoys a share of 2.77 per cent of India's total geographical area, it provides land for 3.37 per cent of the built up area of the country.
* Bihar and West Bengal have, incidentally, set aside a larger proportion of land for agriculture practices as is evident from their larger share in the agricultural land of the country in comparison with their total land asset (6.83 per cent and 3.92 per cent, respectively). Orissa has been following more or less the national average.
* However, in the context of forests, the situation is observed to be just the reverse for Bihar and West Bengal (4.06 per cent and 1.23 per cent, respectively) with Orissa maintaining a proportionately larger area under this category (6.99 per cent).
* Whereas the endowment of wastelands is much smaller in proportion to the total landed assets of the eastern states, they are observed to be better endowed with water bodies.
* The situation is highly alarming in the context of mining and industrial wastelands. Although Bihar accounts for only 5.43 per cent of the total landmass of the country, it shares 30.71 per cent of the country's total area under that category. The positions of Orissa and West Bengal are no good either. The eastern Indian region as a whole accounts for 45.3 per cent of the mining and industrial wastelands of the country in spite of controlling only 13.06 per cent of the landed assets of the country.

13. If one looks at the behaviour of land-use subcategories within each broad category, one comes across the following observations in respect of land under agriculture (Table A-8):

* Bihar, interestingly, shows a higher intensity of double cropping as is evident from 7.69 per cent of the country's double cropped area being located in that state in spite of the fact that Bihar accounts for only 6.83 per cent of the country's total area under agricultural use. Using the same criterion, the situation looks fairly balanced in case of West Bengal but certainly grimmer in respect of Orissa.
* In the context of kharif crops, we observe a proportionately larger share of land being put in Bihar (7.73 per cent) and Orissa (6.49 per cent), with West Bengal having, more or less, a proportionate share (3.74 per cent).
* The situation is a bit different as we consider the rabi crops, with Bihar allocating a, more or less, proportionate share and West Bengal and Orissa putting in a lesser proportional area.
* As is obvious, the tea gardens in West Bengal are responsible for a disproportionately larger proportion of land under agricultural plantations.

14. In respect of area under forests the striking features that emerge are the disproportionately high level of forest blanks in West Bengal (2.90 per cent) and degraded forests in Bihar (8.42 per cent). However, the plantation figures provide some relief as they are observed to be on the

higher side for all the states (7.74 per cent, 3.47 per cent and 1.64 per cent for Bihar, Orissa and West Bengal, respectively) (Table A-9).

15. The present section presented the features of land-use under different categories in terms of percentage land areas. The relevant absolute figures are given in Table A-1 in the Appendix.

III. DISAGGREGATED ANALYSIS OF EASTERN INDIA'S LAND-USE PATTERN

16. As we talk of land, its most important use still is in terms of that for producing foodgrains, as is necessary for the subsistence of human beings. This is far more so in respect of the eastern region of the country because of the relatively greater population pressure on this part of the country. As per capita land available for human use is declining all over the world, partly because of rapid increase in population and partly due to land being put to alternative uses, more and more intensive agricultural practices are becoming the order of the day. Table 3.1 provides an insight into the decline in per capita net cropped area (NCA) and per capita gross cropped area (GCA) for the states under consideration over the years. Land-use planning involves taking stock of the natural endowments, namely, soil, underground water and rainfall, and then managing them properly for the purpose of maximising the productive potentials of available land resources. The practice of intensive use obviously puts pressure on the quality of soil as well as on the ground water reserves. The extent of such use is reflected in the cropping pattern followed in the districts - an aspect that we are taking up in the following paragraphs.

Table 3.1. Decrease in Per Capita Net Cropped Area and Gross Cropped Area in The Eastern States

(in hectares)

YEAR	WEST BENGAL		BIHAR		ORISSA	
	NCA	GCA	NCA	GCA	NCA	GCA
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1950-51	0.180	0.203	0.230	0.281	0.385	0.408
1980-81	0.102	0.140	0.119	0.160	0.232	0.332
2000 AD (Projected)	0.066	0.100	0.079	0.104	0.160	0.273
per cent decline in 50 years	63.33	50.74	65.65	62.99	58.44	33.09

Source: Based on data collected from ARPU.

17. *Cropping Pattern and Management of Arable Land*

An analysis of crop-yield, its instability as measured by coefficient of variation (i.e., CV) in crop-yield, and land area allocation (namely, percentages of GCA) for the four major crops of this region, namely, paddy, wheat, pulses and oilseeds, has been done in Tables 3.2 through 3.5. For each crop, the districts have been classified into eight categories depending upon whether the yield rate is relatively high or low, whether the CV of average yield is high or low, and whether a proportionately high or low percentage of GCA has been allotted to this crop - each category highlighting the need for different policy measures. For example, the districts belonging to Cell 1B in any of these tables, even if they cannot augment productivity and reduce CV further, should attempt to allocate a larger land area under such crops. Districts belonging to Cell 2A need to reduce high CV of yield in crops and if successful, those in Cell 2B should allocate a larger land area under those crops. Districts falling in Cell 3A requires measures at augmenting the poor yield of crops and, once such measures are successful, those belonging to Cell 3B can allocate a large land area to such crops. The districts belonging to Row 4 need measures for both augmenting yield and reducing CV. If such measures are costly to enforce, each district should try to look for crops where it has high yields with low CV.

Table 3.2. Categorisation of Districts in The Eastern States in Terms of Yield, Instability of Yield and Allocation of GCA on Paddy Districts With per cent of GCA Allotted

(1)	A. High (2)	B. Low (3)
1. High yield, Low CV	Bihar: Nalanda, Nawada Orissa: Nil Bengal: Bankura, Birbhum, Burdwan, Malda, Midnapur, Murshidabad, 24 Parganas	Bihar: Bhojpur, Patna, Rohtas, Saran, Siwan Orissa: Nil Bengal: Nil
2. High yield, High CV	Bihar: Darbhanga, W. Champaran Orissa: Nil Bengal: Howrah, Hooghly, Purulia	Bihar: Nil Orissa: Nil Bengal: Nadia
3. Low yield Low CV	Bihar: E. Champaran, Purnia, S. Parganas Orissa: Balasore, Keonjhar, Mayurbhanj, Puri, Sambalpur Bengal: Cooch Bihar, W. Dinajpur	Bihar: Katihar, Munger, Saharsa Orissa: Cuttack, Koraput Bengal: Darjeeling
4. Low yield, High CV	Bihar: Aurangabad, Dhanbad, Hazaribagh, Madhubani, Ranchi, Sitamarhi Gaya, Giridih. Orissa: Nil Bengal: Nil	Bihar: Begusarai, Bhagalpur, Vaisali Gopalganj, Muzaffarpur, Samastipur, Orissa; Bolangir, Dhenkanal, Ganjam, Kalahandi, Phulbani Bengal: Nil

Note: Yield >= 13.75 quintal per hectare (mid-value of range) is high, low otherwise; CV >= 20 is high, low otherwise; land allocation >= 50 per cent of GCA is high, low otherwise.
Source: Datta, 1993.

Table 3.3. Categorisation of Districts in The Eastern States in Terms of Yield, Instability of Yield and Allocation of GCA on Wheat Districts with per cent of GCA Allotted

(1)	A. High (2)	B. Low (3)
1. High yield, Low CV	Bihar: Nil Orissa: Nil Bengal: Murshidabad, Nadia,	Bihar: Nil Orissa: Balasore, Cuttack, Mayurbhanj, Bengal: Birbhum, Howrah, Hooghly, Cooch Bihar, Mednapur
2. High yield, High CV	Bihar: Gopalganj, Nalanda, Patna, Samastipur, Saran, Siwan Orissa: Nil Bengal: Nil	Bihar: S. Parganas, Orissa: Dhenkanal, Keonjhar, Bengal: Bankura, Burdwan, Malda, Purulia, W. Dinajpur
3. Low yield Low CV	Bihar: Nil Orissa: Nil Bengal: Nil	Bihar: Nil Orissa: Bolangir, Sambalpur Bengal: Jalpaiguri
4. Low yield, High CV	Bihar: Aurangabad, Begusarai, Vaisali Bhagalpur, Bhojpur, Darbhanga, Rohtas, Gaya, Katihar, Madhubani, Munger, Palamau, Muzaffarpur, Nawada, W. Champaran, E. Champaran, Purnia, Saharsa, Sitamarhi,	Bihar: Dhanbad, Giridih, Hazaribagh, Ranchi, Orissa: Ganjam, Kalahandi, Puri, Koraput, Phulbani, Sundergarh Bengal: Darjeeling

Note: Yield >= 18.5 quintal per hectare (mid-value of range) is high, low otherwise; CV >= 20 is high, low otherwise; land allocation >= 10 per cent of GCA is high, low otherwise.

Table 3.4. Categorisation of Districts in The Eastern States in Terms of Yield, Instability of Yield and Allocation of GCA on Pulses. Districts with per cent of GCA Allotted

(1)	A. High (2)	B. Low (3)
1. High yield, Low CV	Bihar: Nil Orissa: Nil Bengal: Nil	Bihar: Nil Orissa: Nil Bengal: Nil
2. High yield, High CV	Bihar: Aurangabad, Muzaffarpur, Palamau, Patna, Vaisali Orissa: Keonjhar, Koraput Bengal: Nil	Bihar: Begusarai, Bhagalpur, Madhubani, Nalanda, Nawada, W. Champaran, Samastipur, Saran, Sitamarhi, Siwan Orissa: Nil Bengal: Nil
3. Low yield Low CV	Bihar: Nil Bengal: Nil Orissa: Balasore, Dhenkanal	Bihar: Rohtas Orissa: Nil Bengal: Nil
4. Low yield, High CV	Bihar: Saharsa, Singbhum Orissa: Bolangir, Cuttack, Ganjam, Phulbani, Puri, Kalahandi, Mayurbhanj, Sambalpur, Sundergarh. Bengal: Nil	Bihar: Bhojpur, Darbhanga, Dhanbad, Munger, Giridih, Gopalganj, Hazaribagh, Katihar, Gaya, E. Champaran, Purnia, Ranchi, S. 24 Parganas Orissa: Nil Bengal: Nil

Note: Yield >= 6.8 quintal per hectare (mid-value of range) is high, low otherwise; CV >= 20 is high, low otherwise; land allocation >= 10 per cent of GCA is high, low otherwise. Bengal has hardly any area under pulses.
Source: Datta, 1993.

Table 3.5. Categorisation of Districts in The Eastern States in Terms of Yield, Instability of Yield and Allocation of GCA on Oilseeds Districts with per cent of GCA Allotted

(1)	A. High (2)	B. Low (3)
1. High yield, Low CV	Bihar: Nil Orissa: Nil Bengal: Nil	Bihar: Vaisali Orissa: Nil Bengal: Nil
2. High yield, High CV	Bihar: Nil Orissa: Dhenkanal, Sambalpur Bengal: Nil	Bihar: Begusarai, Patna, Samastipur Orissa: Balasore, Cuttack Bengal: Bankura, Nadia
3. Low yield Low CV	Bihar: Nil Orissa: Nil Bengal: Nil	Bihar: Nil Orissa: Nil Bengal: Nil
4. Low yield, High CV	Bihar: Palamou, Singbhum Orissa: Bolangir, Ganjam, Kalahandi, Keonjhar, Koraput, Phulbani Bengal: W. Dinajpur	Bihar: Aurangabad, Bhagalpur, Bhojpur, Darbhanga, Dhanbad, Gaya, Giridih, Hazaribagh, Katihar, Madhubani, Munger, Muzaffarpur, Nalanda, Nawada, W. Champaran, E. Champaran, Purnia, Siwan, Ranchi, Rohtas, Saharsa, S. Parganas, Saran, Sitamarhi. Orissa: Mayurbhanj, Puri, Sundergarh. Bengal: Birbhum Burdwan. Darjeeling, Hooghly, Jalpaiguri, Cooch Bihar, Malda, Midnapur, Murshidabad, Purulia

Note: Yield >= 8.5 quintal per hectare is high, low otherwise; CV >= 20 is high, else low; land area allocation >= 10 per cent of GCA is high, low otherwise.
Source: Datta, 1993.

18. Incidentally, the intensity of cropping pattern is highly dependent on the availability of water and the efficiency of water use. Water as usual is available from three sources: (1) rainfall, (2) ground water, and (3) other irrigation sources. The distribution of normal and actual rainfall with seasonal break-up for the eastern states of the country (given in Tables 3.6 and 3.7) reveals the following features:

* Not a single district of this region falls within the low rainfall category - whether one considers the average annual rainfall or the

average kharif rainfall. Since the proportion of rainfall received during the monsoon months (July-September) constitutes about 75 to 80 per cent of the total annual rainfall of these states, irrigation becomes extremely important.

* Over the last 20-30 years, the average actual rainfall seems to have fallen short of the normal annual rainfall for all the three states. This is also true season-wise, at least in the cases of West Bengal and Orissa [Datta, 1993].
* Instability of rainfall (in spite of high/medium average rainfall) is a serious problem for those districts for which the coefficient of variation of average annual rainfall is at least 20 per cent.
* But interestingly and quite contrary to expectations, the years in which rainfall received was less than 25 per cent of the normal level, the states have been able to produce more kharif paddy. But the years in which flood visited the region (e.g., in 1978-79 and 1981-82), there was fall in the production of kharif paddy. Thus, flood damages kharif production more than drought in this part of the country [Datta, 1993].

Table 3.6. Categorisation of Districts in Terms of Average Annual Rainfall and Coefficient of Variation Around The Normal Rainfall

CV (per cent) Average Rainfall (mm) (1)	Low (<20) (2)	Medium (20 - 50) (3)	High (>50) (4)
High (>1150)	W. Bengal: Darjeeling, 24 Parganas (N. & S.) Bihar: Giridih, Hazaribagh, Katihar, Munger, Purnia, Ranchi, Saharasa, Singbhum, Samastipur, Santhal Parganas Orissa: Nil	W. Bengal: Bankura, Birbhum, Burdwan, Howrah, Hooghly, Jalpaiguri, Cooch Bihar, Maldah, Medinipur (E. & W.), Murshidabad, Nadia, Purulia Bihar: Bhagalpur, Dhanbad, Gopalganj, Madhubani, Muzaffarpur, Palamau, W. Champaran, E. Champaran, Sitamarhi	W. Bengal: West Dinajpur Bihar: Nil Orissa: Balasore, Bolangir, Cuttack, Dhenkanal, Ganjam, Keonjhar, Mayurbhanj, Phulbani, Puri, Sambalpur
Medium (750-1150)	W. Bengal: Nil Bihar: Begusarai, Bhojpur, Darbhanga, Nalanda, Siwan Orissa: Nil	W. Bengal: Nil Bihar: Aurangabad, Gaya, Nawada, Patna, Rohtas, Vaisali Orissa: Nil	W. Bengal: Nil Bihar: Nil Orissa: Kalahandi, Koraput, Sundergarh
Low (<750)	West Bengal: Nil Bihar: Nil Orissa: Nil	W. Bengal: Nil Bihar: Nil Orissa: Nil	W. Bengal: Nil Bihar: Nil Orissa: Nil

Note: Normal rainfall is estimated average for the last 50 years. The average figures are based on data since 1960-61 for Bihar and since 1970-71 for West Bengal & Orissa. For details, see Datta (1993).

19. Based on the district-wise data on per cent gross cropped area irrigated, ground water availability together with the level of ground water utilisation and source-wise irrigation status, Table 3.8 identifies the following districts in the states where the position of irrigation is very grim (net irrigated area less than 25 per cent of the net cropped area). The stylized facts with respect to development of irrigation and watershed in this region are as follows:

* In the eastern states, most of the alluvial plains having a flat topography and growing mainly rice during all the three seasons, are under irrigation by the major river valley projects, which have caused alarmingly high water-logged conditions in the absence of proper drainage arrangements.
* About 20-30 per cent of available ground water potential has been utilised in Bihar and West Bengal, whereas in Orissa only 4.74 per cent has been utilised against 70-80 percent in Haryana and Punjab [AERC, 1990].
* Two types of factors have been identified for the failure of Deep Tube Wells and River Lift Irrigation: (i) The internal factors, which include mechanical inefficiency, leading to

gradual decline in water discharge rate over time, and the lack of timely maintenance and repair which reduces the life span of the machine; (ii) the external factors which include (a) erratic supply of electricity; (b) theft of transformer and machine parts; and (c) political influence on the operator to irregularise the distribution of water.

Table 3.7. Categorisation of Districts in Terms of Average Kharif Rainfall and Coefficient of Variation Around The Normal Rainfall

CV (per cent) Average Rainfall (mm) (1)	Low (<20) (2)	Medium (20-50) (3)	High (>50) (4)
High (>1150)	W. Bengal: Darjeeling Bihar: Hazaribagh, Munger, Purnia, Ranchi, Saharsa, Singbhum, Siwan, Vaisali Orissa: Nil	W. Bengal: Bankura, Birbhum, Jalpaiguri, Cooch Bihar, Maldah, Medinipur (E & W), Murshidabad, Nadia, 24 Parganas (W & S), Purulia Bihar: Darbhanga, Dhanbad, Giridih, Gopalganj, Katihar, Madhubani, Muzaffarpur, Palamau, W. Champaran, E. Champaran, Samastipur, Santhal Parganas, Sitamarhi Orissa: Sundergarh	W. Bengal: West Dinajpur Bihar: Nil Orissa: Balasore, Bolangir, Cuttack, Ganjam, Kalahandi, Keonjhar, Mayurbhanj, Phulbani, Puri, Sambalpur
Medium (750-1150)	W. Bengal: Nil Bihar: Bhojpur Orissa: Nil	W. Bengal: Burdwan, Howrah, Hooghly Bihar: Aurangabad, Begusarai, Bhagalpur, Gaya, Nalanda, Nawada, Patna, Rohtas Orissa: Sundergarh	W. Bengal: Nil Bihar: Nil Orissa: Dhenkanal, Koraput
Low (<750)	West Bengal: Nil Bihar: Nil Orissa Nil	W. Bengal: Nil Bihar: Nil Orissa: Nil	W. Bengal: Nil Bihar: Nil Orissa: Nil

Note: Normal rainfall is estimated average for the last 50 years. The average figures are based on data since 1960-61 for Bihar and since 1970-71 for West Bengal & Orissa. For details, see Datta, 1993.

* Given the imbalance between demand and supply of irrigation water, there exists a scope for making enormous profit by water sellers through selling excess water to the small and marginal farmers and even to sharecroppers.
* The incidence of use of diesel pumpsets is large enough in spite of relatively higher efficiency and lower private cost of operation in case of electric pumpsets. It is observed that erratic power supply is responsible for the unpopularity of electric pumpset.
* Under the existing property relations, unrestricted use of submersible pumpset has not only restricted the efficiency of shallow tube wells (STWs) but also threatened the prospect of the agrarian economy through depletion and continuous running down of ground water potentials.
* The impact of irrigation in the eastern states is comparatively low, since kharif paddy is the major crop of these states where there is no absolute necessity of irrigation, given the high rainfall, except in the years of drought. Moreover, the consumption of fertilisers and HYV seeds is quite low in the eastern states, which further bring down the impact of irrigation on crop yield.

Table 3.8. Districts Having Critically Low Levels of Irrigation

District (1)	per cent GCA Irrig. (2)	Level GW. Util. (3)	Major Sources of Irrigation (4)
West Bengal			
1. Jalpaiguri	11.93	1.10	Canals
2. Cooch Bihar	8.64	4.30	Underground
3. West Dinajpur	23.13	23.70	Underground
Bihar			
1. Deoghar	8.61	7.90	Minor surface
2. Dhanbad	2.50	1.50	Minor surface
3. Giridih	10.47	1.20	Underground
4. Godda	9.90	5.30	Minor surface
5. Gumla	2.81	2.00	Other sources
6. Hazaribagh	12.57	1.50	Underground
7. Lohardaga	9.72	7.30	Underground & other sources
8. Bokaro	6.12	18.25	Underground
9. Purnia	18.30	10.10	Canal & Underground
10. Ranchi	8.25	2.00	
11. Sahebganj	5.17	11.60	Canal
12. Santhal Parganas	5.69	1.60	Other sources
13. Singbhum	4.60	0.96	Underground
14. Kishenganj	18.97	8.90	Canal Underground

Source: Based on data collected from Agro-climatic Regional Planning Unit (ARPU), Ahmedabad.

* In the eastern states different types of land treatment works on watershed basis are being implemented under different programmes like:
  National Watershed Development Project for Rainfed Areas (NWDPRA);
  Watershed Management Programme in the priority watersheds of the inter-state River Valley Projects;
  Watershed Management under Drought-Prone Area Programme (DPAP).
  All these programmes are being undertaken at government initiative and expenses.

20. *Forests in the Eastern States*

There are certain special features of the eastern states, which make the issue of forestry management in these states both qualitatively and quantitatively distinct:

* Implications of the broad socio-economic features, namely, high population pressure on land and the high incidence of scheduled castes and scheduled tribes population, who are traditionally dependent on forests,
* Strong demand from industries (e.g., paper-making) and the communication sector,
* High order of deforestation due to socio-economic reasons as well as implementation of developmental projects,
* Poor yield rate of forests, and
* Growing importance of participatory mode of forest management with increasing importance being attached to development of minor forest products, which are available in considerable amount.

21. *Wastelands*

Management of wastelands, which implies reclamation of such lands and putting them back to productive and efficient use on a sustainable basis - all at a reasonable cost - is beset with three general and interrelated problems: first, definitional, second, informational, and third, diagnostic. Based on a conservative estimate capturing only barren land, cultivable waste and fallows other than current fallows, most of which are lying vacant, Table 3.9 lists the districts within

these three states, where the area under the category of barren, other fallow and cultivable waste land has increased consistently between 1986 and 1994.

22. The scope for wasteland development through a ranking of the districts in terms of the extent of wasteland available (i.e., the extent of waste lands being measured by the estimate given above as proportion of total geographic area) is displayed in Table 3.10.

Table 3.9. Districts Showing Unfavorable Movement of Area Under Waste Lands

State (1)	Area Increasing between 1986 and 1994 (2)
West Bengal	Cooch Bihar (between 1972-86)
Bihar	E. Champaran, Darbhanga, Sitamarhi, Madhubani, Vaisali, Siwan, Aurangabad, Gumla
Orissa	Lohardaga, Ranchi Baleswar, Bolangir, Dhenkanal, Mayurbhanj, Phulbani, Keonjhar

Source: Based on data collected from ARPU, Ahmedabad.

Table 3.10. Extent of Wastelands Available in Eastern States

Wastelands as Proportion of Total Geographical Area (1)	West Bengal (2)	Bihar (3)	Orissa (4)
Less than 5 per cent	Burdwan, Birbhum, Midnapur, Howrah, Hooghly, 24 Parganas, Nadia, Murshidabad, W. Dinajpur, Darjeeling, Jalpaiguri, Malda	Nalanda, Buxar	Kalahandi, Ganjam
5 to less than 10 per cent	Bankura, Purulia	Bhojpur, Jahanabad, Samastipur, Patna, Rohtas, Muzaffarpur, Madhepura, Darbhanga, Siwan, Aurangabad, Nawada, Bhabhua, Sitamarhi, W. Champaran, Madhubani, Gopalganj, Purnia, Araria, E. Champaran	Mayurbhanj, Dhenkanal
10 to less than 20 per cent	— — —	Saran, Bhagalpur, Supoul, Gaya, Chatra, Khagaria, Begusarai, Vaisali, Munger, Saharasa, Kishenganj, Katihar, Palamau	Puri, Balasore, Cuttack
20 to less than 30 per cent	— — —	Godda, Deoghar, Gumla, Bokaro, Giridih, Banka, Jamui, Singbhum, Ranchi, Sahebganj, Hazaribagh, Lohardaga	Sambalpur, Sundergarh, Phulbani, Keonjhar, Bolangir
More than 30 per cent	Cooch Bihar	Santhal Parganas, Dhanbad	Koraput

Note: Data for West Bengal refer to the year 1986, for the rest of the states the information pertain to 1994.
Source: Based on data collected from ARPU, Ahmedabad.

IV. THE EMERGING ISSUES AND SUGGESTED POLICY FRAMEWORK

23. As we have already mentioned in the beginning, land is being put today to a number of uses many of which often compete with one another. Under such circumstances, we are required to evolve some mechanism that will ensure the simultaneous achievement of the goals mentioned in the previous section and minimise the possibilities of conflicts that may emerge as a result of the different possible uses of land already listed. Can market play the necessary role? Here we argue in the negative. An example may help clarify the underlying problem. There existed a lot of wetlands around the city of Calcutta even a couple of decades ago. Although shrinking in the face of severe pressure of demand for land for growth of real estates, such lands are

yet to vanish altogether. Can market forces help maintenance of the open wetlands, which are regarded as absolutely necessary for supply of oxygen to the millions of dwellers in the city? Land provides a lot many such services to the mankind and for a good number of such services, markets simply do not exist. We are yet to evolve a 'market-clearing mechanism' in respect of environmental degradation. Certain qualitative concepts, like 'food security' and 'bio-diversity', are still not possible to be analysed in a market framework, as the underlying institutions to systematically generate supply and demand for such abstract and, nevertheless, useful concepts are yet to surface - not merely in India, but even in most parts of the world. Land-use planning deals with many such qualitative, abstract and, nevertheless, extremely useful concepts for the survival of humanity. This is where the conceptual framework as found most relevant in this paper deserves attention.

24. *Features of the Suggested Swedish Approach*

The Swedish School of thought, popularly known as the Uppsala network approach, conceptualises the notion of 'handshake' or 'brotherhood' form of organisation, as referred to in the preceding paragraph, and thus tries to fill in the vacuum in between the two well-known polar forms of exchange organisation, namely, markets and hierarchies. This approach radically departs from methodological individualism and the concept of equilibrium of traditional economics, according to which economic agents have identity and have given perceptions, interpretations and preferences even prior to the exchange process. In contrast, this approach looks upon markets as an organisational system which facilitates learning by doing and, change of perception and technology, through ongoing disequilibrium and interaction. As such, according to this philosophy, *the individual does not have an autonomous consciousness but needs communicative interaction with others to develop his or her own identity...* [Nooteboom, 1993, p. 54], and that *alternative options are not known prior to choice but emerge after a choice has been implemented* [Nooteboom, 1993, p. 61]. A serious objection to the methodological individualism in market economics is that the traditional market approach is under-socialised as it fails to acknowledge that an individual exists only in relation to others and therefore the existence of an individual must presuppose society. Community is, therefore, not simply an aggregate of representative individuals but a condition for individuality, according to this view. In this Swedish approach, markets are looked upon as a network wherein time and efforts are spent by interdependent firms to establish exchange relationships in order to gain access to the needed external resources either through joint planning or through power exercised by one party over another. Hence, the coordination is achieved neither through a central plan nor through an organisational hierarchy nor even through the price mechanism, but through specific long-term relationships or bonds which can reduce the exchange and production costs, promote knowledge, provide certain control over others and be used as bridges to other firms.

25. The Swedish School thus proposes a tripolar institutional framework. Larsson [1993, Pp. 87-106] has brought out the distinctive characteristics of the three polar institutional forms (Table 4.1). The invisible hand adjusts the imbalances between demand and supply through prices, while adjustments are made through authoritative orders to the subordinates by the visible hand (i.e., within hierarchical structures). In contrast, adjustments are made by the handshake in terms of negotiations and the resulting structural agreements like formalised federations, joint ventures, trade associations, franchising, informal cartels, etc. These specific types of inter-organisational coordination are in sharp contrast to the lack of specification in case of spot market transactions or in open employment contracts under hierarchies. Obviously, symbiotic resource interdependence rather than a piece of transaction becomes the unit of analysis in this situation.

Table 4.1. Tentative Outlines of Tripolar Institutional Framework

Institutional Form	Invisible Hand of Markets	Handshake of Inter-organisational Coordination	Visible Hand of Hierarchies
(1)	(2)	(3)	(4)
Division of Adjustment	Self-adjustment	Joint-adjustment	Imposed Adjustment
Adjustment Reference	Price	Structural Agreements	Authoritative Orders
Resulting from	Supply and Demand	Negotiation	Planning
Primary Relative Costs	Marketing and Purchasing	Convening and Negotiation	Administration and Internalisation

Source: Larsson, 1993, p. 99.

Collin provides an excellent structure for understanding the dynamics of goal attainment. He argues that the achievement of a certain goal necessitates constraining of actions. 'Defining control as the constraining of action in order to achieve a goal', he classifies 'different modes of control depending upon when the constraint is imposed' [1993, Pp. 69-86]. When a person or an organisation with rules and plans specifies the appropriate action and directs the actor what to do, we talk of 'action control'. Control based on the consequences of action, on the other hand, is termed as 'output control'. Control prior to action is characterised as premise control. Table 4.2 provides the different possibilities depending on the possibilities of measuring goal attainment and the degree of knowledge of the action necessary to achieve the goals.

Table 4.2. Control Types Depending Upon Knowledge of Action and Measurability of Goal Attainment

Knowledge About Action	Goal Attainment	
	Measurable	Not Measurable
(1)	(2)	(3)
High	Action Control or Output Control	Action Control
Low	Output Control	Premise Control

Source: Collin, 1993, p. 74.

27. If the goal to be attained is measurable and one has prior knowledge about the possible actions to be undertaken, the control may be either in terms of action or output. If the goal is not measurable but there is high knowledge about the actions, Collin suggests an action control, i.e., setting up of a hierarchical institution for the purpose. A market form of control in the form of output control is prescribed when the goal is measurable with even a low level of knowledge about the possible actions. In case there arise problems regarding both measurability and knowledge of actions, Collin suggests premise control and argues that *some clan like institution is needed to deal with these conditions...* [Collin, 1993, p. 74]. Such institutions call for collective action within the framework of a 'brotherhood' form of organisation. In this situation, a set of knowledge of the appropriate actions cannot be centralised to any controlling party. Here, instead, the contractual parties called brothers would have a high degree of autonomy, allowing each and every brother to act according to his exclusive knowledge. In a brotherhood contract, therefore, there is high degree of autonomy to either side of the contract, and a low level of specification, due to difficulties of measurement and assessment, characterises the contract. Without the ability to see whether right thing is being done, each brother places trust in the others, since opportunism is restricted by ideology, that is, common norms of conduct and a common value system, which is a 'public good' for the brothers. Brotherhood has a mechanism for creating and reproducing the ideology, which is so crucial for making the contract binding and credible. This ideology is created through socialisation of the members - every member has an incentive to evaluate trustworthiness of the others and also to display his trustworthiness to the others. Symbolic sanctions which reward the trustworthy partners and penalise the defaulters, provide important signalling function in this context and tend to

reduce the costs of evaluation. Obviously, personal identities of the contractual parties become crucial elements in a brotherhood transaction. In the Swedish brotherhood, for example, this premise control is often achieved through transfer of managers within the sphere which not only transmit useful information but also act as a means of socialising members, teaching them about the norms and values of the brotherhood, besides noting their conformity.

28. In the context of the controls necessary to ensure optimum land-use in India, we observe that the goals are neither measurable (we are yet to know the dynamics of the land diversion system in a precise manner) nor has it been possible to identify the correct courses of action (the recurrent concern being shown in the context of rapid deforestation in the country is a pointer towards that). We cannot set up a control regime dominated by market forces given the following facts:

* There exists no clearly defined property rights in respect of considerable proportion of land mass in the country which are under state ownership (around 40 per cent of the total geographical area consisting of forests, wasteland, water bodies and mining/industrial wastes). Although on paper these land belong to the state, the access to such land cannot be restricted fully and very often they get converted into 'open access' properties, with no one showing the necessary interest in optimally utilising them.
* Even though some semblance of clear property rights are observed in the context of land-used for agricultural purposes, there are certain grey areas, like tenancy systems, where the property rights are neither clearly defined, nor vested permanently on the user.
* Certain uses of land generate negative externalities, for example, we may consider the impact of conversion of some forest land into agricultural /industrial land. Such conversion will definitely yield a higher agricultural/industrial production and may even provide employment to a number of individuals. But such an action may simultaneously reduce the bio-diversity, leading to the possible extinction of a number of flora and fauna. Incidentally, we are yet to have a complete knowledge about the importance of the entire flora and fauna available in nature today and their relationship with human life. Such possible extinction may have some impacts on the future generation about which we are not very sure. Further, felling of trees for agricultural/industrial purposes may add to the problems of global warming. These may increase the hardships of people who were not at all involved in taking the decision about such conversion and also not parties to the sharing of the returns generating out of such agricultural/industrial activities.

These factors will lead to a 'market failure' problem and the goals cannot be achieved if we are to depend entirely on 'output control' through the market mechanism.

29. Thus we argue that planning is absolutely necessary to evolve the necessary land mix that maximises the benefits to the society. Is it complete state control then the way out? 'Action control' that the state is supposed to ensure will probably not help as complete knowledge about the appropriate action to be taken may not always be available with the state. Given the present day top-down structure of decision-making, those at the higher levels of hierarchy passing on the directions may not be aware of the possible impacts the people who will actually be facing the consequences of such decisions. This probably may be the reason for the apparent failure at the implementational level of almost all 'plans' with pious wishes.

30. In case of a likelihood of failure of both market control and state control in the simultaneous achievement of several goals, one has to take resort to control prior to action, i.e., control through socialisation. This is the essence of premise control. Consequently, in the context of land-use planning, an approach of 'collective action' and 'participatory management' to ensure necessary control will be more effective while framing the necessary policy prescriptions. Several examples given below will clarify this point.

Urban Planning:

31. As we have already observed, a disproportionately higher amount of land has been usurped by built up area in the region under the present study. The implications of such urbanisation for policy-makers are broadly three-fold, of which one has positive effects whereas the rest two have only negative effects. The first and the positive aspect of urbanisation is that it can play the role of a growth centre and can induce growth through backward and forward linkages with the rural hinterlands. In the context of the eastern states, however, this positive effect does not seem to have played any significant role. Second, one negative effect of the rapid urbanisation process is encroachment of agricultural and forest land and misuse of fringe areas in brick-kiln, sand-digging, small factories and residential construction in an unplanned manner. Third, there is yet another negative effect of urbanisation, namely, the rapid rural-urban migration resulting in two-fold congestion - congestion of people in houses and of houses on land - and causing both environmental and mental pollution. The four major problems which arise out of the excessive pressure of population on urban conglomerates are: (a) exposure of the urban population to increasing risks of disaster, (b) pollution of air, water and noise, (c) scarcity of basic amenities like supply of water, sanitation, etc., and (d) decline in the economic standard of living of the urban population, in general, and of the urban poor, in particular.

32. The whole problem of urban land-use finally boils down to evolution of organisations and institutional mechanisms which can generate urban land-use patterns so that the growth and development through rural-urban linkages are maximised while, at the same time, encroachment of productive agricultural land and the multifarious environmental problems associated with rural-urban migration are kept at the minimum.

33. Broadly speaking, there have been three types of responses to the urban land-use problem in the eastern states: first, preparation of master plans; second, evolution of rules and regulations to control land-use and the problems associated with undesirable uses; and third, evolution of special development authorities, besides the regular corporations, municipalities and notified area authorities, to implement plans, rules and regulations and also to provide further guidance in this regard.

34. The absence of explicit mechanisms and institutional devices, by which failure to achieve targets in terms of desired land area allocations can be prevented, is observed to be the main obstacle *vis-a-vis* urban land-use planning. It appears that exclusive reliance has been placed on statutory rules and regulations for avoiding sub-optimal allocation without regard to the high transaction costs that may be involved in enforcing such statutory provisions. Moreover, not enough attention seems to have been paid either to augment the productivity of organised open space, agricultural and allied activities and water bodies and/or wet land around urban fringes, or to create a public awareness about their environmental utilities and benefits.

35. In order to promote optimal urban land-use and also to strengthen rural-urban ties, all the state governments have been pursuing the growth centre concept through promotion of special area development authorities, but often to the utter neglect of the financial viability of such organisations and at the cost of unnecessary messing up of activities between those of the pre-existing organisations and those of the new ones. The growth of urban population in the three eastern states of W. Bengal, Bihar and Orissa shows that the growth has been particularly phenomenal in recent times in the two states of Bihar (43.95 per cent, 54.40 per cent and 30.49 per cent during 1961-71, 1971-81 and 1981-91, respectively) and Orissa (66.30 per cent, 68.50 per cent and 36.58 per cent during 1961-71, 1971-81 and 1981-91, respectively), which not only started from a lower urban base but also continued to remain so, as compared to W. Bengal (the corresponding growth rates for W. Bengal being 28.41 per cent, 31.61 per cent and 29.65 per cent, respectively). However, there has been a slackening in the growth rate of urban population in the last decade in all the three states and, especially, in Bihar and Orissa. Urban land as a percentage of the land put to non-agricultural uses, though still lower in Bengal and Bihar as compared to the all-India

situation, has increased steadily during 1971-91 in this region, the current percentage figures being 20.5, 18.6, 36.2 and 27.4 for West Bengal, Bihar, Orissa and the country as a whole, respectively [Datta, 1993].

36. It is important to highlight at this stage the experiences of Sweden's eco-municipalities with emphasis on 'self-sustaining cities', where long-term ecological gains rank higher than short-term market calculi [Masson, 1993, Pp. 26-31]. Interestingly, the term 'eco' within the concept of 'eco-municipality' does not merely stand for ecological, it also means economic. Currently, there are 16 eco-municipalities which have taken a growing interest in urban eco-cycles, thus breaking away from the traditional approach of destructive unsustainability of cities and towns. Traditionally, the cities for their survival had to import their food, energy and resources from constantly expanding surrounding areas. In the process of consuming more and more resources, the cities were exporting corresponding amounts of residual products such as air and water pollution, and solid waste in the belief that lakes and water courses were natural means of purification. It is reported that with the advent of sewage pipes, the water-closet came into use and doctors advocated their speedy introduction as the solution to urban health problems, with the result that the nitrogen content in water released by sewage treatment plants increased and there was also a rise in the level of heavy metals in the Baltic sea. Thus, the traditional approach shifted the problems from the street to the water and from one generation to another, instead of solving them outright. The implications are that the industrial methods applied to tackle the local problems contributed to equally unsustainable global problems, such as acidification, forest death, greenhouse effect, endangered species and ozone depletion. Given this realisation, Sweden with its long democratic tradition and highly decentralised local administration has responded to these problems in a unique manner. Their present approach has the following features:

(1) Besides undertaking the regular municipal and welfare activities inclusive of day nurseries, care of the elderly, education, libraries, waste management and sanitation, they also undertake comprehensive environmental planning. The latter includes management of operations which may disrupt or help the environment, education on environmental issues in schools and nurseries and supervision of environmental and health protection. Some of their achievements are:

(a) Stockholm Water has minimised the input into sewers of hazardous pollutants, such as lead, cadmium and mercury, by implementing measures at source. For example, the graphics industry and photo-processing laboratories are no longer allowed to discharge used developer or photo-fixing solutions into the sewer system; they are required to separate and treat them and purify at source.

(b) In 1992, Stockholm Water provided incentives to households to return their mercury thermometers to their local chemists.

(c) They also developed a system of waste-battery collection.

(d) Through a 'Wash Wisely' campaign, they have compelled the largest detergent producing company to make environmentally sound washing powder. Volvo, Sweden's largest car manufacturer has also announced elimination of cadmium, mercury, asbestos and chromium entirely from its manufacturing process, besides implementing 30 per cent cut in solvent emissions since 1988.

(e) For minimising storm water pollution through exhaust emissions and wear and tear on asphalt roads, ban on studded tyres and reduced use of leaded petrol are being seriously considered.

(f) The city has signed an agreement with local farmers for reducing use of fertilisers and chemicals so as to protect Stockholm's reserve water supply - Bornsjo Lake.

(g) Besides implementing energy conservation and use of electricity from hydro and nuclear power, they have decided to phase out nuclear power as it is not a sustainable solution, and have developed solar collector technology for both small and large-scale applications.

(h) Planning is being done to do away with diesel-fuelled vehicles within the next 5 years and petrol-fuelled ones within 15 to 20 years.

(i) Through development of exclusive bicycle paths from outlying areas into city centres, bicycles are being encouraged for short distances and in smaller towns.

(2) Instead of depending on the traditional urban technical infrastructure consisting of complex and large-scale supply-oriented systems, which no individual could fully comprehend, emphasis is being placed on small and medium-scale technical systems which are comprehensible and which are consistent with smaller-scale local ecological cycles.

(3) Biological measures like reinstating wetland areas, establishing coastal beach zones, changing the drainage system of ditches and streams and establishing non-cultivation zone with natural vegetation along water courses are also being applied side by side.

(4) Most important of all, the Gothenburg project, a project to clear up Gothenburg, 450 km south-west of Stockholm, emphasises the cooperative approach in solving common problems. Unlike in the earlier approach, where environmental protection measures were implemented under threat of law, the Gothenburg project has sought the following cooperative strategy:

> *'Let us end this stalemate. If the authorities and the environmental organisations continue to regard industry as the enemy, we cannot make any progress. Let us cease to see only the problems and instead strive to cooperate where we can. We have a problem - let us solve it together'*. [Masson, 1993, p. 29].

As a result, cooperation with trade and industry, with environmental organisations and with the public has increased substantially and in a free and open manner.

37. In the light of the trend on urban land-use and the experiences of Sweden's eco-municipalities, the following policy prescriptions are suggested to improve urban land-use:

* A systematic and comprehensive survey of urban land for all cities and towns which should synchronise with decennial population census. Use of satellite pictures, as recent studies reveal, may provide useful data in this regard.
* Another important area where planned actions are called for is land under mixed use. The concept of 'Building Centres', with emphasis on mixed land-use, are being applied by these state governments to provide cheap housing to low and middle income groups in urban fringes. Ideally, the state governments should play the role of facilitators - encouraging and inducing private and cooperative initiatives often in collaboration with industries to undertake these tasks and manage them, rather than themselves going in for such ventures.
* In case of places like Calcutta Metropolitan Development Authority (CMDA) area which has nearly stopped growing, development of core areas which have deteriorated in recent times and lack the facilities of open space and do not have adequate roads or streets for speedy movement of traffic, renewal or redevelopment seems to be the only strategy. It may even be useful to 'undo', to some extent, big metropolis like the CMDA area, by shifting the major activities (even the state capital in case of Calcutta) to far-off places. In order to facilitate this process, subsidies on urban life should be removed and the urban-dwellers ought to be made to pay fully for the services they receive. The government should facilitate the role and growth of secondary cities more and more in the coming years.
* There is considerable scope for achieving a balanced distribution of urban population within towns through development of certain wards and areas within wards.

* One major step in avoiding/minimising environmental hazards, especially in large urban conglomerates, is to recognise the communities' 'right to know' and facilitate smoother information flows.
* Decentralised and perfectly comprehensible small projects, having 'graceful failures' (i.e., small rather than colossal failures, which are much more easily borne by the society and which also provide greater scope for correction - at least in areas where the same process has not been applied yet), are suggested as a viable strategy to combat growing urban vulnerability to disaster.
* Based on the experiences of the past, the current trend is to move towards participatory approach to management from application of intimidatory laws and regulations.
* The various regulatory instruments available in this country for handling urban land-use deserve a fresh and critical look not only in view of the potentials of the participatory approach at the local level, highlighted above, but also in view of the fact that, as in the U.S., a number of incentive-based instruments like 'marketable permits' allowing for competitive trading in right to pollute, can allow urban strategies to move further into market mechanisms [for details on such instruments, see, for example, Pearce and Jeremy, 1993, Chapter 8, Pp. 195-213].
* There is a need for business to keep local government informed, and also a need for local governments to work with industry in promoting safe, beautiful and risk-free urban life.
* Poor assessment of land and landed property very often leads to poor tax collection and the resulting violation of equity. The current tax base is either capital value or annual value. What is suggested is that a tax based on some physical properties of land (e.g., floor space, open space, age structure of constructions, etc.) should be followed.

38. *Need for a Fresh Look on the Issue of Land Reforms*

Till today, the equity objective of land reforms seems to have played a much bigger role than the objective of growth in shaping the nature and details of land reforms in these states. The major issues are as follows:

* With respect to the behaviour of the size redistribution of operational land holdings, all the three states are tending towards more equal pattern of land distribution of operational holdings.
* All the three eastern states have achieved very little success in land consolidation, as the number of parcels per holding is quite high in these states (5.38, 6.27 and 5.02 for West Bengal, Bihar and Orissa, respectively).
* On the issue of distribution of surplus and vested land in the eastern states, the position is as follows: Contrary to the fact that pressure of population on land is high and hence the pressure for distribution of surplus and vested land would also be high, the performance of these states is not especially encouraging.
* As regards tenancy arrangements, sharecropping is the dominant form of tenancy contract in all the three states, although in Bihar, leased-in land under infrastructural contract constitutes a significant proportion of total leased-in land. While legislation for protecting the rights of tenants and regulating land rent is also there in Bihar and Orissa, West Bengal has by far made the most elaborate arrangements for enforcing tenancy legislations, namely, to record the names of sharecroppers, so that they cannot be unlawfully evicted, and also to ensure that the lawful share of the produce goes to them.

39. In the context of land reforms and land-use planning, it appears we need to take a fresh and proper perspective on the issue. Given production technology at any given point in time, any attempt at overcoming unevenness in the existing distribution of land and other complementary resources across households and/or over space to facilitate production and exchange, generates a series of alternatives to the society - redistribution of land and related assets across households and

space, elimination of intermediary rights in land to pave the way for self-cultivation, and use of a variety of contractual forms to facilitate leasing in/out (purchase/sale) of the services of land, labour and other complementary assets (inputs). In a dynamic context, the society has a further option of devising and adopting new technologies in order to overcome the twin problems of unevenness in distribution in the ownership and control of resources and of limited substitutability across factor inputs. In a liberalised and globalised framework, therefore, the options are far greater than mere physical redistribution of only land assets. The essence of the present approach is therefore to create an overall environment and property rights over all resources and not merely on land so as to provide the strongest possible motivation for acquisition and disposition of entrepreneurial skills.

40. It is important at this stage to restate the function of entrepreneurship and highlight the role of land reforms in promoting such entrepreneurship. In any line of activity and not merely in agriculture, production and sale are subject to behaviour of a number of random variables with known/unknown probability distributions. Given the fact that at least a part of the risk or uncertainty involved in the behaviour of a random variable is interactive rather than totally exogenous, the job of an entrepreneur is to undertake activities and play with this interactive component so as to shift to the right or narrow down the spread of the curve governing the probability distribution of his returns. In other words, through undertaking appropriate action programmes either at an individual level or at a collective level, an entrepreneur converts a risk into income and profits. These action programmes may be mere stretching of his work efforts, discharging his duties with greater care or application of some scientific-technical knowledge either at individual level or at a collective level. Obviously, the question arises whether the private costs of such action are justified by the extent of private gains. If the answer is already in the affirmative, he would be willing to undertake such action and the role of land reforms in this context may be negative as far as promotion of entrepreneurship is concerned. When private costs exceed private returns, land reforms can still change the calculus at individual level. But when the costs are justified by gains only at a collective level with constant/modified technology (due to economies of scale and scope), a free rider's problem is likely to arise in organising the appropriate level of collective action, and a narrow view of land reforms, even if it boosts up entrepreneurial function at individual level, may not be strong enough to handle all risks. This is where a spectrum of agrarian reform measures, like generation and dissemination of technical and institutional alternatives and investment in social infrastructure, which go far beyond the scope of narrowly defined land reforms, by a suitable collective agency can overcome the free-rider's problem and bring private benefits in line with private costs. It is possible to convert by radical land reform measures a wage labourer into a share tenant or to a fixed rent tenant or even to the owner of land and apparently incentives to perform the entrepreneurial functions may thus be created but, in the absence of suitable complementary measures overcoming the 'free-rider's' problem, such narrowly viewed land reforms may not be producing the best results. This is precisely where the past land reform measures seem to have failed in most of the states. The major hypothesis of this paper is that land reform in the narrow sense is only a component of the whole package of agrarian reforms, which alone can release enough entrepreneurial skill to promote the necessary technological and institutional innovations for achieving the goal of growth with equity.

41. The rationale for the present approach, with emphasis on 'brotherhood' type institution building to undertake entrepreneurial functions in agro-processing and marketing activities, becomes clear when one tries to relate (a) the land reform measures across states (namely, percentage of cultivated area consolidated and vested land area distributed as percentage of cultivable area) to (b) technological adoption indicators (namely, gross area irrigated as percentage of gross cropped area, actual level of fertiliser consumption nitrogen + phosphate + potassium (N+P+K) as percentage of the recommended quantity, percentage of gross cropped area under

high-yielding variety (HYV) seeds, number of pumpsets and tubewells per thousand hectare of gross cropped area, or to (c) the rural development indicators (e.g., number of annual employment days available per agricultural male labourer in agricultural and non-agricultural occupations, percentage of rural population below poverty line, net domestic product from agriculture at constant prices per thousand of cultivators and agricultural labourers, on the one hand, and (d) infrastructural development indicators (like capacity of cooperative godowns in tonnes per thousand hectare of gross cropped area (GCA), number of wholesale assembling and regulated markets per thousand hectare of GCA and villages connected with all-weather roads as percentage of total villages to the same set of variables (i.e., (b) and (c)), on the other. It is interesting to note that for the major states of this country, the technology adoption or rural development indicators are more strongly correlated to infrastructural development indicators rather than to land reform measures, thus, highlighting the need for having a broader than a very narrow view of land reforms [Datta, 1993].

42. *Management of Arable Land*

The following districts have been identified where there is enormous scope for bringing more land under cultivation (as the per cent of net sown area to cultivable area is less than 80). In rest of the districts of these states, improvement in agricultural production has, therefore, to be brought about through a more intensive use of cultivated land as the scope for bringing more land under cultivation has been practically exhausted.

Table 4.3. Districts Having Potentials For Bringing More Lands Under Cultivation

Bihar:	Aurangabad, Bhagalpur, Deoghar, Dhanbad, Gaya, Giridih, Godda, Gumla, Hazaribagh, Katihar, Khagaria, Lohardaga, Munger, Palamou, Ranchi, Saharsa, Sahebganj and Singbhum.
Orissa:	Phulbani, Keonjhar and Koraput.
West Bengal:	Purulia.

Source: Based on data collected from ARPU.

43. However, the various types of land which can be brought under cultivation are generally cultivable waste and fallow lands, barren and uncultivable lands and vested lands which are badly degraded and denuded of any vegetative cover and their productivity is almost negligible or far below the potential. Here is need for a shift in favour of tree plantations from that of regular agricultural crops.

44. Another way of improving the productivity of land and thus income of the farmers is to achieve inter-crop transfer of area, which requires strong infrastructural support in the form of marketing, processing and input supply in favour of those crops for which the land is most suited. In this context, cooperatives, if formed on principles of sound planning and managed by local leadership, as in cases of Gujarat and Maharashtra, are most suitable organisations to provide the necessary forward and backward linkages required to induce the farmers to shift their cropping pattern in favour of the most profitable crops of that area. This again highlights the need for suitably-structured 'brotherhood' type organisations right from the farmer level. Baviskar and Attwood [1995] have provided important social, economic and political reasons as to why such organisations have flourished relatively more in the states of Gujarat and Maharashtra than elsewhere in the country.

45. Extending the facilities of regulated markets and all weather roads can also go a long way in strengthening the forces of the competitive market system and inducing a more optimal allocation of arable land area across crops.

46. Agricultural production cannot be optimised unless due care is taken in the provision of necessary irrigational facilities. The following suggestions are in order in the context of management of irrigation and watersheds:

* Land levelling should not be encouraged in the irrigated alluvial zone of the eastern states. Instead, pump sets for lifting water from nearby canals should be encouraged.

* The problem of waterlogging can somewhat be avoided if conjunctive use of tank water is encouraged to grow seedlings for transplanting paddy without charging the whole irrigation system during the nursery stage. Renovation of old tanks lying in the command area and digging up more to store water is desirable to avoid waterlogging.
* Integrated watershed development (IWD) requires coordination and integration among three groups: (a) Departments of Agriculture, Revenue, Irrigation, Forestry and Animal Husbandry, (b) Scientists and planners, and (c) Farmers and voluntary agencies.
* The state governments should undertake legislation of water rights in tanks, *jheels* and lakes and their maintenance may initially be vested with panchayats. However, some precautions are necessary here. The panchayats may be dominated by those people who do not demand water for irrigation from these sources leading to their inefficient management. Therefore, statutory provisions should be made under the panchayat legislations that pave the way for formulating user groups consisting of the group of farmers who are mainly dependent on these sources for irrigation water. Subsequently, the management of tanks, *jheels* and lakes and even irrigation equipments (e.g., mini deep tube wells installed under, World Bank support in West Bengal) should be entrusted to such user groups. While the help of panchayats is no doubt necessary not only at initial stages but also in later stages as a facilitator, too much of reliance on political bodies like panchayats for almost everything, especially in the absence of local level awareness and capabilities, may not generate optimal results. Local economic organisations based on user group control ought not to be overshadowed by the panchayats as well as their political programmes.
* There is need to change the design of the cross drainage works in alluvial plains to an alternative one of feeding small drainage channels to the canals and distributories themselves. The conventional system should be replaced by sluice gates both in the up-stream and down-stream side of the drainage channel while crossing the canal.
* Given the very low exploitation of ground water resources in the eastern states, the main thrust of irrigation development strategy has to be tapping the large ground water resources of these states.
* Regarding distribution of irrigation water and even management of small to medium irrigation structures and equipments, the successful experience of user group controlled organisations of Gujarat and Maharashtra [see, for example, Kolavalli, 1996 and Shah et al., 1995] can be operationalised in the eastern states as well. Recovery of institutional finance for minor irrigation would also improve under user group associations rather than when loans are given to individual farmers.
* The following measures can be implemented to prevent possible over-exploitation of ground water resources: (i) the abandonment of the government policy of low-cost, highly subsidised irrigation from government owned irrigation works, (ii) linking water rates to volume of water actually used by the farmers, (iii) giving up the flat power tariff for electric pumpsets, and (iv) undertaking massive extension work to educate the farmers about both, efficient irrigation and the harmful effects of over- irrigation.
* It is clear from the analysis that all the watershed development programmes in the eastern states are totally dependent on government support. Watersheds managed either by local peoples or by some non-governmental organisations (NGOs) are virtually absent in this part of the country. In order to avoid scattered work on watershed management that are being done at the state level under various programs, a state level authority - say, watershed area development authority (WADA) - may be created in the same lines as the command area development authority (CADA). This authority would be vested with power to co-ordinate different items of work on watershed basis (for which master plans are being prepared by the districts) and utilise funds of Agriculture, Pisiculture, Animal Husbandry, and Soil Conservation Departments to work as per watershed plans prepared for the district.

47. *Management of Forests*

For developing an appropriate management perspective, discrepancies in forestry data across sources should be convincingly reconciled as the very first step. It is recommended that maps based on remote-sensing data be used for location of area for plantation and, inside the forests, for location of forest blanks and degraded forests.

48. It is not wise to fully depend upon only exotic species and monoculture programme. At the same time, however, the experience gained on exotic species and its success should not be lost sight of. Some successful exotics, which have proved the test of time, especially in these eastern states, like Eucalyptus (hybrid), *Acacia Auriculoformis* and *Casuarina Equisetifolia* (for sandy coastal belts) should not be discarded on the basis of mere prejudices and presumptions.

49. Trees that yield well on desert conditions are likely to yield well on saline soils also. It is, therefore, wise to try promising varieties of mangrove vegetation in the desert, and desert suitable species in the coastal as well as in other saline areas, where there is physiological aridity. *Prosopis juliflora,* a plant of the desert has already established itself in coastal saline areas. *Prosopis cineraria* needs experiment.

50. Considerable forest area has been lost in the reservoirs of irrigation projects. As a compensatory measure, an equivalent area in the command may be earmarked to be put under 'ideal production site' for practising intensive forestry including commercial production of wildlife such as deer, rabbits, etc.

51. Regarding management of the social forestry programme, the following observations/ recommendations are in order:

* Training and orientation for the staff;
* Involving local bodies like panchayats and cooperatives and even granting 'tree pattas' to individuals seem to be the crying need of the hour;
* This programme ought to be put on media (newspapers, telivisions, radio) and the pros and cons of the project as well as the economics of farm forestry as worked out by the National Bank for Agriculture and Rural Development (NABARD) ought to be propagated. Include big industrial houses, paper mills, etc., under the purview of farm forestry to facilitate growth of forests on long term leased-out forest land; and
* Long-term leasing rights ought to be generated in favour of private individuals in case of non-strategic and non-priority lands, whereas for strategic and priority lands, government should alter property rights in favour of the community and their organisations, which ought to be run in a spirit of partnership with the government.

52. *Management of Mined Land*

While the three eastern states are fortunate in having a rich endowment of mineral resources, as we have already mentioned, they also have the misfortune of inheriting a number of complicated problems due to these mining activities. In view of the gravity of the problem, the state governments have made it mandatory on the part of the potential lessee to prepare land-use plans encompassing pre-operational, operational and post-operational phases of a mine, along with the project report for exploitation of any particular mineral deposit in a given area, which would be approved and also monitored by suitable authorities.

53. The current approach, which seems to be full of wishful thinking and is devoid of strong economic reasoning, have laid too much of reliance on the benevolent disposition of the leaseholders of mining land and the effectiveness of government regulatory mechanism, to the utter neglect of the recent advancements in the participatory modes of management and the sustainability properties of the existing system of arrangement.

54. In the present context, given the whole spectrum of technologies available from the technologists, the question is: How should one go about resolving the following issues:

* Should one emphasise only reclamation of mined lands, as done in the past, or look at the environmental problems arising from the very beginning of mining operations?
* How far can one depend upon afforestation as a solution to the multiple environmental problems arising out of mining operations?
* If afforestation is a solution, what are the optimal combinations of species, which ought to be encouraged in a given situation?
* What are the best ways of handling old and defunct mines which are still generating environmental problems because of their inappropriate handling in the past by their leaseholders?
* Given the long run and invisible nature of the environmental problems, how should contracts on mining rights be devised?
* Whether, how, how far and to what extent the involvement through a participatory approach of local residents and employees, who seem to be having the largest stake in environmental control, would improve upon environmental enforcement?
* What would be the future role of the area as well as the local residents/employees when the mining activities will be over? How should one incorporate the life of a mining area in land-use planning?
* Who will incur the expenses on Research and Development (R&D) for environmental control and how should these costs be distributed over time and space? Should there be a federation of mining companies, which should undertake these R & D activities and disseminate the findings?
* What should be the future role in this context of National Afforestation and Eco-Development Board *vis-a-vis* other government departments /agencies? How should the functions of various government R&D agencies /institutions relating to mining activities be integrated and coordinated?

55. Obviously, a 'network' of the stakeholders involving the organisations of residents of nearby settlements, the leaseholders, the relevant government departments - all functioning within the checks and balances of a premise control framework - seems to be able to provide answers to all the questions raised above. Neither the market system nor the 'command and control' of the state machinery alone has the capability of solving all these problems simultaneously.

56. Based on the existing pattern of land-use across districts, Table 4.4 identifies the districts which need special care, i.e., interventions of one kind or another, to improve (or halt deterioration in) existing land-use.

57. Table 4.5 lists some of the technological solutions as well as institutional requirements for recovering saline land, waterlogged areas and acid soils of the eastern states.

58. Regarding handling of the relevant data and administration of the land-use planning exercise, the following suggestions emanate from the discussions in the earlier sections:

* The land-use planning exercise by the National Land-Use and Conservation Board and the State Land-Use Boards, on the one hand, and the agro-climatic regional planning exercise by the Planning Commission, on the other, ought to have a point of convergence.
* Given the data availability position, land-use planning exercise ought to be performed at a more disaggregated taluka level. It is high time that the State Land-Use Boards (SLUBs) be instructed to maintain on a continuing basis updated information at taluka level on all aspects of land-use planning.
* Now that the panchayat system has been functioning at the grass-root level with the Seventy-Third Amendment to the Constitution, land-use planning exercise ought to be performed even at the level of the lowest administrative unit, namely, villages. However, in order to get the maximum mileage out of this exercise, geographic jurisdictions of villages, blocks and even districts may have to be reorganised and redefined so that they can correspond to the definitions of micro and macro-watersheds.
* Ideally, SLUBs ought to be a crucial part of the Planning and Development Department, having liaison with the planning and development activities of each and every Department. Moreover, they must be given an appropriate status in terms of decision-making

and law-making powers so that they can effectively coordinate their task with the relevant governmental and non-governmental bodies.

Table 4.4. Districts Requiring Special Attention in Terms of Land-Use

Categories (1)	Districts (2)	Relevant Issues (3)
1. Disproportionately low per cent of NCA (< 30)	Bihar: - Orissa: Koraput, Phulbani Bengal: -	1(a) Whether and how cropping intensity can be augmented.
2. Proportionately high per cent of Wastelands (> 5)	Bihar: Aurangabad, Begusarai, Bhagalpur, Bhojpur, Darbhanga, Dhanbad, Gaya, Giridih, Gopalganj, Hazaribagh, Katihar, Madhubani, Munger, Muzaffarpur, Nalanda, Nawada, Palamau, E. Champaran, Patna, W. Champaran, Purnia, Ranchi, Rohtas, Saharsa, Samastipur, Santhal Parganas, Saran, Singbhum, Sitamarhi, Siwan Orissa: Balasore, Bolangir, Cuttack, Keonjhar, Koraput, Puri, Phulbani, Sambalpur, Sundergarh Bengal: Birbhum, Bankura, Howrah, Purulia, Cooch Behar	2(a) Whether this is induced by land legislations or other government policy or a real phenomenon. 2(b) Scientific and economic devices to bring down the area under this category. 2(c) Identification of locations and reasons. 2(d) Technological and institutional devices to bring down area under this category.
3. Proportionately low per cent of pastures and miscelloneous trees (< 5)	Bihar: Aurangabad, Begusarai, Bhagalpur, Bhojpur, Dhanbad, Gaya, Giridih, Gopalganj, Hazaribagh, Katihar, Madhubani Munger, Muzaffarpur, Nalanda, Nawada, Palamau, W. Champaran, Patna, Purnia, Ranchi, Rohtas, Saharsa, Samastipur, Santhal Parganas, Saran, Singbhum, Sitamarhi, Siwan, Vaisali. Orissa: Kalahandi, Mayurbhanj. Bengal: All districts	3(a) Whether consistent with the role of the animal husbandry sector. 3(b)Measures to improve management of CPR type pastures. 3(c) Measures to improve cultivation of tree crops.
4. Proportionately low per cent of Forests (< 10)	Bihar: Aurangabad, Begusarai, Bhagalpur, Bhojpur, Darbhanga, Dhanbad, Giridih, Gopalganj, Hazaribagh ,Katihar, Madhubani, Muzaffarpur, Nalanda, Palamau, Patna, E. Champaran, Purnia, Ranchi, Saharsa, Samastipur,Santhal Parganas, Saran, Singbhum, Sitamarhi, Siwan, Vaisali. Orissa: Balasore. Bengal: Burdwan, Birbhum, Hooghly, Howrah, Nadia, Murshidabad, W. Dinajpur, Darjeeling	4(a) Measures to improve management of existing forests. 4(b) Extension of social forestry outside of regular forests.
5. Proportionately high per cent of Non-Agricultural Area (> 5)	Bihar:Aurngabad,Begusarai, Bhagalpur, Bhojpur, Darbhanga, Dhanbad, Gaya, Giridih, Gopalganj, Hazaribagh, Madhubani, Munger, Muzaffarpur, Nalanda, W. Champaran, Patna, Purnia, Ranchi, Rohtas, Saharsa, Samastipur, Santhal Parganas, Saran, Singbhum, Sitamarhi, Siwan, Vaisali Orissa: Balasore, Cuttack, Koraput, Puri. Bengal: All districts except Cooch Bihar.	5(a) Measures to check urbanisation Area. 5(b) Measures to improve management of existing non-agricultural land-use.
6. Proportionately low per cent of Non-Agricultural Area (< 3)	Bihar: Nil Orissa: Kalahandi, Phulbani Bengal: Cooch Bihar	6(a) Measures to induce non-agricultural land-use for benefit of both agricultural and non-agricultural sectors.

Note: Wasteland in this context includes cultivable waste, current fallow, other fallow and barren lands.
Source: Datta, 1993.

Table 4.5. Corrective Technological Solutions For Certain Types of Waste Lands (Saline, Acidic And Waterlogged Lands)

Technical Correctives (1)		Institutional Requirements (for both 1 & 2) (2)
1.	For acid and saline soils:	(i) Since for most of these solutions, the benefits are divisible across individual beneficiaries and the costs do not outstrip the private benefits, government ought to strengthen the market system by (a) Arranging extension and dissemination of knowledge through various private (inclusive NGO-type) and semi-government organisations. (b) Arranging proper monitoring through participation of local people so that the statutory provisions for thermal power stations and cement factories to have electrostatic precipitators for arresting 'fly ash' are enforced. (c) Since industrial wastes and effluents are so useful in amending and treating problems of lands and soils, a committee ought to be formed at the initiative of the State Land-Use Boards including representatives from State Pollution Control Boards, agricultural and soil chemists of the state and other relevant persons, to work out the details for adaptive research cum pilot projects following this approach.
1.1	Paper mill sludges to be used as liming material to neutralise acid soils; applicable to non-calcareous saline coastal areas of Orissa and W. Bengal.	
1.2	'Fly ash' from cement factories and thermal power plants available in colloidal forms to be used for liming soils	
1.3	Dolomite, lime stone waste and coal cinder of railways after pulverising to be used for treatment of acid soils, coal cinder will also add potash to the soil.	
1.4	Rock phosphate, besides treating acid soils, in particular, will add phosphate to the soil.	
1.5	Pyrites and gypsum for treating saline and alkaline soils.	
1.6	Liquid effluents from paper mills after minor treatment can be used to irrigate acid soils under plantation forests.	
2.	For waterlogged areas.	
2.1	Rice bran and Saw dust can be applied to improve soil tilth and organic matter of the heavy soil in mildly /moderately waterlogged areas.	(ii) When there are economies of scale and scope in arrangement (i), a collective body at local level may generate better result than that obtained through arrangement (i), given the market system in the purchase and sale of the necessary ingredients.
2.2	Vermiculite (hydrous silicate minerals with tiny flakes of mica) may be used to aid better soil erosion against water-logged heavy soils.	
2.3	Low grade lignites and graphites having low commercial value or their wastes near beneficiation plants can be diverted to agricultural fields to improve both soil tilth and organic matter content of soils.	(iii) When costs and/or benefits are indivisible, a free rider's problem is certain to arise and development of a collective body to share the costs and benefits is a must. A cooperative-type user-controlled body is preferred in situations (ii) and (iii).

V. LIMITATIONS OF THE PRESENT STUDY AND CONCLUSIONS

59. Before we conclude, it is necessary to mention some of the limitations of the present study. The lack of availability of accurate, precise and updated data bases is a vital constraint in taking up studies of this nature. As we have already mentioned, the second section used data from NRSA. However, the latest available figures for the year 1988-89 (though published in 1997) are quite backdated. Still they had to be used, as this appears to be the only exercise that used a uniform methodology in arriving at the estimates for all the states of the country. Land-use data estimated at the state levels are hardly comparable because of definitional discrepancies. We should point out one apparent discrepancy between the data used in Section 2 and the subsequent sections, in respect of salt affected area. As per estimate of NRSA, none of the eastern states is endowed with such type of land. However, when we analysed data estimated at state level, we came across such type of land existing in all the states under the present study. Consequently, while suggesting the policy mechanisms in the subsequent sections, we considered ways to tackle problems of salt affected areas as well. In spite of the above-stated limitations of state level data, these had to be accessed through ARPU (which has apparently achieved some standardisation in the state level data) and used for disaggregated analyses in Sections 3 and 4 in the absence of suitable NRSA data. Management of fisheries and animal husbandry, although idealistically a part of land-use planning, could not be attempted here for lack of space.

60. The present paper has been an attempt to provide a perspective on the multitude of uses land is put to in the eastern states of India, namely, West Bengal, Bihar and Orissa. The following features are necessary to be kept in mind while preparing land-use plans to ensure their desired

implementation:

* Minimise reliance on centralised decision-making bodies and their budgetary provisions.
* Not to leave everything to be decided by the unconstrained functioning of the existing market forces.
* Evolve self-governing and self-sustaining decentralised user group institutions at local level (e.g., at the level of villages and micro-watersheds) with appropriate higher-tier organisations, which would perform the land-use planning exercise as part of their regular business.
* Evolve indigenous and less complex technologies, which are consistent with the capabilities of such decentralised organisations.
* Highlight interesting cases, in general, and success stories, in particular, which can bring out the crucial role of institutions and technologies in land-use planning exercise, for possible replication.

61. The available information and the subsequent policy prescriptions point towards a Herculean task ahead of the planners and policy makers to devise an optimal land-use pattern necessary for this region. However difficult the task may look to be, we are of the view that institutional changes, if brought about within the framework of a civil society so as to involve people's participation in the truest sense of the term and thereby to develop the networks necessary for premise control, may make the task easier.

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ABBREVIATIONS

ARPU	- Agro-climatic Regional Planning Unit, Ahmedabad
CADA	- Command Area Development Authority
CMDA	- Calcutta Metropolitan Development Authority
CPR	- Community Property Rights
CV	- Coefficient of Variation
DPAP	- Drought Prone Area Programme
GCA	- Gross Cropped Area
GW	- Ground water
IWD	- Integrated Watershed Development
NABARD	- National Bank for Agriculture and Rural Development
NRSA	- National Remote Sensing Agency
NSA	- Net Sown Area
NWDPRA	- National Watersheds Development Project for Rainfed Areas
SLUB	- State Land-Use Boards
STW	- Shallow Tube Wells
WADA	- Watershed Area Development Authority

APPENDIX

Table A-1. Land-Use Classifications in Eastern Indian States

(Area in hectares)

(1)	Bihar (2)	Orissa (3)	West Bengal (4)	Total (5)
Built-Up Area	1,771,180	1,074,036	468,950	13,913,772
Kharif	9,315,985	7,822,736	4,513,813	120,587,409
Rabi	5,193,156	1,815,445	2,287,417	76,300,545
Double Cropped	4,085,323	1,724,653	1,886,006	53,109,797
Net Area Sown	10,423,618	7,913,528	4,915,224	143,801,216
Fallow	548,688	7,338	503,281	13,762,590
Agri. Plantation	311,540	29,292	1,064,475	7,700,343
Total Agri. Area	11,284,046	7,950,158	6,482,980	165,244,359
Evergreen Forest	29,015	0	124,126	14,184,366
Deciduous Forests	1,114,792	3,847,388	292,532	31,813,875
Degraded Forests	1,370,013	683,053	121,687	16,274,270
Forest Blanks	67,402	4,862	52,523	1,813,853
Forest Plantations	86,654	38,899	18,334	1,119,452
Mangrove Forests	0	21,093	198,905	504,999
Total Forest Area	2,667,876	4,595,295	808,107	65,710,815
Salt Affected Area	0	0	0	1,988,380
Water Logged Area	124,661	5,549	28,899	1,219,666
Marshy/Swampy Area	37,296	44,942	49,634	823,876
Gullied/Ravinious Area	44,218	15,436	480	2,020,329
Land With or Without Scrubs	667,379	1,230,647	165,774	26,514,564
Sandy Area	122,136	18,776	52,236	5,572,086
Barren/Stoney Area	108,219	46,642	15,812	6,251,414
Total Wasteland Area	1,103,909	1,361,992	312,835	44,390,315
River/Streams	368,172	165,678	672,341	8,414,852
Lake/Reservoirs/Canals	36,397	216,863	8,029	2,195,968
Total Water Bodies	404,569	382,541	680,370	10,610,820
Shifting Cultivation	0	11,407	0	2,823,626
Grass/Grazing Lands	5,607	0	7,671	3,104,538
Salt Pans/Snow Covered	0	2,625	0	7,030,063
Mining/Industrial Wastes	35,778	8,276	9,076	116,497
Unclassified	114,735	184,370	105,211	7,452,095
Total Area Reported Under Land-Use Classification	17,387,700	15,570,700	8,875,200	320,396,900

Source: NRSA, 1997.

Table: A-2. Land under Different Uses as Percentage of Total Geographical Area

State (1)	Built-Up Area (2)	Agriculture (3)	Forests (4)	Wasteland (5)	Water Bodies (6)	Mining / Ind. Wastes (7)
Bihar	10.19	64.90	15.34	6.35	2.33	0.21
Orissa	6.90	51.06	29.51	8.75	2.46	0.05
W. Bengal	5.28	73.05	9.11	3.52	7.67	0.10
India	4.34	51.57	20.51	13.85	3.31	0.04

Source: NRSA, 1997.

Table: A-3. Land-Use under Different Categories of Agriculture Sectors as Percentage of Total Geographical Area

State	Kharif	Rabi	Double Cropped	Fallow	Agri. Plantation	Total Agri. Area
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Bihar	53.58	29.87	23.50	3.16	1.79	64.90
Orissa	50.24	11.66	11.08	0.05	0.19	51.06
W. Bengal	50.86	25.77	21.25	5.67	11.99	73.05
India	37.64	23.81	16.58	4.30	2.40	51.57

Source: NRSA, 1997.

Table: A-4. Land-Use under Different Categories of Forest Sectors as Percentage of Total Geographical Area

State	Ever Green	Deciduous	Degraded	Blanks	Plantation	Mangrove	Total Forest
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Bihar	0.17	6.41	7.88	0.39	0.50	0.00	15.34
Orissa	0.00	24.71	4.39	0.03	0.25	0.14	29.51
W. Bengal	1.40	3.30	1.37	0.59	0.21	2.24	9.11
India	4.43	9.93	5.08	0.57	0.35	0.16	20.51

Source: NRSA, 1997.

Table: A-5. Land-Use under Different Categories of Wasteland as Percentage of Total Geographical Area

State	Salt Affected	Water Logged	Marshy/ Swampy	Gullied/ Ravinous	Land With/ Without Scrubs	Sandy	Barren Stoney	Total Wasteland
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Bihar	0.00	0.72	0.21	0.25	3.84	0.70	0.62	6.35
Orissa	0.00	0.04	0.29	0.10	7.90	0.12	0.30	8.75
W. Bengal	0.00	0.33	0.56	0.01	1.87	0.59	0.18	3.52
India	0.62	0.38	0.26	0.63	8.28	1.74	1.95	13.85

Source: NRSA, 1997.

Table: A-6. Land-Use under Different Categories of Water Bodies as Percentage of Total Geographical Area

State	River/Streams	Lake/Resevoirs/Canals	Total Water Bodies
(1)	(2)	(3)	(4)
Bihar	2.21	0.21	2.33
Orissa	1.06	1.39	2.46
W. Bengal	7.58	0.09	7.67
India	2.63	0.69	3.31

Source: NRSA, 1997.

Table: A-7. States' Share of Land under Different Uses in India

State	Built-Up Area	Agriculture	Forests	Wasteland	Water Bodies	Mining / Ind. Wastes	Total Geo. Area
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Bihar	12.73	6.83	4.06	2.49	1.66	30.71	5.43
Orissa	7.72	4.81	6.99	3.07	3.61	7.10	4.86
W. Bengal	3.37	3.92	1.23	0.70	6.41	7.79	2.77

Source: NRSA, 1997.

Table: A-8. States' Share of Land in Agriculture as Percentage of Total Agricultural Land in India

State	Kharif	Rabi	Double Cropped	Fallow	Agri. Plantation	Total Agri. Area
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Bihar	7.73	6.81	7.69	3.99	4.05	6.83
Orissa	6.49	2.38	3.25	0.05	0.38	4.81
W. Bengal	13.74	3.00	3.55	3.66	13.82	3.92

Source: NRSA, 1997.

Table A-9. States' Share of Land Under Forest as Percentage of Total Forest Land in India

State (1)	Ever Green (2)	Deciduous (3)	Degraded (4)	Blanks (5)	Plantation (6)	Mangrove (7)	Total Forest (8)
Bihar	0.20	3.50	8.42	3.72	7.74	0.00	4.06
Orissa	0.00	12.09	4.20	0.27	3.47	4.18	6.99
W. Bengal	0.88	0.92	0.75	2.90	1.64	39.39	1.23

Source: NRSA, 1997.

Table A-10. States' Share of Wasteland as Percentage of Total Wasteland in India

State	Salt Affected	Water Logged	Marshy/ Swampy	Gullied/ Ravinous	Land with/ without Scrubs	Sandy	Barren/ Stoney	Total Wasteland
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Bihar	0.00	10.22	4.53	2.19	2.52	2.19	1.73	2.49
Orissa	0.00	0.45	5.45	0.76	4.64	0.34	0.75	3.07
W. Bengal	0.00	2.37	6.02	0.02	0.63	0.94	0.25	0.70

Source: NRSA, 1997.

Table: A-11. States' Share of Water Bodies as Percentage of Total Water Bodies in India

State (1)	River/Streams (2)	Lake/Reservoirs/Canals (3)	Total Water Bodies (4)
Bihar	4.38	1.66	3.81
Orissa	1.97	9.88	3.61
W. Bengal	7.99	0.37	6.41

Source: NRSA, 1997.

OPERATIONAL EFFICIENCY OF LIFE INSURANCE CORPORATION OF INDIA

D. Tripati Rao

Notwithstanding the phenomenal growth of Life Insurance Corporation of India (LIC), the state monolith has come under close scrutiny with regard to its operational efficiency. Against this backdrop, this paper seeks to evaluate the operational efficiency of the LIC, in physical and financial terms. Insurance, being essentially a service industry, a distinct set of criteria (both, physical and financial) have been developed to evaluate its overall efficiency.

There has been a significant improvement in the physical performance of the LIC. But, the financial performance in terms of profitability has not been up to the expected level. However, given the constraints of statutory regulations and government control coupled with a highly cost-prone rural business, the financial performance may be considered as satisfactory although there is a considerable scope for improvement. The LIC should vigorously try to improve its operational efficiency in terms of both the above, to benefit the policy holders and to compete in a liberalised environment.

I. INTRODUCTION

In India, as elsewhere in the developing world, there is an active debate on financial sector reforms. The debate is no doubt spurred on the one hand by the success of East Asian economies in the 1980s and the comprehensive reforms that many a developing country has initiated in recent years, on the other. In India, the macroeconomic stabilisation and structural adjustment programmes launched in 1991 have brought into focus the issue of financial sector reforms. While some financial markets such as the capital market, the foreign exchange market and the banking sector have already been subject to various degrees of reforms and restructuring [GOI, 1996], the insurance sector is as yet relatively untouched by reforms. An official committee has gone into the various aspects of the insurance industry [GOI, 1994]. The only step that is effected in the direction of insurance sector reforms is the appointment of an Interim Regulatory Authority.

The Life Insurance Corporation of India (LIC), a state monolith, has been playing a dominant role in resource mobilisation. As a national insurance agency it serves to pool and redistribute risks associated with millions of policy holders and, as a major collective savings institution, it is a dominant financial intermediary in the economy channeling investable funds to productive sectors. Since its nationalisation, the LIC's new business (individual), i.e., business contracted during a given year, in terms of sum assured has gone up from Rs 283.07 crore in 1957 to Rs 56,993.94 crore in 1996-97 and new business in terms of individual policies increased from 8.16 lakh to 122.80 lakh for the same period, reflecting more than 15 per cent annual growth from the post-1980s in terms of both, sum assured (real) and number of policies. The number of new members in group policies increased from about 74 lakh in 1983-84 to about 223.78 lakh in 1996-97. The individual business in force, i.e., the total business at the end of the financial year, in terms of sum assured grew from about Rs 1,473 crore in 1957 to Rs 344,619 in 1996-97 and in terms of number of policies from 56.83 lakh to 777.50 lakh for the same period. The total number of members in business in force in terms of group insurance (including group superannuation schemes) increased from 3.19 lakh in 1970-71 to 244.51 lakh in 1996-97 and in terms of sum assured it increased from Rs 122.64 crore to Rs 65,142.10 crore for the same period. The rural business in terms of number of policies grew from 5.33 lakh in 1961 to 60.33 lakh in 1996-97 and in terms of sum assured from Rs 182.59 crore to Rs 24,279 crore for the same period, with more than 20 per cent growth both in terms of sum assured

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(real) and number of policies. Commensurate with growing business, its annual premium income, accumulated life fund and total investments increased to substantial amounts as they stood at Rs 16,239.79 crore, Rs 87,759.96 crore and Rs 77,935.19 crore in 1996-97, respectively [LIC, Various Years]. However, notwithstanding the phenomenal growth of the LIC, it has come under close scrutiny with regard to its operational efficiency in conducting life business [GOI, 1994].

Against this backdrop, this Paper seeks to evaluate the operational efficiency, in physical and financial terms, of the LIC. Insurance, being essentially a service industry, would require a distinct set of criteria for evaluating its overall efficiency. Therefore, a distinct set of criteria (both physical and financial) have been developed specifically for the above purpose. In the discussion that follows, the focus will be on following a set of physical and financial performance indicators. The physical performance indicators include the Lapsation, Claims Settlement, Productivity per Employee, Productivity per Office, Productivity per Agent, Computerisation and Product Range. The financial performance indicators include the stability ratios, turnover ratios and the profitability ratios.

II. PHYSICAL PERFORMANCE

This section discusses the relevant physical performance indicators.

II.a) Lapsation

One of the important indicators of physical performance is the rate of lapsation of policies. For various reasons the insured sometimes shows his inability to pay the premiums after a short continuation leading to lapsation of the policy. This is a loss for both the insurer and the insured. The insurer bears a loss, i.e., the cost of procuration of the policy due to the high initial expenses, and for this reason the moment the policy lapses before its full life, it pushes up the expense ratio and gets reflected in the higher premium rate. And the insured forgoes the benefits he would have got, had the policy continued till the maturity period. In the pre-nationalisation period high lapsation ratio was witnessed, therefore, one of the objectives of nationalisation was to curb lapsation of policies effectively to avoid inevitable wasteful expenses involved therein. Lapsation rate expressed in terms of lapse ratio[1] of the Corporation has shown an improvement as it came down from 6.22 in the late 1950s to 4.83 per cent in the 1980s (Table 1), except for a rising trend of 5.96 in the recent years.

However, net lapse ratio would be a better indicator than the afforsaid lapse ratio. Since lapses are the heaviest at the early duration of the policies, lapse ratio calculated without taking into account the distribution of the business according to duration, do not always provide a reliable index of the trend of lapses from year to year. Therefore, the best method of studying the phenomenon of lapses is to take the new business done during a particular year and follow it during the next few years and see how much of it lapsed in the same calendar year, how much in the next and so on [LIC, 1959]. Both the ratios are given in Table 1.

The net lapse ratio gives the survival period of a policy with respect to the year of commencement. This shows a gradual decline from 34.04 per cent to 28.70 per cent. That means roughly one out of 4 policies that are issued, lapses within the fourth year of its commencement. Though it has shown a gradual decline, still effective steps need to be taken to curb this phenomenon.

Lapsation of policies is influenced by external factors and client servicing. Agents play a crucial role in policies being issued. It is often argued that due to the pressure from development officers and the lure of high commission in the first year from new policies, the agents carry out forceful method of issuance of policies and rush hour acting neglecting the qualitative aspect of a policy holder. Therefore, as noticed in Table 1, in the second year of the commencement lot of policies prematurely get terminated.[2]

Table 1. Lapse Ratio and Net Lapse Ratio by Mean Duration of LIC

(Annual Averages)

Years	Lapse Ratio[1] (in per cent)	Net Lapse Ratio[2] by Mean Duration[3] (in per cent)				
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1957-61	6.22	2.64	18.62	8.68	4.10	34.04
1962-63 - 71-72	6.78	1.48	17.85	9.15	4.85	33.33
1972-73 - 81-82	4.84	0.69	15.71	8.27	3.36	28.03
1982-83 - 91-92	4.83	0.50	14.38	8.01	3.44	26.32
1992-93	5.90	1.00	15.60	8.90	3.80	29.30
1993-94	6.30	0.60	17.00	8.50	2.60	28.70
1994-95	6.10	0.60	17.80	-	-	-
1995-96	5.40	0.90	15.60	-	-	-
1996-97	5.10	1.10	-		-	-

Notes: (1) Lapse Ratio is the net lapses to mean life insurance business in force. (2) For net lapse ratio corresponding year refers to year of new business. (3) Mean Duration is the year of lapsation minus the year of commencement.
Source: LIC, Various Years.

Further, there is unevenness of business in and around the last month of the year. This calls for a stress on the qualitative aspect of the business. The examination of monthly business shows that on an average the new business in the last two months constituted 52.32 per cent in the late 1950s, 28.89 in the 1960s 32.86 per cent in the 1970s, 43.04 per cent in the 1980s and 41.06 in the 1996-97 [LIC, Various Years]. The peak tends to be in the last quarter of the financial year; this is done to avail of the tax-concession through purchase of insurance policies to settle income tax accounts. Also this happens to be post-harvest period when financial market in general tends to become vibrant, it being a busy season. Nevertheless, it can be said that to some extent the high commission in the first year is instrumental in this rush by agents.

II.b) Claim Settlement

Client servicing influences a lot the selling of life insurance policies and their continuance afterwards. Much of it influences the people's perception towards life insurance. The claim settlement operation is one of the important aspects of the customer service of any life insurance office. The efficiency of claim settlement operation is looked at in terms of the total number of intimated claims settled during a given year. In other words, if outstanding claims, as a proportion to the total number of claims that are payable during a given year, are showing a consistently declining trend, this is supposed to reflect efficiency in settling the claims. This is presented in Table 2.

Table 2. Outstanding Claims as Percentage of Claims Payable[1] during the Year

(Annual Averages) (Amounts in Rs crore)

Year	Death Claims		Maturity Claims		Total Claims	
(1)	Number (2)	Amount (3)	Number (4)	Amount (5)	Number (6)	Amount (7)
1974-75 to 78-79	28.16	30.21	10.56	8.11	13.31	14.35
1979-80 to 83-84	26.46	28.46	12.62	10.16	14.22	14.74
1984-85 to 88-89	16.01	20.41	5.14	4.64	6.08	7.78
1989-90 to 93-94	8.79	15.66	2.77	2.80	3.29	5.42
1994-95 to 96-97	11.51	16.19	2.98	2.92	3.49	5.52

Note: (1) Claims payable are the claims outstanding at the beginning of the year plus claims intimated during the year.
Source: LIC, Various Years.

The outstanding claims as a proportion of the claims payable in a given year both by number and amount have declined to a significant extent. The percentage of outstanding maturity claims both in terms of number and amount declined sharply to a little less than 3 per cent whereas the outstanding death claims declined to 11.51 per cent and 16.19 per cent, respectively. The operational efficiency lies not only in settling claims but settling claims in the minimum time duration. The analysis of average days taken for settling both maturity and death claims will shed some light on this aspect (Table 3).

Table 3. Duration-Wise Percentage Distribution of Settled Claims

(Annual Averages)

Time Duration	Maturity Claims					Death Claims				
Number-->	1974-75	1979-80	1984-85	1989-90	1994-95	1974-75	1979-80	1984-85	1989-90	1994-95
Amount-->	1978-79	1983-84	1988-89	1993-94	1996-97	1978-79	1983-84	1988-89	1993-94	1996-97
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Less than 3 months										
By Number	45.92	52.68	58.04	69.24	67.47	39.17	39.98	46.48	49.83	41.75
By Amount	48.95	54.54	58.16	70.81	71.33	38.36	40.47	47.04	45.32	40.02
3 to 6 months										
By Number	23.44	21.16	18.95	14.04	17.89	16.12	15.68	16.55	17.64	22.05
By Amount	21.11	19.70	18.28	13.52	13.95	16.16	15.38	16.52	17.75	20.94
6 to 12 months										
By Number	13.84	12.05	12.79	8.69	9.02	17.89	18.35	16.59	17.78	19.33
By Amount	11.70	10.55	12.21	8.28	8.39	17.75	18.68	16.74	19.39	19.94
1 to 2 Year										
By Number	10.17	8.74	6.91	5.08	5.81	16.04	14.85	11.92	9.85	12.11
By Amount	10.26	9.69	6.35	4.53	4.48	17.04	14.38	11.97	11.92	13.43
More than 2 Years										
By Number	6.63	5.37	5.31	2.95	2.91	10.78	11.14	8.46	4.90	4.76
By Amount	7.98	5.52	5.00	2.86	1.90	10.09	11.08	7.73	5.62	5.67
Total										
By Number	100	100	100	100	100	100	100	100	100	100
By Amount	100	100	100	100	100	100	100	100	100	100

Source: LIC, Various Years.

The above data shows that there is a definite improvement in claim settlement operations in terms of average time taken for claim settlement. More percentage of maturity claims both in terms of number and amount are settled in less than 3 months, which stood on an average at 69 and 71 per cent, respectively, in the mid-1990s. In case of death claims, improvement has been registered up to around 42 and 40 per cent, respectively, during the above period. Further, nearly 85 per cent of maturity and more than 60 per cent of death claims were settled within 6 months. Therefore, with the improvement in the claim settlement operation, the number of complaints per ten thousand policies in force has come down on an annual average from 1.36 per cent in the 1960s to 0.69 per cent in the 1970s, 0.31 per cent in the 1980s, and 0.15 per cent in 1996-97 [LIC, Various Years].

II.c) Productivity per Office and per Employee

At the time of nationalisation the life insurance business was mostly concentrated in urban pockets and in big metropolitan cities with few offices. Hence, efforts were being made to spread the business by opening up a large number of divisional and branch offices and recruiting employees to bring in both urban as well remote rural areas into its area of operation. Commensurate with the growing business, one would notice that divisional and branch offices together

have grown in number from 274 (including 34 divisional offices) in 1959 to 2,123 (including 100 divisional offices) in 1997, with an annual average growth rate of 5.41 and 6.96 per cent in the two sub-periods, namely, 1957 to 1982-83 and 1983-84 to 1996-97.[3] The average production per office increased from 3.22 thousand to 4.16 thousand policies and from Rs 2.46 crore to Rs 15.03 crore sum assured in terms of new business for the same. While policies in force per office have declined marginally from 27.02 thousand to 26.86 thousand per office, sum assured increased from Rs 15.31 crore to Rs 41.88 crore (Table 4).

Table 4. Performance of Offices[1]

Performance Indicators (1)	1957 to 1982-83 (2)	1983-84 to 1996-97 (3)
1. Growth Rates[2] of Total No of Offices (per cent)	5.41	6.96
2. Average Production[3] per Office		
a. New Business-Individual		
(i) Number of Policies ('000)	3.22	4.16
(ii) Sum Assured (Rs in Crore)[4]	2.46	15.03
b. Business in Force		
(i) Number of Policies ('000)	27.02	26.86
(ii) Sum Assured (Rs in Crore)[4]	15.31	41.88

Notes: (1) Total number of offices includes the zonal offices, divisional offices and branch offices. (2) The period wise growth rates are estimated using a Kinked-Exponential Fit of the type $Ln(Y) = A+B(D1t+D2k) + C(D2_t - D2_k) + e$, where Y is the dependent variable, t is the time period, k is the kink, B and C are the growth rates for the respective periods, and D1 and D2 are the dummy variables. (3) Average production refers to the life insurance business per office. (4) The value figures are nominal and not corrected for inflation.
Source: LIC, Various Years.

At the same time, the growth in employees[4] from about 30.768 thousand in 1957 to 126.620 thousand in 1997, being 1.59 and 6.21 per cent during 1957 to 1982-83 and 1983-84 to 1996-97, respectively, is less than the growth in offices. The average production per employee increased significantly both in terms of new business and business in force. The new business has gone up on an average from over 236 to 512 in terms of policies and from Rs 22.43 lakh to Rs 176.52 lakh in terms of sum assured in the respective sub-periods. At the same time, the cost ratio (salaries and other benefits to Development Officers (DOs), to premiums) per DO has shown a slight decline. Thus, while there is a marginal decline in expenses, average production has shown improvement over the years (Table 5).

Table 5. Growth and Performance of Employees

Year (1)	1957 to 1982-83 (2)	1983-84 to 1996-97 (3)
1. Growth Rates[1] of Total No of Offices (per cent)		
Total Employees (in per cent)	1.59	6.21
a) Class I Officers	4.76	8.46
b) Development Officers	0.17	9.64
c) Supervisory & Clerical	1.66	5.68
d) subordinate Staff	1.24	3.42
2. Average Production per Employee		
(i) *New Business-Individual*		
a) Number of Policies	32.69	71.59
b) Sum Assured (Rs in lakh)	2.90	26.00
(ii) *Business in force-Individual*		
a) Number of Policies	290.24	499.19
b) Sum Assured (Rs in lakh)	18.62	30.51
3. Average Production Per Development Officer		
New Business-Individual		
a) Number of Policies	236.12	512.49
b) Sum Assured (Rs in lakh)	22.43	176.52
4. Average Cost[2] Per		
a) Employee (in per cent)	14.45	11.02
b) Development Officer (in per cent)	21.48	21.09

Notes: (1) In computing growth rates, the same procedure is followed as in Table 4. (2) Average Cost is the ratio of salaries and other benefits paid to employees to premium income. (3) The value figures are nominal and not corrected for inflation.
Source: LIC, Various Years.

II.d) Productivity of Agent

Agents play a crucial role in the progress of life business. More or less, the quality of the business ultimately hinges upon the shoulders of agents. There are agents who take it as subsidiary profession and others who are specially recruited being known as active agents. In the pre-nationalisation period there existed former type of agents and most of them were casual and *benami* agents, just for getting high initial commissions, seriously affecting the growth of the business. One of the planks of nationalisation was to do away with this mushrooming of *benami* agents by taking appropriate steps, such as training and encouraging agents, through higher remuneration, to take it up as main profession.

Even panchayats and cooperatives were permitted to take up an agency. The changes in the nature and quality of the agents soon get reflected in the growth of the business along with increase in the productivity of the agents. The detailed analysis of the performance of the agents is given in Table 6.

Table 6. Performance of Agents

Performance Indicators (1)	1957 to 1982-83 (2)	1983-84 to 1996-97 (3)
1. Growth Rates[1] of		
a) Total Agents (in per cent)	-1.25	13.09
b) Active Agents (in per cent)	0.46	12.61
2. Average Production per Active Agent		
New Business-Individual		
(i) Number of Policies	13.23	20.18
(ii) Sum Assured ('000 Rs)	12.45	66.98
3. Commissions ('000 Rs)	2.96	14.03
4. Average Cost (in per cent)	8.62	8.82

Notes: (1) In computing growth rates, the same procedure is followed as in Table 4. (2) The value figures are nominal and not corrected for inflation.
Source: LIC, Various Years.

As the benami agents were removed through careful selection and other appropriate measures, one can see a negative growth rate of -1.25 per cent for total agents in the first period and a positive growth rate of 0.46 per cent for active agents. In the sub-period II, both total agents and active agents grew at an annual average growth rate of 13.09 and 12.61 per cent, respectively. The average productivity per agent was on an average about 13 and 20 policies, respectively, and Rs 12 thousand and Rs 67 thousand in terms of sum assured, respectively, in the two sub-periods. In other words, an individual active agent who used to take on an average around 28 days in the sub-period I to get a policy to be issued now takes only 18 days in the sub-period II, reflecting an improvement. At the same time, the cost on account of the agents, i.e., the ratio of the commissions and bonuses paid to the agents to the premium income, remained almost the same in both the sub-periods. This brings out the LIC's efforts in the initial years to attract agentship as an active profession and it has been fairly successful in this direction.

II.e) Computerisation

For bringing in increasing operational efficiency in terms of speedy policy servicing, computerisation programme is very essential. The computerisation programmes started in the early 1980s. However, only in recent years a serious thrust has been given to it as technology support for policy service. Control and management operation was accorded high importance [LIC, 1995]. In this direction, the corporation has initiated efforts for revitalising the in-house technology by adding enhancement in three areas of branch operations, namely, New Business, Cash Counter and Policy Servicing Counter. The *front end package* has been implemented in 542 branch offices all over India to provide enhanced customer service [LIC, 1997]. A comprehensive software package has been implemented for policy servicing in 705 branches and networking of branches (as a first step, all the branches of the four divisions of Mumbai). In addition to this, three more additional areas, namely, Loans, Claims and Development Officers' Appraisals, are brought within its scope, and about 1,680 branches out of 2,036 are facilitated with front end application. The Malhotra Committee has also strongly recommended computerisation [GOI, 1994]. However, there has been a strong resistance from the trade unions because of the concern for plausible retrenchment of staff. But the Corporation must march ahead in this direction.

II.f) Product Range

In a competitive world firms seek product differentiation in order to gain an edge over their rivals in the market. Product differentiation may come about through product variation and advertisement [Chamberlin, 1962, Pp. 89-92]. Product variation results from technical changes or a new design or better service.

Even though life insurance business in the Indian context is a monopoly[5] product differentiation would still be necessary for somewhat different reasons. It needs to adopt a sophisticated marketing strategy to identify the needs of the customers through the introduction of a variety of new products. One such strategy is market segmentation which aims at devising products to suit the needs of particular sections of the society. Market segmentation is usually based on demographic and buyers' characteristics such as attitude, motivation, values and use patterns [Franklin and Woodhead, 1980, p. 159]. This helps in determining the types of segmentation and in positioning different products accordingly.

The LIC has devised various schemes in order to spread the message of life insurance and increase sales. The typology of products can be classified in number of ways. On the basis of duration: whole life policy or endowment policy or term insurance policy[6] and these are further subdivided. On the basis of payment of premium, the policies may be level premium policy or single premium policy. One policy may over single life or joint or multiple lives, and policies under group insurance schemes cover a number of lives at a time. These policies may be in the nature of 'with-profit' or 'without-profit', depending on whether or not the insured is entitled to receive a share of profit/bonus. The with-profit policy generally carries high premium rates relatively to without-profit policy.

Apart from these conventional policies, the corporation offers from time to time different policies targeting different sections (for details, see Appendix A). These products include those aimed at covering work force of industrial and organised sector including public sector employees, vulnerable sections including the farming community, armed forces, women work force, pension holders, children, the disabled, ailing persons, etc. The incentive structure in the early years was designed to protect life cover, easy payment and waiving of extra premiums. But after the 1980s there is a marked shift in the product structure attached with income tax concessions, hedge against inflation, cheap term insurance and endowment plans, protection to children for educational and marriage purposes, provision for construction of house, and protection from major ailments.

The group insurance products provide protection for the retirement age with low premiums and easy insurable conditions, loans and pension benefits to the employers of the organised sector (Appendix B). In recent years for protecting the weaker sections of the society, a number of social security group insurance schemes for Landless Agricultural Labourers (LALGI from August 15, and Integrated Rural Development Programme (IRDP) beneficiaries from April, 1988)[7] have been devised with central government sponsorship. Also with the central government directive the LIC constituted a separate fund, called Social Security Fund of Rs 100 crore in 1988-89 for the benefit of the economically weaker sections of the society in the organised sector.[8]

But, unless one knows how these have been accepted by the intended beneficiaries, one cannot be sure whether they are successful or not. This can be known, to some extent, from the analysis of plan of assurance. In this respect the distribution of new business according to plan of assurance is analysed in Table 7.

From Table 7 it can be inferred that the whole life policies not only continued to be a small part of the total new business but also its share declined over the years. Though endowment policies hold a substantial share, it has been showing a declining trend. Contrarily, there is a marked shift in people's preference for other policies, which are target-oriented products. From the analysis, it may be asserted that the growth in business in the post-1980s may also be due to the varieties of products the LIC was to offer, bringing marketing professionalism in its functioning. An important implication of this analysis would be that there is a change in people's perception in going for life insurance. They no longer view it merely as a death tax,[9] rather as source of incentives and are choosy. They take up policies based on the incentive structure behind the product such as:

whether the product offers income tax relief, savings element, cheap term insurance, investment linked higher returns or any special element added to it. This would mean that, given the competition from the growing number of other savings institutions, the LIC should come up with effective marketing strategy by designing better target-oriented products to better cater to people's preferences and choices with higher returns attached with the products. For this, the LIC's investment portfolio should yield higher returns ensuring safety.

Table 7. Percentage Distribution of New Business (Individual) According to Plan of Assurance

(Annual Averages)

Plan of Assurance Policies (1)		1964-65 to 1968-69 (2)	1969-70 to 1973-74 (3)	1974-75 to 1979-80 (4)	1979-80 to 1983-84 (5)	1984-85 to 1988-89 (6)	1989-90 to 1993-94 (7)	1994-95 to 1996-97 (8)
Whole Life	(No.)	5.39	4.80	2.78	1.65	0.28	0.06	0.05
	(SA)	8.10	6.72	4.01	2.72	0.56	0.14	0.07
Endowment	(No.)	77.08	70.70	58.07	59.96	63.73	40.28	32.38
	(SA)	66.16	59.14	44.00	48.26	51.55	33.73	28.25
Anticipated Endowment	(No.)	12.95	16.92	31.71	9.74	0.54	0.00	0.00
	(SA)	16.50	21.86	41.10	11.69	1.23	0.01	0.00
Children's	(No.)	2.46	3.34	2.63	1.47	0.92	0.33	0.05
	(SA)	4.66	7.25	5.30	2.90	1.89	0.47	0.06
Other	(No.)	2.12	4.24	4.81	27.81	34.53	59.33	67.52
	(SA)	4.57	5.03	5.59	34.42	44.77	65.65	71.62
Total New Business	(No.)	100.00	100.00	100.00	100.00	100.00	100.00	100.00
	(SA)	100.00	100.00	100.00	100.00	100.00	100.00	100.00

Notes: (1) No refers to Number of Policies. (2) SA refers to Sum Assured. (3) Other includes specific products developed from time to time such as: Salary Saving Schemes, Centenary Policy, *Grihalakshmi,* Money Back, Cash and Cover, *Jana Raksha, Jeevan Mitra, Jeevan Sathi* etc.
Source: LIC, Various Years.

III. FINANCIAL PERFORMANCE

The previous section has examined the physical performances of the LIC based on claim settlement operation, time taken for claim settlement, productivity of the personnel and agents, product range, and so on. A better physical performance normally implies operation of economies of scale, reduction in premium rates, minimisation of operational expenses with higher percentage of institutionalisation of savings as life fund, which, in turn, would mean, *ceteris paribus,* higher profits and vice-versa.

The present section seeks to examine the extent to which the relatively better physical performance of the Corporation over the years gets reflected in its financial performance. In other words it goes into the question: Does the better growth performance of the corporation get translated into higher profitability and better financial position? But before dealing with this question it should be made clear that it is plausible that even the realised physical performance does not yield corresponding financial results. The reasons for this may be poor financial management, constraint of markets, government regulations, requirement in respect of compulsory social services, etc.

Often there seems to be a conflict between the objectives of a public sector enterprise as an economic unit and the political considerations that may enter into the decision-making process of the management. Under these considerations, the norms applied to asses financial performance of a private business may not apply to the LIC since its sources of finance, cost of finance, and wage and pricing policies are entirely different

from those of the private enterprises. As already referred, profit or losses are not necessarily the result of management capability but also of conscious state intervention or of market imperfections, hence, the use of profitability as an index of efficiency becomes very questionable. Evaluation of the public sector in India is based essentially on the limited information gathered from the balance sheet and profit and loss accounts of the enterprises, whereas the role expected of the enterprises may not be confined to financial performance only. Such objectives as provision of employment, emphasis on social security measures, contribution to growth, technical progress, and the correction of regional imbalances may often contradict objectives like generating financial surpluses for self-stability. This would mean that microeconomic profitability does not always reflect the macroeconomic benefits [UNCTAD, 1993].

Despite the widely accepted conceptual difficulties in dealing with financial performance, *per se* financial profitability is often used as an important criterion for the evaluation of public sector performance. A study of financial performance is important in itself in that financial health, as one aspect of general economic health, is essential if business is to perform its social function well and play its proper part in the general well being of the economy. As Sen argues, the tendency to judge the success or failure of public enterprises based on this criterion might not be fully justified, but it is fairly inescapable in the absence of a different system or well formulated alternative criteria for performance evaluation [Sen, 1983]. Thus, financial profitability and good operating efficiency are necessary to enable the public sector to discharge social objectives as well. The evaluation of the Corporation from the dimensions of physical as well as financial performance is imperative and constitutes a good starting point for reexamination of its role to evaluate the case for privatisation.

III.a) Methodology

An understanding of financial ratios, that reflects the soundness of the internal working of a company, is necessary for the purpose of any sound analysis of financial statements [BSE, 1996, p. 38]. The present section follows the usual methodology adopted by the Bombay Stock Exchange Directory in computing special ratios for the Life Insurance Corporation. Financial ratios presented on annual basis are expressed in percentages. The financial performance of the Corporation is analysed for the period of 1964-65 to 1996-97. The financial ratios used to evaluate financial performance are grouped under three heads: (a) Stability Ratios, (b) Turnover Ratios, and (c) Profitability Ratios. Since any one ratio taken alone may cloak the strength or weakness of others, the study make use of all available financial ratios to get the overall picture.

III.b) Stability Ratios

The stability ratios comprise the following nine computed ratios (Table 8):
(i) Reserves to Paid-Up Capital: The first ratio is reserves to paid up capital. A higher percentage does indicate a better capacity to maintain dividends and bonus in the difficult years. For the Corporation this has been showing a continuous upward trend except in the early 1970s where there is a decline.

(ii) Net Worth to Total Assets (or Proprietary Ratio): This is the percentage of assets financed by shareholders. This ratio measures the importance of shareholder's equity in relation to borrowed funds and indicates the margin of safety for creditors. This ratio remained around 1 per cent except in the initial years when it was more then 3 per cent. A lower percentage indicates that a larger portion of funds is supplied by trade and long-term creditors and the shareholder's equity is very small which is obvious for the Life Insurance Corporation as the central government's initial contribution is Rs 5 crore only, whereas its huge fund comes through the

premiums it collects by selling policies. Thus, the lower ratio implies under-capitalisation but higher earnings per share.

(iii) The Outstanding Premiums and Balances with Agents and Other Insurers to Total Assets: This ratio measures the liquidity of the enterprise. The amounts due from other insurers of insurance companies are like trade debtors of non-financial companies. This ratio is very low for the Corporation and around 1 to 2 per cent only. This is a positive indication which implies that at the end of the year lower amount is outstanding, so the liquidity of the Corporation high.

(iv) Increase in Insurance Funds to Net Premium: This is the ratio of insurance funds at the end of the year minus insurance funds at the end of the previous year to premiums less reinsurance. Insurance funds represent unearned premiums or reserve for unexpired risks, that is the allocation made out of the premiums received during the year to pay claims arising out of policies for which the period coverage or risk has not expired as at the date of the balance sheet. Thus, the provisions made depend on the nature of the business. This ratio shows the net increase or decrease in the amount carried forward as a percentage of the premiums received during the year. A positive ratio indicates that the true profits for the year are likely to be understated, and that more is carried forward to provide a cushion against future unfavourable contingencies. This represents a stable position and the higher the percentage greater is the stability. For the Corporation this ratio is not only high but has also shown an upward trend as it increased from 72 to 90 per cent.

(v) Investment to Net Worth Plus Insurance Funds: Investments on the one hand are a source of income and yield major portion of profit to a company and, on the other hand, in time of need they can be sold off for meeting current liabilities. Therefore, a greater percentage ensures greater stability and indicates higher potential profits. This ratio varied between 53 and 61 per cent showing more or less a stable and upward trend.

(vi) Investment in Government and Other Trustee Securities to Total Investment: Government securities ensure security and stability. A high percentage indicates better liquidity and stability. However, a high percentage beyond a point does imply uneconomic utilisation of resources which could be used in other ways of earning a higher income. The corporation has been investing heavily in government and other trustee securities to ensure security. This has increased from 75 to 90 per cent between from the mid 1960s to the early 1980s but later declined to 81 per cent in the 1990s. This does indicate that, though the objective of maximum security is fulfilled by ensuring liquidity and stability, it might be losing higher income earning capacity from its alternative investment opportunities.

(vii) Investment in Equity Shares to Total Investment in Companies: This ratio is the proportion of equity shares in the investment portfolios with respect to companies. Equity capital is risk capital, so a higher percentage indicates a relatively higher risk with higher returns in general. The Corporation's investment in equity capital, which was 58 per cent in the early period showed a sharp reduction in subsequent years. It has again shown an increasing in trend in recent years and is around 43 per cent in the 1990s.

(viii) Investment in Preference Shares to Total Investment in Companies: Investment in preference shares carries higher dividend than the interest paid on government securities or debentures. The Corporation's investment in preference shares as a proportion of total investment in companies declined sharply and there is no investment in preference shares at all in recent period.

(ix) Investment in Debentures to Total Investment in Companies: This ratio shows the proportion of the total investment held in the form of debentures. The income from debenture investment is fixed and the principal is safe. Therefore, a high ratio of investment in debentures to total investment indicates greater stability. This ratio increased from 25 to around 60 per cent.

Table 8. Trends in Stability Ratios[1]

(Annual Averages in per cent)

Ratio/Year (1)		1964-65 to 1968-69 (2)	1969-70 to 1973-74 (3)	1974-75 to 1978-79 (4)	1979-80 to 1983-84 (5)	1984-85 to 1988-89 (6)	1989-90 to 1993-94 (7)	1994-95 to 1996-97 (8)
(i)	Reserves to Paid Up Capital	738.40	695.20	1,381.60	1,602.80	2,822.80	4,902.40	8,188.67
(ii)	Net Worth to Total Assets	3.40	1.80	1.80	1.00	1.00	1.00	0.67
(iii)	Outstanding Premiums and Balances to Total Assets	1.40	1.60	1.00	1.00	1.00	1.60	2.00
(iv)	Increase in Insurance Funds to Net Premiums	72.20	71.80	72.80	84.00	85.00	86.60	90.33
(v)	Investment to Net Worth plus Insurance Funds	61.80	61.60	53.80	55.80	61.00	61.40	68.00
(vi)	Investment in Govt. and Other Trustee Securities to Total Investment	75.60	80.20	86.00	90.40	88.40	83.00	81.00
(vii)	Investment in Equity Shares to Total Investment in Companies	58.40	56.60	56.80	51.40	30.40	30.80	43.33
(viii)	Investment in Preference Shares to Total Investment in Companies	16.20	17.00	16.00	11.20	3.20	1.00	0.00
(ix)	Investment in Debentures to Total Investment in Companies	25.40	26.40	27.20	37.40	66.20	68.20	56.67

Note: 1. In computing ratios, the Bombay Stock Exchange (BSE) Directory avoids two decimal figures. Therefore, slight differences may exist in rounding of the decimal figures.
Source: BSE, Various Years, Volume 13 (ii).

III.c) Turnover Ratios

For the analysis of turnover, two turnover ratios have been computed as follows (Table 9):

(i) Operating Income to Total Assets: This ratio gives the relationship between the amount invested in assets and the results accruing in terms of sales indicating the efficiency in the utilisation of the assets of the company. This ratio may also show whether there is a tendency towards over-investment in assets. For the Corporation this ratio on an average varied between 9 to 12 per cent without showing, thereby, a tendency towards over investment in assets.

Table 9. Trends in Turnover Ratios

(Annual Averages in per cent)

Ratio/Year (1)	1964-65 to 1968-69 (2)	1969-70 to 1973-74 (3)	1974-75 to 1978-79 (4)	1979-80 to 1983-84 (5)	1984-85 to 1988-89 (6)	1989-90 to 1993-94 (7)	1994-95 to 1996-97 (8)
1. Operating Income to Total Assets	10.80	9.00	10.00	9.00	10.40	12.40	12.00
2. Operating Income to Net Worth	239.20	459.40	572.60	781.00	1,274.40	1,545.00	2,257.00

Note: 1. In computing ratios, the Bombay Stock Exchange Directory avoids two decimal figures, therefore slight differences may come.
Source: BSE, Various Years, Volume 13 (ii).

(ii) Operating Income to Net Worth: This ratio shows the turnover of long term investment in terms of sales. Higher ratio is a more profitable situation, but beyond a certain stage a large turnover is hazardous. This ratio shows a continuous upward trend from 239 per cent to 2,257 per cent for the above period.

III.d) Profitability Ratios

To examine profitability, following eight profitability ratios have been used (Table 10):

(i) Claims Paid to Earned Premium: This ratio shows claims under policies less reinsurance as a percentage of earned premium income. Earned premiums represent that portion of the premiums which expire during the accounting year. The ratio of claims to earned premiums shows the part of earned premium lost in meeting the claims arising out of maturity, death or surrender for life insurance business. A higher ratio discloses the risk involved in the business. This ratio is high and has also shown an upward trend for the LIC. In the case of general insurance companies, because of the yearly nature of underwriting, claims are settled from the earned premiums and thus earned premiums are crucial. For life insurance, due to its long term nature of claims, not only will it have in its hand the earned premiums for disposal but also the income from its investments.

(ii) Claims Paid on Death to Total Claims Paid to Policy Holders: This ratio shows percentage of premature discontinuity of policies due to the death of the policy holders. A lower ratio reflects a reduction in the cost of premiums. This is more profitable to business. For the Corporation, this ratio has declined from 22 to 16 per cent.

(iii) Net Commission to Net Premium: Net premium is the premium receivable for the insurance business underwritten during the course of the year. This ratio is the percentage of net commission paid to premiums less reinsurance. A low ratio indicates a more profitable situation. For all these years this ratio is low and has shown a marginal decline from 10 to 9 per cent for the Corporation.

(iv) Expenses of Management to Net Premium: Most of the expenses of management are incurred at the time of procuring new policies. This ratio shows the percentage of net premium taken away in expenses of management. A lower ratio indicates efficient management. This ratio, has shown fluctuations. All the same, it has declined from 27.58 per cent in the mid 1960s to 20.01 per cent in the 1990s.

(v) Operating Net Profit to Earned Premium: This ratio shows what percentage of the premium earned is available after meeting all expenses but before taking into account non-operating income and expenditure to meet the income-tax liability and to provide a return on the shareholder's investment. This ratio was negative for the LIC during the 1970s, around 10 per cent in the 1980s and again turned negative. Moreover this ratio also shows yearly fluctuations.

(vi) Net Profit to Earned Premium: This ratio shows the percentage of earned premiums ultimately left to the shareholders. Except for the 1970s when this ratio was negative, for all other years this ratio is positive for the LIC.

(vii) Net Profit to Net Worth: This ratio measures the investor's rate of return in the form of dividends and profits retained in the business on owner's funds comprising of the paid-up capital and the accumulated profits/loss of the enterprise during past years. This is a key ratio to judge the overall financial performance of the corporation. Except in the 1970s, when it was negative, this ratio is positive and improved over the years significantly.

Table 10. Trends in Profitability Ratios

(Annual Averages in per cent)

Ratio/Year (1)	1964-65 to 1968-69 (2)	1969-70 to 1973-74 (3)	1974-75 to 1983-84 (4)	1979-80 to 1983-84 (5)	1984-85 to 1988-89 (6)	1989-90 to 1993-94 (7)	1994-95 to 1996-97 (8)
i. Claims Paid to Earned Premium	79.60	118.80	135.20	252.00	344.80	313.20	479.33
ii. Claims Paid on Death to Total Claims Paid to the Policy Holders	22.40	24.40	19.60	19.00	14.80	14.60	15.67
iii. Net Commission to Net Premium	10.00	8.00	8.80	8.00	8.20	9.60	8.67
iv. Expenses of Management to Net Premium	27.58	27.82	23.60	23.19	25.20	22.81	20.01
v. Operating Net Profit to Earned Premium	2.40	-8.40	-1.00	11.20	10.00	0.80	-2.67
vi. Net Profit to Earned Premium	9.00	-1.75	4.67	16.50	6.25	12.80	12.67
vii. Net Profit to Net Worth	17.40	-2.00	8.33	28.00	21.00	38.00	39.67
viii. Final Net Profit to Total Assets	5.20	-0.25	1.00	0.50	19.00	0.00	0.00

Note: In computing ratios, the Bombay Stock Exchange Directory avoids two decimal figures, therefore slight differences may come.
Source: BSE, Various Years, Volume 13 (ii).

(viii) Final Net Profit to Total Assets: This ratio measures the overall efficiency and profitability of an enterprise and reflects the economic productivity of the total resources employed by the Corporation. A higher percentage signifies more economical or profitable use of the resources. On the other hand, a low ratio may reflect over-investment in assets in relation to sales or inefficiency of management. This ratio was for the LIC mostly 0 to 1 per cent for many years. However, business being long term in nature, the operating income and profit arising out of it will be very small compared to its huge amount of assets.

IV. CONCLUSION

This paper examined the operating efficiency of the LIC in terms of its physical and financial performance. With the growth in business it is found that there is a significant improvement in the physical performance of the LIC. All the indicators such as, the outstanding claims to claims payable, and average time taken for settling claims including maturity and death claims, productivity per office, employee and agent, and lapsation of policies have shown consistent improvement over the period, while the operational cost remained almost the same implying an improvement in physical performance of the LIC. Therefore, the bonus per thousand sum assured, expressed as bonus rate increased for whole life and endowment policies from Rs 16 and Rs 14 in 1957 to Rs 82.50 and Rs 66 in 1990, respectively. And since 1991 the differential bonus rates adopted for different policies according to the year of commencement stood at Rs 91, Rs 88 and Rs 84 for the whole life policies and Rs 74, Rs 71 and Rs 67 for the endowment policies in 1993-94 [LIC, Various Years].

It is important to mention about the annual net addition to life fund[10] from premium income of the LIC, in the context of operational efficiency. The annual net addition to the life fund from premium income has increased on an average from 68.77 per cent per annum in the pre 1980s to 85.84 per cent per annum in the post 1980s [LIC, Various Years], implying that a higher proportion of premium income is being converted into savings in the form of life fund. This again reflects the improvement in the operational efficiency of the LIC.

The financial performance in terms of stability ratio and turnover ratio shows improvement over

the period. Both the indicators reflects the safety and ability of the LIC as a financial institution. The analysis of various profitability ratios shows that though most of the profitability indicators have improved over the years and are positive, as compared to the growth of business and physical performance, the financial performance has not been up to the expected level. However, given the constraints of statutory regulations and government control coupled with a highly cost-prone rural business, from a consistently positive, if not, a high profitability, one may deduce that the financial performance of the LIC is satisfactory.

Further, as outlined earlier, a conscious evaluation of financial performance is needed as the LIC is operating under government control and regulations. For instance, its major chunk of investments have been going into pubic sector to finance socially oriented sectors consistent with development plan programmes. So the benefits, intangible in nature, spill over to the macroeconomy at large through the central government, state governments and statutory corporations and cooperative and housing banks. Therefore, direct returns (yields) may be not high from the investments in government securities and may in turn affect financial profitability ratios. Further, the enormous spread of life business in the transaction cost-prone rural areas may pull down the profits.

Though, there has been a noticeable shift in the flow of funds to the private corporate sector with the development of capital market and with the relaxed regulation, yet there needs further relaxation in the investment operations of the LIC. This is for higher returns from the LIC's investment portfolio without jeoparadising safety of policyholders. This will reflect in higher financial gains and also will provide equal competitive edge with other private insurers, if allowed to operate.

As a wider part of the financial sector reforms, the issue of privatisation and foreign participation is under consideration as the union government already announced that insurance sector is going to be opened up to the domestic private sector. Earlier the Malhotra Committee strongly recommended privatisation and foreign participation on the grounds of bringing in greater efficiency by increasing productivity and reducing transaction costs [GOI, 1994]. Therefore, the LIC should equip itself for resilience[11] in a competitive world.

But it may be suggested that the LIC should come up with aggressive and effective marketing strategy in product design and innovation to cater to larger needs of the policy holders and to combat other competing alternative saving institutions and instruments, for instance, mutual funds and *nidhis*, emerging in the market in recent years. Ostensibly, it should try to improve its operational efficiency vigorously not only to benefit millions of policyholders but also to compete in a liberalised environment.

NOTES

1. Lapse ratio is the ratio of sum assured lapsed less sum assured revived in the year to the mean business in force during the year.

2. There exists little information regarding what causes for the high termination ratio of policies in the second year. Also given the sensitivity of issue of privatisation and foreign participation in the insurance sector, it became difficult to elicit information through informal talk with the concerned officials.

3. The significant growth of the LIC has been marked since 1983-84 due to (i) external favourable macroeconomic changes since the 1980s, and more importantly, (ii) major organisational and administrative changes of the nature of decentralisation of functioning of divisional offices and decentralisation of policy servicing of branch offices. Therefore, the entire study period is structured as two subperiods. An exhaustive analysis of the growth of the LIC has been carried out in [Rao, 1996].

4. Employees include Class I officers, Development officers, Supervisory and Clerical staff and Subordinate staff.

5. The LIC's monopoly refers only to the 'insurance aspect' of life insurance policies. However, there exists another aspect of life insurance policies, i.e., they can be viewed as providing one among different forms of 'financial instruments' of savings and in this regard there exists competition (in limited sense) *vis-a-vis* other financial intermediaries/saving institutions. For a detailed analysis of alternative financial forms of savings, see Rao [1996].

6. Under whole life policy, sum assured is paid only on the death or after attaining the age of 100 years by the assured. Endowment policy is for a fixed period and the sum assured is payable either at the end of the period or earlier on the death of the assured. Term insurance policy is a short term policy and sum assured is payable in case of death of the assured within the period.

7. Up to March 31, 1994, 120 lakh and 151.74 lakh lives were covered under the LALGI and IRDP schemes, respectively.

8. There are 23 groups covered under different schemes. They include: Handloom Weavers, Khadi Brick-Kiln Workers, Bidi Workers, Carpenters, Cobblers, Fisherman, Handicraft Artisans, Hammal, Tailors, Leather Workers, Ricksha Pullers, Safai Karmacharis, Papad Workers, Physically Handicapped, Self Employed, Tendu Leaf Collectors, Urban Poor, Forest Workers, Sericulture Workers, Powerloom Workers, Toddy Tappers.

9. The term 'death tax' refers here to the insecurity aspect of people's lives. The use of the above is motivated by Mahatma Gandhi's denial of insuring his life as he viewed life insurance policy as a tax against insecurity of life [Agarwala; 1961]. In this study, it is used to reflect the changing preference of the people for endowment policies against whole life and term insurance policies, as the former are attractive due to their saving element as well.

10. The excess of premiums over current cost of life insurance, is an accretion to life insurance fund liability for endorsing future claims. This is nothing but institutionalisation of savings. In fact, the strength of any life office can be gauged by from the magnitude of life fund at its disposal and its capacity to convert a greater proportion of premium income into life fund.

11. A mimeo on 'Implications of Privatisation and Foreign Participation in Life Insurance Sector' has been circulated to the faculty of, Department of Economics, Mumbai University, which deals with a number of issues, such as, structure of the world insurance industry, theoretical issues of financial sector reforms, insurance markets, critical evaluation of Malhotra Committee Report and the likely implication of privatisation and foreign participation in the life insurance sector. In this study a resilience test for the LIC in a competitive environment has been done [Rao, 1998].

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Appendix A. Product Range

Year (1)	Product (2)	Targeted Group (3)	Special Features (4)	Present Status (5)
	General			
1972	Unit Linked Insurance Scheme		Planned saving and investment in Units and term insurance protection	
1977	Money Back		Anticipated Endowment Policy	
1977	Progressive Protection		Automatic increase in sum assured at fixed intervals	
1985	*Jeevan Mitra*		Double cover endowment plan with profits	
1985	New *Jana Raksha* Plan		Single premium	
	Organised and Industrial Sector			
1957	Janata Policy Scheme		Door to door premium collection and low sum assured	Withdrawn
1957	Salary Saving Scheme	Salaried employees	No extra premium and premiums paid from monthly salary	
1958	Non-medical Scheme	Approved male employees of organised sector	Issues of policies without medical examination under certain plans	
	Vulnerable and Rural Farming Community			
1971	Centenary Policy		Concession for default in payment	Withdrawn
1981	*Jana Raksha* Plan		Full insurance cover for 3 years	
	Family and Children			
1975	*Grihalaksmi*	House Wives	Protection to Women	Withdrawn
1977	Cash and Cover	Family	Early return of policy proceeds	Withdrawn
1979	Children's Anticipated Policy	Children	Child's life is insured at the age of 12	
1985	*Jeevan Sathi*	For Couples	Double cover joint life plan	
1985	Marriage Plan/ Educational Annuity Plan with Profits	Students or young girls	Counter against inflation	
1985	New Children's Differed Assurance Plan	Children	Risk coverage on the life of a child	
1988	*Jeevan Dhara* and *Jeevan Akshay*	Pensioner	Income-tax relief	
1989	*Jeevan Balya*	Children	Income benefit is paid in the death of the father/mother before age 21	
1992	*Jeevan Griha*		Double and Triple cover endowment plan	
1993	*Jeevan Sukanya*	Young girls	Risk cover to life assured after marriage	
1993	*Jeevan Surabhi*		Improved money back plan with increasing term insurance cover	
	Policy Holder			
1988	*Bima Niwas Yojana*		Construction / purchase of flats	
	Patient			
1994	*Asha Deep*		Death and maturity payment against major ailments	

(Contd.)

Appendix A. Product Range *(Concld.)*

Year	Product	Targeted Group	Special Features	Present Status
(1)	(2)	(3)	(4)	(5)
1995	*Bimakiran*		Term assurance added with maturity payment against survival, in-built accident cover, free term cover of additional 10 years after	
	Jeevan Shree	Upper Segment of Society	Attractive guaranteed additions and loyality additions	
	Money-back Policy	Children	Designed to provide for children's higher educational expenses with optimal family benefit	
	Asha Deep II	Diseased	Death and maturity payment against major ailments	
1996	*Jeevan Adhar*	Handicapped	Income tax relief	
	Jeevan Suraksha	Pensioner	Avails minimum of 50 per cent of the target pension to spouse on death during the deferment period	
1997	*Jeevan Sneha*	Women	Without profit money back plan with guaranteed additions, loyality additions and survival benefit	

Source: *Annual Reports of LIC,* 1957 to 1996-97.

Appendix B. Group Insurance Scheme

(1)	(2)	(3)	(4)
1.	Group Term Insurance	Employers or group of persons	Uniform coverage, Outstanding loans to Primary Housing Societies, for Employers in construction of houses and for Professional groups
2.	Group Insurance and Superannuation Schemes		
a.	Deposit Linked Insurance Scheme	Employers	Low premium, Uniform coverage option, Prompt Settlement of Claims
b.	Gratuity Schemes	Employers	Protection against death, Higher benefits to dependents
c.	Superannuation Scheme	Employers	Regular incomes by way of pension after retirement
d.	Pension Scheme	Pensioner	Pension throughout the life and incase of death full purchase price is payable
e.	Savings Linked Insurance Scheme	Employers	Higher coverage and savings element with a sound rate of interest
f.	Voluntary Retirement Scheme	Employers	Group Annuity Certain and Group Life Annuity
g.	Social Security Schemes		
(i)	Landless Agricultural Labourers Group Insurance Scheme (LALGI)	Landless Agricultural Labourers	Central Government sponsored scheme with a low assured (of Rs 2,000)
(ii)	Group Insurance Scheme for IRDP	IRDP beneficiaries	Insurance coverage to the IRDP borrowers to the extent of Rs 3,000 and Rs 6,000 for normal and accidental death
(iii)	Social Security Fund	Weaker Sections	The premiums are paid by LIC and Central Government on 50/50 basis, Maximum benefit of Rs 5,000 and Rs 10,000 for normal and accidental death

Source: *Annual Reports of LIC,* 1957 to 1996-97.

THE TRADITIONAL MAHARASHTRIAN VILLAGE: *GAVGADA*, RESUMÉ AND REFLECTIONS

S.H. Deshpande

This Paper purports to familiarise the interested reader with the contents of an important and neglected Marathi book 'Gavgada' written by T.N. Atre and published in 1915. The book primarily discusses the functioning of the balute system - the Maharashtrian variant of the Jajmani system - and delineates its economic, social and moral consequences. The woeful conditions of the farmers resulting from the depradations of various kinds of parasitic groups is the chief concern of Atre. Here his observations are summarised and comments on them offered. Atre's insights can serve as a basis for constructing a full fledged critique of the economics of caste.

I. INTRODUCTION

In this paper, I intend to acquaint the reader with an important book on rural society written in Marathi and first published in the year 1915. The name of the book is *Gavgada* and its author is Trimbak Narayan Atre.* Literally translated *Gavgada* means 'The Village - Cart'. The image of the (bullock) cart is redolent of a slow-moving vehicle loaded pell-mell. The English sub-title of the original edition is: *Notes on Rural Sociology and Village Problems with Special Reference to Agriculture*. The 1959 (third) edition, referred to here, contains a preface by D.R. Gadgil.

The publisher of the third edition (1959) gives us the following information about Atre. He was born in 1872 in Sangamner, district Ahmednagar (Maharashtra) and died in Amaravati in 1933. He had obtained the Bachelor's Degree in Arts and the Law Degree (B.A., LL.B.) of the University of Bombay (now Mumbai). He started his career in Government service as a taluka-level Revenue Officer, i.e., *Mamledar, (Mamlatdar)* and held posts in Parner, Karjat, Jamnagar, Jamkhed, Sinner, etc. Then he was *Mujrub* (Judicial Officer) in Amalner, Nandurbar, Chopda, Yaval and other places. He was Sub-judge in Khandesh (North Maharashtra). He was also, for some time, a Famine Officer. Besides *Gavgada,* there is another book to his credit - *Gunhegar Jati* (Criminal Tribes) - which is a translation. He was well-read in Economics and Sociology and fairly well acquainted with Sanskrit and English literature. He was invited by Lokamanya Tilak to join the editorial staff of *Kesari* but for some reason could not accept the offer. He also helped Pandita Ramabai in her work.[1]

Atre states in his introduction to the book that Enthoven (Superintendent Ethnographical Survey, Bombay Presidency) 'trained me in the methods of obtaining information of the customs of various castes and tribes and made me employ them repeatedly'. He then says, '(After this Training) when I happened to put up in villages (in connection with official work) and talk to people about their joys and sorrows, I learnt the origins of a number of customs, turned introspective and I got the feeling that I had received in some measure the reflection (as if in a mirror) of the inner life of the villages' (Introduction, p. 14).**

Atre tells us that he acquainted himself with important works on rural sociology and history. He acknowledges his debt to authors like Spencer, Maine, Molesworth, Baden-Powell, Grant-Duff, Leewarner, Nairn, Enthoven, Orr, McNeal, Sedan, Keatinge, Simcox, Kennedy, Phadnis, Dandekar, Mujumdar, Parasnis, Kathavate, etc., and to the Gazetteers, Census Reports, Monographs of Ethnological Surveys and other literature, official or non-official, in the form of books, articles, etc. (Intro. p. 15).

The principal themes of the book are: (1) The administration of villages in pre-British times and changes which it underwent during the British

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*T.N. Atre - pronounced Aatre -, *Gavgada*, Ha.Vi. Mote Prakashan, Bombay, 1959, Pp. 23+216, Price Rs 8.00.

**Figures within brackets refer to the page numbers of *Gavgada,* third edition, 1959. Other references are given at the end.

rule, with a focus on the *vatan* system, (2) the relationships between the farmers and the various castes of artisans or professionals, and (3) the effects on the villages, especially on the farmers and agriculture, of the raids of nomadic and criminal tribes which frequently visited them. These subjects are treated in the first six chapters. The remaining six chapters are devoted to subjects like shopkeeping, marketing and money-lending in rural areas, the general conditions of the agriculturists, measures suggested to correct the deficiencies, etc. There is finally a chapter called *Mahayatra* ('The Great Pilgrimage') which is a sort of an addendum and describes experiences in places of pilgrimage.

The *Vatan* system, in its various manifestations, is the fulcrum around which the book revolves. Atre's conception of *Vatan* is very broad. To state it in his own words, 'caste specific occupation, hereditary work or job, assignment, (annual) income, privilege, honour, rights, ancestral property, movable or immovable, birth-place — all these are termed *vatan.* One who holds a *vatan* is a *vatandar.* Those who have a right, either continuing over generations or for some time, on the revenue of the village, crops, other objects, charitable offerings pertaining to temples or *dargas* (sacred places of Muslims) or coming from villagers, are all *vatan*-holders' (p. 11).

From this, it appears that any work or duty with which is associated some material gain or mental satisfaction (such as a specific honour) and which has acquired the respectability of a tradition is a *vatan.* It does not have to be hereditary; any sufficiently long usage would do. Of course, it ordinarily takes the form of a hereditary right as in the case of *Inam* lands ('tax-free' is one meaning; in another meaning the revenue of the land is assigned to the beneficiary) in respect of government functionaries and the customary services of village artisans and professionals to farmers. These had also a legal or semi-legal sanction. But, Atre says, even the nomadic and criminal tribes who visit the villages usually to cheat and rob them look upon their activities as *vatans* and villagers, too, through long practice, have been accustomed to considering them as *vatandars.*

The socio-psychological and, especially, the ethical fall-out of this system is Atre's main concern throughout the book. In his opinion the caste system with hereditary occupations is a form of the *vatan* system. It is Atre's view that particularly in modern times, the system has led to wide-spread moral degradation. This he illustrates through the working of the *vatan* system in the earlier part of the book; the remainder, although devoted to sundry other topics, describes how this degradation has entered into the caste structure and several areas of village life and also life beyond the village borders.

Atre's book has several outstanding features.

1. He has a rich knowledge of village life in its historical perspective. The detail which he provides is astonishing. As D.R. Gadgil has noted in his preface to the 1959 edition, Atre's village is a village in the plains (*Desh*) part of Maharashtra, and does not represent coastal parts *(Konkan)* (p. 18). Here it should be noted that though Atre's direct observations and studies may have been confined to places in which he was posted for Government work, i.e., districts of Ahmednagar, Nashik, East Khandesh and West Khandesh, owing to his vast erudition and talks with people and officers of other places, he must have learnt much about the life elsewhere and his account may be considered as pertaining to the typical Maharashtrian *Desh* village around the beginning of the twentieth century and in many respects even earlier.
2. He is a keen observer and writes with wonderful socio-psychological insight. In this context it must be specially emphasised that he does not stop at describing merely the economic structure but explores its social and psychological consequences in vivid detail. In other words, he looks at the *society* through the aperture provided by its *economy.*

3. He makes a forceful plea for a transition to a market economy. In this sense he is a relatively early exponent of economic liberalism.

Although this does not concern us here, the book has been aptly honoured as a classic also because of its earthy Marathi prose strewn over with robust rustic words and expressions carrying the flavour of the rural hinterland. It may be mentioned here that *Gavgada* had the honour to be prescribed as a text-book by the Bombay University (Intro. p. 3).

It is rather sad that the voluminous literature in English on the Indian village fails to take notice of Atre's work. So far as the economic structure of the Indian village is concerned W.H. Wiser's book *The Hindu Jajmani System,* published in 1936, is taken as a starting point by most authors, in spite of the fact that Atre's book which, *inter alia,* deals with the Maharashtrian version of the *Jajmani* system, is much older (1915). Henry Orenstein who studied villages around Pune in the early fifties makes no mention of Atre's book [Orenstein, 1965]. Most surprisingly, we do not find its mention in Fukazawa's very admirable writings on Medieval Maharashtrian villages [Fukazawa, 1991]. This is what has prompted me to present a gist of *Gavgada* and pick up some points for comment.

II. BALUTEDARI

I have selected for comment that part of the *vatan* system, as described by Atre, which has mostly to do with the village economy. That part is the relationship between the agriculturists on the one hand and the several artisan and professional castes who serve them, on the other.

Without going into too many details, the broad contours of the system can be listed as follows:

In a village several castes co-exist and pursue their crafts, professions or occupations. These occupations are hereditary. These castes provide their services (i.e., 'goods' and 'services') to the rest of the villagers of whom the majority are agriculturists. As per age-old custom the farmers give them a portion of their agricultural produce, once or twice a year at harvest-time. This portion is called *balute.* Those who receive the *balute* are called *balutedars.* The *balutedars* also render services to one another but without expectation of any compensation. The system also is called *balute, 'balutyachi paddhat'* or *balutedari.* I shall henceforward use the word *balutedari.*

It must be noted that *balute* is not the only source of the *balutedar's* livelihood. Atre is not very specific on this point but other sources suggest that at least some *balutedars* had *inam* lands. The Mahars certainly did.

One more and obviously a minor element in the total earnings of the *balutedars* are *haks* or what may be called 'perquisites'. They may be in the form of occasional meals, vegetables, ritual offerings of food, etc.

There are also 'psychic' benefits, at least for some *balutedars,* e.g., a place or some token of honour *(manpan)* at the time of village functions or festivals.

Atre does not mention this but some sources indicate that at the time of deliberating important village affairs most *balutedars* were represented in the assembly.[2]

If there is one household of a particular *balutedar* caste, it is natural that it should serve all the other households. However, when a *balutedar* caste has a number of households they would divide their 'clients' among themselves or serve them by rotation. All those who receive services are called *asamis.*

This may be explained as follows: 'Blacksmith' (*lohar*) is a caste which works in iron-smithy. The blacksmith would give the farmer a service which entails iron-work for his plough or bullock cart, etc., whenever the farmer needs it. He receives from the farmer a certain amount of grain. This is the main mode of payment. The same method applies to the service of the carpenter (*sutar*), leather-worker (*chambhar*), etc. However, when the carpenter and the blacksmith need each other's services they are exchanged without any

payment being involved. When there is only one household of a blacksmith, he would serve all the *asamis* in the village; when there are several, they would divide the *asamis* among themselves or in one year one blacksmith would serve all and in another, another. (It seems the 'rotation' system applied only to *Mahars).*

Atre speaks of twelve *balutedars* and eighteen *alutedars* although some put the number of *alutedars* also at twelve. *Alutedars* are, in fact, *balutedars* of a lower order, since their services are less essential to the *asamis.* However in their case, too, the mode of payment is the same. *Balutedars*, infrequently now, are called *Karus* and *alutedars Narus*. It must be remembered that the whole contingent of *Karus* and *Narus* may not be found in each village, but may vary according to its size. Again, the 'village' need not mean one single habitation; it may comprise of a number of offshoots like *wadis, vastis* (suburbs), etc.

The same professions may not be found to figure everywhere in the list of *balutedars* and *alutedars.* Some occupations are part of *balutedari* in some places, others in others.

Even among *balutedars,* there are supposed to exist three grades or ranks (*ols* or *kas*). The rates of payment decline from the higher to the lower rank. *Alutedars,* too, by this logic, get less payment than the *balutedars.* But more about payments later.

In the example given above, we assumed the *asami-balutedar* relationship to exist only between the farmer and the *balutedar.* But *balutedars* not merely served individual *asamis;* they also satisfied some of the collective needs of the village and also the needs of the government. For example, to chop wood and provide it to the farmer's household is the satisfaction of a domestic need; if some work is done in connection with a village festival, that would be a service rendered to the village as a whole; if the treasury is carried from the village to the upper level administrative headquarters, that is work for the Government. Of course, not all *balutedars* performed all kinds of functions. (The *Mahar*, a major subcaste among those regarded as 'untouchables', performed all the three).

We can also classify *balute* services in another manner:

i. Some services are of the nature of providing economic inputs to the farmer's profession. For example a plough, an axe (blacksmith, carpenter), *mot* (leather bucket) for drawing well-water (leather worker), ropes for bullocks (the rope-maker).
ii. Some services satisfy personal or household needs: e.g. a haircut by the barber, an earthen pot by the potter.
iii. Some services satisfy religious or ritual needs. For example, at the time of the *bendur* festival (devoted to the celebration of bullocks), the potter presents clay figurines of bullocks; on the occasion of a wedding, the *mang* (member of a rope-making ex-untouchable caste) hangs a *toran* (an auspicious string decked with mango tree leaves, etc., placed at the lintel).

The description given above of the various kinds of functions performed by the *balutedars* would show that they are not purely economic. This would mean that *balutedari* is a *social* system rather than an *economic* system. Of course, the economic aspect of life would be important in any society and, therefore, the major part of work that the *balutedars* do pertains to economic (agricultural) activities. However, it is the larger social relations which the village organises and the purely economic ones form a part, may be a large part, of the totality of relations. To use Karl Polanyi's expression, the *economy* is 'enmeshed' in *society* [Polanyi, 1944]. The economic life of the people is not a separate segment; in fact there is nothing like an 'economy' as distinct from 'society' in the perception of the people. It is with the emergence of markets and capitalism that the economy begins to become a distinct, identifiable, autonomous area of life. It will be useful to remember this point when we come to the question of the remuneration to the *balutedars.*

III. ECONOMIC ASPECTS

A brief picture of *balutedari* has been presented above. From the economic point of view the central questions are: What is the nature of the *balute* payment? What is the principle that governs the rate (*nirakh*) of the *balute?*

The *balutedar* receives his portion of grain in the form of sheaves on the threshing floor. When harvest has reached the farmer's house in the form of grain the *balutedar* would receive his portion in grain.

Not all *balute* was paid in kind. It appears from Atre's account that a part of it, in some cases, was paid in a fixed amount of cash. However, the cash element in the total transaction seems to have been small.

How was the *nirakh* determined? Was the *balute* a fixed quantity or fixed proportion of the yearly output? These are core questions but extremely difficult to answer. 'Core questions' because they pertain to the distribution of income within the rural society and issues, such as inequality and poverty, become relevant in their context. Here amidst the confusion of several norms we have to pick our way with circumspection.

Atre illustrates the custom through examples like the following:

'The *lohar* (blacksmith) is given from half a *seer* to one-and-a-half seer of seed-grain and 1.75 per cent of edible grain at the time of *ras*' (p. 77). (A 'seer' was a measure roughly equivalent to 1 kg. *Ras* is the heap of threshed grain.) 'The *chambhar* (leather-worker) is given two *seers* of seed-grain and 2.5 per cent of edible grain' (p. 77) 'The *kumbhar* (potter) gets one or one-and-a-half *seer* of seed-grain and 1.25 per cent of edible grain' (p. 77).

This is a combination of two methods mentioned above: fixed quantity and fixed proportion. One applies to seed and the other to edible grain. From Atre's account, it appears that the dominant method was a fixed proportion of the crop, since seed-grain would form a small part of total *balute.*

Against this we have contrary information from other quarters. In my own village (Shirwal, District Satara, Maharashtra) the amount of grain is a fixed *quantity* related to the size of operations of the farmer. The size of a normal crop would be broadly denoted by the acreage, but the custom here is to use as a proxy the number of ploughs or bullocks. Why the acreage, a more direct measure, is not used is difficult to say. However, a possible answer is that the number of ploughs or bullocks, especially bullocks, reflects more accurately the amount of work that the *balutedar* has to perform. Bullocks are used not only for cultivation but also for transport and, since the *balutedar* has to look after these needs also, bullocks would have an edge over ploughs or acres, as indicators of the scale of operations involved.

As against a fixed quantity, a proportion of the crop as stated by Atre would be a varying quantity from year to year, depending on the annual output.

There is a further meaning to the *nirakh* related to the size of operations. It relates to the amount of total work, at least in a rough-and-ready way, i.e., more pay for more work, etc. There is some approximation to the market principle here, which does not obtain when the payment is a proportion of the total crop.

Even in the examples that Atre gives, the 'market' principle makes its appearance in two ways. First, there is the difference between the *balute* of *balutedars* and *alutedars,* based on the necessity or 'essentiality' of the work. Second, even among *balutedars* there are grades based on the criticality of their inputs and, accordingly, they get differential emoluments.

If we compare the two methods, we would immediately notice that payment according to work would ensure, in an admittedly rough way, compensation to *balutedars,* in accordance with their contribution to the total work. Payment as a proportion of the realised crop would make the *balutedar* share both the prosperity and the adversity of the farmer.

There is one more norm mentioned. This is the principle of 'need'. The underlying idea is that what the *balutedar* gets should have some relation to his family's needs. This is because the village is conceived as a brotherhood, a family. Look at the following observations of Atre.

'Although the *Karus* and *Narus* belong to different castes, they call each other *Karbhau* and *Narbhau* (*kar*-brothers and *nar*-brothers) and all of them together refer to their relationship with the farmer as that between children and their mother' (p. 9).

It has been mentioned above that *balutedars* are divided into grades *-ols-* which are also called *Kas*. *Kas* means the udders of a milch animal. Atre explains the significance of the use of this term in the following words:

'The word *Kas* is used because the farmer is imagined to be (in the place of) the cow and the *balutedars* the calves. And these calves take their turns at the udders' (p. 9).

'If one even superficially considers the village affairs, i.e., the system based on *vatans*, one will not fail noticing its similarity with the joint family' (p. 139).

'*Gavgada* means a joint family of the village' (p. 141).

The following statement lays down the principle in the most unmistakable terms.

'.... the *balutedar* has a share in what the farmer eats, a part of the morsel which the farmer swallows. But (the condition is that) no one, neither a human being, nor an animal, should be suffered to die of starvation. That was the arrangement designed' (p. 119). This is Atre's speculation about the basic law of distribution.

Remember, in addition, that the *balutedars* and *alutedars* call each other *Kar-bhau* and *Nar-bhau*, i.e., 'brothers' or 'comrades' in profession, and residents of neighbouring villages are referred to as *Shiv-bhau* 'brothers on the border'. It seems from these examples that the sentiment of brotherhood was part of the village ethos and sedulously sought to be cultivated.

The above excerpts would point to the 'family principle' of distribution. Within a family, the communistic principle of 'from each one according to his ability, and to each one according to his need' is broadly in operation. In the village context, it may be paraphrased as 'from each one according to the need of the *asami* and to each one according to his need'. *Balutedar's* 'need' would be his subsistence requirements. That 'no one should be suffered to die of starvation' should mean that his minimum human needs should be taken care of. To express this alternatively, 'in normal times, no one should go hungry'.

Thus, the several approaches seem to conflict. In one case (proportion of the crop), what the *balutedar* gets is related to the size of the produce without regard to the subsistence needs of his family. In the second (according to the number of bullocks and ploughs), his actual work is sought to be valued, again without regard to his needs. In the third his needs, i.e., subsistence requirements, become the norm. A fixed quantum can, of course, be derived from the family needs of the *balutedar*. Some of the difficulties faced here can be resolved by looking upon subsistence as a 'threshold' (minimum) payment.

At this stage the question might arise about the 'operability' of the 'family needs' principle. If there is only one *asami* for the *balutedar*, he (the *asami*) would give him his *balute* considering his need. But when the *balutedar* collects his grain from several *asamis* the total he gets might exceed or fall short of his requirements. It may be that when the *nirakhs* were first fixed, the village leaders calculated the needs of the *balutedar* families and distributed the burden on the several *asamis*. However, in course of time the number and needs of the *balutedars* as well as the number and output of the *asamis* must change and original norms must become obsolete. This is a valid question but one must not expect very strict application of the rule. This is because although the family principle might weigh in the transaction, the aim will not necessarily be to wipe out completely the poverty of the *balutedar*. As we shall later see this will not be the sole principle in the determination of the *nirakh*.

Confusion gets worse confounded when Atre says that the greater the division of agricultural property, the greater is the income of the *balutedar*. He also suspects that because of this reason the *balutedars* foment quarrels among members of joint families of *asamis*, so that they separate and divide the land (p. 146). The whole question of norms of payment thus gets clouded.

To find a satisfactory solution to this problem let us imagine the situation on the threshing floor when *asami* stands *vis-a-vis* the *balutedar*. The *asami* would first offer whatever he thinks is fit, also knowing fully well that the bargain is not going to end there and higgling and haggling is soon to ensue. The *balutedar* can be expected to protest and ask for more. The *asami* is bound to complain that the *balutedar* has not done his work properly or in time and the *balutedar* would start denying the accusation; or if he accepts it, he would present a long list of obstacles in his way. The quantum originally offered may go up a bit as a result of this dialogue but would still leave the *balutedar* unsatisfied. He would invoke the traditional norms, in whatever form they exist, and the *asami* would certainly reply that they belonged to a bygone era. Finally the *balutedar* might plead his poverty. In fact, Atre mentions that the *balutedars* actually advance this argument. 'When today *karu-narus* ask for their portion from the farmer they do not say, "I have done so much work and the value of my work is so much". On the contrary they say, "My family is so large; how can I satisfy their needs with the meagre quantity that you give"'? (p. 184). The farmer will not fail to point to his own family's needs. Even then, something extra will be offered at this stage if the *balutedar* is really poor and at that point, perhaps, the bargain would be settled.

These would be the principal considerations that go into the deal. But there would be others. As we have noted earlier *balutedari* is a *social* rather than a purely *economic* system. The *balutedar* also performs non-economic domestic and ritual functions. Some of his functions relate to the village as a collective of which the *asami* is a part. In this way the purely economic thinking in the mind of the *asami* would get somewhat modified and he would tend to be more generous.

One must also realise that village economic activity is a close-knit web. The *asami*, for all practical purposes, has no alternative but to turn to the hereditary *balutedar* to get his work done. Replacement is difficult if not impossible since another artisan of the same caste would not ordinarily encroach upon the *vatan* of his fellow *balutedar*; nor would the traditional *balutedar* accept this eventuality without resistance. Under these circumstances, it is important from the point of view of the *asami* that the *balutedar* continues to serve him in a reasonably good state of body and mind. Of course, this consideration would weigh more in the case of *balutedars* like carpenter, blacksmith, leather-workers, etc., whose services are the most critical for the pursuit of *asami*'s occupation.

Nor would it be proper to dismiss the family needs norm as farfetched. The village, it must not be forgotten, is a 'primary' or 'face-to-face' community, *gemeinschaft* as the sociologist would say. In spite of caste divisions, and even untouchability, a sense of good-neighbourliness and fellow feeling must not be supposed to be totally absent. In such a situation extreme distress of a fellow-villager is unlikely to go unnoticed or uncared for. 'Let no one go hungry!'

On the whole, therefore, one may conclude that conventional norms, the perceptions of both parties regarding the amount and quality of the work done, the strength or weakness of their mutual dependence, the importance of the *balutedar* in village affairs, the capacity of the farmer and the economic condition of the *balutedar*, are all elements likely to go into the final decision regarding the quantum of payment. If at all one single principle is to be named it could only be the 'personal equation' between *asami* and *balutedar* established at the time of the live encounter. Each individual case would thus be separately treated. Norms stated in literature for villages or regions will, therefore, play a limited

role in most cases. This is all that we can make out of the meagre and chaotic information that we have at hand.

If this is conceded and the role of extra-economic considerations in the transaction is appreciated it should be obvious that there was some degree of 'fairness' in the distribution of the social product. That is, in spite of social inequality, there must have existed a modicum of economic equality in the old villages as compared to the modern ones. The *Dharmashastra* literature brings out starkly the extreme social inequality that existed. Real as it was, its rigours may have been softened to some extent by a sense of social justice, ultimately flowing from compassion. The *smritis* (*Dharmashtra*), it is generally accepted, are didactic treatises and do not necessarily reflect social reality.

We mentioned earlier that the economic consideration also enters the calculation of *balute* in the sense that there is some attempt to match the amount of work to the remuneration offered. We said that there is some approximation here to the market principle. But this is to be understood in a strictly limited sense. There is hardly any market norm to go by because the market, as such, hardly exists for the services rendered by the *balutedars* and also for the crop that the farmer produces. Therefore, the major principle of distribution in the village economy can be negatively described as the 'non-market' principle. All economies had to adopt it some time or the other in their career before the rise of capitalism. It can take two forms: 'command' and 'custom' [Hicks, 1969, p. 9 ff.]. Under the command system, some authority would distribute the product. Under the custom system, 'usage' that has been handed down from generation to generation would govern the distribution. Although there are stray references to the existence of a commanding authority implementing the customary mode, by and large, the 'system of customary payments with a good deal of personal and social factors thrown in' may turn out to be the proper description of what determined the distribution in Maharashtra villages.

And yet the market principle was not entirely absent from village life. The next section elaborates this point.

IV. ROLE OF THE MARKET

Although, in substance, *balutedari* was a non-market system, it is not as if the village remained untouched by the market principle. There are four ways in which it made an entry into the village.

1. Even *balutedars* did not observe the *balute* system in all their transactions with the *asamis*. Some jobs fell outside the sphere of *balute* and a price was charged for them. For example, Atre lists many jobs done by the carpenter (Pp. 75-76) and then says, 'When manufacturing a new plough, seed-drill *(pabhar)* or a cart he (the carpenter) takes wages *(majuri)*' (p. 76). Here the price is the price of labour - *majuri*. This is because the raw material is supplied by the *asami*. The difference between un-priced and priced jobs may not always be based, as Atre says, on repair work and new products, respectively. For example, Apte mentions in a recent survey that the potter *(kumbhar)* of *Vadu* (a village in Pune district) presents the *asami* with small earthen pots (*madki* or ceremoniously called *sugad* - from Sanskrit *sughat*) on the occasion of the festival of *sankranti*; however, for bigger pots like *ranjan* or *kothali*, he charges a price [Apte, 1993, p. 55]. In any case, it is clear that some jobs were done against *balute* and some against a price (and perhaps cash-price). Orenstein has given a list of both kinds of jobs in respect of most *balutedars* [Orenstein, 1965].
2. There were weekly markets in at least the bigger villages.
3. Usually every village had at least one fair *(jatra)* during which vendors from outside set up their stalls.
4. As Atre shows, nomadic tribes regularly visited the villages and sold certain goods and services. To quote some examples. The *Ghisadi* sold plough-shares, axes, sickles, spades, etc. (p. 82). 'The *Kaikadis* sold baskets of various kinds' (p. 83). *Kanjaris*

sold strings (p. 83). *Beldars* did the stonework for wells, houses, platforms around trees (*pars*) (p. 82).

One must, however, understand that altogether the role of the market in the economic life of the people was peripheral. The largest item of consumption within the village is food. In the poorer families today 60 to 70 per cent of expenditure is on food; in medieval villages the proportion that food occupied in total consumption must have been even more and that may be taken to have been covered by *balute*. Material for shelter would be obtained from nature.

The above account also shows, incidentally, that the village was not hundred per cent self-sufficient; some of its needs were satisfied by imports from outside.

V. SOCIO-PSYCHOLOGICAL CONSEQUENCES

We decided that *balutedari* is primarily a non-market system. Thus it has its advantages and disadvantages. Falling broadly under the heading of 'custom'-ruled economy it is an automatic mechanism of income distribution and it shares this feature with the market system. (The 'command' economy may be likened to a 'planned' or 'centraly directed' economy).

The disadvantage is that where there is no greater reward for more or better work and less reward for less or inferior work; there is no incentive to achieve excellence. That is why the village economy remained stagnant for centuries. (The famed Indian handicrafts were urban, not rural). Let us quote Atre on this point.

'The *balutedars* take the *balute* all right but neglect work in an irresponsible manner. As a result the *asami* has to get his need satisfied from another person by paying in cash or kind' (p. 143). 'For excellence, what one needs is ambition and ambition needs the spur of competition and incentive' (p. 146). 'If skill grows, human happiness will increase; for skill to increase we need workmanship, driving force, (supplied by) incentive. Since it did not exist our knowledge stagnated' (p. 146).

Thus, Atre focuses on the absence of economic incentive in *balutedari* and points to stagnation as its result. However he has more to say. In his opinion, in course of time the *balutedars* became more irresponsible, began to shirk work increasingly but continued to insist on their right to receive *balute*. This led to parasitism, and to exercise it *balutedars* practised 'aggression, mendicancy and thieving' (p. 152). The result was exploitation of the farmer by the *balutedars* (although Atre does not use the word). The farmer's vulnerability, in his opinion, is compounded by his naturally generous nature - he is *Baliraja*[3] and addressed as such by *balutedars* - and by the generally unprotected condition of his fields.

Attention must be drawn here to another point. We observed earlier on that 'at least' some *balutedars* enjoyed income from *inam* lands in addition to *balute* and *haks*. However, the other balutedars must have had *mirasi* (taxed) lands if not *inami*. In conditions of ample availability of land, this seems most likely. (In any case the literature nowhere says that *balutedars* were barred from owning or renting land.) Atre's mention of 'seed-grain' as part of *balute* supports this inference.

If this is so the *balutedar's* dependence on *balute* would not be exclusive and his incentive to work hard, to work with intelligence - or even to work at all, would be, to that extent, less.

But *balutedars* are not the only parasites. There are the hordes of nomadic and criminal tribes who fleece farmers. To the discussion of this phenomenon we must now turn.

VI. THE NOMADIC AND CRIMINAL TRIBES

Atre lists almost sixty itinerant groups who descend on the villagers. They are a miscellaneous crowd of entertainers, professionals, beggars, ascetics and thieves. The profession or trade is generally a *facade*; the inner motive is to loot the countryside. The same applies to the ascetics - the *Sadhus*.

As we saw above, there entered parasitism in *balutedari*, but the life of the nomadic and criminal tribes is more openly parasitic. Atre points to two evil effects of this state of affairs. One, the existence of an unproductive class is itself an economic loss; two, their depredations on the productive classes dampen the latter's enterprise. To quote Atre: 'In Hindusthan, criminal tribes population is about 50 lakh and begging castes and sects total up to 52 lakh' (p. 170). 'If the hardy, adventurous and clever but begging and thieving castes enter the useful professions, Hindusthan will save an amount of about Rs 40 crore which currently it has to fork out to support them; they will in fact earn about Rs 50 crore (from their own labour)' (p. 173).

In Atre's book, the nomadic and criminal tribes are treated independently as a phenomenon exogenous to the village. In a way it is, but at a deeper level, one suspects, it is part of the system which Atre has been discussing in the earlier chapters. It is the system of caste which is at the basis of *balutedari*, and the caste system and the itinerant tribes (nomadic + criminal) seem to be related phenomena. This needs explanation.

The society based on caste has no answer to the question as to what members of a caste should do when it loses its occupation and even in a generally stagnant economy some occupations might prosper, some might decline and some might altogether vanish, due to external events like wars, aggression, conquest, pestilence, famine, etc., if not due to internal economic dynamics. When an occupation becomes moribund or dead, the members of the caste barred from finding other useful occupations will have a tendency to turn to a parasitic way of life. History of the origins of many criminal and nomadic groups appears to testify to this development.

There is another question, too, to which the caste society provides no answer. When, during the course of its expansion (as the Aryans are supposed to have done), it meets with an outsider group, the former cannot integrate the latter with itself economically, because all the existing occupations have already been distributed among various castes. In such a situation it is likely that the outer group might begin to lead a parasitic life in one form or another. Perhaps this has happened in the history of Indian society.

Naturally, when one studies the effects of the caste system on the economy the rise and growth of parasitic groups and the consequences of their predatory activities must also be taken into account.

Thus, from inside, sloth, malingering, mendicancy and cheating by *balutedars* and, from outside, the more overt rapacity of the beggars, *sadhus* and criminals eat into the vitals of the village economy and society. The moral fibre of the society gets snapped. Agricultural labourers, shopkeepers, moneylenders, priests at the places of pilgrimage - all descend into the mire, and grasping, mendacity, subterfuge, double-crossing become rampant. The farmer himself, initially the victim, is not slow to react in the same way. Atre remarks, 'Shirking and lying are followed by land-grabbing and feuds. To leave animals to forage into one-another's fields, to graze them on the sly on someone else's pasture, to set fire to bundles of sheaves, to get others' cattle poisoned through *mahars* and *mangs*, to poach on the fields of others directly or through one's henchmen, to accept deposits of stolen material or to buy it at throw-away prices - such actions which are a disgrace to the esteemed name of *Baliraja* are now common with the farmers' (p. 125).

VII. THE MORAL BLIGHT

In respect of the general level of morals in the village communities of Maharashtra, Atre's picture is as follows: He endorses Captain Briggs' observation on Khandesh (1818) about the difficulty of eliciting truth from the people and other moral lapses (p. 47). About the functioning of the old Panchayats, Atre says, 'the honest juror *(panch)* or the impartial witness was a rarity' (p. 42). About *Vatandars* he says that they 'never had any scruples when it came to acquiring *vatans*' (p. 60). About the rapacity of village artisans and other functionaries, he says they bled the farmer white in return for perfunctory and half-hearted services. He estimated that about a third of the farmer's gross produce was appropriated by them; what was stolen by numerous professional and non-professional thieves being extra (p. 122).

As vignettes of the general village ethos the following quotations should be pondered. 'It is an old tradition (with the *vatandars*) to bribe superiors and to get bribed in turn by inferiors' (p. 87). 'It is an ancient belief of our shopkeepers that "a shop will not run without the use of trickery just as silver will not ring without being alloyed with copper", and that is why since ages they have been bound by tradition to throw dust in the eyes of customer' (p. 108). 'The *Kunbi* worker is habituated to working less and obtaining an inflated wage' (p. 124). 'The worker will not work unless there is constant goading' (p. 124). 'Malingering is in our blood' (P. 125). 'Receiving obligations, an unashamed mendicancy and indifference to other persons' property are the private and social vices which have seeped into the very being of the majority of our people. The habit of begging is not confined to Brahmins; it has reached the lowest ranks of the Hindu society'. 'The system of hereditary occupations has taught everyone arrogance, begging and the arts of the thief' (p. 152). 'Even rich men in the village will ask you, "you have got a good crop of mangoes (groundnuts, cabbages); well, when are we going to be favoured with a sample?"' (p. 153).

We may add that this was also the scene that struck the eye of the early British administrators who ruled Maharashtra and they corroborate Atre's observation.

Mountstuart Elphinstone observed as follows about Maharashtra Brahmins, 'The Brahmins who have long conducted all the business of the country, are correctly described as an intriguing, lying, corrupt, licentious and unprincipled race', to which captain Grant adds with equal truth that 'when in power, they (are) coolly unfeeling and systematically oppressive ...' [Elphinstone, 1872, Pp. 5-6]. About Maratha chiefs, he says, 'While in power and especially while with armies (they) are generally coarse, ignorant, rapacious and oppressive' [Elphinstone, 1872, p. 6]. Elphinstone is aware that 'we see the worst of the whole' and that 'it is among those at a distance .... that we look for any virtue ....' and yet when he looks at those at a distance, i.e., at the peasantry, while admitting that they are 'peaceful, sober, frugal and industrious' he still feels that: 'The faults of their Government have ... created the corresponding vices among them; its oppression and extortion have taught them dissimulation, mendacity and fraud' [Elphinstone, 1872, p. 7].'I may here say something of the moral character of the people. Falsehood in all shapes pervades all ranks ... there is no regard for truth or respect for an oath throughout the whole community ...' [Elphinstone, 1872 p. 52]. Walter Neale quotes Cecil Walsh as follows: 'When giving evidence before the Simon Commission at the end of 1928, the Inspector-General of Police for Bihar-Orissa said that 99 per cent of the constabulary, 75 per cent of the Sub-inspectors and 50 per cent of the Inspectors were probably corrupt ...'. (Neale, 1962, p. 200) Neale, himself a scholar and serious student of the rural scene in Uttar Pradesh in the 1960s, notes that in villages there is 'no disgrace in perjury' (Neale, 1962, p. 195).

Lest it might be thought that these are expressions of Western ethnocentrism, let us quote an observer who noticed the existence of the same traits on the same scale, if not larger. Gopal Hari

Deshmukh (1823-1891), pen-named Lokahitavadi (*pro bono publico*), was the first to hold a mirror to the widespread moral decay of Maharashtrian society in the post-Peshwa days, just as he was the first to grasp and preach most of the essential principles of modernization and enlightenment. His observation that only 5 per cent of the Englishmen are dishonest whereas 5 per cent of the Hindus are honest, may lack precision but in page after page of his book, *Shatapatre* (Essays written between 1848 and 1850) you come across the most ruthless exposure of the moral chaos that was the Maharashtrian society one hundred and forty-eight years ago. Of bribes, he talks frequently, in addition to devoting two special chapters to its discussion and considers it one of the most pernicious traits of the natives. 'I think', he says, 'the English were the first to introduce in India the concept of bribery as a punishable offence', and perceptively notes that the Sanskrit language has no equivalent to the English 'bribe', Persian *rishwat* or Marathi *lanch* [Lokahitvadi, 1977, p. 300]. 'I asked a Pundit' he continues, "Is acceptance of bribe justified?" He answered, "It is natural for the judge to accept bribes. Only he should accept it from the party which has the right on its side"' [Lokahitvadi, 1977, p. 292]. Lokahitvadi, himself a Brahmin, described his fellow-castemen as ignorant, greedy, indolent, corrupt and arrogant [Lokahitvadi, 1977, Pp. 183-216].

Atre not merely describes the all-round moral degradation but also suggests that the omnipresence of evil has shaped society's thinking about morals in a peculiar manner. After telling us that members of criminal tribes consider their profession as ordained by God and age-old tradition, at one place he says, '.... only the victim (of robbery, etc.) sheds tears. But nobody feels that such caste-duty is destructive of society, leave alone being pained at it. If such a tribe harms the interests of others, the third parties say, "Such things will always happen. It is the craft of that tribe. How would they fill their belly otherwise? What is the point in punishing them?"' (p. 169). 'In *swarajya* there was an open vogue of corruption and the corrupt used to be proud of their doings. *Vatandars* do not blame one another for corrupt practices and cheating; on the contrary, they laugh at the uncorrupt as simpletons ... if people are indifferent to a sin like the misappropriation of another man's property and should consider it as an art, is this not a sign of great moral decay?' (p. 154).

Atre feels that this state of affairs is the result of a system which has outlived its purpose. In older times 'farmers were few and cultivable land in plenty' (p. 119) and there was room therefore for all sorts of people to engage in useful economic activities and *vatandars* of all kinds did not constitute much of a burden on the farming community. But then later population increased, cultivation reached its limits, new laws about forests, etc., restricted farmer's access to natural wealth, domestic industry collapsed and the burden of hangers-on and parasites became unbearable leading to all-round moral degradation.

However, one tends to feel that it was not merely changing circumstances that led to the social and moral *malaise* that Atre speaks of. The deeper cause, one suspects, is the Economics of the caste system which left no incentive to work, which could not accommodate new groups into its economic network, which could not provide socially useful new occupations to those who lost the earlier ones. In other words, the economic system, founded on caste-occupation identity was basically unviable. Atre shows consciousness of this fact when he says, '... in the system of *jati-dharma* (caste duty, i.e., caste-occupation identity) and the *vatan* system, no account was taken of such low proclivities of man as indolence, greed and selfishness' (p. 147). 'Those who first acquired *vatans* must have doubtless been men of remarkable merit and they may have felt, owing to filial sentiment, that their own virtues will pass undiluted into their progeny and will get heightened. But human experience tells us that this assumption is contrary to the laws of nature'

(p. 146). 'If we think with unprejudiced mind we have to admit that the *vatan* system based on caste occupation did not achieve a balance between work and reward and, if at all it was achieved some time in the past, it did not survive' (p. 143).

If the system is inherently faulty, the twin evils of stagnation and parasitism must have held sway over the Hindu society throughout the history of caste in India and only got worse with adverse exogenous factors, such as growth of population, shortage of land, collapse of domestic industry, etc. - culminating in the truly sorry state of affairs in Maharashtrian villages, in the late nineteenth and early twentieth centuries which Atre portrays with such acumen and vividness.

We have no record of how *balutedari* worked in ancient and medieval times but we have symptoms galore of moral decay and a generally amoral attitude. About the latter Norman Brown observes, 'The Universe is a gigantic blend, with the pleasant and the unpleasant mingled in a confusion which indicates that social ethics is relative, not an absolute subject. The ideal of individual conduct, therefore, is that of one's own segment of society... Hence the religious teacher has one set of duties; the thief, or a member of a criminal caste, has quite another; but each should live up to the best traditions of his profession' [Brown, 1978, Pp. 112-13].

How does one explain the moral laxity on the one hand and the peculiar tolerance, bordering on indulgence, shown to crime, the absence of any repugnance towards evident and gross immorality, on the other? I venture to suggest that to the extent an ethical ideology reflects social reality, the answer, at least in part, is to be found in a system which makes parasitism the only means of living available to some sections of population.

Fuller discussion of this theme requires the study of the Economics of caste not merely in the rural areas but also in the towns and cities. This is a large subject and Atre's stimulating monograph beckons scholars to turn their eyes towards it.[4]

NOTES

1. Pandita Ramabai (1858-1922), a Sanskrit scholar, converted to Christianity in 1883, championed causes of women's education and social reform.

2. A historical review of *balutedari* is contained in two papers by Kulkarni [Kulkarni, 1988, 1991-92]

3. 'Baliraja', after a mythical king of the same name, is used as an honorific for a person known for his generosity. 'Bali' or 'Baliraja' is supposed to symbolically represent a peasant king cheated out of his lands (kingdom) by a jealous God, taking advantage of his excessive generosity.

4. A preliminary attempt is made by the present author [See Deshpande, 1998].

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COLONIAL ECONOMIC DRAIN FROM INDIA - A REAPPRAISAL

A Reluctant Rejoinder

N.V. Sovani

I am grateful to Banerji for condescending to write a response to my 'laboured article' interrupting his busy research schedule. Being pointed out as the only exception among his reviewers I felt like having written a minority minute of dissent to an otherwise unanimous majority report. Instead of admiring and praising the elegance and subtlety of Banerji's theoretical formulation, commended as correct on high, I dared to verify it and found it wanting. The comparative and historical evidence from Australia, Canada and the USA (the few countries for which the required statistical data for the relevant period was available) for this purpose is, I am told, out of court because such comparison is not qualified. 'Neither size, nor population, nor wealth, nor the external transfers being swamped many times over by net inflow of capital qualify this comparison'. This amounts to saying that India's was a unique case incomparable with any other country for which the required information was available. A unique case can never serve as basis for a general theoretical proposition. The position is so obdurate and oracular that no further debate is possible or necessary. In the circumstances, though this can be done, I see no point in meeting the other points that Banerji raises. I am happy to be in the minority of one.

DOCUMENTATION

The purpose of this section is to make available to the readers official documents such as reports of committees, commissions, working groups, task forces, etc., appointed by various ministries, departments, and agencies of central and state governments which are not readily accessible either because they are old, or because of the usual problems of acquiring governmental publications, or because they were printed but not published, or because they were not printed and remained in mimeographed form. It will be difficult and probably not worthwhile to publish the documents entirely. We shall publish only such parts of them as we think will interest our readers. The readers are requested to send their suggestions regarding official documents or parts thereof for inclusion in this section.

In the present section we publish:

Extracts of the Judgement of Supreme Court of India on *Kesavananda v. State of Kerala* [*All India Reporter*, 1973, Supreme Court, p. 1461, Vol. 60, Case 333].

KESAVANANDA V. *STATE OF KERALA*
ALL INDIA REPORTER 1973 SUPREME COURT 1461
(VOLUME 60 CASE 333)

Writ Petitions Nos. 135/70, 351-352, 373-374 and 400 of 1972, D/- 24-4-1973.

PER SIKRI, S.M., CHIEF JUSTICE

92. The history of the shaping of the Preamble would show that the Preamble was in conformity with the Constitution as it was finally accepted. Not only was the Constitution framed in the light of the Preamble but the Preamble was ultimately settled in the light of the Constitution.

292. It seems to me that reading the Preamble, the fundamental importance of the freedom of the individual, indeed its inalienability, and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of provisions like Articles 52, 53 and various other provisions to which reference has already been made, an irresistible conclusion emerges that it was not the intention to use the word 'amendment' in the widest sense.

293. It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state.

294. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament, that the expression 'amendment of this Constitution' has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents.

295. This conclusion is reinforced if I consider the consequences of the contentions of both sides. The respondents, who appeal fervently to democratic principles, urge that there is no limit to the powers of Parliament to amend the Constitution. Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-thirds majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. This would no doubt invite extra-constitutional revolution. Therefore, the appeal by the respondents to democratic principles and the necessity of having absolute amending power to prevent a revolution to buttress their contention is rather fruitless because, if their contention is accepted, the very democratic principles, which they appeal to, would disappear and a revolution would also become a possibility.

296. However, if the meaning I have suggested is accepted a social and economic revolution can gradually take place while preserving the freedom and dignity of every citizen.

297. For the aforesaid reasons, I am driven to the conclusion that 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 of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated reasonable abridgments of fundamental rights can be effected in the public interest.

298. It is of course for Parliament to decide whether an amendment is necessary. The Courts will not be concerned with the wisdom of the amendment.

299. If this meaning is given it would enable Parliament to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen.

300. It is urged by Mr. Seervai that we would be laying down a very unsatisfactory test which it would be difficult for the Parliament to comprehend and follow. He said that the Constitution-makers had discarded the concept of 'due process' in order to have something certain,

and they substituted the words 'by authority of law' in Article 21. I am unable to see what bearing the dropping of the words 'due process' has on this question. The Constitution itself has used words like 'reasonable restrictions' in Article 19 which do not bear an exact meaning, and which cannot be defined with precision to fit in all cases that may come before the Courts; it would depend upon the facts of each case whether the restrictions imposed by the legislature are reasonable or not. Further as Lord Reid observed in *Ridge* v *Baldwin*, 1964 AC 40 (64-65):

> In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But *I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist.* The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the Courts is much more definite than that (emphasis supplied).

301. It seems to me that the concept of amendment within the contours of the Preamble and the Constitution cannot be said to be a vague and unsatisfactory idea which Parliamentarians and the public would not be able to understand.

302. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended, provided in the result, the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and Democratic forms of Government;

(3) Secular character of the Constitution;

(4) Separation of powers between the legislature, the executive and the judiciary; (and)

(5) Federal character of the Constitution.

303. The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.

304. The above foundation and the above basic features are easily discernible not only from the Preamble but the whole scheme of the Constitution.

406. It is contended on behalf of the respondents that the 24th Amendment does enlarge the power of Parliament to amend the Constitution. ... (A)s Article 368 clearly contemplates amendment of Article 368 itself, Parliament can confer additional powers of amendment on it.

408. It seems to me that it is not legitimate to interpret Article 368 in this manner. Clause (e) of the proviso does not give any different power than what is contained in the main article. The meaning of the expression 'Amendment of the Constitution' does not change when one reads the proviso. If the meaning is the same, Article 368 can only be amended so as not to change its identity completely. Parliament, for instance, could not make the Constitution uncontrolled by changing the prescribed two-thirds majority to simple majority. Similarly, it cannot get rid of the true meaning of the expression 'Amendment of the Constitution' so as to derive power to abrogate fundamental rights.

409. If the words 'notwithstanding anything in the Constitution' are designed to widen the meaning of the words 'Amendment of the Constitution', it would have to be held void as beyond the amending power. But I do not read these to mean this. They have effect to get rid of the argument that Article 248 and Entry 97 List I contains the power of amendment. Similarly, the insertion of the words 'in exercise of its constituent power' only serves to exclude Article 248 and Entry 97, List I and emphasize that it is not

ordinary legislative power that Parliament is exercising under Article 368 but legislative power of amending the Constitution.

410. It was said that if Parliament cannot increase its power of amendment, clause (d) of Section 3 of the 24th Amendment, which makes Article 13 inapplicable to an amendment of the Constitution, would be bad. I see no force in this contention. Article 13 (2), as existing previous to the 24th Amendment as interpreted by the majority in *Golak Nath's* case, 1967, prevented legislatures from taking away or abridging the rights conferred by Article 13. In other words, any law which abridged a fundamental right even to a small extent was liable to be struck down. Under Article 368, Parliament can amend every article of the Constitution as long as the result is within the limits already laid down by me. The amendment of Article 13 (2) does not go beyond the limits laid down because Parliament cannot even after the amendment abrogate or authorise abrogation or the taking away of fundamental rights. After the amendment now a law, which has the effect of merely abridging a right while remaining within the limits laid down, would not be liable to be struck down.

PER JUSTICE SHELAT AND JUSTICE GROVER

495. All the six writ petitions involve common questions as to the validity of the 24th, 25th and 29th amendments to the Constitutions.

497. .... On the side of the petitioners, it is maintained *inter alia* that the power of the amending body (Parliament) under Article 368 is of a limited nature. The Constitution gave the Indian citizens the basic freedoms and a polity or a form of government which were meant to be lasting and permanent. Therefore, the amending power does not extend to alteration or destruction of all or any of the essential features, basic elements and fundamental principles of the Constitution which power, it is said, vests in the Indian people alone who gave the Constitution to themselves, as is stated in its Preamble.

498. The respondents, on the other hand, claim an unlimited power for the amending body. It is claimed that it has the full constituent power which a legal sovereign can exercise provided the conditions laid down in Article 368 are satisfied. The content and amplitude of the power is so wide that, if it is so desired, all rights contained in Part III (Fundamental Rights) such as freedom of speech and expression, the freedom to form associations or unions and the various other freedoms guaranteed by Article 19(1) as also the right to freedom of religion as contained in Articles 25 to 28 together with the protection of interests of minorities (to mention the most prominent ones) can be abrogated and taken away. Similarly, Article 32 which confers the right to move this court, if any fundamental right is breached, can be repealed or abrogated. The directive principles in Part IV can be altered drastically or even abrogated. It is claimed that democracy can be replaced by any other form of government which may be wholly undemocratic, the federal structure can be replaced by a unitary system by abolishing all the States and the right of judicial review can be completely taken away. Even the Preamble which declares that the People of India gave to themselves the Constitution, to constitute India into a Sovereign Democratic Republic for securing the great objectives mentioned therein can be amended; indeed, it can be completely repealed. Thus, according to the respondents, short of total abrogation or repeal of the Constitution, the amending body is omnipotent under Article 368 and the Constitution can, at any point of time, be amended by way of variation, addition or repeal so long as no vacuum is left in the governance of the country.

499. These petitions which have been argued for a very long time raise momentous issues of great constitutional importance. Our Constitution is unique, apart from being the longest in the world. It is meant for the second largest population with diverse people speaking different languages and professing varying religions. It was chiselled and shaped by great political leaders and legal luminaries, most of whom, had taken an active part in the struggle for freedom from the British yoke and who knew what domination of

a foreign rule meant in the way of deprivation of basic freedoms and from the point of view of exploitation of the millions of Indians. The Constitution is an organic document which must grow and it must take stock of the vast socio-economic problems, particularly, of improving the lot of the common man consistent with his dignity and the unity of the nation.

500. We may observe at the threshold that we do not propose to examine the matters raised before us on the assumption that Parliament will exercise the power in the way claimed on behalf of the respondents nor did the latter contend that it will be so done. But while interpreting constitutional provisions it is necessary to determine their width or reach; in fact the area of operation of the power, its minimum and maximum dimensions cannot be demarcated or determined without fully examining the rival claims. Unless that is done, the ambit, content, scope and extent of the amending power cannot be properly and correctly decided.

513. It is more proper, however, to look for the true 'meaning' of the word 'amendment' in the Constitution itself rather than in the dictionaries. Let us first analyse the scheme of Article 368 itself as it stood before the 24th Amendment.

(i) The expression 'amendment of the Constitution' is not defined or explained in any manner although in other Parts of the Constitution the word 'amend' as will be noticed later, has been expanded by use of the expression 'amend by way of addition, variation or repeal'.

(ii) The power in respect of amendment has not been conferred in express terms. It can be spelt out only by necessary implication.

(iii) The proviso uses the words 'if such amendment seeks to make any change in'. It does not use the words 'change of' or 'change' simpliciter.

(iv) The provisions of the Constitution mentioned in the proviso do not show that the basic structure of the Constitution can be changed if the procedure laid down therein is followed. For instance, clause (a) in the proviso refers to Articles 54 and 55 which relate to the election of the President. It is noteworthy that Article 52, which provides that there shall be a President of India, and Article 53, which vests the power of the Union in the President and provides how it shall be exercised, are not included in clause (a). It is incomprehensible that the Constitution-makers intended that although the ratification of the legislatures of the requisite number of States should be obtained if any changes were to be made in Articles 54 and 55, but that no such ratification was necessary if the office of the President was to be abolished and the executive power of the Union was to be exercised by some other person or authority.

(v) Another Article which is mentioned in clause (a) is Article 73 which deals with the extent of the executive power of the Union. So far as the Vice-President is concerned there is no mention of the relevant Articles relating to him. In other words the States have been given no voice in the question whether the office of the Vice-President shall be continued or abolished or what the method of his election would be.

(vi) The next Article mentioned in clause (a) is 162 which deals with the extent of the executive power of the States. The Articles relating to the appointment and conditions of service of a Governor, Constitution and functions of his council of ministers as also the conduct of business are not mentioned in clause (a) or any other part of the proviso.

(vii) Along with Articles 54, 55, 73 and 162, Article 241 is mentioned in clause (a) of the proviso. This Article dealt originally only with the High Courts for States in Part C of the First Schedule.

(viii) Chapter IV of Part V of the Constitution deals with the Union Judiciary and Chapter V of Part VI with the High Courts in the States. Although these have been included in clause (b) of the proviso it is surprising that Chapter VI of Part VI which relates to Subordinate Judiciary is not mentioned at all, which is the immediate concern of the States.

(ix) Chapter I of Part XI which deals with legislative relations between the Union and the States is included in clause (b) of the proviso but Chapter II of that Part which deals with Administrative Relations between the Union and the States and various other matters in which the

States would be vitally interested are not included.

(x) The provisions in the Constitution relating to services under the State as also with regard to Trade and Commerce are not included in the proviso.

(xi) Clause (c) of the proviso mentions the Lists in the Seventh Schedule. Clause (d) relates to the representation of States in Parliament and clause (e) to the provisions of Article 368 itself.

514. The net result is that the provisions contained in clauses (a) and (b) of the proviso do not throw any light on the logic, sequence or systematic arrangement in respect of the inclusion of those Articles which deal with the whole of the federal structure. These clauses demonstrate that the reason for including certain Articles and excluding others from the proviso was not that all Articles dealing with the federal structure or the States had been selected for inclusion in the proviso. The other unusual result is that if the fundamental rights contained in Part III have to be amended that can be done without complying with the provisions of the proviso. It is difficult to understand that the Constitution makers should not have thought of ratification by the States if such important and material rights were to be abrogated or taken away wholly or partially. It is also interesting that in order to meet the difficulty created by the omission of Articles 52 and 53 which relate to there being a President in whom the executive functions of the Union would vest, the learned Solicitor General sought *to read by implication* the inclusion of those Articles because, according to him, the question of election cannot arise with which Articles 54 and 55 are concerned if the office of President is abolished.

515. We may next refer to the use of the words 'amendment' or 'amended' in other articles of the Constitution. In some articles these words in the context have a wide meaning and in another context they have a narrow meaning. The group of articles which expressly confer power on the Parliament to amend are five including Article 368. The first is Article 4. It relates to laws made under Articles 2 and 3 to provide for amendment of the First and the Second Schedules and supplemental, incidental and consequential matters. The second Article is 169 which provides for abolition or creation of Legislative Councils in States. The third and the fourth provisions are paras 7 and 21 of the 5th and 6th Schedules, respectively, which have to be read with Article 244 and which deal with the administration of Scheduled Areas and Tribal Areas. The expression used in Articles 4 and 169 is 'amendment'. In paras 7 and 21 it is the expanded expression 'amend by way of addition, variation or repeal' which has been employed. Parliament has been empowered to make these amendments by law and it has been expressly provided that no such law shall be deemed to be an amendment of the Constitution for the purpose of Article 368.

516. It is apparent that the word 'amendment' has been used in a narrower sense in Article 4. The argument that if it be assumed that Parliament is invested with wide powers under Article 4 it may conceivably exercise power to abolish the legislative and the judicial organs of the State altogether was refuted by this court (in) *Mangal Singh* v. *Union India* (1967), by saying that a State cannot be formed, admitted or set up by law under Article 4 by the Parliament which does not conform to the democratic pattern envisaged by the Constitution. Similarly, any law which contains provisions for amendment of the Constitution for the purpose of abolition or creation of legislative councils in States is only confined to that purpose and the word 'amendment' has necessarily been used in a narrow sense. But in Paras 7 and 21, the expanded expression is employed and indeed an attempt was made even in the Constituent Assembly for the insertion of a new clause before clause (a) of draft Article 304 (Present Article 368). The amendment* (No. 3,239) was proposed by Mr. H.V. Kamath and it was as follows:

> Any provision of this Constitution may be amended, whether by way of variation, addition or repeal, in the manner provided in this article.

* *Constituent Assembly Debates*, Vol. 9, p. 1,663.

Mr. Kamath had moved another amendment in draft Article 304 to substitute the words 'it shall upon presentation to the President receive his assent'. Both these amendments were negatived by the Constituent Assembly.† It is noteworthy that the 24th amendment as now inserted has introduced substantially the same amendments which were not accepted by the Constituent Assembly.

519. Dr. B. R. Ambedkar who was not only the Chairman of the Drafting Committee but also the main architect of the Constitution made it clear that the articles of the Constitution were divided into different categories: the first category was the one which consisted of articles which could be amended by the Parliament by a bare majority; the second set of articles were such which required the two-thirds majority. .... The scheme of the amending provisions outlined by Dr. B.R. Ambedkar seems to indicate that the Constitution makers had in mind only one distinction between the amending power conferred by other Articles and Article 368. .... It appears that the statement in the articles and provisions containing the amending power other than Article 368 that any amendment made under those articles would not amount to an amendment under Article 368 merely embodied the distinction emphasised by Dr. B.R. Ambedkar that one category could be amended by the Parliament by a bare majority and all the other articles could be amended by the said body but only by following the form and manner prescribed by Article 368.

520. According to Mr. Palkhivala there can be three possible meanings of amendment:

(i) to improve or better; to remove an error; the question of improvement being considered from the stand point of the basic philosophy underlying the Constitution but subject to its essential features;

(ii) to make changes which may not fall within (i) but which do not alter or destroy any of the basic features, essential elements or fundamental principles of the Constitution; and

(iii) to make any change whatsoever including changes falling outside (ii).

He claims that the preferable meaning is that which is contained in (i) but what is stated in (ii) is also a possible construction. Category (iii) should be ruled out altogether. Categories (i) and (ii) have a common factor, namely, that the essential features cannot be damaged or destroyed.

521. On behalf of the respondents it is not disputed that the words 'amendment of this Constitution' do not mean repeal or abrogation of this Constitution. The amending power, however, is claimed on behalf of the respondents to extend to addition, alteration, substitution, modification, deletion of each and every provision of the Constitution. The argument of the Attorney General is that the amending power in Article 368 as it stood before the 24th amendment and as it stands now has always been and continues to be the constituent power, e.g., the power to deconstitute or reconstitute the Constitution or any part of it. Constitution at any point of time cannot be so amended by way of variation, addition or repeal as to leave a vacuum in the government of the country. The whole object and necessity of amending power is to enable the Constitution to continue and such a constituent power unless it is expressly limited in the Constitution itself, can by its very nature have no limit because if any such limit is assumed, although not expressly found in the Constitution, the whole purpose of an amending power will be nullified. It has been pointed out that in the Constitution First Amendment Act which was enacted soon after the Constitution of India came into force, certain provisions were inserted, others substituted or omitted and all these were described as amendments of the articles mentioned therein. In the context of the Constitution, amendment reaches every provision including the Preamble and there is no ambiguity about it which may justify having resort to either looking at the other Articles for determining the ambit of the amendatory power or taking into consideration the Preamble or the scheme of the Constitution or other permissible aids to construction.

† *Constituent Assembly Debates*, Vol. 9, p. 1,663.

523. It is not possible to accept the argument on behalf of the respondents that amendment can have only one meaning. This word or expression has several meanings and we shall have to determine its true meaning as used in the context of Article 368 by taking assistance from the other permissible aids to construction. We shall certainly bear in mind the well known principles of interpretation and construction, particularly, of an instrument like a Constitution. A Constitution is not to be construed in any narrow and pedantic sense. A broad and liberal spirit should inspire those whose duty it is to interpret it. ...

'The question, then, is one of construction and in the ultimate resort must be determined upon the actual words used read not in a vacuo but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact, and the construction must hold a balance between all its parts' [Lord Wright in *James* v. *Commonwealth of Australia*, 1936].

Apart from the historical background and the scheme of the Constitution the use of the Preamble has always been made and is permissible if the word amendment has more than one meaning. ... (T)he words should never be interpreted in vacuo because few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. ... 'it is to read the statute as a whole and ask one self the question:

'In this state, in this context, relating to this subject-matter, what is the true meaning of that word'?

We shall first deal with the Preamble in our Constitution. The Constitution makers gave to the Preamble the pride of place. It embodied in a solemn form all the ideals and aspirations for which the country had struggled during the British regime and a Constitution was sought to be enacted in accordance with the genius of the Indian people. It certainly represented an amalgam of schemes and ideas adopted from the Constitutions of other countries. But the constant strain which runs throughout each and every article of the Constitution is reflected in the Preamble which could and can be made sacrosanct. It is not without significance that the Preamble was passed only after draft articles of the Constitution had been adopted with such modifications as were approved by the Constituent Assembly. The Preamble was, therefore, meant to embody in a very few and well-defined words the key to the understanding of the Constitution.

530. The history of the drafting and the ultimate adoption of the Preamble shows:

(1) that it did not 'walk before the Constitution' as is said about the Preamble to the United States Constitution;

(2) that it was adopted last as a part of the Constitution;

(3) that the principles embodied in it were taken mainly from the Objectives Resolution;

(4) the Drafting Committee felt, it should incorporate in it 'the essential features of the new State'; and

(5) that it embodied the fundamental concept of sovereignty being in the people.

537. There is a clear recital in the Preamble that the people of India gave to themselves this Constitution on the 26th day of November, 1949. Even if the Preamble was actually adopted by the Constituent Assembly at a later date, no one can question the statement made in the Preamble that the Constitution came into force on the date mentioned therein. The Preamble itself must be deemed by a legal fiction to have come into force with effect from 26th November, 1949. Even if this is a plausible conclusion, it does not appear to be sufficient to support the observations in the *Berubari* case that the Preamble was not a part of the Constitution. To our mind, it hardly makes any substantial difference whether the Preamble is a part of the Constitution, or not. The Preamble serves several important purposes. Firstly, it indicates the source from which the Constitution comes, viz., the people of India. Next it contains the enacting clause which brings into force the Constitution. In the third place, it declares the great rights and freedoms which the people of India intended to secure to all citizens and the basic type of government and polity which was

to be established. From all these, if any provision in the Constitution had to be interpreted and if the expressions used therein were ambiguous, the Preamble would certainly furnish valuable guidance in the matter, particularly when the question is of the correct ambit, scope and width of a power intended to be conferred by Article 368.

538. The stand taken up on behalf of the respondents that even the Preamble can be varied, altered or repealed, is an extraordinary one. It may be true about ordinary statutes but it cannot possible be sustained in the light of the historical background, the Objectives Resolution which formed the basis of the Preamble and the fundamental position which the Preamble occupies in our Constitution. It constitutes a land-mark in India's history and sets out as a matter of historical fact what the people of India resolved to do for moulding their future destiny. It is unthinkable that the Constitution makers ever conceived of a stage when it would be claimed that even the Preamble could be abrogated or wiped out.

539. If the Preamble contains the fundamentals of our Constitution, it has to be seen whether the word amendment in Article 368 should be so construed that by virtue of the amending power the Constitution can be made to suffer a complete loss of identity or the basic elements on which the constitutional structure has been erected, can be eroded or taken away. ....

540. Now let us examine the effect of the declarations made and the statements contained in the Preamble on interpretation of the word 'amendment' employed in Article 368 of the Constitution. The first thing which the people of India resolved to do was to constitute their country into a Sovereign Democratic Republic. No one can suggest that these words and expressions are ambiguous in any manner. Their true import and connotation is so well-known that no question of any ambiguity is involved. The question which immediately arises is whether the words amendment or amended as employed in Article 368 can be so interpreted as to confer a power on the amending body to take away any of these three fundamental and basic characteristics of our polity. Can it be said or even suggested that the amending body can make institutions created by our Constitution undemocratic as opposed to democratic; or abolish the office of the President and, instead, have some other head of the State who would not fit into the conception of a 'Republic'? The width of the power claimed on behalf of the respondents has such a large dimension that even the above part of the Preamble can be wiped out from which it would follow that India can cease to be a Sovereign Democratic Republic and can have a polity denuded of sovereignty, democracy and republican character.

541. No one has suggested — it would be almost unthinkable for anyone to suggest — that the amending body acting under Article 368 in our country will ever do any of the things mentioned above, namely, change the Constitution in such a way that it ceases to be a Sovereign Democratic Republic. But while examining the width of the power, it is essential to see its limits, the maximum and the minimum; the entire ambit and magnitude of it and it is for that purpose alone that this aspect is being examined. While analysing the scope and width of the power claimed by virtue of a constitutional provision, it is wholly immaterial whether there is a likelihood or not of such an eventuality arising.

542. Mr. Palkhivala cited example of one country after another in recent history where from a democratic Constitution the amending power was so utilized as to make that country wholly undemocratic resulting in the negation of democracy by establishment of rule by one party or a small oligarchy. We are not the least impressed by these instances and illustrations. In the matter of deciding the questions which are before us, we do not want to be drawn into the political arena which, we venture to think, is 'out of bounds' for the judiciary and which tradition has been consistently followed by this Court.

543. Since the respondents themselves claim powers of such wide magnitude that the results which have been briefly mentioned can flow apart from others which we shall presently notice, the

consequences and effect of suggested construction have to be taken into account as has been frequently done by this Court. Where two constructions are possible the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory.

547. According to Mr. Palkhivala, the test of the true width of a power is not how probable it is that it may be exercised but what can possibly be done under it, that the abuse or misuse of power is entirely irrelevant, that the question of the extent of the power cannot be mixed up with the question of its exercise, and that when the real question is as to the width of the power, expectation that it will never be used is as wholly irrelevant as an imminent danger of its use. The Court does not decide what is the best and what is the worst. It merely decides what can possibly be done under a power if the words conferring it are so construed as to have an unbounded and limitless width, as claimed on behalf of the respondents.

548. It is difficult to accede to the submission on behalf of the respondents that while considering the consequences with reference to the width of an amending power contained in a Constitution any question of its abuse is involved. It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution makers or for the Parliament or the legislature. But that the real consequences can be taken into account while judging the width of the power is well settled. The Court cannot ignore the consequences to which a particular construction can lead while ascertaining the limits of the provisions granting the power. According to the learned Attorney-General the declaration in the Preamble to our Constitution about the resolve of the people of India to constitute it into a Sovereign Democratic Republic is only a declaration of an intention which was made in 1947 and it is open to the amending body now under Article 368 to change the Sovereign Democratic Republic into some other kind of polity. This by itself shows the consequence of accepting the construction sought to be put on the material words in that article for finding out the ambit and width of the power conferred by it.

549. The other part of the Preamble may next be examined. The Sovereign Democratic Republic has been constituted to secure to all the citizens the objectives set out. The attainment of those objectives forms the fabric of and permeates the whole scheme of the Constitution. While most cherished freedoms and rights have been guaranteed the government has been laid under a solemn duty to give effect to the Directive Principles. Both Parts III and IV which embody them have to be balanced and harmonised — then alone the dignity of the individual can be achieved. It was to give effect to the main objectives in the Preamble that Parts III and IV were enacted. The three main organs of government,' legislative, executive and judiciary', and the entire mechanics of their functioning were fashioned in the light of the objectives in the Preamble, the nature of polity mentioned therein and the grand vision of a united and free India in which every individual high or low will partake of all that is capable of achievement. We must, therefore, advert to the background in which Parts III and IV came to be enacted as they essentially form a basic element of the Constitution without which its identity will completely change.

554. It is pointed out on behalf of the petitioners that the scheme of Article 368 itself contains intrinsic pieces of evidence to give a limited meaning to the word 'amendment'. Firstly, Article 368 refers to 'an amendment of this Constitution', and the result of the amendment is to be that the 'Constitution shall stand amended'. As the Constitution has an identity of its own, an amendment, made under a power howsoever widely worded cannot be such as would render the Constitution to lose its character and nature. In other words, an amendment cannot be such as would denude the Constitution of its identity. The amending power is conferred on the two Houses of Parliament, whose identity is clearly established by the provisions in the Constitution. It must be the Parliament of the Sovereign

Democratic Republic. It is not any Parliament which has the amending power, but only that Parliament which has been created by the Constitution. In other words, it must continue to be the Parliament of a sovereign and democratic republic. The institution of States (regional) must continue to exist in order that they may continue to be associated with the amending power in the cases falling under the proviso. If the respondents are right, the proviso can be completely deleted since Article 368 itself can be amended. This would be wholly contrary to the scheme of Article 368 because two agencies are provided for amending the provisions covered by the proviso. One agency cannot destroy the other by the very exercise of the amending power. The effect of limitless amending power in relation to amendment of Article 368 cannot be conducive to the survival of the Constitution because the amending power can itself be taken away and the Constitution can be made literally unamendable or virtually unamendable by providing for an impossible majority.

555. While examining the above contentions, it is necessary to consider the claim of the respondents that the amending body under Article 368 has the full constituent power. It has been suggested that on every occasion the procedure is followed as laid down in Article 368 by the two Houses of Parliament and the assent of the President is given, there is the reproduction of the functions of a Constituent Assembly. In other words, the Parliament acts in the same capacity as a Constituent Assembly when exercising the power of amendment under the said Article. This argument does not take stock of the admission made on behalf of the respondents that the entire Constitution cannot be repealed or abrogated by the amending body. Indisputably, a Constituent Assembly specially convened for the purpose would have the power to completely revise, repeal or abrogate the Constitution. This shows that the amending body under Article 368 cannot have the same powers as a Constituent Assembly. Even assuming that there is a reference on the nature of power between enacting a law and making an amendment, both the powers are derived from the Constitution. The amending body has been created by the Constitution itself. It can only exercise those powers with which it has been invested. And if that power has limits, it can be exercised only within those limits.

556. The respondents have taken up the position that even if the power was limited to some extent under Article 368, as it originally stood, that power could be enlarged by virtue of Clause (e) of the proviso. It must be noted that the power of amendment lies in the first part of Article 368. What Clause (e) in the proviso does is to provide that if Article 368 is amended, such an amendment requires ratification by the States, besides the larger majority provided in the main part. If the amending power under Article 368 has certain limits and is not unlimited, Article 368 cannot be so amended as to remove these limits nor can it be amended so as to take away the voice of the States in the amending process. If the Constitution makers were inclined to confer the full power of a Constituent Assembly, it could have been easily provided in suitable terms. If, however, the original power was limited to some extent, it could not be enlarged by the body possessing the limited power. That being so, even where an amending power is expressed in wide terms, it has to be exercised within the framework of the Constitution. It cannot abrogate the Constitution or frame a new Constitution or alter or change the essential elements of the constitutional structure. It cannot be overlooked that the basic theory of our Constitution is that 'Pouvoir Constituent' is vested in the people and was exercised, for and on their behalf, by the Constituent Assembly for the purpose of framing the Constitution.

557. To say, as has been said on behalf of the respondents, that there are only two categories of Constitutions, rigid or controlled and flexible or uncontrolled and that the difference between them lies only in the procedure provided for amendment, is an over-simplification. In certain Constitutions there can be procedural and/or substantive limitations on the amending power. The procedural limitations could be by way of a prescribed form and manner without the satisfaction of which no amendment can validly result. The form and manner may take different forms,

such as a higher majority either in the houses of the concerned legislature sitting jointly or separately or by way of a convention, referendum, etc. Besides these limitations, there can be limitations in the content and scope of the power. .... The true distinction between a controlled and an uncontrolled Constitution lies not merely in the difference in the procedure of amendment, but in the fact that in controlled Constitutions the Constitution has a higher status by whose touch-stone the validity of a law made by the legislature and the organ set up by it is subjected to the process of judicial review. Where there is a written Constitution which adopts the Preamble of sovereignty in the people, there is, firstly, no question of the law-making body being a sovereign body, for that body possesses only those powers which are conferred on it. Secondly, however representative it may be, it cannot be equated with the people. This is especially so where the Constitution contains a Bill of Rights, for such a Bill imposes restraints on that body, i.e., it negates the equation of that body with the people.

563. The meaning of the words 'amendment of this Constitution' as used in Article 368 must be such which accords with the true intention of the Constitution makers as ascertainable from the historical background, the Preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various Articles including Article 368. It is neither possible to give it a narrow meaning nor can such a wide meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the Constitution. Even the concession of the learned Attorney General and the Advocate General of Maharashtra that the whole Constitution cannot be abrogated or repealed and a new one substituted supports the conclusion that the widest possible meaning cannot be given to it.

564. Coming to the question of what has been called 'inherent and implied limitations' to the amending power in Article 368 of our Constitution, Mr. Palkhivala has maintained that inherent limitations are those which inhere in any authority from its very nature, character and composition whereas implied limitations are those which are not expressed but are implicit in the scheme of the Constitution conferring the power. He maintains that the 'rule is established beyond cavil that in constructing the Constitution of the United States, what is implied is as much a part of the instrument as what is expressed'.* Although the courts have rejected in various cases a plea that a particular inherent or implied limitation should be put upon some specific constitutional power, no court, says Mr. Palkhivala, has ever rejected the principle that such limitations which are fairly and properly deducible from the scheme of the Constitution should be read as restrictions upon a power expressed in general terms. Several decisions of our Court, of the Privy Council, Irish courts, Canadian and Australian courts have been cited in support of the contention advanced by him. The approach to this question has essentially to be to look at our own decisions first. They fall in two categories. In one category are those cases where limitations have been spelt out of constitutional provisions; the second category consists of such decisions as have laid down that there is an implied limitation on legislative power.

567. Before we go to cases decided by the courts in other countries it may be useful to refer to some of the constitutional provisions which are illustrative of the concept of implications that can be raised from the language and context thereof. The first provision in point is Article 368 itself. It has been seen at the stage of previous discussion that the power to amend is to be found in that Article only by implication as there is no express conferment of that power therein....

569. ....The oft-quoted words about the affirmative conferment of power and absence of express restriction on the power are used only to repel the contention that conditional legislation was barred by implication. (If) the principle (is laid down) that the powers in a Constitution must be conferred only in affirmative words, the argument of the respondents itself will suffer from

* *American Jurisprudence*, Edition-2, Vol. 16, p. 251.

the infirmity that it is only by necessary implication from the language of Article 368 (before the 24th Amendment) that the source of the amending power can be said to reside in that Article. There were no such words in express or affirmative terms which conferred such a power....

594. Indeed it has been said that the heart and core of a democracy lies in the judicial process. Judicial review is undertaken by the Courts 'not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution' [Chief Justice Patanjali Shastri, in *State of Madras* v. *V.G. Row*, 1952]. The respondents have also contended that to let the Court have judicial review over constitutional amendments would mean involving the Court in political questions. To this the answer may be given in the following words:

> 'The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law. For, where the dispute is, as here, not only between Commonwealth and citizens but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue, it is vain to invoke the voice of Parliament'.

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity, as is the case in the United States Constitution, but it envisages such a separation to a degree as was found in *Ranasinghe's* case, 1965. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances. Apart from that, as already stated the necessity for judicial decision on the competence or otherwise of an Act arises from the very federal nature of a Constitution. (Per Haldane, L. C., in *Attorney General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.*, 1914, and *Ex parte Walsh and Johnson.* In re Yates, 1925. The function of interpretation of Constitution being thus assigned to the judicial power of the State, the question whether the subject of a law is within the ambit of one or more powers of the legislature conferred by the Constitution would always be a question of interpretation of the Constitution. It may be added that at no stage the respondents have contested the proposition that the validity of a constitutional amendment can be the subject of review by this Court. The Advocate General of Maharashtra has characterised judicial review as undemocratic. That cannot, however, be so in our Constitution because of the provisions relating to the appointment of judges, the specific restriction to which the fundamental rights are made subject, the deliberate exclusion of the due process clause in Article 21, and the affirmation in Article 141 that judges declare but not make law. To this may be added the none too rigid amendatory process which authorises amendment by means of two-thirds majority and the additional requirement of ratification.

595. According to the learned Attorney General the entire argument on the basis of implied limitations is fundamentally wrong. He has also relied greatly on the decision in *Burah's* case, 1878, and other similar decisions. It is pointed out that there can be no inherent limitation on the power of amendment having regard to the purpose for which the power is needed. The argument about the non-amendability of the essential framework of the Constitution is illusive because every part of a Constitution document admits of the possibility of imperfect drafting or ambiguity. Even basic concepts or ideals undergo progressive changes. It has been strenuously urged that the Constitution, read as a whole, did not contemplate the perpetuation of the existing social and economic inequalities and a duty has been cast on the State to organise a new social order. The Attorney General quoted the opinion of several writers and authors in support of his contention that there must be express words of limitation in a provision which provides for amendment of the Constitution from which it follows that no implied limitations can be read therein.

596. The correct approach to the question of limitations which may be implied in any legislative provisions including a constitutional document has to be made from the point of view of interpretation. It is not a novel theory or a doctrine which has to be treated as an innovation of those who evolve heterodox methods to substantiate their own thesis. The argument that there are no implied limitations is a contradiction in terms. Implied limitations can only arise where there are no express limitations. The contention of the learned Attorney General that no implications can be read in an amending power in a Constitution must be repelled in the following words '.... a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied'.

597. We are equally unable to hold that in the light of the Preamble, the entire scheme of the Constitution, the relevant provisions thereof, and the context in which the material expressions are used in Article 368, no implied limitations arise to the exercise of the power of amendment. The respondents do not dispute that certain limitations arise by necessary implication, e.g., the Constitution cannot be abrogated or repealed in its entirety and that India's polity has to be of a Sovereign Democratic Republic, apart from several other implications arising from Article 368 which have been noticed.

598. The argument that the Nation cannot grow and that the objectives set out in the Preamble cannot be achieved, unless the amending power has the ambit and the width of the power of a Constituent Assembly itself or the People themselves, appears to be based on grounds which do not have a solid basis. The Constitution makers provided for development of the country in all the fields social, economic and political. The structure of the Constitution has been erected on the concept of an egalitarian society. But the Constitution makers did not desire that it should be a society where the citizen will not enjoy the various freedoms and such rights as are the basic elements of those freedoms, e.g., the right to equality, freedom of religion, etc., so that his dignity as an individual may be maintained. It has been strongly urged on behalf of the respondents that a citizen cannot have any dignity if he is economically or socially backward. No one can dispute such a statement but the whole scheme underlying the Constitution is to bring about economic and social changes without taking away the dignity of the individual. Indeed, the same has been placed on such a high pedestal that to ensure the freedoms, etc., their infringement has been made justiciable by the highest Court in the land. The dictum of Chief Justice Das, in *Kerala Education Bill* case, paints the true picture in which there must be harmony between Parts III and IV; indeed the picture will get distorted and blurred if any vital provision out of them is cut out or denuded of its identity.

599. The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen not the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind, there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated).

1. The supremacy of the Constitution.
2. Republican and Democratic form of Government and sovereignty of the country.
3. Secular and federal character of the Constitution.
4. Demarcation of power between the legislature, the executive and the judiciary.
5. The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
6. The unity and the integrity of the nation.

600. The entire discussion from the point of view of the meaning of the expression 'amendment' as employed in Article 368, and the limitations which arise by implications, leads to the result that the amending power under Article 368 is neither narrow nor unlimited. On the footing on which we have proceeded the validity of the 24th Amendment can be sustained if Article 368, as it originally stood and after the amendment, is read in the way we have read it. The insertion of

Articles 13(4) and 368(3) and the other amendments made will not affect the result, namely, that the power in Article 368 is wide enough to permit amendment of each and every Article of the Constitution by way of addition, variation or repeal so long as its basic elements are not abrogated or denuded of their identity.

PER JUSTICE HEGDE AND JUSTICE MUKHERJEA

635. In order to find out whether Parliament has the power to take away or abridge any of the Fundamental Rights in exercise of its power under Article 368, we must first ascertain the true scope of that Article. As seen earlier in *Sankari Prasad's* case, this Court ruled that the power to amend the Constitution is to be found in Article 368.... The provisions relating to the amendment of the Constitution are some of the most important features of any modern Constitution. All modern Constitutions assign an important place to the amending provisions.... It is difficult to believe that our Constitution-makers who were keenly conscious of the importance of the provision relating to the amendment of the Constitution and debated that question for several days, would have left this important power hidden in Entry 97 of List I leaving it to the off chance of the courts locating that power in that Entry. We are unable to agree with those learned Judges when they sought to place reliance on Article 245, Article 246 and Article 248, and Entry 97 of List I for the purpose of locating the power of amendment in the residuary power conferred on the Union. Their reasoning in that regard fails to give due weight to the fact that the exercise of the power under those articles is 'subject to the provisions of this Constitution'. Hardly few amendments to the Constitution can be made subject to the existing provisions of the Constitution. Most amendments of the Constitution must necessarily impinge on one or the other of the existing provisions of the Constitution. We have no doubt in our minds that Article 245 to Article 248 as well as the Lists in the VIIth Schedule merely deal with the legislative power and not with the amending power.

636. Now coming back to Article 368, it may be noted that it has three components; firstly, it deals with the amendment of the Constitution; secondly, it designates the body or bodies which can amend the Constitution, and lastly, it prescribes the form and the manner in which the amendment of the Constitution can be effected. The Article does not expressly confer power to amend; the power is necessarily implied in the Article. The Article makes it clear that the amendment of the Constitution can only be made by Parliament but in cases falling under the proviso, ratification by legislatures of not less than one half of the States is also necessary.... To restate the position, Article 368 deals with the amendment of the Constitution. The Article contains both the power and the procedure for amending the Constitution. No undue importance should be attached to the marginal note which says 'Procedure for amendment of the Constitution '. Marginal note plays a very little part in the construction of a statutory provision. It should have much less importance in construing a constitutional provision. The language of Article 368 to our mind is plain and unambiguous.... As the power to amend under the Article as it originally stood was only implied, the marginal note rightly referred to the procedure of amendment. The reference to the procedure in the marginal note does not negative the existence of the power implied in the Article.

637. The next question is whether the power conferred under Article 368 is available for amending each and every provision of the Constitution. The Article opens by saying 'An amendment of this Constitution' which means an amendment of each and every provision and part of the Constitution. We find nothing in that Article to restrict its scope. If we read Article 368 by itself, there can be no doubt that the power of amendment implied in that Article can reach each and every Article as well as every part of the Constitution.

648. It is true that this Court has characterised the Fundamental Rights as 'paramount'....., as 'sacrosanct'....., as 'inalienable and inviolable'....., as rights 'reserved by the people'....., and as 'transcendental'..... in several other cases. In so describing the Fundamental Rights in those cases, this Court could not have intended to say that the Fundamental Rights alone are the basic

elements or fundamental features of the Constitution. Mr. Palkhivala conceded that the basic elements and fundamental features of the Constitution are found not merely in Part III of the Constitution but they are spread out in various other parts of the Constitution. They are also found in some of the Directive Principles set out in Part IV of the Constitution and in the provisions relating to the sovereignty of the country, the Republication and the Democratic character of the Constitution. According to the Counsel, even the provisions relating to the unity of the country are basic elements of the Constitution.

649. It was urged that since even amendment of several provisions of minor significance requires the concurrence of the legislatures of the majority of the States it is not likely that the Constitution makers would have made the amendment of the provisions relating to Fundamental Rights a plaything of the Parliament. This argument, however, does not lead to any definite conclusion. It is not unlikely that the Constitution makers thought that the states are specially interested in the provisions mentioned in the proviso to Article 368, so that the amendment of those provisions should require ratification by the legislatures of majority of the States. When the language of Article 368 is plain, as we think it is, no question of construction of that Article arises. There is no need to delve into the intention of the Constitution makers.

650. Every Constitution is expected to endure for a long time. Therefore, it must necessarily be elastic. It is not possible to place the society in a strait-jacket. The society grows, its requirements change. The Constitution and the laws may have to be changed to suit those needs. No single generation can bind the course of the generations to come. Hence every Constitution wisely drawn up provides for its own amendment. We shall separately consider the contention of Mr. Palkhivala that our Constitution embodies certain features which are so basic that no free and civilised society can afford to discard them and in no foreseeable future can those features become irrelevant in this country. For the present we shall keep apart, for later consideration, Mr. Palkhivala's contention that the Parliament which is only a constituted body cannot damage or destroy the essential features of the Constitution.... (T)o implement the duties imposed on the State under Part IV, it may be necessary to abridge in certain respects the rights conferred on the citizens or individuals under Part III, as in the case of incorporation of clause 4 in Article 15 to benefit the backward classes and Scheduled Castes and Scheduled Tribes, and the amendment of Article 19(2) with a view to maintaining effectively public order and friendly relations with foreign States. Hence we are unable to construe the amending power in a narrow or pedantic manner. That power, under any circumstance, must receive a broad and liberal interpretation. How large it should be is a question that requires closer examination. Both on principle as well as on the language of Article 368, we are unable to accede to the contention that no right guaranteed by Part III can be abridged.

654. While interpreting a provision in a statute or Constitution the primary duty of the court is to find out the legislative intent. In the present case our duty is to find out the intention of the founding fathers in enacting Article 368. Ordinarily the legislative intent is gathered from the language used. If the language employed is plain and unambiguous, the same must be given effect to, irrespective of the consequences that may arise. But if the language employed is reasonably capable of more meanings than one, then the Court will have to call into aid various well settled rules of construction and, in particular, the history of the legislation - to find out the evil that was sought to be remedied and also in some cases the underlying purpose of the legislation - the legislative scheme and the consequences that may possibly flow from accepting one or the other of the interpretations because no legislative body is presumed to confer a power which is capable of misuse.

655. It was conceded at the bar that generally speaking, the word 'amendment', like most words in English or for that matter in any language, has no precise meaning. Unlike 'sale' or 'excise', it is not a term of law. It is capable of receiving a

wide meaning as well as a narrow meaning. The power to amend a Constitution in certain contexts may include even a power to abrogate or repeal that Constitution. It may under certain circumstances mean a power to effect changes within narrow limits. It may sometimes mean a power that is quite large but yet subject to certain limitations. To put it shortly, the word 'amendment' without more, is a colourless word. It has no precise meaning. It takes its colour from the context in which it is used. It cannot be interpreted in vacuo. Few words in English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of the context. As observed by Justice Holmes, in *Towne* v. *Eisner,* 1918, 'A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to circumstances and the time in which it is used'. We must read the word 'amendment' in Article 368 not in isolation but as occurring in a single complex instrument. Article 368 is a part of the Constitution. The Constitution confers various powers on legislatures as well as on other authorities. It also imposes duties on those authorities. The power conferred under Article 368 is only one such power. Unless it is plain from the constitutional scheme that the power conferred under Article 368 is a super power and is capable of destroying all other powers, as contended on behalf of the Union and the States, the various parts of the Constitution must be construed harmoniously for ascertaining the true purpose of Article 368.

656. In our Constitution unlike in the Constitution of the United States of America the words 'amendment' and 'amend' have been used to convey different meanings in different places. In some Articles they are used to confer a narrow power, a power merely to effect changes within prescribed limits - see Articles 4, 107(2), 111, 169 (2), 196 (2), 197 (2) and 200. Under Paragraph 7 of the Fifth Schedule as well as Paragraph 21 of the Sixth Schedule to the Constitution, a much larger power to amend those Schedules has been conferred on Parliament. That power includes power to amend 'by way of addition, variation or repeal . Similar is the position under the repealed Article 243 (2), Articles 252 (2) and 350 (5). It is true that the power to amend conferred under the Fifth and Sixth Schedules is merely a power to amend those Schedules but if the Constitution-makers were of the opinion that the word 'amendment' or 'amend' included within its scope, unless limited otherwise, a power to add, vary, or repeal, there was no purpose in mentioning in those Articles or parts 'amend by way of addition, variation or repeal'. In this connection, it may also be remembered that the Constituent Assembly amended Section 291 of the Government of India Act, 1935 on August 21, 1949 just a few days before it approved Article 368, i.e., on September 17, 1949. The amended Section 291 empowered the Governor-General to amend certain provisions of the 1935 Act 'by way of addition, modification or repeal'. From these circumstances, there is prima facie reason to believe that our Constitution makers made a distinction between a mere power to amend and a power to amend by way of 'addition, modification or repeal'. It is one of the accepted rules of construction that the Courts should presume that ordinarily the legislature uses the same words in a statute to convey the same meaning. If different words are used in the same statute, it is reasonable to assume that, unless the context otherwise indicates, the legislature intended to convey different meanings by those words. This rule of interpretation is applicable in construing a Constitution as well.

657. Now that we have come to the conclusion that the word 'amendment' in Article 368 is not a word of precise import and has not been used in the various Articles and parts of the Constitution to convey always the same precise meaning, it is necessary to take the aid of the other relevant rules of construction to find out the intention of the Constitution makers.

658. The question whether there is any implied limitation on the amending power under Article 368 has not been decided by this Court till now. That question did not come up for consideration in *Sankari Prasad's* case. In *Sajjan Singh's* case neither the majority speaking through Chief Justice Gajendragadkar nor Justice Hidayatullah

(as he then was) went into that question. But Justice Mudholkar did foresee the importance of that aspect. He observed in the course of his judgment:

'We may also have to bear in mind the fact that ours is a written Constitution. The Constituent Assembly which was the repository of sovereignty could well have created a sovereign Parliament on the British model. But instead it enacted a written Constitution, created three organs of State, made the Union executive responsible to Parliament and the State executive to the State Legislatures, erected a federal structure and distributed legislative power between Parliament and the State Legislatures; recognised certain rights as fundamental and provided for their enforcement, prescribed forms of oaths of office or affirmations which require those who subscribe to them to owe true allegiance to the Constitution and further require the members of the Union Judiciary and of the higher judiciary in the States, to uphold the Constitution. Above all, it formulated a solemn and dignified Preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution? It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368'?

659. For the first time in *Golak Nath's* case the contention that the power of amendment under Article 368 is subject to certain inherent and implied limitations was urged. Chief Justice Subba Rao, speaking for himself and four of his colleagues, while recognising the force of that contention refrained from pronouncing on the same. Justice Wanchoo, (as he then was) speaking for himself and two other Judges opined that the power under Article 368 is a very wide power but it may not include a power to abrogate the Constitution. He did explain what he meant by 'abrogate the Constitution'. Justice Hidayatullah, (as he then was) did not address himself to that question. Justice Bachawat, side-stepped that question by saying that the impugned amendments did not destroy any basic feature of the Constitution. The only Judge who rejected the contention that there are inherent or implied limitations on the amending power was Justice Ramaswami. From the above discussion it is seen that in cases that came up for consideration before this Court in the past, several Judges did consider the possibility of having some limitation on the amending power under Article 368 though they did not definitely pronounce on that question.

660. One of the well-recognised rules of construction is the rule laid down in *Heydon's* case. What was the mischief that the Constitution-makers intended to remedy? What was the purpose intended to be achieved by the Constitution? To answer this question it is necessary to make a brief survey of our Nationalist movement ever since 1885 and the objectives sought to be achieved by that movement.

664. From the Preamble it is quite clear that the two primary objectives that were before the Constituent Assembly were (1) to constitute India into a Sovereign Democratic Republic, and (2) to secure to its citizens the rights mentioned therein. Our founding fathers, at any rate, most of them had made immense sacrifices for the sake of securing those objectives. For them freedom from British Rule was an essential step to render social justice to the teeming millions in this country and to secure to one and all in this country the essential human rights. Their constitutional plan was to build a welfare state and an egalitarian society.

665. Now that we have set out the objectives intended to be achieved by our founding fathers, the question arises whether those very persons could have intended to empower the Parliament a body constituted under the Constitution to destroy the ideals that they dearly cherished and for which they fought and sacrificed.

666. If the nature of the power granted is clear and beyond doubt, the fact that it may be misused is wholly irrelevant. But, if there is reasonable doubt as to the nature of the power granted then

the Court has to take into consideration the consequences that might ensure by interpreting the same as an unlimited power. We have earlier come to the conclusion that the word 'amendment' is not an expression having a precise connotation. It has more than one meaning. Hence it is necessary to examine the consequence of accepting the contention of the Union and the States. Therefore let us understand the consequences of conceding the power claimed. According to the Union and the States that power *inter alia,* includes the power to (1) destroy the sovereignty of this country and make this country a satellite of any other country; (2) substitute the democratic form of government by monarchical or authoritarian form of government; (3) break up the unity of this country and form various independent States; (4) destroy the secular character of this country and substitute the same by a theocratic form of Government; (5) abrogate completely the various rights conferred on the citizens as well as on the minorities; (6) revoke the mandate given to the States to build a Welfare State; (7) extend the life of the two Houses of Parliament indefinitely; and (8) amend the amending power in such a way as to make the Constitution legally or at any rate practically unamendable. In fact, their contention was that the legal sovereignty, in the ultimate analysis rests only in the amending power. At one stage, Counsel for the Union and the States had grudgingly conceded that the power conferred under Article 368 cannot be used to abrogate the Constitution but later under pressure of questioning by some of us they changed their position and said that by 'abrogation' they meant repeal of the Constitution as a whole. When they were asked as to what they meant by saying that the power conferred under Article 368 cannot be used to repeal the Constitution, all that they said was that while amending the Constitution, at least one clause in the Constitution must be retained though every other clause or part of the Constitution including the Preamble can be deleted and some other provisions substituted. Their submission, in short, was this that so long as the expression the 'Constitution of India' is retained, every other Article or part of it can be replaced. They tried to tone down the effect of their claim by saying that, though legally, there is no limitation on the amending power, there are bound to be political compulsions which make it impermissible for Parliament to exercise its amending power in a manner unacceptable to the people at large. The strength of political reaction is uncertain. It depends upon various factors such as the political consciousness of the people, their level of education, strength of the various political organisations in the country, the manner in which the mass media is used and finally the capacity of the government to suppress agitations. Hence the peoples' will to resist an unwanted amendment cannot be taken into consideration in interpreting the ambit of the amending power. Extralegal forces work in a different plane altogether.

667. We find it difficult to accept the contention that our Constitution-makers after immense sacrifices for achieving certain ideals made provision in the Constitution itself for the destruction of those ideals. There is no doubt as men of experience and sound political knowledge, they must have known that social, economic and political changes are bound to come with the passage of time and the Constitution must be capable of being so adjusted as to be able to respond to those new demands. Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. In other words, one cannot legally use the Constitution to destroy itself. Under Article 368, the amended Constitution must remain 'the Constitution' which means the original Constitution. When we speak of the 'abrogation' or 'repeal' of the Constitution, we do not refer to any form but to substance. If one or more of the basic features of the Constitution are taken away to that extent the Constitution is abrogated or repealed. If all the basic features of the Constitution are repealed and some other

provisions inconsistent with those features are incorporated, it cannot still remain the Constitution referred to in Article 368. The personality of the Constitution must remain unchanged.

668. It is also necessary to bear in mind that the power to amend the Constitution is conferred on Parliament, a body constituted under the Constitution. The people as such are not associated with the amendment of the Constitution. From the Preamble we get that it is the people of this country who conferred this Constitution on themselves. The statement in the Preamble that the people of this country conferred the Constitution on themselves is not open to challenge before this Court. Its factual correctness cannot be gone into by this Court which again is a creature of the Constitution. The facts set out in the Preamble have to be accepted by this Court as correct. Anyone who knows the composition of the Constituent Assembly can hardly dispute the claim of the members of that Assembly that their voice was the voice of the people. They were truly the representatives of the people, even though they had been elected under a narrow franchise. The Constitution framed by them has been accepted and worked by the people for the last 23 years and it is too late in the day now to question, as was sought to be done at one stage by the Advocate-General of Maharashtra, the fact that the people of this country gave the Constitution to themselves.

669. When a power to amend the Constitution is given to the people its contents can be construed to be larger than when that power is given to a body constituted under that Constitution. Two-thirds of the members of the two Houses of Parliament need not necessarily represent even the majority of the people of this country. Our electoral system is such that even a minority of voters can elect more than two-thirds of the members of the either House of Parliament. That is seen from our experience in the past. That apart, our Constitution was framed on the basis of consensus and not on the basis of majority votes. It provides for the protection of the minorities. If the majority opinion is taken as the guiding factor then the guarantees given to the minorities may become valueless. It is well known that the representatives of the minorities in the Constituent Assembly gave up their claim for special protection which they were demanding in the past because of the guarantee of Fundamental Rights. Therefore, the contention on behalf of the Union and the States that the two-thirds of the members in the two Houses of Parliament are always authorised to speak on behalf of the entire people of this country is unacceptable.

677. It was strenuously urged on behalf of the Union and the States that if we come to the conclusion that there are implied or inherent limitations on the amending power of Parliament under Article 368, it would be well nigh impossible for Parliament to decide beforehand as to what amendments it could make and what amendments it is forbidden to make. According to the Counsel for the Union and the States, the conceptions of basic elements and fundamental features are illusive conceptions and their determination may differ from judge to judge and therefore we would be making the task of Parliament impossible, if we uphold the contention that there are implied or inherent limitations on the amending power under Article 368. We are unable to accept this contention. The broad contours of the basic elements or fundamental features of our Constitution are clearly delineated in the Preamble. Unlike in most of the other Constitutions, it is comparatively easy in the case of our Constitution to discern and determine the basic elements or the fundamental features of our Constitution. For doing so, one has only to look to the Preamble. It is true that there are bound to be border line cases where there can be difference of opinion. That is so in all important legal questions. But the Courts generally proceed on the presumption of constitutionality of all legislations. The presumption of the constitutional validity of a statute will also apply to constitutional amendments. It is not correct to say that what is difficult to decide does not exist at all. For that matter, there are no clear guidelines before the Parliament to determine what are essential legislative functions which cannot be delegated, what legislations do invade on the judicial power or what restrictions are reasonable

restrictions in public interest under Articles 19(2) to 19(6) and yet, by and large, the legislations made by Parliament or the State legislatures in those respects have been upheld by Courts. No doubt, there were occasions when Courts were constrained to strike down some legislations as *ultra vires* the Constitution. The position as regards the ascertainment of the basic elements or fundamental features of the Constitution can by no means be more difficult than the difficulty of the legislatures to determine beforehand the constitutionality of legislations made under various other heads. Arguments based on the difficulties likely to be faced by the legislatures are of very little importance and they are essentially arguments against judicial review.

679. It was contended on behalf of the Union and the States that, the Constitution should not be treated as something sacred. It should be regarded just in the same way as we regard other human institutions. It should be possible to alter every part of it from time to time so as to bring it in harmony with the new and changed conditions. In support of this contention we were invited to the writings of the various writers such as Burgess, Bryce, Wills, Orfield, Weaver, Livingson, etc. It was further urged that the Constituent Assembly, knowing that it will disperse, had arranged for the recreation of a Constituent Assembly under Article 368 in order to so shape the Constitution as to meet the demands of the time. However, attractive these theories may sound in the abstract, on a closer examination it will be seen that they are fallacious, more particularly in a constitutional set up like ours. We have earlier noticed that under our electoral system, it is possible for a party to get two-thirds majority in the two Houses of Parliament even if that party does not get an absolute majority of votes cast at the election. That apart, when a party goes to election, it presents to the electorate diverse programmes and holds out various promises. The programmes presented or the promises held out need not necessarily include proposals for amending the Constitution. During the General Elections to Parliament in 1952, 1957, 1962 and 1967, no proposal to amend the Constitution appears to have been placed before the electorate. Even when proposals for amendment of the Constitution are placed before the electorate as was done by the Congress Party in 1971, the proposed amendments are not usually placed before the electorate. Under these circumstances, the claim that the electorate had given a mandate to the party to amend the Constitution in any particular manner is unjustified. Further a Parliamentary Democracy like ours functions on the basis of the party system. The mechanics of operation of the party system as well as the system of Cabinet government are such that the people as a whole can have little control in the matter detailed law-making..... 'On practically every issue in the modern State, the serried millions of voters cannot do more than accept or reject the solutions offered. The stage is too vast to permit of the nice shades of quantitative (qualitative?) distinction impressing themselves upon the public mind. It has rarely the leisure, and seldom the information to do more than indicate the general tendency of its will. It is in the process of law-making that the subtler adjustments must be effected' [Laski: *A Grammar of Politics;* Fifth Edition, Pp. 313-314].

680. The assertion that either the majority of members of Parliament or even two-third members of Parliament speak on behalf of the nation has no basis in fact. Indeed, it may be possible for the ruling party to carry through important constitutional amendments even after it has lost the confidence of the electorate. The members of Lok Sabha are elected for a term of five years. The ruling party or its members may or may not enjoy the confidence of the electorate throughout their term of office. Therefore, it will not be correct to say that whenever Parliament amends the Constitution, it must be held to have done it as desired by the people.

681. There is a further fallacy in the contention that whenever Constitution is amended, we should presume that the amendment in question was made in order to adopt the Constitution to respond to the growing needs of the people. We have earlier seen that by using the amending power, it is theoretically possible for Parliament to extend its own life indefinitely and also, to

amend the Constitution in such a manner as to make it either legally or practically unamendable ever afterwards. A power which is capable of being used against the people themselves cannot be considered as a power exercised on behalf of the people or in their interest.

682. On a careful consideration of the various aspects of the case, we are convinced that the Parliament has no power to abrogate or emasculate the basic elements or Fundamental features of the Constitution such as the sovereignty of India, the democratic character of our policy (polity?), the unity of the country, the essential features of the individual freedoms secured to the citizens. Nor has the Parliament the power to revoke the mandate to build a Welfare State and egalitarian society. These limitations are only illustrative and not exhaustive. Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligations imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good. We are unable to agree with the contention that in order to build a Welfare State, it is necessary to destroy some of the human freedoms. That, at any rate is not the perspective of our Constitution. Our Constitution envisages that the State should without delay make available to all the citizens of this country the real benefits of those freedoms in a democratic way. Human freedoms are lost gradually and imperceptibly and their destruction is generally followed by authoritarian rule. That is what history has taught us. Struggle between liberty and power is eternal. Vigilance is the price that we, like every other democratic society, have to pay to safeguard the democratic values enshrined in our Constitution. Even the best of governments are not averse to have more and more power to carry out their plans and programmes which they may sincerely believe to be in public interest. But a freedom once lost is hardly ever regained except by revolution. Every encroachment on freedoms sets a pattern for further encroachments. Our constitutional plan is to eradicate poverty without destruction of individual freedoms.

683. In the result we uphold the contention of Mr. Palkhivala that the word 'amendment' in Article 368 carries with it certain limitation and, further that the power conferred under Article 368 is subject to certain implied limitations though that power is quite large.

690. We have already come to the conclusion that Article 368 as it originally stood comprehended both power as well as procedure to amend the Constitution. Hence the change effected in the marginal note has no significance whatsoever. The marginal note as it stood earlier was in a sense incomplete. The expression 'constituent power' is used to describe only the nature of the power of amendment. Every amending power, however large or however small it might be, is a facet of a constituent power. The power, though described to be 'constituent power', still continues to be an 'amending power'. The scope and ambit of the power is essentially contained in the word 'amendment'. Hence, from the fact that the new article specifically refers to that power as a constituent power, it cannot be understood that the contents of the power have undergone any change. The power conferred under the original Article being a limited power to amend the Constitution, the constituent power to amend the Constitution referred to in the amended Article must also be held to carry with it the limitations to which that power was subject earlier. There is also no significance in the substitution of the expression, 'amend by way of addition, variation or repeal of any provision of this Constitution', found in the amended Article in the place of the expression, 'amendment of the Constitution', found in the original Article. Every power to amend a statute must necessarily include within itself some power to make addition, variation or repeal of any provision of the statute. Here again, the power conferred under the original Article being a limited one, that limitation will continue to operate notwithstanding the change in the phraseology. The words 'addition, variation or repeal' only prescribe the modes or manner by

which an 'amendment' may be made, but they do not determine the scope of the power of 'amendment'. The original Article 368 mentioned that after the Bill for amendment of the Constitution is passed by the two Houses of Parliament in the manner prescribed in Article 368, 'it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill'. The amended Article makes a change. It prescribes that when the Bill is presented to the President, he 'shall give his assent to the Bill'. Some comment was made at the bar about the inappropriateness of commanding the President to give his assent to the Bill. That is a question of propriety. The substance of the matter is that when the Bill is presented to the President, he shall not withhold his assent. This change cannot be said to have damaged or destroyed any basic element of the Constitution. In fact, Article 111 which deals with the assent to the Bills specifically prescribes that when a money Bill, after having been passed by the Houses of Parliament is presented to the President he 'shall not withhold assent therefrom'. Hence it cannot be said that the change made in Article 368 relating to the assent of the President has any great importance in the scheme of our Constitution. In fact under our Constitution the President is only a constitutional head. Ordinarily he has to act on the advice of the cabinet. There is no possibility of the Constitution being amended in opposition to the wishes of the cabinet.

692. It was contended that by means of the 24th Amendment, Parliament intended to and in fact purported to enlarge its amending power. In this connection reliance was placed on the statement of objects and reasons attached to the Bill which resulted in the 24th Amendment. The power of Parliament does not rest upon its professed intention. It cannot acquire a power which it otherwise did not possess. We are unable to accept the contention that Clause (e) to the proviso to Article 368 confers power on Parliament to enlarge its own power. In our judgment the power to amend the Constitution as well as the ordinary procedure to amend any part of the Constitution was and is contained in the main part of the Article. The proviso merely places further restrictions on the procedure to amend the Articles mentioned therein. Clause (e) to the proviso stipulates that Article 368 cannot be amended, except in the manner provided in the proviso. In the absence of that clause, Article 368 could have been amended by following the procedure laid down in the main part. At best Clause (e) of the proviso merely indicates that Article 368 itself comes within its own purview. As we have already seen, the main part of Article 368 as it stood earlier, expressly lays down only the procedure to be followed in amending the Constitution. The power to amend is only implied therein.

693. It is difficult to accept the contention that an implied power was impliedly permitted to be enlarged. If that was so, there was no meaning in limiting that power originally. Limitation on the power to amend the Constitution would operate even when Article 368 is amended. A limited power cannot be used to enlarge the same power into an absolute power.... What Parliament cannot do directly, it also cannot do indirectly. We have earlier held that the 'amendment of this Constitution' means the amendment of every part of the Constitution. It cannot be denied that Article 368 is but a part of the Constitution. Hence, the mere fact that the mover of the 24th Amendment Act, in the Statement of Objects and Reasons, laid claim to certain power does not go to show that Parliament either endorsed that claim or could have conferred on itself such a power. It must be deemed to have exercised only such power as possessed. It is a well accepted rule of construction that if a provision is reasonably capable of two interpretations the Court must accept that interpretation which makes the provision valid. If the power conferred on Parliament to amend the Constitution under Article 368 as it stood originally is a limited power, as we think it is, Parliament cannot enlarge the scope of that power....

694. For the reasons mentioned heretofore, the scope of Parliament's power to amend the Constitution or any part thereof must be held to have remained as it was before the 24th Amendment,

notwithstanding the alterations made in the phraseology of Article 368. The 24th Amendment made explicit, what was implicit in the unamended Article 368. In this view of the matter the 24th Amendment must be held to be valid.

PER JUSTICE RAY

762. The principal question which falls for determination is whether the power to amend is under any express limitation of Article 13(2). Another question is whether there are implied and inherent limitations on the power of amendment. Can there be any implied or inherent limitation in the face of any express power of amendment without any exception? Questions have been raised that essential features of the Constitution cannot be amended. Does the Constitution admit of distinction between essential and non-essential features? Who is to determine what the essential features are? Who is the authority to pronounce as to what features are essential? The pre-eminent question is whether the power of amendment is to be curtailed or restricted, though the Constitution does not contain any exception to the power of amendment. The people gave the Constitution to the people. The people gave the power of amendment to Parliament. Democracy proceeds on the faith and capacity of the people to elect their representatives, and faith in the representatives to represent the people. Throughout the history of mankind if any motive power has been more potent than another it is that of faith in themselves. The ideal of faith in ourself (ourselves) is of the greatest help to us. Grote, the historian of Greece, said that the diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a Government at once free and peaceable. By constitutional morality Grote meant a paramount reverence for the forms of the Constitution, with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of opponents than in his own. The question is, 'He that planted the ear, shall he not hear? or he that made the eye, shall he not see?'

763. The real question is whether there is any power to amend the Constitution and if so whether there is any limitation on the power.

764. The scope and power under Article 368 as it stood prior to the Constitution (24th) Amendment Act to amend the Constitution falls for consideration.

765. Two principal questions arise. First, is the Constitution as well as an amendment to the Constitution law within the meaning of Article 13 (2). Second, is there any implied and inherent limitation on the power of amendment apart from Article 13(2).

797. In a broad sense, law may include the Constitution and the law enacted by the legislature. There is however a clear demarcation between ordinary law in exercise of legislative power and constitutional law which is made in exercise of constituent power. Therefore, a power to amend the Constitution is different from the power to amend ordinary law. It was said by Mr. Palkhivala that legislative power is power to make law and constituent power is the power to make or amend constitutional law and since law in its ordinary sense includes constitutional law the legislative power is the genus of which the constituent power is the species. The difference between legislative and constituent power in a flexible or uncontrolled Constitution is conceptual, depending upon the subject-matter. A Dog Act in England is *prima facie* made in exercise of legislative power. The Bill of Rights was made in the exercise of constituent power as modifying the existing constitutional arrangement. But this conceptual difference does not produce different legal consequences since the provisions of a Dog Act inconsistent with the earlier provisions of the Bill of Rights would repeal those provisions *pro tanto*. In a rigid or controlled Constitution the distinction between legislative power and constituent power is not only conceptual but material and vital in introducing legal consequences. In a controlled Constitution it is not correct to say that legislative power is the genus of which constituent power is the species. The question immediately arises as to what the differentia is which

distinguishes that species from other species of the same genus. It would be correct to say that the law-making power is the genus of which legislative power and constituent power are the species. The differentia is found in the different procedure prescribed for the exercise of constituent power as distinguished from that prescribed for making ordinary laws. The distinction between legislative power and constituent power is vital in a rigid or controlled Constitution, because it is that distinction which brings in the doctrine that a law *ultra vires* the Constitution is void, since the Constitution is the touchstone of validity and that no provision of the Constitution can be *ultra vires*.

798. The legislatures constituted under our Constitution have the power to enact laws on the topics indicated in Lists I to III in the Seventh Schedule or embodied specifically in certain provisions of the Constitution. The power to enact laws carries with it the power to amend or repeal them. But these powers of legislatures do not include any power to amend the Constitution, because it is the Constituent Assembly which enacted the Constitution and the status given by Article 368 to Parliament and the State legislatures, is the status of a Constituent Assembly. The distinction between the power to amend the Constitution and the ordinary power to enact laws is fundamental to all federal Constitutions. When Parliament is engaged in the amending process it is not legislating. It is exercising a particular power which is *sui generis* bestowed upon it by the amending clause in the Constitution.

799. In our Constitution when the amendment falls within the proviso to Article 368 it requires that the amendment must be ratified by at least one half of the State legislatures and the process is radically different from ordinary legislative procedure. The Union legislature acting under Chapter II of Part V has no connection with the State Legislatures. Therefore, when amendment is effected under the proviso to Article 368 Parliament does not act as a Union legislature. The feature that in the passage of the Bill for amendment of the Constitution, the House of Parliament has to adopt the procedure for ordinary legislation has little bearing. If the intention of the framers of the Constitution was to leave to the Union legislature the power to effect amendments of the Constitution, it would have been sufficient to insert a provision in Chapter II of Part V in that behalf without enacting a separate part and inserting a provision therein for amendment of the Constitution.

800. Under clause (e) of Article 368 the Article itself can be amended. Therefore, an amendment of Article 368 providing that provisions in Part III can be amended will be constitutional. If it was intended by Article 13(2) to exclude Part III altogether from the operation of Article 368, clause (e) would not have been enacted. The Constituent Assembly thus enacted Article 368 so that the power to amend should not be too rigid nor too flexible. Clause (e) of Article 368 requires an amendment to be ratified by not less than half the number of States. The title of Part XX and the opening words of Article 368 show that a provision is being made for 'amendment of this Constitution' which in its ordinary sense means every part of the Constitution. This would include Article 368 itself. There is no limitation imposed upon or exception made to the amendments which can be made. It is not permissible to add to Article 368 words of limitation which are not there.

835. .... When the power under Article 368 is exercised Parliament acts as a recreation of Constituent Assembly. Therefore, such power cannot be restricted by or widened by any other provision. As soon as amendment is made it becomes a part of the Constitution. An amendment prevails over the Article or Articles amended. The fact that Article 368 confers constituent powers is apparent from the special conditions prescribed in the Article. Those conditions are different from ordinary law-making process. Article 368 puts restraints on the ordinary law making process and thus confers constituent power. The Constituent Assembly was fully aware that if any limitation was to be put on the amending power the limitation would have to be expressly provided for....

847. The distinction between constituent and legislative power in a written Constitution is of enormous magnitude. No provision of the Constitution can be declared void because the Constitution is the touchstone of validity. There is no touchstone of validity outside the Constitution. Every provision in a controlled Constitution is essential or so thought by the framers because of the protection of being amendable only in accordance with the Constitution. Every Article has that protection....

863. Constitutional provisions are presumed to have been carefully and deliberately framed. The words alterations or amendments, the words amendments or revisions, the words revision and alteration are used together to indicate that these words have the same meaning in relation to amendment and change in Constitution.

864. The meaning and scope of amending power is in the object and necessity for amendment in a written Constitution.

865. The various amendments which have already beer carried out to our Constitution indicate that provisions have been added, or varied or substituted. The Attorney-General gave two correct reasons for the object and necessity of the power of amendment in a written Constitution. First, the object and necessity of amendment in a written Constitution means that the necessity is for changing the Constitution in an orderly manner, for otherwise the Constitution can be changed only by an extra constitutional method or by revolution. Second, the very object of amendment is to make changes in the fundamental law or organic law to make fundamental changes in the Constitution, to change the fundamental or the basic principles in the Constitution. Otherwise there will be no necessity to give that importance to the high amending power to avoid revolution.

866. The object of amendment is to see that the Constitution is preserved. Rebellion or revolution is an illegal channel of giving expression to change. The 'consent of the governed' is that each generation has a right to establish its own law. Conditions change. Men change. Opportunities for corresponding change in political institutions and principles of Government therefore arise....

867. An unamendable Constitution is said to be the worst tyranny of time. Jefferson said in 1789 that each generation has a right to determine a law under which it lives. The earth belongs in usufruct to the living the dead have neither powers nor rights over it. The machinery of amendment is like a safety valve. It should not be used with too great facility nor should be too difficult. That will explode and erode the Constitution.

869. Amendment is a form of growth of the Constitution inasmuch as amendment means fundamental changes. The Constitution devises special organs or special methods to amend or change the fundamental principles that create the Government. The methods of amendment may be by ordinary law-making body as in Great Britain, or by the ordinary law-making body with special procedure or unusual majority, or by special organs of Government created for the purpose such as constitutional convention, or by the electorate in the form of referendum or of initiating a referendum. In case a written Constitution makes no provision for amendment it is usually held that the national law-making body by ordinary procedure may amend the Constitution. If a Constitution provides the method of amendment that method alone is legal. Any other method of amendment would be a revolution. The deliberative and restrictive processes and procedure ensure a change in the Constitution in an orderly fashion in order to give the expression to social necessity and to give permanence to the Constitution.

872. Except for special methods of amendment in a rigid or controlled Constitution although the methods may vary in different Constitutions and except for express limitations, if any, in rigid or controlled Constitutions, the meaning and scope of the amending power is the same in both the flexible and rigid forms.

873. The flexible Constitution is one under which every law of every description can be legally changed with the same ease and in the same manner by one and the same body. Laws in a flexible Constitution are called constitutional because they refer to subjects supposed to affect the fundamental institutions of the State, and not because they are legally more sacred or difficult to change than other laws.

874. A rigid Constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws. The rigidity of the Constitution consists in the absence of any right of the legislatures when acting in its ordinary capacity to modify or repeal definite laws termed constitutional or fundamental. In a rigid Constitution the term 'Constitution' means a particular enactment belonging to the Articles of the Constitution which cannot be legally changed with the same ease and in the same manner as ordinary laws.

878. The background in which Article 368 was enacted by the Constituent Assembly has an important aspect on the meaning and scope of the power of amendment.

879. On 12 November, 1946 Sir B.N. Rau, Constitutional Adviser, prepared a brochure containing Constitutions of the British Commonwealth countries and the Constitutions of other countries. Different countries having different modes of amendments were referred to. In the same volume the fundamental rights under 13 heads were extracted from 13 selected countries, like U.S.A., Switzerland, Germany, Russia, Ireland, Canada, Australia. Two features follow from that list. First, there is no absolute standard as to what constitutes fundamental right. There is no such thing as agreed fundamental rights of the world. Second, fundamental rights which are accepted in our Constitution are not superior to fundamental rights in other Constitutions nor can it be said that the fundamental rights are superior to Directive Principles in our Constitution.

880. On 17 March, 1947 a questionnaire was circulated under the subject as to what provisions should be made regarding the amendment of the Constitution. The draft clause of amendment to the Constitution prepared by the Constitutional Adviser at that time indicates that an amendment may be initiated in either House of the Union Parliament and when the proposed amendment is passed in each House by a majority of not less than two-thirds of the total number of members of that House and is ratified by the legislatures of not less than two-thirds of the units of the Union, excluding the Chief Commissioners' Provinces, it shall be presented to the President for his assent and upon such assent being given the amendment shall come into operation. There were two explanations to that clause.

881. On 29 April, 1947 Shri Santhanam's amendment to the draft clause was accepted. The amendment was 'that this clause also if necessary may be amended in the same way as any other clause in the Constitution'. In June, 1947 the drafting of the amending clause started....

882. The following features emerge. First, the Constituent Assembly made no distinction between essential and non-essential features. Secondly, no one in the Constituent Assembly said that fundamental rights could not be amended. The framers of the Constitution did not have any debate on that. Thirdly, even in the First Constitution Amendment debate, no one doubted change of amendment of fundamental rights. At no stage it appeared that fundamental rights are absolute. While a Constitution should be made sound and basic it should be flexible and for a period it should be possible to make necessary changes with relative facility.

885. Proceedings in the Constituent Assembly show that the whole Constitution was taken in broad perspective and the amendments fell under three categories providing for simple majority, or two-thirds majority or two-thirds majority and ratification by the States. These different procedures were laid down to avoid rigidity.

891. Mr. Palkhivala submits that the principle of inherent or implied limitations on power to amend the controlled Constitution stems from three basic features. First, the ultimate legal sovereignty resides in the people. Second, Parliament is only a creature of the Constitution. Third, power to amend the Constitution or destroy the essential features of the Constitution is an application of ultimate legal sovereignty.

892. Mr. Palkhivala enumerated 12 essential features. These were as follows: (1) The supremacy of the Constitution. (2) The sovereignty of India. (3) The integrity of the country. (4) The democratic way of life. (5) The republican form of Government. (6) The guarantee of basic human rights elaborated in Part III of the Constitution. (7) A secular State. (8) A free and independent judiciary. (9) The dual structure of the Union and the States. (10) The balance between the legislature, the executive and the judiciary. (11) A Parliamentary form of Government as distinct from the presidential form of Government. (12) Article 368 can be amended but cannot be amended to empower Parliament to alter or destroy any of the essential features of the Constitution, make the Constitution literally or practically unamendable, make it generally amendable by a bare majority in Parliament, confer the power of amendment either expressly or in effect on the State Legislatures and delete the proviso and deprive the States of the power of ratification which is today available to them in certain broad areas.

917. A Constitution is essentially a frame of government laying down governmental powers exercisable by the legislature, executive and the judiciary. Even so other provisions are included in the Constitution of a country which provisions are considered by the framers of that Constitution to have such special importance that those should be included in the Constitution or organic law. Thus all provisions of the Constitution are essential and no distinction can be made between essential and non-essential features from the point of view of amendment unless the makers of the Constitution make it expressly clear in the Constitution itself. The Attorney General rightly said that if the positive power of 'amendment of this Constitution' in Article 368 is restricted by raising the walls of essential features or core of essential features, the clear intention of the Constituent Assembly will be nullified and that would make a mockery of the Constitution and that would lead to destruction of the Constitution by paving the way for extra constitutional or revolutionary changes in the Constitution. The theory of implied and inherent limitations cannot be allowed to act as a boa constrictor to the clear and unambiguous power of amendment.

918. If there is no express prohibition against amendment in Article 368 the omission of any such restriction did not intend to impose any restriction. When certain restrictions are imposed it is not intended that other undefined restrictions should be imposed by implication. The general rule is not to import into statutes words which are not found there. Words are not to be added by implication into the language of a statute unless it is necessary to do so to give paragraph sense and meaning in its context. If a matter is altogether omitted from a statute it is not allowable to insert it by implication. Where the language of an Act is clear and explicit, effect is to be given to it whatever may be the consequences. The words of the statute speak the intention of the legislature. Where the reading of a statute produces an intelligible result, there is no ground for reading any words or changing any words according to what may be supposed intention of the legislature. If a statute is passed for the purpose of enabling something to be done but omits to mention in terms some detail which is of great importance to the proper performance of the work which the statute has in contemplation, the Courts are at liberty to infer that the statute by implication empowers the details to be carried out. The implication is to empower the authority to do that which is necessary in order to accomplish the ultimate object.

919. The implication sought to be raised by Mr. Palkhivala is for the purpose of reading negative words into Article 368 to destroy the positive power to amend. The provisions of our Constitution, in the light of historical background and

special problems of the country, will show that no provision can be considered as non-essential. The Constitution-makers did not think so. The Attorney General rightly contended that no one has the power or authority to say that any single provision is more essential than another or that the amending power under Article 368 does not operate on any provision on the ground of alleged essentiality when Article 368 provides amendment of this Constitution which obviously means the whole Constitution including every provision. In a Constitution different methods of amendment may be laid down depending upon the degree of importance attached to particular parts of the Constitution. Apart from the language of Article 368 the draft Constitution as it emerged through the Constituent Assembly shows that no provision of the Constitution was excepted from the amending power.

921. The character of the provisions which are amendable under the proviso to Article 368 itself shows that the petitioner's submission that essential features are unamendable is a baseless vision. Article 54 speaks of the method of election of the President. This may be changed. The manner or scale of representation of the different States in regard to the election of the President may also be changed. The executive power of the Union and the States may be changed. Chapter IV of Part V (the Union Judiciary), Chapter V of Part VI (the High Courts in the States) are also mentioned in Article 368 as liable to be changed. Article 141 may also be changed. Chapter I of Part XI and the Seventh Schedule (legislative relations between Union and the States) may be changed. The representation of the States in Parliament (Articles 80 and 81) may be changed. The number of representation (representatives) may be increased or reduced. The method of election of such representatives as Parliament may by law prescribe and the number of the members of the House of the People may be increased or reduced. The method of election to the House of People may be changed. Finally, the provisions of Article 368 itself, which is the most important part of the Constitution, may be changed.

922. To find out essential or non-essential features is an exercise in imponderables. When the Constitution does not make any distinction between essential and non-essential features it is incomprehensible as to how such a distinction can be made. Again, the question arises as to who will make such a distinction. Both aspects expose the egregious character of inherent and implied limitations as to essential features or core of essential features of the Constitution being unamendable. Who is to judge what the essential features are? On what touchstone are the essential features to be measured? Is there any yardstick by which it can be gauged? How much is essential and how much is not essential? How can the essential features or the core of the essential features be determined? If there are no indications in the Constitution as to what the essential features are the task of amendment of the Constitution becomes an unpredictable and indeterminate task. There must be an objective data and standard by which it can be predicated as to what is essential and what is not essential. If Parliament cannot judge these features Parliament cannot amend the Constitution. If, on the other hand, amendments are carried out by Parliament the petitioner contends that eventually Court will find out as to whether the amendment violates or abridges essential features or the core of essential features. In the ultimate analysis, it is the Court which will pronounce on the amendment as to whether it is permissible or not. This construction will have the effect of robbing Parliament of the power of amendment and reposing the final power of expressing validity of amendment in the Courts.

925. The American Courts evolved a test of reasonableness by the doctrine of substantive due process which means not that the law is unreasonable but that on political, social and economic grounds the majority of Judges consider that the law ought not be permitted to be made. The crucial point is that in contradistinction to the American Constitution where rights are couched in wide general terms leaving it to the Courts to evolve necessary limitations, our Constitution limited it by precise words of limitation as for example in Articles 19 and 21. In Article 21 the Constitution-makers substituted 'procedure

established by law' for the words 'due process of law'. The reason for the change was that the procedure established by law was specific. The framers of the Constitution negatived the vague indefinite reasonableness of laws on political, social and economic grounds. In *Gopalan* case due process was rejected by clearly limiting the rights acquired and by eliminating the indefinite due process. The Constitution-makers freed judicial review of subjective determination. Due process as a test of invalidity of law was deliberatively withheld or denied. Courts are not concerned with the wisdom or policy of legislation. The Courts are equally not concerned with the wisdom and policy of amendments to the Constitution.

926. ....(O)pinions that natural justice is so vague as to be practically meaningless, are tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. In the same case it was said that the idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law. Extracting those observations it was said by Mr. Palkhivala that though the border-line between essential features and non-essential features could not be stated or it was not possible to specify exhaustively the amendment which could be invalid on that principle yet there was no reason why the principle of inherent and implied limitations to amend our Constitution should not be accepted. Inherent and implied limitations cannot originate in an oracle when the Constitution does not contain any express prohibition against amending any provision. When Article 368 speaks of changes in the provisions of the Constitution as are set out in Clauses (a) to (d) of the proviso, it is manifest that the makers of the Constitution expressed their intention with unerring accuracy that features which can broadly be described as federal features, and from that point of view 'Essential features' could be amended. In the face of these express provisions it is impossible to hold that the Constitution does not contemplate an amendment of the so-called essential features of the Constitution. The proviso confers that power with relation to the judiciary, the executive and the legislature, none of which could be said to be inessential. Indeed it is difficult to imagine that the Constitution contained any provision which was inessential. It need hardly be said that amendment not only means alteration, addition or repeal of provision but also deletion of some part, partial repeal and addition of a new part.

927. It was said that if our Parliamentary system was changed to a Presidential system it would be amending the core of our Constitution. But such a change is permissible under Article 368. Whether the people would adopt such an amendment is a different matter and does not fall for consideration here. The core of the federal form of Government in our country is greater power in the Union Parliament than States for preserving the integrity of the country. There can be changes by having a confederation or by conferring greater power on the Centre. These contentions about unamendability of essential features do not take into consideration that the extent and character of any change in the provisions of the Constitution is to be determined by legislatures as amending bodies under Article 368 and as representatives of the people in a democracy and it is not the function of the Courts to make any such determination.

934. The theory of unamendability of the so-called essential features is unmeritorious in the face of express provisions in Article 368, particularly in Clauses (a) to (d) of the proviso. Clauses (a) to (d) relate to 66 Articles dealing with some of the most important features of the Constitution. Those Articles relate to the judiciary, the legislature and the executive. The legislative relations between the Union and the States and the distribution of legislative power between them are all within the ambit of amendment.

935. The question which was raised by Mr. Palkhivala as to whether under proviso (e) to the

unamended Article 368 the power of amendment could be increased is answered in the affirmative. The reasons broadly stated are three.

936. First, under Article 368 proviso (e), any limitation on the power of amendment alleged to be found in any other Article of the Constitution can be removed....

937. Secondly, judicial decisions show that by amending the Article conferring the power of amendment, a greater power to amend the Constitution can be obtained than was conferred by the original Article.

938. Thirdly, the power to amend the amending Article must include the power to add, alter or repeal any part of that Article and there is no reason why the addition cannot confer a power of amendment which the authorities named in Article 368 did not possess. By the exercise of the amending power, provision can be made which can increase the powers of Parliament or increase the powers of the States. Again, by amendment, future amendments can be made more difficult. The picture drawn by Mr. Palkhivala that a future amendment would be rendered impossible either by absolutely forbidding amendment or by prescribing an impractically large majority does not present any legal impediment to such an amendment. The safeguard against such action is external. The contingency of any such amendment being proposed and accepted is extremely remote because such an amendment might sow the seeds of revolution which would be the only way to bring about the change in the Constitution. The Solicitor General rightly said that the effect of the amendment is that 'it shall stand amended in accordance with the terms of the Bill'. The product is not required to be 'this Constitution'. It will not be identically the old Constitution. It will be a changed or amended Constitution and its resemblance will depend on the extent of the change. More rigid process, like referendum or initiative or greater majority or ratification by a larger number of States, might be introduced by amendment.

942. Mr. Palkhivala contended that the people reserved the power to themselves to amend the essential features of the Constitution and if any such amendment were to be made it should be referred to the people by referendum. It was said that the Constitution makers did not intend that essential features should be damaged or destroyed even by the people, and therefore, the Constitution did not provide for referendum. The other contention on behalf of the petitioner was that referendum was not provided for because it might have been difficult to have the Constitution accepted on those terms. The second view would not eliminate the introduction of referendum as a method of amendment. If a referendum were introduced by an amendment people would have complete power to deal with essential features. The other question would be as to whether the Preamble and the fundamental rights would be a limitation on the power of the people. On behalf of the petitioner it was said that it was not necessary to decide the questions. Both the Attorney General and Mr. Seervai correctly said that the submissions made on behalf of the petitioner indicated that, if essential features could be amended by the people, the very fact that the Constituent Assembly did not include referendum as one of the methods of amendment and that the Constitution-makers excluded no part of the Constitution from amendment established that the amendment of a written Constitution can be legally done only by the method prescribed by the Constitution. If the method of referendum be adopted for purpose of amendment as suggested by Mr. Palkhivala that would be extra constitutional or revolutionary. The amending body to amend the Constitution represents the will of the people.

943. .... Mr. Palkhivala on behalf of the petitioner did not rely on the majority decision in *Golak Nath* case that the fundamental rights could be abridged or taken away only by convening a Constituent Assembly, but based his argument on a theory of legal sovereignty of the people. The Constitution is binding on all the organs of Government as well as the people. The Attorney-General rightly submitted that the concept of popular sovereignty is well settled in

parliamentary democracy and it means that the people express their will through their representatives elected by them at the general election as the amending body prescribed by the Constitution.

944. Are fundamental rights unamendable? Mr. Palkhivala contended that apart from Article 13(2), fundamental rights are based on Universal Declaration of Human Rights and are natural rights and, therefore, they are outside the scope of amendment. In *Golak Nath* case the majority view declined to pronounce any opinion on alleged essential features other than fundamental rights. The concurring view was that fundamental rights were unamendable because they were fundamental.... (Four) Judges rightly rejected the theory of implied limitations. The three reasons given.... are these. First, the doctrine of essential and non-essential features would introduce uncertainty. Secondly, constituent power of amendment does not admit of any impediment of implied restrictions. Thirdly, because there is no express limitation there can be no implied limitation.

945. Mr. Seervai correctly contended that there is intrinsic evidence in the provisions of Part III itself that our Constitution does not adopt the theory that fundamental rights are natural rights or moral rights which every human being is at all times to have simply because of the fact that as opposed to other beings he is rational and moral. The language of Article 13 (2) shows that these rights are conferred by the people of India under the Constitution and they are such rights as the people thought fit to be in the organised society or State which they were creating. These rights did not belong to the people of India before 26 January 1950 and could not have been claimed by them. Article 19 embodies valuable rights. Rights under Article 19 are limited only to citizens. Foreigners are human beings but they are not given fundamental rights because these rights are conferred only on citizens as citizens.

946. Article 33 enacts that Parliament may by law modify rights conferred by Part III in their application to Armed Forces. Parliament may restrict or abrogate any of the rights conferred by Part III so as to ensure the proper discharge of the duties of the Armed Forces and the maintenance of discipline among them. Therefore, Article 33 shows that citizens can be denied some of these rights. If these are natural rights these cannot be abrogated. Article 34 shows restriction on right conferred by Part III while martial law is in force in any area. The dominant concept is social good. Where there is no restraint the society fails.

947. Articles 352 and 358 also illustrate as to how while the proclamation of emergency is in operation provisions of Article 19 are suspended during emergency. The framers of the Constitution emphasised the social content of those rights. The basic concept of fundamental rights is therefore a social one and it has a social function. These rights are conferred by the Constitution. The nature of restriction on fundamental rights shows that there is nothing natural about those rights. The restrictions contemplated under Article 19 (2) with regard to freedom of speech are essential parts of a well organised developed society. One must not look at location of power but one should see how it acts. The restrictions contemplated in Article 19 are basically social and political. Friendly relations with foreign states illustrate the political aspect of restrictions. There are similar restrictions on right to move freely. The protection of Scheduled Tribes is also reasonable in the interest of society.... (T)here are no natural rights under our Constitution and natural rights played no part in the formulation of the provisions therein.

950. The Constitution is the higher law and it attains a form which makes possible the attribution to it of an entirely new set of validity, the validity of a statute emanating from the sovereign people. Invested with statutory form and implemented by judicial review, higher law becomes juristically the most fruitful for people. There is no higher law above the Constitution.

951. .... If that is so the question of basic rights being unamendable on the basis of higher law or natural law does not arise. ....

952. The Attorney General relied on Friedmann (Legal Theory 5th Ed.) to show that there was a revival of natural law theory from the reaction against the excesses of the Nazi regime. The view of Friedmann is that natural law may disguise to pose itself the conflict between the values which is a problem of constant and painful adjustment between competing interests, purposes and policies. This conflict is resolved by ethical or political evolution which finds place in legislative policies and also in the impact of changing ideas on the growth of law.

953. Fundamental rights are social rights conferred by the Constitution. There is no law above the Constitution. The Constitution does not recognise any type of law as natural law. Natural rights are summed up under the formula which became common during the Puritan Revolution, namely, life, liberty and property.

954. The theory of evolution of positive norms by supra-positive law as distinguished from superior positive law had important consequences in the post-war revival of natural law in some countries, particularly Germany. Most of the German Constitutions from the early 19th Century to the Nazi Regime did not provide for judicial review. Under the Weimar regime, the legislature reigned supreme and legal positivism was brought to an extreme. The reaction after World War II was characterised by decreases of legislative power matched by an increase of judicial power.... It is in this context that the entire suggestion is that norms could not only be judged by a superior law, namely, constitutional law but by natural law to broaden the scope of judicial review. ....

955. On the one hand there is a school of extreme natural law philosophers who claim that a natural order establishes that private capitalism is good and socialism is bad. On the other hand, the more extreme versions of totalitarian legal philosophy deny the basic value of the human personality as such. Outside these extremes, there is a far greater degree of common aspirations. The basic autonomy and dignity of human personality is the moral foundation of the teaching of modern natural law philosophers like Maritain. It is in this context that our fundamental rights and Directive Principles are to be read as having in the ultimate analysis a common good. The Directive Principles do not constitute a set of subsidiary principles to fundamental rights of individuals. The Directive Principles embody the set of social principles to shape fundamental rights to grant a freer scope to the large scale welfare activities of the State. Therefore, it will be wrong to equate fundamental rights as natural, inalienable, primordial rights which are beyond the reach of the amendment of the Constitution.... (T)he doctrine of natural rights is nothing but a foundation of shifting sand.

956. Mr. Seervai rightly said that if the power of amendment of the Constitution is co-extensive with the power of the judiciary to invalidate laws, the democratic process and the co-ordinate nature of the great departments of the State are maintained. The democratic process is maintained because the will of the people to secure the necessary power to enact laws by amendment of the Constitution is not defeated. The democratic process is also respected because when the judiciary strikes down a law on the ground of lack of power, or on the ground of violating a limitation on power, it is the duty of the legislature to accept that position, but if it is desired to pass the same law by acquiring the necessary power, an amendment validly enacted enables the legislatures to do so and the democratic will to prevail. This process harmonises with the theory of our Constitution that the three great departments of the State, the legislature, the judiciary and the executive, are co-ordinate and that none is superior to the other. The normal interaction of enactment of law by the legislation, of interpretation by the courts, and of the amendment of the Constitution by the legislature, go on as they were intended to go on.

957. If the power of amendment does not contain any limitation and if this power is denied by reading into the Constitution inherent limitations to extinguish the validity of all amendments on the principles of essential features of the Constitution which are undefined and untermed, the courts will have to lay down a new Constitution.

958. It is said that the frame of the Government cannot be changed or abrogated by amendment of the Constitution. There is before us no aspect of abrogation of the form of Government or of the changes apprehended by the petitioners like the abrogation of the judiciary or extending the life of Parliament.

959. The problems of the times and the solutions of those problems are considered at the time of framing the Constitution. But those who frame the Constitution also know that new and unforseen problems may emerge, that problems once considered important may lose their importance because priorities have changed, that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification, that judicial interpretation may rob certain provisions of their intended effect, that public opinion may shift from one philosophy of Government to another. Changes in the Constitution are thus actuated by a sense of duty to the people to help them get what they want out of life. There is no destiny of man in whose service some men can rightfully control others; there are only the desires and preferences and ambitions that men actually have. The duty to maximise happiness means that it is easier to give people what they want than to make them want what you can easily give. The framers of the Constitution did not put any limitation on the amending power because the end of a Constitution is the safety, the greatness and well being of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution.

960. The way in which the doctrine of inherent and implied limitations was invoked by Mr. Palkhivala in interpreting the Constitution was that the test of power under the Constitution must be to ascertain the worst that can be done in exercise of such power. Mr. Palkhivala submitted that if unbridled power of amendment were allowed the basic features of our Constitution, namely, the republican and/or democratic form of Government and fundamental rights could be destroyed and India could be converted into a totalitarian dictatorship. The Court was invited to take into account the consequences of the kind described. Mr. Palkhivala suggested that a wide power of amendment would lead.... to the liquidation of our Constitution.

961. The Attorney General rightly said that the unambiguous meaning of amendment could not be destroyed to nurse the theory of implied limitations. He also said that the live distinction between power and exercise of power is subject to popular will and popular control. The theory of implied and inherent limitation was a repudiation of democratic process.....

962. In a democracy the determination of the right policies to be pursued can only be determined by a majority vote cast at election and then by a majority of the elected representatives in the legislature. Democracy proceeds on the faith in the capacity to elect their representatives, and faith in the representatives to represent the people. The argument that the Constitution of India could be subverted or destroyed might have hortative appeal but it is not supportable by the actual experience in our country or in any country. The two basic postulates in democracy are faith in human reason and faith in human nature. There is no higher faith than faith in democratic process. Democracy on adult suffrage is a great experiment in our country. The roots of our democracy are in the country and faith in the common man.....

964. The doctrine of consequences has no application in constructing a grant of power conferred by a Constitution. In considering a grant of power the largest meaning should be given to the words of the power in order to effectuate it fully. The two exceptions to this rule are these. First, in order to reconcile powers exclusively conferred on different legislatures, a narrower meaning can be given to one of the powers in order

that both may operate as fully as is possible..... Second, technical terms must be given their technical meaning even though it is narrower than the ordinary or popular meaning.

965. The theory of consequences is misconstrued if it is taken to mean that considerations of policy, wisdom and social or economic policies are included in the theory of consequences.....

970. Mr. Palkhivala relied on the opinion of Cooley on the Constitutional Limitations that 'a written Constitution is in every instance a limitation upon the powers of Government in the hands of agents; for there never was a written republican Constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent, and incapable of definition'.... This view of Cooley is not relevant to the amending power.

971.... First, except where the Constitution has imposed limitations upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. Second, in the absence of constitutional restraint, the legislative department of a State Government has exclusive and ample power and its utterance is the public policy of the State upon that subject, and the Courts are without power to read into the Constitution a restraint of the legislature with respect thereto. Third, if the Courts are not at liberty to declare statutes void because of their apparent injustice of impolicy, neither can they do so because they appear to the minds of the Judges to violate fundamental principles of republican Government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. The principles of republican Government are not a set of inflexible rules, vital and active in the Constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity. Fourth, the Courts are not at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words.

976. The Attorney General.... points out a distinction between a political society or State, on the one hand, and governmental organs, on the other, to appreciate that constitutional limitations are against governmental organs. An individual has no legal rights against a sovereign organised political society, except what the society gives. The doctrine of national sovereignty means that people who made the existing distribution of powers between the federal and the State Governments may alter it. Amendment is left to legislatures because as a matter of convenience the legislatures generally express the will of the people. In the Constitution the people prescribe the manner in which they shall amend the Constitution. An amendment of a particular statute means usually it is a change germane to the subject matter of that statute. Any change in the Government of the nation is germane to the Constitution. Any change altering the disposition of powers would therefore be germane to the purposes of the instrument.... It is clear that no limitation on the amending power can be found in this notion of necessity for germaneness.

PER JUSTICE JAGANMOHAN REDDY

1110. The question whether there are any implied limitations on the power to amend under Article 368 or whether an amendment under that Article can damage or destroy the basic features of the Constitution would depend, ... on the meaning of the word 'amendment' before the Twenty-Fourth Amendment. If that word has a limited meaning, which is the case of the petitioner, it is contended that that power of amendment could not be enlarged by the use of the words, 'amend by way of addition, variation and repeal'.

1111. It may be mentioned that arguments similar to those which were (earlier) addressed before us were advanced, namely, (i) that the expression 'amendment' in Article 368 has a positive and negative content and that in exercise of that power Parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument for its better effectuation; (ii) that if the fundamentals would

be amenable to the ordinary process of amendment with a special majority, the institution of the President can be abolished, the Parliamentary executive can be abrogated, the concept of federation can be obliterated and, in short, the sovereign democratic republic can be converted into a totalitarian system of Government....

1115..... We should free ourselves of any considerations which tend to create pressure on the mind. In our view, it is not the gloom that should influence us, as Milton said, 'we cannot leave the real world for a utopia but instead ordain wisely', and, if I may add, according to the well-accepted rules of construction and on a true interpretation of the constitutional provisions.

1116..... There is no constitutional matter which is not in some way or the other involved with political, social or economic questions, and if the Constitution-makers have vested in this Court a power of judicial review, and while so vesting, have given it a prominent place describing it as the heart and soul of the Constitution, we will not be deterred from discharging that duty, merely because the validity or otherwise of the legislation will affect the political or social policy underlying it. The basic approach of this Court has been, and must always be, that the legislature has the exclusive power to determine the policy and to translate in into law, the constitutionality of which is to be presumed, unless there are strong and cogent reasons for holding that it conflicts with the constitutional mandate. In this regard both the legislature, the executive, as well as the judiciary are bound by the paramount instrument and, therefore, no Court and no Judge will exercise the judicial power *de hors* that instrument, nor will it function as a Supreme legislature above the Constitution. The bonafides of all the three of them has been the basic assumption, and though all of them may be liable to error, it can be corrected in the manner and by the method prescribed under the Constitution and subject to such limitations as may be inherent in the instrument.

1117. This Court is not concerned with any political philosophy, not has it its own philosophy, nor are Judges entitled to write into their judgements the prejudices or prevalent moral attitudes of the times, except to Judge the legislation in the light of the felt needs of the society for which it was enacted and in accordance with the Constitution. No doubt, political or social policy may dominate the legal system. It is only when, as I said, the legislatures in giving effect to them translate it (them) into law, and the Courts, when such a measure is challenged, are invited to examine those policies to ascertain its validity, it then becomes a legal topic which may tend to dominate sometimes to its detriment.

1118. The citizen whose rights are affected, no doubt, invokes the aid of the judicial power to vindicate them, but in discharging its (their) duty, the Courts have nothing to do with the wisdom or the policy of the legislature. When the Courts declare a law, they do not mortgage the future with intent to bind the interest of the unborn generations to come. There is no everlasting effect in those judgements, nor do they have force till eternity as it were. The concept, on the other hand, is that the law declared in the past was in accord with the settled judgement of the society, the social and economic conditions then existing, and that if those judgments are not likely to subserve the subsequent generations or the requirements and needs of the society as it may then be conditioned, they will have to be changed by the process known to law, either by legislative action or judicial action or judicial re-review where that is possible. The Courts, therefore, have a duty, and have indeed the power, to re-examine and re-state the law within the limits of its interpretative function in the fullness of the experience during which it was in force so that it conforms with the socio-economic changes and the jurisprudential outlook of that generation. The words of the law may be like coats of Biblical Joseph, of diverse colours, and in the context in which they are used they will have to be interpreted and wherever possible they are made to subserve the felt-needs of the society. This purpose can hardly be achieved without an amount of resilience and play in the interpretative process.

1129. Reference may also be made to the fact that during the debates in the Constituent Assembly it was pointed out by many speakers that that Assembly did not represent the people as such, because it was not elected on the basis of adult franchise, that some of them even moved resolutions suggesting that the Constitution should be ratified by the people. Both, the claim and the demand were rejected. Dr. Ambedkar explained that, 'the Constituent Assembly in making a Constitution has no partisan motive. Beyond securing a good and workable Constitution it has no axe to grind. In considering the articles of the Constitution it has no eye on getting through a particular measure. The future Parliament, if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate to the passing of party measures which they have failed to get through Parliament by reason of some Article of the Constitution which the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected on limited franchise, can be trusted to pass the Constitution by simple majority and why the Parliament though elected on adult suffrage cannot be trusted with the same power to amend it' (*Constituent Assembly Debates* (C.A.D.), Vol. VII, Pp. 43-44).

1130. At the final stages of the debate on the amending article, Dr. Ambedkar replying to the objection that the Constituent Assembly was not a representative assembly as it has not been elected on an adult franchise, that a large mass of the people are not represented and, consequently, in framing the Constitution the Assembly has no right to say that this Constitution should have the finality, ... said - 'Sir, it may be true that this Assembly have not been elected on the basis of adult suffrage. I am prepared to accept that argument, but the further inference which is being drawn that if the Assembly had been elected on the basis of adult suffrage, it was then bound to possess greater wisdom and greater political knowledge is an inference which I utterly repudiate' (C.A.D., Vol. IX, p. 1,663).

1131. The fact that the Preamble professed in unambiguous terms that it is the people of India who have adopted, enacted and 'given to themselves this Constitution', that the Constitution is being acted upon unquestioned for the last over twenty-three years and every power and authority is purported to be exercised under the Constitution, and that the vast majority of the people have, acting under the Constitution, elected their representatives to Parliament and the State Legislatures in five general elections, makes the proposition indisputable that the source and the binding force of the Constitution is the sovereign will of the people of India.

1132. On this assumption no State need have unlimited power and indeed in Federal Polities no such doctrine is sustainable....

1136. The existence or non-existence of any implied limitations on the amending power in a written Constitution which does not contain any express limitations on that power has been hotly debated before us for days. I have earlier set out some of these contentions. If the word 'amendment' has the restricted meaning, has that power been enlarged by the use of the words 'amend by way of addition, variation or repeal' or do they mean the same as amendment? If they are wider than amendment, could Parliament in exercise of its amending powers in Article 386 enlarge that power? This aspect has been seriously contested and cannot on a superficial view be brushed aside as not worthy of merit. There can be two ways of looking at it. One approach can be, and it would be the simplest solution to the problem that confronts us, to assume that the amending power is semi-sovereign and thereafter the task will be easy because so much has been written by academic writers that it will not be difficult to find expression of views which support that conclusion. Long years ago, Oliver Wendell Holmes had written, 'you can give any conclusion a logical form' and one can only say how true it is. This course, however, should be eschewed, firstly, because of the priori assumption and the speculation inherent in drawing upon such writings, and secondly, because the interpretation placed by these learned writers on Constitutions

which are different will, if drawn upon, in effect allow them to interpret out Constitution, which though derivative it may be, has to be interpreted on the strength of its provisions and the ethos it postulates. It is therefore, necessary to ascertain from the background of our national aspirations, the objectives adopted by the Constituent Assembly as translated into a working organic instrument which established a sovereign democratic Republic with a Parliamentary system of Government where under individual rights of citizens, the duties towards the community which the State was enjoined to discharge; the diffusion of legislative power between Parliament and State Legislatures and the provision for its amendment, etc., are provided for. All these aspects were sought to be well balanced as in a ship built for fair weather as well as for foul. This then will be the proper approach.

1137. The Attorney-General contends that the word 'amendment' has a clear, precise, definite and unambiguous legal meaning and has been so used in all the written Constitutions of other countries also ever since written Constitutions have been innovated. The word 'amendment' according to him has received a well accepted construction which gives it the widest amplitude unrestricted by any limitations thereon.....

1147. In further explaining his submissions the Attorney-General said that the amending power in Article 368 as it stood before the Twenty-Fourth Amendment and as it stands now has always been, and continues to be, a constituent power, that is to say, the power to de-constitute or re-constitute the Constitution or any part of it. Such power extends to the addition to or variation of any part of the Constitution. But the amending power does not mean that the Constitution at any point of time would be so amended by way of addition, variation or repeal as to leave vacuum in the governance of the country. According to him that is the whole object and necessity of the amending power in a Constitution so that the Constitution continues, and a constituent power, unless it is expressly limited in the Constitution itself, can by its very nature have no limits, because if any such limit is assumed, although not expressed in the Constitution, the whole object and purpose of the amending power will be nullified.

1152. Though there are naturally some limitations to be found in every organic instrument, as there are bound to be limitations in any institution *or any other set up* brought into existence by human agencies, ...it is in my view not necessary to consider in this case the question of the existence or non-existence of implied or inherent limitations.... What has to be considered is whether the word 'amendment' is wide enough to confer a plenitude of power including the power to repeal or abrogate.

1154. If the power of amendment is limitless and Parliament can do all that the petitioners contend it can do under Article 368, the respondents say it should not be assumed that power will be abused, but on the other hand the presumption is that it will be exercised wisely and reasonably, and the only assurance against any abuse is the restraint exercised by the people on the legislative organs. But the recognition of the truism that power corrupts and absolute power corrupts absolutely has been the wisdom that made practical men of experience in not only drawing up a written Constitution limiting powers of the legislative organs but in *securing* to all citizens certain basic rights against the State. If the faith in the rulers is so great and the faith in the people to curb excessive exercise of power or abuse of it is so potent, then one needs no elaborate Constitution, because all that is required is to make Parliament omnipotent and omni-sovereign. But this the framers did not do and hence the question will be whether by an amendment under Article 368, can Parliament effect a metamorphosis of power by making itself the supreme sovereign. I do not suppose that the framers were unaware of the examples which must be fresh in their minds that once power is wrested which does not legitimately belong to a limited legislature, the efforts to dislodge it must only be by a painful process of struggle, bloodshed and attrition - what in common parlance would be a revolution. No one suggests this will be done, but no one should be complacent that this will not be possible, for if

there is power it can achieve even a destructive end. It is against abuse of power that a constitutional structure of power relationship with checks and balances is devised and safeguards provided for, whether expressly or by necessary implication. And the question is whether there are any such in our Constitution, and if so, whether they can be damaged or destroyed by an amending power?

1163.... It is submitted that an amendment should not alter the basic structure of the Constitution or be repugnant to the objectives set out in the Preamble and cannot be exercised to make the Constitution unidentifiable by altering its basic concept governing the democratic way of life accepted by the people of this country. If the entire Constitution cannot be abrogated, can all the provisions of the Constitution leaving the Preamble, or one article, or a few articles of the original Constitution be repealed and in their place other provisions replaced, whereby the entire structure of the Constitution, the power relationship *inter se* three Departments, the federal character of the State and the rights of the citizens *vis-a-vis* the State, are abrogated and new institutions, power relationships and the fundamental features substituted therefor? In my view, such an attempt would equally amount to abrogation of the Constitution, because any such exercise of the power will merely leave the husk and will amount to the substitution of an entirely new Constitution, which it is not denied, cannot be done under Article 368.

1171. I will now consider the question which has been strenuously contended, namely, that there are non essential features, that every feature in the Constitution is essential, and if this were not so, the amending power under the Constitution will apply only to non essential features, which it would be difficult to envisage was the only purpose of the framers in inscribing Article 368 and that, therefore, there is no warrant for such a concept to be read into the Constitution. The argument at first flush is attractive, but if we were to ask ourselves the question whether the Constitution has any structure or is structureless or is a 'jelly fish' to use an epithet of the learned Advocate for the petitioner, the answer would resolve our doubt. If the Constitution is considered as a mechanism, or call it an organism or a piece of constitutional engineering, whichever it is, it must have a structure, or a composition or a base or foundation. What it is can only be ascertained, if we examine the provisions..... The elements of the basic structure are indicated in the Preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props, remove any of them, the Constitution collapses. These are: (1) Sovereign Democratic Republic; (2) Justice social, economic and political; (3) Liberty of thought, expression, belief, faith and worship; (4) Equality of status and of opportunity. Each one of these is important and collectively they assure a way of life to the people of India which the Constitution guarantees. To withdraw any of the above elements, the structure will not survive and it will not be the same Constitution, or this Constitution, nor can it maintain its identity, if something quite different is substituted in its place, which the sovereign will of the people alone can do. There can be a Democratic Republic in the sense that people may be given the right to vote for one party or only one candidate either affirmatively or negatively, and are not given the choice to choose another opposed to it or him. Such a republic is not what has been assured to our people and is unthinkable by any one forsworn to uphold, defend, protect, or preserve or work the Constitution. A democratic republic that is envisaged is the one based on a representative system in which people holding opposing views to one another can be candidates and invite the electorate to vote for them. If this is the system which is the foundation of a democratic republic, it is unthinkable that it can exist without elements (2) to (4) above, either collectively or separately. What is democracy without social, economic and political justice, or what value will it have, where its citizens have no liberty of thought, belief, faith or worship or where there is no equality of status and of opportunity? What then are the essential features or the basic elements comprising the structure of our Constitution need not be considered in detail as these will fall for consideration in any concrete case where they are said to have

been abrogated and made non-existent. The fact that a complete list of these essential elements constituting the basic structure are not enumerated, is no ground for denying that these exist. Are all the elements which make a law void and unconstitutional ever required to be concatenated for the recognition of the validity or invalidity of laws judged on the anvil of the Constitution? A sovereign democratic republic, Parliamentary democracy, the three organs of the State, certainly in my view constitute the basic structure. But do the fundamental rights in Part III and Directive Principles in Part IV constitute the essential elements of the basic structure of our Constitution in that the Constitution will be the Constitution without them? In other words, if Parts III and IV or either of them are totally abrogated, can it be said that the structure of the Constitution as an organic instrument establishing sovereign democratic republic as envisaged in the Preamble remains the same? In the sense as I understand the sovereign democratic republic, it cannot; without either fundamental rights or directive principles, what can such a government be if it does not ensure political, economic, or social justice?

1173..... There can be no doubt that the object of the fundamental rights is to ensure the ideal of political democracy and prevent authoritarian rule, while the object of the Directive Principles of State Policy is to establish a welfare State where there is economic and social freedom without which political democracy has no meaning. What is implicit in the Constitution is that there is a duty on the Courts to interpret the Constitution and the laws to further the Directive Principles which under Article 37, are fundamental in the governance of the country..... (T)o say that the Directive Principles give a directive to take fundamental rights seems a contradiction in terms. There is no rationale in the argument that the Directive Principles can only be given effect to, if fundamental rights are abrogated. If that were the desiderata then every Government that comes into power and which has to give effect to the Directive Principles of State policy in securing the welfare of its citizens, can say that since it cannot give effect to it so long as fundamental rights subsist, they must be abrogated. I do not think there is any such inherent postulate in the Constitution . Some of these rights, though limited, were subsisting from even the British days under the laws then in force..... The demand for securing fundamental rights since then became an Article of faith, which, as Dr. Ambedkar said, became part and parcel of the mental makeup and the silent immaculate premise of their outlook. The outlook of the framers of the Constitution could not have provided for such a contingency where they can be abrogated, nor in any view, is it a necessary concomitant of the Jeffersonian theory that no one can bind the succeeding generations who by the will of the majority of the people of the country, can bind themselves. One of the views in America since then held and which still persists, was expressed by Justice Hugo Black, one of the eminent Judges of the Supreme Court in these terms: 'I cannot consider the Bill of Rights to be an outworn 18th century "strait-jacket". Its provisions may be thought out-dated abstractions by some. And it is true that they are designed to meet ancient evils. But they are the same against all human evils that have emerged from century to century whenever excessive power is sought by the few at the expense of many'. In 1895, the famous Jurist Maitland, even where Parliament was Supreme, said of Magna Charta that, 'this document becomes and rightly becomes the sacred text, the nearest approach to an irreplaceable "fundamental statute" that England has ever had' (Pollock and Maitland, (1898) Volume I, p. 173).

1174. In the frame of mind and with the recognition of the dominant mental make up and the silent immaculate premise of our outlook, which became the outlook of the people, the framers of our Constitution could not have provided for the freedoms inherent as a part of the right of civilised man to be abrogated or destroyed, the interest of the community and of the society will not be jeopardized and can be adjusted without abrogating, damaging, emasculating or destroying these rights in such a way as to amount to abrogation of the fundamental rights. The Advocate-General of Maysore said that even if fundamental rights are totally abrogated, it is not as if the people will be without any rights. They will be subject to ordinary rights under the law. I must repudiate this contention, because then the clock will be put back to the same position as existed when Britain ruled India and against

which rule our leaders fought for establishing freedom, dignity and basic rights. In this view, my conclusion is that Article 13(2) inhibits only a law made by the ordinary legislative agency and not an amendment under Article 368; that Parliament could under Article 368 amend Article 13 and also the fundamental rights, and though the power of amendment under Article 368 is wide, it is not wide enough to totally abrogate or what would amount to an abrogation or emasculating or destroying in a way as would amount to abrogation of any of the fundamental rights or other essential elements of the basic structure of the Constitution and destroy its identity. Within these limits, Parliament can amend every article. In this view of the scope of the amending power in Article 368, I hold the Twenty-Fourth Amendment valid, for it has the same amending power as it existed before the amendment.

1183. Section 3 of the Twentyfifth Amendment has caused me considerable difficulty because on the one hand, the amendment is designed to give effect to Article 39 (b) and (c) of the Directive Principles of the State policy in the larger interest of the community, and on the other, the basic assumption underlying it is that this cannot be done without taking away or abridging any of the rights conferred by Articles 14, 19 and 31....

1184. The learned advocate for the petitioner submits that Article 31-C (inserted by the above Section 3) subverts seven essential features of the Constitution: (i) it destroys the supremacy of the Constitution by giving a blank charter to Parliament and all the State Legislatures to defy and ignore the Constitution; (ii) it subordinates the Fundamental Rights to Directive Principles of State Policy and thus destroys one of the foundations of the Constitution; (iii) the 'manner and form' of amendment laid down in Article 368 is virtually abrogated inasmuch as while the Fundamental Rights still remain ostensibly on the Statute Book and Article 368 remains unamended, the Fundamental Rights can be effectively silenced by a law passed by a simple majority in the Legislature; (iv) ten Fundamental Rights which are vital for the survival of democracy, the rule of law, and the integrity and unity of the Republic, are in effect abrogated. Seven of these ten Fundamental Rights are unconnected with property; (v) Judicial Review and enforceability of Fundamental Rights, another essential feature of the Constitution, is destroyed, in that the Court is prohibited from going into the question whether the impugned law does or does not give effect to the Directive Principles; (vi) the State Legislatures which cannot otherwise amend Article 368 are permitted to supersede a whole series of Fundamental Rights with the result that Fundamental Rights may prevail in some States and not in others, depending upon the complexion of the State Government; and (vii) the protection to the minorities and their religious, cultural, linguistic and educational rights can be seriously affected on the ground that the law was intended to give effect to the Directive Principles.

1191. ....The Government and Parliament or the Government and Legislature of a State have, within the sphere allotted to each other, the undoubted right to embark on legislative action which they think will ensure the common good, namely, the happiness of the greatest number and so they have the right to make mistakes and retrace any steps taken earlier to correct such mistakes when that realisation dawns on them in giving effect to the above objectives. But if the power to commit any mistake through democratic process is taken away as by enabling an authoritarian system, then it will be the negation of Parliamentary democracy. The State, therefore, has the full freedom to experiment in implementing its policy for achieving a desired object. Though the Courts, ... have no function in the evaluation of these policies or in determining whether they are good or bad for the community, they have, however, in examining legislative action taken by the State in furthering the ends, to ensure that the means adopted do not conflict with the provisions of the Constitution within which the State action has to be confined.

1194. If Parliament by an amendment of the Constitution under Article 368, cannot abrogate, damage or destroy the basic structure of the Constitution or any of the essential elements

comprising that basic structure, or run counter to defeat the objectives of the Constitution declared in the Preamble and if each and every fundamental right is an essential feature of the Constitution, the question that may have to be considered is whether the amendment by the addition of Article 31-C as a fundamental right in Part III of the Constitution has abrogated, damaged or destroyed any of the fundamental rights.

1195. Article 31-C has 4 elements: (i) it permits the legislature to make a law giving effect to Article 39 (b) and Article 39 (c) *inconsistent with* any of the rights conferred by Articles 14, 19 and 31; (ii) it permits the legislature to make a law giving effect to Article 39 (b) and Article 39 (c) *taking away* any of the rights conferred by Articles 14, 19 and 31; (iii) it permits the legislature to make a law giving effect to Article 39 (b) and (c) *abridging* any of the rights conferred by Articles 14,19 and 31; and (iv) it prohibits calling in question in any Court such a law if it contains a declaration that it is for giving effect to the policy of State towards securing the principles specified in Clauses (b) and (c) of Article 39 on the ground that it does not give effect to such a policy of the State.

1196. The first element seems to have been added by way of abundant caution, for it takes in the ohter two elements, namely, taking away and abridging of the rights conferred by Article 14, 19 and 31. However, it would be *ultra vires* the amending power conferred by Article 368, if it comprehends within it the damaging or destruction of these fundamental rights. The second element, namely, *taking away* of these fundamental rights would be ultra vires the amending power, for taking away of these fundamental rights is synonymous with destroying them. As for the third element, namely, *abridging* of these rights, the validity will have to be examined and considered separately in respect of each of these fundamental rights, for an abridgment of the fundamental rights is not the same thing as the damaging of those rights. An abridgment ceases to be an abridgment when it tends to affect the basic or essential content of the right and reduces it to a mere right only in name. In such a case it would amount to the damaging and emasculating the right itself and would be *ultra vires* the power under Article 368. But a right may be hedged in to a certain extent but not so as to affect the basic or essential content of it or emasculate it. In so far as Article 31-C authorises or permits abridgment of the rights conferred by Article 19, it would be *intra vires* the amending power under Article 368 as thereby the damaging or emasculating of these rights is not authorised....

1216. On the fourth element, I agree with the reasoning and conclusion of my learned brother Justice Khanna, ... and with great respect I also adopt the reasoning on that aspect alone as an additional reason for supporting my conclusions on the first three elements also.

PER JUSTICE PALEKAR

1320. A legislature functioning under a Constitution is entitled to make a law and it is not disputed that such a law can be amended in any way the legislature likes by addition, alteration or even repeal. This power to amend is implicit in the legislative power to make laws. It can never be suggested that when the legislature amends its own statute either directly or indirectly it is inhibited by any important or essential parts of that statute. It can amend the important, desirable, parts as unceremoniously as it can any other unimportant parts of the statute. That being so, one does not see the reasonableness of refusing this latitude to a body which is specifically granted the unqualified power to amend the Constitution. While the legislature's power to amend operates on each and every provision of the statute it is difficult to see why the amending clause in a Constitution specifically authorising the amendment of the Constitution should stand inhibited by any part of the Constitution. Essential parts and unessential parts of a Constitution should make no difference to the amending power.... That a legislature can repeal an Act as a whole and the constituent body does not repeal the Constitution as a whole is not a point of distinction. A legislature repeals an Act when it has outlived its utility. But so far as a Constitution is concerned it is an organic instrument continuously growing in utility and the question of its

repeal never arises as long as orderly change is possible. A Constitution is intended to last. Legislative Acts do not have that ambition. It is the nature and character of the Constitution as a growing, organic, permanent and sovereign instrument of Government which exclude the repeal of the Constitution as a whole and not the nature and character of the Amending power.

1321. Since the 'essential features and basic principles' referred to by Mr. Palkhivala are those culled from the provisions of the Constitution, it is clear that he wants to divide the Constitution into parts - one of provisions containing the essential features and the other containing non-essential features. According to him, the latter can be amended in any way the Parliament likes, but so far as the former provisions are concerned, though they may be amended, they cannot be amended so as to damage or destroy the core of the essential features. Two difficulties arise. Who is to decide what are essential provisions and non-essential provisions? According to Mr. Palkhivala it is the Court which should do it. If that is correct, what stable standard will guide the Court in deciding which provision is essential and which is not essential? Every provision, in one sense, is an essential provision, because if a law is made by the Parliament or the State legislatures contravening even the most insignificant provision of the Constitution, that law will be void. From that point of view, the Courts acting under the Constitution will have to look upon its provisions with an equal eye. Secondly, if an essential provision is amended and a new provision is inserted which, in the opinion of the constituent body, should be presumed to be more essential than the one repealed, what is the yard-stick the Court is expected to employ? It will only mean that whatever necessity the constituent body may feel in introducing a change in the Constitution, whatever change of policy that body may like to introduce in the Constitution, the same is liable to be struck down if the Court is not satisfied either about the necessity or the policy. Clearly this is not a function of the Courts. The difficulty assumes greater proportion when an amendment is challenged on the ground that the core of an essential feature is either damaged or destroyed. What is the standard? Who will decide where the core lies and when it is reached? One can understand the argument that particular provisions in the Constitution embodying some essential features are not amendable at all. But the difficulty arises when it is conceded that the provision is liable to be amended, but not so as to touch its 'core'. Apart from the difficulty in determining where the 'core' of an 'essential feature' lies, it does not appear to be sufficiently realised what fantastic results may follow in working the Constitution. Suppose an amendment of a provision is made this year. The mere fact that an amendment is made will not give anybody the right to come to this Court to have the amendment nullified on the ground that it affects the core of an essential feature. It is only when a law is made under the amended provision and that law affects some individual's right, that he may come to this Court. At that time he will first show that the amendment is bad because it affects the core of an essential feature and, if he succeeds there, he will automatically succeed and the law made by the Legislature in the confidence that it is protected by the amended Constitution will be rendered void. And such a challenge to the amendment may come several years after the amendment which till then is regarded as a part of the Constitution. In other words, every amendment, however innocuous it may seem when it is made, is liable to be struck down several years after the amendment although all the people have arranged their affairs on the strength of the amended Constitution. And in dealing with the challenge to a particular amendment and searching for the core of the essential feature, the Court will have to do it either with reference to the original Constitution or the Constitution as it stood with all its amendments upto date. The former procedure is clearly absurd because the Constitution has already undergone vital changes by amendments in the meantime. So the challenged amendment will have to be assessed on the basis of the Constitution with all its amendments made prior to the challenged amendment. All such prior amendments will have to be accepted as good because they are not under challenge, and on that basis Judges will have to deal with the

challenged amendment. But the other amendments are also not free from challenge in subsequent proceedings, because we have already seen that every amendment can be challenged several years after it is made, if a law made under it affects a private individual. So there will be a continuous state of flux after an amendment is made and at any given movement when the Court wants to determine the core of the essential feature, it will have to discard, in order to be able to say where the core lies, every other amendment because these amendments also being unstable will not help in the determination of the core. In other words, the Courts will have to go by the original Constitution to decide the core of an essential feature ignoring altogether all the amendments made in the meantime, all the transformations of rights that have taken place after them, all the arrangements people have made on the basis of the validity of the amendments and all the laws made under them without question. An argument which leads to such obnoxious results can hardly be entertained. In this very case, if the core argument were to be sustained, several previous amendments will have to be set aside because they have undoubtedly affected the core of one or the other fundamental right. Prospective overruling will be the order of the day.

1322. The argument of implied limitations in effect invites us to assess the merits and demerits of the several provisions of the Constitution as a whole in the light of social, political and economic concepts embodied therein and determine on such an assessment what is the irreducible minimum of the several features of the Constitution. Any attempt by amendment, it is contended, to go beyond such irreducible minimum - also called 'core' of essential features - should be disallowed as invalid. In other words, we are invited to resort to the substantive due process doctrine of the Supreme Court of America in the interpretation of a Constitutional Amendment. That doctrine was rejected long ago by this Court (*Gopalan's* case) even in its application to ordinary legislation.... The argument does not have anything to do with the meaning of the expression, 'Amendment of the Constitution', because it is conceded for the purpose of this argument that 'amendment of this Constitution' means 'amendment of all provisions by way of addition, alteration or repeal'. What is contended, is that by the very implications of the structure, general principles and concepts embodied in the Constitution, an amendment can go only thus far and no further. In other words, the scope of amendment is circumscribed not by what the constituent body thinks but by what the Judges ultimately think is its proper limits. And these limits, it is obvious, will vary with individual Judges and, as in due process, the limits will be those fixed by a majority of Judges at one time, changed, if necessary, by a bigger majority at another. Every time an amendment is made of some magnitude, as by the Twenty-fifth Amendment, we will have, without anything to go on, to consider how, in our opinion, the several provisions of the Constitution react on one another, their relative importance from our point of view, the limits on such imponderable concepts as liberty, equality, justice, we think proper to impose, whether we shall give preponderance to directive principles in one case and fundamental rights in another - in short, determine the 'spirit of the Constitution' and decide how far the amendment conforms with that 'spirit'. We are no longer, then, construing the words of the Constitution which is our legitimate province but determining the spirit of the Constitution - a course deprecated by this Court in *Gopalan's* case. When concepts of social or economic justice are offered for our examination in their interaction on provisions relating to right to property - matters traditionally left to legislative policy and wisdom, we are bound to founder 'in labyrinths to the character of which we have no sufficient guides'.

1323. It is true that Judges do judicially determine whether certain restrictions imposed in a statute are reasonable or not. We also decide questions involving reasonableness of any particular action. But Judges do this because there are objective guides. The Constitution and the Legislatures specifically leave such determination to the higher courts, not because they will be always right, but because the subject-matter itself defies definition and the legislatures would sooner abide by what the judges say. The same is

true about limits of delegated legislation or limits of legislative power when it encroaches on the judicial or any other field. Since the determination of all these questions is left to the higher judiciary under the Constitution and the law, the judges have to apply themselves to the tasks, however difficult they may be, in order to determine the legality of any particular legislative action. But all this applies to laws made under Constitution and have no relevance when we have to deal with a constitutional amendment. The Constitution supplies the guides for the assessment of any statute made under it. It does not supply any guides to its own amendment which is entirely a matter of policy.

1324. The 'core' argument and the division into essential and non-essential parts are fraught with the greatest mischief and will lead to such insuperable difficulties that, if permitted, they will open a Pandora's box of endless litigation creating uncertainty about the provisions of the Constitution which was intended to be clear and certain. Every single provision embodies a concept, a standard, norm or rule which the framers of the Constitution thought was so essential that they included it in the Constitution. Every amendment thereof will be liable to be assailed on the ground that an essential feature or basic principle was seriously affected. Our people have a reputation of being a litigious lot. We shall be only adding to this.

1325. When an amendment is successfully passed, it becomes part of the Constitution having equal status with the rest of the provisions of the Constitution. If such an amendment is liable to be struck down on the ground that it damages or destroys an essential feature, the power so claimed should, *a fortiori,* operate on the Constitution as it stands. It will be open to the Court to weigh every essential feature like a fundamental right and, if that feature is hedged in by limitations, it would be liable to be struck down as damaging an essential feature. Take for example personal liberty, a fundamental right under the Constitution. If the Court holds the opinion that the provision with regard to preventive detention in Article 22 damages the core of personal liberty, it will be struck down. The same can be said about the freedoms in Article 19. If this Court feels that the provision with regard to, say State monopolies damages the fundamental right of trade of a citizen it can be struck down. In other words, if an amendment which has become part of the Constitution is liable to be struck down because it damages an essential feature, it should follow that every restriction originally placed on that feature in the Constitution would necessarily come under the pruning knife of the Courts.

1326. In short, if the doctrine of unamendability of the core of essential features is accepted it will mean that we add some such proviso below Article 368: 'Nothing in the above Amendment will be deemed to have authorized an Amendment of the Constitution, which has the effect of damaging or destroying the core of the essential features, basic principles and fundamental elements of the Constitution as may be determined by the Courts'. This is quite impermissible.

1328. On a consideration, therefore, of the nature of the amending power, the unqualified manner in which it is given in Article 368 of the Constitution, it is impossible to imply any limitations on the power to amend the fundamental rights. Since there are no limitations express or implied on the amending power, it must be conceded that all the amendments which are in question here must be deemed to be valid. We cannot question their policy or their wisdom.

PER JUSTICE KHANNA

1395. .... A Constitution provides the broad outlines of the administration of a country and concerns itself with the problems of the Government. This is so whether the Government originates in a forcible seizure of power or comes into being as the result of a legal transfer of power. At the time of the framing of the Constitution many views including those emanating from conflicting extremes are presented. In most cases the Constitution is the result of a compromise between conflicting views. Those who frame a Constitution cannot be oblivious of the fact that in the working of a Constitution many difficulties

would have to be encounted and that it is beyond the wisdom of one generation to hit upon a permanently workable solution for all problems which may be faced by the State in its onward march towards further progress. Sometimes a judicial interpretation may make a Constitution broad-based and put life into the dry bones of a Constitution so as to make it a vehicle of a nation's progress. Occasions may also arise where judicial interpretation might rob some provision of a Constitution of a part of its efficacy as was contemplated by the framers of the Constitution. If no provision were made for the amendment of the Constitution the people would be left with no remedy or means for adapting it to the changing need of times and would perforce have recourse to extra-constitutional methods of changing the Constitution. The extra-constitutional methods may sometimes be bloodless but more often they extract a heavy toll of the lives of the citizens and leave a trail of smouldering bitterness. A State without the means of some change; as said by Burke in his *Reflections on Revolution* is without the means of its conservation. Without such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve. According to Dicey twelve unchangeable Constitutions of France have each lasted on an average for less than ten years, and have frequently perished by violence.....

1400. The machinery of amendment, it has been said, should be like a safety valve, so devised as neither to operate the machine with too great facility nor to require, in order to set it in motion, an accumulation of force sufficient to explode it. In arranging it, due consideration should be given on the one hand, to the requisites of growth and, on the other hand, to those of conservatism. The letter of the, Constitution must neither be idolized as a sacred instrument with that mistaken conservatism which clings to its own worn-out garments until the body is ready to perish from cold, nor yet ought it to be made a plaything of politicians to be tampered with and degraded to the level of an ordinary statute (see *Political Science and Government* by J. W. Garner, p. 538).

1401. The framers of our Constitution were conscious of the desirability of reconciling the urge for change with the need of continuity. They were not oblivious of the phenomenon writ large in human history that change without continuity can be anarchy; change with continuity can mean progress; and continuity without change can mean no progress. The Constitution-makers have, therefore, kept the balance between the danger of having a non-amendable Constitution and a Constitution which is too easily amendable. It has accordingly been provided that except for some not very vital amendments which can be brought about by simple majority, other amendments can be secured only if they are passed in each House of Parliament by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of each House present and voting. Provision is further made that in respect of certain matters which affect the interest of the States the amendment must also be ratified by the legislatures of not less than one-half of the States by resolution to that effect. It can, therefore, be said that while a provision has been made for amendment of the Constitution, the procedure for the bringing about of amendment is not so easy as may make it a plaything of politicians to be tampered with and degraded to the level of ordinary statute. The fact that during the first two decades after the coming into force of the Constitution, the amending Bills have been passed without much difficulty with requisite majority is a sheer accident of history and is due to the fact that one party has happened to be in absolute majority at the Centre and many of the States. This circumstance cannot obliterate the fact that in normal circumstances when there are well balanced parties in power and in opposition the method of amending the Constitution is not so easy.

1402. Another circumstance which must not be lost sight of is that no generation has monopoly of wisdom nor has any generation a right to place fetters on future generations to mould the machinery of government and the laws according to their requirements. Although guidelines for the organisation and functioning of the future government may be laid down and although norms

may also be prescribed for the legislative activity, neither the guidelines should be so rigid nor the norms so inflexible and unalterable as should render them to be incapable of change, alteration and replacement even though the future generations want to change, alter or replace them. The guidelines and norms would in such an event be looked upon as fetters and shackles upon the free exercise of the sovereign will of the people in times to come and would be done away with by methods other than constitutional. It would be nothing short of a presumptuous and vain act and a myopic obsession with its own wisdom for one generation to distrust the wisdom and good sense of the future generations and to treat them in a way as if the generations to come would not be *sui juris*. The grant of power of amendment is based upon the assumption that as in other human affairs, so in Constitutions, there are no absolutes and that the human mind can never reconcile itself to fetters in its quest for a better order of things. Any fetter resulting from the concept of absolute and ultimate inevitably gives birth to the urge to revolt. Santayana once said: 'Why is there sometimes a right to revolution? Why is there sometimes a duty to loyalty? Because the whole transcendental philosophy, if made ultimate, is false, and nothing but a selfish perspective hypostatized, because the will is absolute neither in the individual nor in the humanity ....'. (see *German Philosophy and Politics*, 1915, Pp. 645-49). .... What is true of transcendental philosophy is equally true in the mundane sphere of a constitutional provision. An unamendable Constitution, according to Mulford, is the worst tyranny of time, or rather the very tyranny of time. It makes an earthly providence of a convention which was adjourned without day. It places the scepter over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres (see, *Political Science and Government* by J.W. Garner, pages 537, 538).

1410. It seems inconceivable that the framers of the Constitution in spite of the precedents of the earlier French Constitutions which perished in violence because of their non-amendability, inserted in the Constitution a Part dealing with fundamental rights which even by the unanimous vote of the people could not be abridged or taken away and which left with people no choice except extra-constitutional methods to achieve that object. The mechanics of the amendment of the Constitution, including those relating to extinguishment or abridgement of fundamental rights, in my opinion, are contained in the Constitution itself and it is not necessary to have recourse to a revolution or other extra-constitutional methods to achieve that object.

1411. Confronted with the situation that if the stand of the petitioners was to be accepted about the inability of the Parliament to amend Part III of the Constitution except by means of a revolution or other extra-constitutional methods, the learned counsel for the petitioners has argued that such an amendment is possible by making a law for convening a Constituent Assembly or for holding a referendum. It is urged that there would be an element of participation of the people in the convening of such a Constituent Assembly or the holding of a referendum and it is through such means that Part III of the Constitution can be amended so as to take away or abridge fundamental rights. The above argument, in my opinion, is untenable and fallacious. If Parliament by a two-thirds majority in each House and by following the procedure laid down in Article 368 cannot amend Part III of the Constitution so as to take away or abridge fundamental rights, it is not understood as to how the same Parliament can by law create a body which can make the requisite amendment. If it is not within the power of Parliament to take away or abridge fundamental rights even by a vote of two-thirds majority in each House, would it be permissible for the same Parliament to enact legislation under Entry 97 List I of Seventh Schedule by simple majority for creating a Constituent Assembly in order to take away or abridge fundamental rights? Would not such Constituent Assembly be a creature of statute made by the Parliament even though such a body has the high-sounding name of Constituent Assembly? The nomenclature of the said Assembly cannot conceal its real nature as being one created under a statute made by the Parliament. A body created by the Parliament cannot

have powers greater than those vested in the Parliament. It is not possible to accept the contention that what the Parliament itself could not legally do, it could get done through a body created by it. If something is impermissible, it would continue to be so even though two steps are taken instead of one for bringing about the result which is not permitted. Apart from the above, if we were to hold that the Parliament was entitled under Entry 97, List I to make a law for convening a Constituent Assembly for taking away or abridging fundamental rights, some startling results are bound to follow. A law made under Entry 97 List I would need a simple majority in each House of the Parliament for being brought on statute book, while an amendment of the Constitution would require a two-thirds majority of the members of each House present and voting. It would certainly be anomalous that what Parliament could not do by two-thirds majority, it can bring about by simple majority. This apart, there are many articles of the Constitution, for the amendment of which ratification by not less than half of the State Legislatures is required. The provision regarding ratification in such an event would be set at naught. There would also be nothing to prevent Parliament while making a law for convening a Constituent Assembly to exclude effective representation or voice of State Legislatures in the convening of Constituent Assembly.

1412. The argument that provision should be made for referendum is equally facile. Our Constitution-makers rejected the method of referendum. In a country where there are religious and linguistic minorities, it was not considered a proper method of deciding vital issues. The leaders of the minority communities entertained apprehension regarding this method. It is obvious that when passions are roused, the opinion of the minority in a popular referendum is bound to get submerged and lose effectiveness.

1413. It also cannot be said that the method of bringing about amendment though referendum is a more difficult method.... (T)he method of referendum for amending the Constitution has hardly provided much difficulty in Switzerland. Out of 64 amendments proposed for amending the federal Constitution, 49 were adopted in a popular referendum. So far as the method of amendment of the Constitution by two-thirds majority in their House of the Central Legislature and the ratification by the State Legislatures is concerned, we find that during first 140 years since the adoption of the United States Constitution, 3,113 proposals of amendment were made and out of them, only 24 so appealed to the Congress as to secure the approval of the Congress and only 19 made sufficient appeal to the State Legislatures to secure ratification....

1427. ... I find it difficult to deny to the Parliament the power to amend the Constitution so as to take away or abridge fundamental rights by complying with the procedure of Article 368 because of any such supposed fear or possibility of the abuse of power.....

1429. Apart from the fact that the possibility of abuse of power is no ground for the denial of power if it is found to have been legally vested, I find that the power of amendment under Article 368 has been vested not in one individual but in the majority of the representatives of the people in Parliament. For this purpose, the majority has to be of not less than two-thirds of the members present and voting in each House. In addition to that, it is required that the amendment Bill should be passed in each House by a majority of the total membership of that House. It is, therefore, not possible to pass an amendment Bill by a snap vote in a House wherein a small number of members are present to satisfy the requirement of the rule of quorum. The condition about the passing of the Bill by each House, including the Rajya Sabha, by the prescribed majority ensures that it is not permissible to get the Bill passed in a joint sitting of the two Houses (as in the case of ordinary legislation) wherein the members of the Rajya Sabha can be outvoted by the members of the Lok Sabha because of the latter's greater numerical strength. The effective voice of the Rajya Sabha in the passing of the amendment Bill further ensures that unless the prescribed majority of the representatives of the States agree, the Bill cannot

be passed. The Rajya Sabha under our Constitution is a perpetual body; its members are elected by the members of the State Assemblies and one-third of them retire every two years. We have besides that the provision for the ratification of the amendment by not less than one-half of the State Legislatures, in case the amendment relates to certain provisions which impinge upon the rights of the States. The fact that a prescribed majority of the people's representatives is required for bringing about the amendment is normally itself a guarantee that the power would not be abused. The best safeguard against the abuse or extravagant use of power is public opinion, and not a fetter on the right of people's representatives to change the Constitution by following the procedure laid down in the Constitution itself. It would not be a correct approach to start with a distrust in the people's representatives in the Parliament and to assume that majority of them would have an aversion for the liberties of the people and would act against the public interest. To quote the words of Justice Holmes:

'Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the Courts'.

1430. ....(T)he best safeguard against the abuse of power is public opinion. Assuming that under the sway of some overwhelming impulse, a climate is created wherein cherished values like liberty and freedom lose their significance in the eyes of the people and their representatives and they choose to do away with all fundamental rights by amendment of the Constitution, a restricted interpretation of Article 368 would not be of much avail. The people in such an event would forfeit the claim to have fundamental rights and in any case fundamental rights would not in such an event save the people from political enslavement, social stagnation or mental servitude. I may in this context refer to the words of Learned Hand in his eloquent address on the Spirit of Liberty:

'I often wonder whether we do not rest our hopes too much upon Constitutions, upon laws and upon Courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no Constitution, no law, no Court can save it; no Constitution, no law, no court can even do much to help it. While it lies there it needs no Constitution, no law, no Court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few'. (See pages 189-190, *Spirit of Liberty* edited by Irving Dilliard).....

'...(A) society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nature of that spirit, that spirit in the end will perish' (See page 164, *Spirit of Liberty* edited by Irving Dilliard)....

1437. We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word 'amendment'. Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in my opinion, should be in the negative. I am further of the opinion that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only changes have to be made in it. The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework

of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words 'amendment of the Constitution' with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the state according to which the state shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful *harakiri*. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368.

1438. The word 'amendment of this Constitution' and 'the Constitution shall stand amended' in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution but the existing Constitution though in an amended form. The language of Article 368 thus lends support to the conclusion that one cannot, while acting under that article, repeal the existing Constitution and replace it by a new Constitution.

1439. The connotation of the amendment of the Constitution was brought out clearly by Pandit Nehru in the course of his speech in support of the First Amendment wherein he said that 'a Constitution which is responsive to the people's will, which is responsive to their ideas, in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it'. It is, therefore, plain that what Pandit Nehru contemplated by amendment was the varying of the Constitution 'here and there' and not the elimination of its basic structure for that would necessarily result in the Constitution losing its identity.

1441. ...If the power of amendment does not comprehend the doing away of the entire Constitution but postulates retention or continuity of the existing Constitution, though in an amended form, question arises as to what is the minimum of the existing Constitution which should be left intact in order to hold that the existing Constitution has been retained in an amended form and not done away with. In my opinion, the minimum required is that which relates to the basic structure or framework of the Constitution. If the basic structure is retained, the old Constitution would be considered to continue even though other provisions have undergone change. On the contrary, if the basic structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues and survives.

1442. Although there are some observations in 'Limitations of Amendment Procedure and the Constituent Power' by Conrad to which it is not possible to subscribe, the following observations, in my opinion, represent the position in a substantially correct manner:

'Any amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority'.

It has further been observed:

'The amending procedure is concerned with the statutory framework of which it forms part itself. It may effect changes in detail, remould the legal expression of undeylying principles, adapt the system to the needs of changing conditions, be in the words of Calhoun 'the medicatrix of the system', but should not touch its foundations'.

... Carl J., Friedrich (page 272 of *Man and His*

Gove*rnment* 1963) (observes):

'A Constitution is a living system. But just as in a living, organic system, such as the human body, various organs develop and decay, yet the basic structure or pattern remains the same with each of the organs having its proper function, so also in a constitutional system the basic institutional pattern remains even though the different component parts may undergo significant alterations. For it is the characteristic of a system that it perishes when one of its essential component parts is destroyed'....

1443. ... Sutherland in this context states that any change of the scope or effect of an existing statute whether by addition, omission or substitution of provisions which does not wholly terminate its existence whether by an Act purporting to amend, repeal, revise or supplement or by an Act independent and original in form, is treated as amendatory.

1444. It is, no doubt, true that the effect of the above conclusion at which I have arrived is that there would be no provision in the Constitution giving authority for drafting a new and radically different Constitution with different basic structure or framework. This fact, in my opinion, would not show that our Constitution has a lacuna and is not a perfect or a complete organic instrument, for it is not necessary that a Constitution must contain a provision for its abrogation and replacement by an entirely new and different Constitution. The people in the final analysis are the ultimate sovereign and if they decide to have an entirely new Constitution, they would not need the authority of the existing Constitution for this purpose.

1445. Subject to the retention of the basic structure or framework of the Constitution, I have no doubt that 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. During the course of years after the Constitution comes into force, difficulties can be experienced in the working of the Constitution. It is to overcome those difficulties that the Constitution is amended. The amendment can take different forms....

1446. ... 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 with amendment relating to fundamental rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of 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.

1447. ...The dictionary meaning of the word 'amend' or 'amendment' according to which power of amendment should be for purpose of bringing about an improvement, would not, in my opinion, justify a restricted construction to be placed upon those words. The sponsors of every amendment of the Constitution would necessarily take the position that the proposed amendment is to bring about an improvement on the existing Constitution. There is indeed an element of euphemism in every amendment because it proceeds upon the assumption on the part of the proposer that the amendment is an improvement. In the realities and controversies of politics, question of improvement becomes uncertain with the result that in legal parlance the word amendment when used in reference to a Constitution signifies changes or alteration. Whether the amendment is, in fact, an improvement or not, in my opinion, is not a justiciable matter, and in judging the validity of an amendment the Courts would not go into the question as to whether the amendment has in effect brought about an improvement. It is for the special majority in each House of Parliament to decide as to whether it constitutes an improvement; the courts would not be substituting their own opinion for that of the Parliament in this respect. Whatever may be the personal view of a Judge regarding the wisdom behind or the improving quality of an amendment, he would be only concerned with the legality of

the amendment and this, in its turn, would depend upon the question as to whether the formalities prescribed in Article 368 have been complied with.

1448. The approach while determining the validity of an amendment of the Constitution, in my opinion, has necessarily to be different from the approach to the question relating to the legality of amendment of pleadings. A Constitution is essentially different from pleadings filed in Court by litigating parties. Pleadings contain claim and counter-claim of private parties engaged in litigation, while a Constitution provides for the framework of the different organs of the State, viz., the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of a people. Besides laying down the norms for the functioning of different organs, a Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is Constitution like a plaint or a written statement filed in a suit between two litigants. A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration. A Constitution, it needs to be emphasised, is not a document for fastidious dialectics but the means of ordering the life of a people. It had its roots in the past, its continuity is reflected in the present and it is intended for the unknown future. The words of Holmes while dealing with the U.S. Constitution have equal relevance for our Constitution. Said the great Judge:

.... the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth'....

....Frankfurter in his tribute to Holmes:

'Whether the Constitution is treated primarily as a text for interpretation or as an instrument of government may make all the difference in the world. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in a civilized society' (See *Mr. Justice Holmes,* edited by Felix Frankfurter, p. 58).

1449.... Maurice Gwyer .... said: '(A) broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert language of the enactment in the interest of any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors. There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a Court to vacate or repeal a Statute on that ground alone. But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. Any assumption of authority beyond this would be to

place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights'.

1453. I cannot subscribe to the view that an amendment of the Constitution must keep alive the provision sought to be amended and that it must be consistent with that provision. Amendment of Constitution has a wide and broad connotation and would embrace within itself the total repeal of some articles or their substitution by new articles which may not be consistent with or in conformity with earlier articles. Amendment in Article 368 has been used to denote change....

1454. ...The scheme of Article 368 is not to divide the articles of the Constitution into two categories, viz., important and not so important articles. What article 368 contemplates is that the amending power contained in it should cover all the articles, leaving aside those provisions which can be amended by Parliament by bare majority. In the case, however, of such of the articles as relate to the federal principle or the relations of the States with the Union, the framers of the Constitution put them in the proviso and made it imperative to obtain ratification by not less than half of the State Legislatures in addition to the two-thirds majority of the members present and voting in each House of the Parliament for bringing about the amendment. It is plain that for the purpose of ratification by the State Legislatures, the framers of the Constitution attached greater importance to the federal structure than to the individual rights. ...K.C. Wheare in his book on the *Federal Government* has observed on page 55:

'It is essential in a federal government that if there be a power of amending the Constitution, that power, so far at least as concerns those provisions of the Constitution which regulate the status and powers of the general and regional governments, should not be confided exclusively either to the general government or to the regional governments'.

We may in this context refer to the speech of Dr. Ambedkar who, while dealing with the category of articles for the amendment of which ratification by the States was required, observed:

'Now, we have no doubt put certain Articles in a third category where for the purpose of amendment the mechanism is somewhat different or double. It requires two-thirds majority plus ratification by the States. I shall explain why we think that in the case of certain articles it is desirable to adopt this procedure. If members of the House who are interested in this matter are to examine the articles that have been put under the proviso, they will find that they refer not merely to the Centre but to the relations between the Centre and the Provinces. We cannot forget the fact that while we have in a large number of cases invaded provincial autonomy, we still intend and have, as a matter of fact, seen to it that the federal structure of the Constitution remains fundamentally unaltered. We have by our laws given certain rights to Provinces, and reserved certain rights to the Centre. We have distributed legislative authority; we have distributed executive authority and we have distributed administrative authority. Obviously to say that even those articles of the Constitution which pertain to the administrative, legislative, financial and other powers, such as the executive powers of the Provinces should be made liable to alteration by the Central Parliament by two-thirds majority, without permitting the Provinces or States to have any voice, is in my judgment altogether nullifying the fundamentals of the Constitution'.

1455. ...So far as the concept of implied limitations is concerned it has two facets. Under the first facet, they are limitations which flow by necessary implication from express provisions of the Constitution. The second facet postulates limitations which must be read in the Constitution irrespective of the fact whether they flow from express provisions or not because they are stated to be based upon certain higher values which are very dear to the human heart and are generally considered essential traits of civilized existence. It is also stated that those higher values constitute the spirit and provide the scheme of the Constitution. This aspect of implied limitations is linked with the existence of natural rights and it is stated that such rights being of paramount character, no amendment of Constitution can result in their erosion.

1456. I may at this stage clarify that there are certain limitations which inhere and are implicit in the word 'amendment'. These are limitations which flow from the use of the word 'amendment' and relate to the meaning or construction of the word 'amendment'. This aspect has been dealt with elsewhere while construing the word 'amendment'. Subject to this clarification, we may now advert to the two facets of the concept of implied limitations referred to above.

1457. So far as the first facet is concerned regarding a limitation which flows by necessary implication from an express provision of the Constitution..... I have not been able to discern in the language of that article or other relevant articles any implied limitation on the power to make amendment, contained in the said article....

1458. We may now deal with the second aspect of the question which pertains to limitation on the power of making amendment because such a limitation, though not flowing from an express provision, is stated to be based upon higher values which are very dear to the human heart and are considered essential traits of civilized existence. So far as this aspect is concerned, one obvious objection which must strike every one is that the Constitution of India is one of the lengthiest Constitutions, if not the lengthiest, of the world. The framers of the Constitution dealt with different constitutional matters at considerable length and made detailed and exhaustive provisions about them. Is it then conceivable that after having dealt with the matter so exhaustively and at such great length in express words, they would leave things in the realm of implication in respect of such an important article as that relating to the amendment of the Constitution? If it was intended that limitation should be read on the power of making amendment, question would necessarily arise as to why the framers of the Constitution refrained from expressly incorporating such limitations on the power of amendment in the Constitution itself. The theory of implied limitations on the power of making amendment may have some fascination and attraction for political theorists, but a deeper reflection would reveal that such a theory is based upon a doctrinaire approach and not what is so essential for the purpose of construing and working a Constitution, viz., a pragmatic and practical approach. This circumstance perhaps accounts for the fact that the above theory of implied limitations has not been accepted by the highest Court in any country.

1459. As the concept of implied limitations on the power of amendment under the second aspect is not based upon some express provision of the Constitution, it must be regarded as essentially nebulous. The concept has no definite contours and its acceptance would necessarily introduce elements of uncertainty and vagueness in a matter of so vital an importance as that pertaining to the amendment of the Constitution. Whatever might be the justification for invoking the concept of implied limitations in a short Constitution, so far as the Constitution of India with all its detailed provisions is concerned, there is hardly any scope or justification for invoking the above concept. What was intended by the framers of the Constitution was put in express words and, in the absence of any words which may expressly or by necessary implication point to the existence of limitations on the power of amendment, it is, in my opinion, not permissible to read such limitations in the Constitution and place them on the power of amendment..... The quest for things not said, but which were to be as effective as things said, would take us to the realm of speculation and theorising and must bring in its wake the uncertainty which inevitably is there in all such speculation and theorising. All the efforts of the framers of the Constitution to make its provisions to be definite and precise would thus be undone.

1467. We may now deal with the concept of natural rights. Such rights are stated to be linked with cherished values like liberty, equality and democracy. It is urged that such rights are inalienable and cannot be affected by an amendment of the Constitution. I agree with the learned counsel for the petitioners that some of the natural rights embody within themselves cherished values and represent certain ideals for which men have striven through the ages. The natural rights have, however, been treated to be

not of absolute character but such as are subject to certain limitations. Man being a social being, the exercise of his rights has been governed by his obligations to the fellow beings and the society, and as such the rights of the individual have been subordinated to the general weal. No one has been allowed to so exercise his rights as to impinge upon the rights of others. Although different streams of thought still persist, the later writers have generally taken the view that natural rights have no proper place outside the Constitution and the laws of the state. It is up to the state to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it. But independently of the Constitution and the laws of the state, natural rights can have no legal sanction and cannot be enforced. The courts look to the provisions of the Constitution and the statutory law to determine the rights of individuals. The binding force of constitutional and statutory provisions cannot be taken away nor can their amplitude and width be restricted by invoking the concept of natural rights. Further, as natural rights have no place in order to be legally enforceable outside the provisions of the Constitution and the statute, and have to be granted by the constitutional or statutory provisions, and to the extent and subject to such limitations as are contained in those provisions, those rights, having been once incorporated in the Constitution or the statute, can be abridged or taken away by amendment of the Constitution or the statute. The rights, as such, cannot be deemed to be supreme or of superior validity to the enactments made by the state, and not subject to the amendatory process.

1468. It may be emphasised in the above context that those who refuse to subscribe to the theory of enforceability of natural rights do not deny that there are certain essential values in life nor do they deny that there are certain requirements necessary for a civilised existence. It is also not denied by them that there are certain ideals which have inspired mankind through the corridor of centuries and that there are certain objectives and desiderata for which men have struggled and made sacrifices. They are also conscious of the noble impulses, yearning for a better order of things, of longings natural in most human hearts, to attain a state free from imperfections where higher values prevail and are accepted. Those who do not subscribe to the said theory regarding natural rights, however, do maintain that rights in order to be justiciable and enforceable must form part of the law or the Constitution, that rights to be effective must receive their sanction and sustenance from the law of the land and that rights which have not been codified or otherwise made a part of the law, cannot be enforced in courts of law nor can those rights override or restrict the scope of the plain language of the statute or the Constitution.

1474. 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.

1475. Distinction has been made on behalf of the petitioners between a fundamental right and the essence, also described as core, of that fundamental right. It is urged that even though the Parliament in compliance with Article 368 has the right to amend the fundamental right to property, it has no right to abridge or take away the essence of that right. In my opinion, this differentiation between fundamental right and the essence or core of that fundamental right is an over-refinement which is not permissible and cannot stand judicial scrutiny. If there is a power to abridge or take away a fundamental right, the said power cannot be curtailed by invoking the theory that though a fundamental right can be abridged or taken away, the essence or core of that fundamental right cannot be abridged or taken away. The essence or core of a fundamental right must in the nature of things be its integral part and

cannot claim a status or protection different from and higher than that of the fundamental right of which it is supposed to be the essence or core. There is also no objective standard to determine as to what is the core of a fundamental right and what distinguishes it from the periphery. The absence of such a standard is bound to introduce uncertainty in a matter of so vital an importance as the amendment of the Constitution. I am, therefore, unable to accept the argument, that even if a fundamental right be held to be amendable, the core or essence of that right should be held to be immune from the amendatory process.

1480. I am also of the view that the power to amend the provisions of the Constitution relating to the fundamental rights cannot be denied by describing the fundamental rights as natural rights or human rights. The basic dignity of man does not depend upon the codification of the fundamental rights nor is such codification a prerequisite for a dignified way of living....

It would, in my opinion, be not a correct approach to say that amendment of the Constitution relating to abridgment or taking away of the fundamental rights would have the effect of denuding human beings of basic dignity and would result in the extinguishment of essential values of life.

1481. It may be mentioned that the provisions of Article 19 show that the framers of the Constitution never intended to treat fundamental rights to be absolute. The fact that reasonable restrictions were carved in those rights clearly negatives the concept of absolute nature of those rights. There is also no absolute standard to determine as to what constitutes a fundamental right. The basis of classification varies from country to country. What is fundamental right in some countries is not so in other countries. On account of the difference between the fundamental rights adopted in one country and those adopted in another country, difficulty was experienced by our Constitution-makers in selecting provisions for inclusion in the chapter on fundamental rights....

1482. Reference has been made on behalf of the petitioners to the Preamble to the Constitution and it is submitted that .... there is no power to amend the Preamble because, according to the submission, Preamble is not a part of the Constitution but 'walks before the Constitution'. I am unable to accept the contention that the Preamble is not a part of the Constitution. Reference to the debates of the Constituent Assembly shows that there was considerable discussion in the said Assembly on the provisions of the Preamble. A number of amendments were moved and were rejected. A motion was thereafter adopted by the Constituent Assembly that 'the Preamble stands part of the Constitution' (see *Constituent Assembly Debates*, Vol. X, Pp. 429-456). There is, therefore, positive evidence to establish that the Preamble is a part of the Indian Constitution....

1484. As Preamble is a part of the Constitution, its provisions other than those relating to basic structure or framework, it may well be argued, are as much subject to the amendatory process contained in Article 368 as other parts of the Constitution. Further, if Preamble itself is amendable, its provisions other than those relating to basic structure cannot impose any implied limitations on the power of amendment. The Preamble can also be used to shed light on and clarify obscurity in the language of a statutory or constitutional provision. When, however, the language of a section or article is plain and suffers from no ambiguity or obscurity, no gloss can be put on the words of the section or article by invoking the Preamble..... (T)he Preamble can never be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power *per se*; it can never amount, by implication to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature, and extent, and application of the power actually conferred by the Constitution, and not substantively to create them. The office of the Preamble has been stated by the House of Lords in *Attorney-General* v. *H.R.H. Prince Ernest Augustus of Hanover*, 1957. In that case, Lord Normand said:

'Where there is a Preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions. The Preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts. There may be no exact correspondence between Preamble and enactment, and the enactment may go beyond or it may fall short of the indications that may be gathered from the Preamble'. ...

1497. The argument that Parliament cannot by amendment enlarge its own powers is untenable. Amendment of the Constitution, in the very nature of things, can result in the conferment of powers on or the enlargement of powers of one of the organs of the State. Likewise, it can result in the taking away or abridgment of the powers which were previously vested in an organ of the State. Indeed nearly every expansion of powers and functions granted to the Union Government would involve consequential contraction of powers and functions in the Government of the States. The same is true of the converse position. There is nothing in the Constitution which prohibits or in any other way prevents the enlargement of powers of Parliament as a result of constitutional amendment and, in my opinion, such an amendment cannot be held to be impermissible or beyond the purview of Article 368..... I am also unable to accede to the contention that an amendment of the Constitution as a result of which the President is bound to give his assent to an amendment of the Constitution passed in accordance with the provisions of Article 368 is not valid. Article 368 itself gives, inter alia, the power to amend Article 368 and an amendment of Article 368 which has been brought about in the manner prescribed by that article would not suffer from any constitutional or legal infirmity..... The change made by the Twenty-fourth Amendment in the Constitution of India, to which our attention has been invited, has not done away with the assent of the President but has made it obligatory for him to give his assent to the Constitution Amendment Bill after it has been passed in accordance with Article 368. As it is not now open to the President to withhold his assent to a Bill in regard to a constitutional amendment after it has been duly passed, the element of personal discretion of the President disappears altogether. Even apart from that, under our Constitution the position of the President is that of a constitutional head and the scope for his acting in exercise of his personal discretion is rather small and limited.

PER JUSTICE MATHEW

1552. In the cases before us, the Constitution of our country, in its most vital parts has to be considered and an opinion expressed which may essentially influence the destiny of the country.....

1576. (A)lthough the word 'amendment' has a variety of meanings, we have to ascribe to it in the article (Article 368) a meaning which is appropriate to the function to be played by it in an instrument apparently intended to endure for ages to come and to meet the various crises to which the body public will be subject. The nature of that instrument demands awareness of certain presupposition. The Constitution has no doubt its roots in the past but was designed primarily for the unknown future. The reach of this consideration was indicated by Justice Holmes in language that remains fresh no matter how often repeated.

'..... when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters....'.

1577. Every well drawn Constitution will therefore provide for its own amendment in such a way as to forestall as is humanly possible, all revolutionary upheavals. See Carl J. Fredrich, 'Constitutional Government and Democracy', p. 135. That the Constitution is a framework of great governmental powers to be exercised for great public ends in the future, is not a pale intellectual concept but a dynamic idea which must dominate in any consideration of the width of the amending power. No existing Constitution has reached its final form and shape and become, as it were a

fixed thing incapable of future growth. Human societies keep changing; needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it, may burst forth with an intensity that exacts more than reasonable satisfaction. See Felix Frankfurter, *Of Law and Men*, p. 35. As Wilson said a living Constitution must be Darwinian in structure and practice. See *Constitutional Government in the United States*, p. 25. The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. 'A Constitution is an experiment as all life is an experiment'. See Justice Holmes in *Abrams* v. *United States*, (1918) 250 U. S. 616. If the experiment fails, there must be provision for making another. Jefferson said that there is nothing sanctimonious about a Constitution and that nobody should regard it as the ark of the covenant, too sacred to be touched. Nor need we ascribe to men of preceding age, a wisdom more than human and suppose that what they did should be beyond amendment. A Constitution is not an end in itself, rather a means for ordering the life of a nation. The generation of yesterday might not know the needs of today, and, 'If yesterday is not to paralyse today', it seems best to permit each generation to take care of itself. The sentiment expressed by Jefferson in this behalf was echoed by Dr. Ambedkar. *Constituent Assembly Debates*, Vol. X, Pp. 296-97. If there is one sure conclusion which I can draw from this speech of Dr. Ambedkar, it is this: He could not have conceived of any limitation upon the amending power. How could he have said that what Jefferson said is 'not merely true but absolutely true', unless he subscribed to the view of Jefferson that 'each generation as a distinct nation with a right, by the will of the majority to bind themselves but none to bind the succeeding generations more than the inhabitants of another country', and its corollary which follows as the night the day that each generation should have the power to determine the structure of the Constitution under which they live. And how could this be done unless the power of amendment is plenary, for it would be absurd to think that Dr. Ambedkar contemplated a revolution in every generation for changing the Constitution to suit its needs and aspirations. I should have thought that if there is any implied limitation upon any power, that limitation is that the amending body should not limit the power of amendment of the future generation by exercising its power to amend the amending power. Mr. Palkhivala said that if the power of amendment of the amending power is plenary, one generation can, by exercising that power, take away the power of amendment of the Constitution from the future generations and foreclose them from ever exercising it. I think the argument is too speculative to be countenanced. It is just like the argument that if men and women are given the freedom to choose their vocations in life, they would all jump into a monastery or a nunnery, as the case may be, and prevent the birth of a new generation; or the argument of some political thinkers that if freedom of speech is allowed to those who do not believe in it, they would themselves deny it to others when they get power and, therefore, they should be denied that freedom today, in order that they might not deny it to others tomorrow.

1578. Seeing, therefore, that it is a 'Constitution that we are expounding' and that the Constitution-makers had before them several Constitutions where the word 'amendment' or 'alteration' is used to denote plenary power to change the fundamentals of the Constitution, I cannot approach the construction of the word 'amendment' in Article 368 in niggardly or pettifogging spirit and give it a narrow meaning; but 'being a familiar expression, it was used in its familiar legal sense'....

1589. Once it is realised that a Constitution differs from law in that a Constitution is always valid whereas a law is valid only if it is in conformity with the Constitution, and that the body which makes the Constitution is a sovereign body and generally needs no legal authority whereas a body which makes the ordinary law is not sovereign but derives its power from the Constitution, an amendment to the Constitution has the same validity as the Constitution itself,

although the question whether the amendment has been made in the manner and form and within the power conferred by the Constitution is always justiciable. Just as an ordinary law derives its validity from its conformity with the Constitution, so also, an amendment of the Constitution derives its validity from the Constitution. An amendment of the Constitution can be *ultra vires* just as an ordinary law can be.

1615. Mr. Palkhivala contended that even if the word 'amendment' in Article 368 before it was amended is given its widest meaning ..., there were and are certain inherent and implied limitations upon the power of amendment flowing from three basic features which must be present in the Constitution of every republic. According to counsel, these limitations flow from the fact that the ultimate legal sovereignty resides in the people, that Parliament is a creature of the Constitution and not a constituent body, and that the power to alter or destroy the essential features of the Constitution belongs only to the people, the ultimate legal sovereign. Counsel submitted that if Parliament has power to alter or destroy the essential features of the Constitution, it would cease to be a creature of the Constitution and would become its master; that no constituted body like the Amending Body can radically change the Constitution in such a way as to damage or destroy the basic constitutional structure, as the basic structure was decided upon by the people, in the exercise of their constituent revolutionary power. Counsel also argued that it is constitutionally impermissible for one constituent assembly to create a second perpetual constituent assembly above the nation with power to alter its essential features and that Fundamental Rights constitute an essential feature of the Constitution.

1616. The basic premise of counsel's argument was that the ultimate *legal* sovereignty under the Constitution resides in the people. The Preamble to the Constitution of India says that 'We the people of India.... adopt, enact and give unto ourselves this Constitution'. Every one knows that historically this is not a fact. The Constitution was framed by an assembly which was elected indirectly on a limited franchise and the assembly did not represent the vast majority of the people of the country. At best, it could represent only 28.5 per cent of the adult population of the provinces, let alone the population of the Native States.* And who would dare maintain that they alone constituted the 'people' of the country at the time of framing the Constitution?** The Constituent Assembly derived its legal competence to frame the Constitution from Section 8 (1) of the Indian Independence Act, 1947. The British Parliament, by virtue of its legal sovereignty over India, passed the said enactment and invested the Assembly with power to frame the Constitution. ... The assertion by some of the makers of the Constitution that the Constitution proceeded from the people can only be taken as a rhetorical flourish, probably to lay its foundation on the more solid basis of popular will and to give it an unquestioned supremacy, for ever since the days of Justinian, it was thought that the ultimate legislative power including the power to frame a Constitution resides in the people and, therefore, any law or Constitution must mediately or immediately proceed from them. ... Two ideas are thus brought into play. One is the so-called 'positive' conception of law as a general expression merely for the particular commands of a human law-giver, as a series of acts of human will; the other is that the highest possible embodiment of human will, is 'the people'. ...

1617. It is said that the assertion in the Preamble that it was the people who enacted the Constitution raises an incontrovertible presumption and a Court is precluded from finding out the truth. ... It does not follow that because the people of India did not frame the Constitution or ratified it, the Constitution has no legal validity. The validity of a Constitution is one thing; the source from which it proceeds is a different one. Apart from its legal

* See Granville Austin, *The Indian Constitution*, 1972, p. 10 and Appendix I, Pp. 331-32.

** As to who are the people in a country, see the Chapter 'The People', in *Modern Democracies*, by Bryce, Vol. I, Pp. 161-69.

validity derived from the Indian Independence Act, its norms have become efficacious and a Court which is a creature of the Constitution will not entertain a plea of its invalidity. If the legal source for the validity of the Constitution is not that it was framed by the people, the amending provision has to be construed on its own language, without reference to any extraneous consideration as to whether the people did or did not delegate all their constituent power to the Amending Body or that the people reserved to themselves the Fundamental Rights.

1618. Let me, however, indulge in the legal fiction and assume, as the Preamble has done, that it was the people who framed the Constitution. What follows? Could it be said that after the Constitution was framed, the people still retain and can exercise their sovereign constituent power to amend or modify the basic structure or the essential features of the Constitution by virtue of their legal sovereignty?

1619. According to Austin, a person or body is said to have legal sovereignty, when he or it has unlimited law-making power and that there is no person or body superior to him or it. Perhaps, it would be correct to say that the possession of unlimited law-making power is the criterion of legal sovereignty in a State, for, it is difficult to see how there can be any superior to a person or group that can make laws on all subjects since that person or group would pass a law abolishing the powers of the supposed superior. The location of sovereignty in a quasi-federal Constitution like ours is a most difficult task for any lawyer and I shall not attempt it. Many writers take the view that sovereignty in the Austinian sense does not exist in any State* and that, at any rate, in a federal State, the concept of sovereignty in that sense is incapable of being applied.** This Court has said ... that the 'legal theory on which the Constitution was based was the withdrawal or resumption of all the powers of sovereignty into the people of this country', and that the '.... Legal sovereignty of the Indian nation is vested in the people of India, who, as stated by the Preamble, have solemnly resolved to constitute India into a Sovereign Democratic Republic...'... I am not quite sure of the validity of the assumption implicit in this dictum. The Supreme Court of U.S.A. has held that sovereignty vests in the people. ... The same view has been taken by writers like Jameson, Willis, Wilson and others. But it is difficult to understand how the unorganised mass of the people can *legally* be sovereign. In no country, except perhaps in a direct democracy, can the people *en masse* be called legally sovereign. This is only to put more explicitly what Austin meant when he said that political power must be in a determinate person or body of persons, for, the people at large, the whole people, as distinct from particular person or persons, are incapable of concerted action and hence, of exercising political power and therefore of legal supremacy.† 'When the purported sovereign is anyone but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are Rules of Law logically prior to him. ... It is not impossible to ascertain the will of an individual without the aid of rules; he may be presumed to mean what he says, and he cannot say more than one thing at a time. But the extraction of a precise expression of will from a multiplicity of human beings is, despite all the realists say, an artificial process and one which cannot be accomplished without arbitrary rules. It is, therefore, an incomplete statement to say that in a state such and such an assembly of human beings is sovereign. It can only be sovereign when acting in a certain way prescribed by law. At least some rudimentary manner and form is demanded of it; the simultaneous incoherent cry of a rabble, small or large, cannot be law, for it is unintelligible.‡ 'While it is true that the sovereign cannot act otherwise than in compliance with law, it is equally true that it creates the law in accordance with which it is to act.$ And what is the provision in the Constitution

* See W.J. Rees, 'Theory of Sovereignty Re-stated', in the book *In Defence of Sovereignty*, by W.J. Stankiewicz (Ed.), p. 209.

** See Salmond's *Jurisprudence*, 7th Ed., p. 531.

† See 'From John Austin to John C. Hurd', by Irving B. Richman in *Harward Law Review*, Vol. 14, p. 364.

‡ See Latham, 'What is an Act of Parliament' (1939), King's Counsel, p. 152.

$ See Orfiend, 'The Amending of the Federal Constitution', p. 255.

or the law for the people to act as legal sovereign or as regards the manner and form when they act as legal sovereign?

1620. The supremacy enjoyed by the Constitution has led some to think that the document must be regarded as sovereign. They talk about the Government of laws and not of men; but sovereignty, by definition, must be vested in a person or body of persons. The Constitution itself is incapable of action. Willoughby has said that sovereignty of the people, popular sovereignty and national sovereignty, cannot accurately be held to mean that, under an established government, the sovereignty remains in the people. It may mean, however, that the constitutional jurisprudence of the State to which it is applied is predicated upon the principle that no political or individual organ of the government is to be regarded as the source whence, by delegation, all other public powers are derived, but that, upon the contrary, all legal authority finds its original source in the whole citizen body or in an electorate representing the governed.* Probably, if sovereignty is dropped as a legal term and viewed as a term of political science, the view of the Supreme Court of the U.S.A. and the writers who maintain that the people are sovereign might be correct. No concept has raised so many conflicting issues involving jurists and political theorists in so desperate a maze as the genuine and proper meaning of sovereignty.

1621. Seeing, however, that the people have no constitutional or legal power assigned to them under the Constitution and that by virtue of their political supremacy they can unmake the Constitution only by a method not sanctioned by the juridical order, namely, revolution, it is difficult to agree with the proposition of counsel that the *legal sovereignty* under the Constitution resides in the people, or, that as ultimate legal sovereign the people can constitutionally change the basic structure of the Constitution even when the Constitution provides for a specific mechanism for its amendment. In the last analysis, perhaps, it is right to say that if sovereignty is said to exist in any sense at all, it must exist in the Amending Body, for, as Willoughby has said: 'In all those cases in which owing to the distribution of governing power there is doubt as to the political body in which sovereignty rests, the test to be applied is, the determination of which authority has, in the last instance the legal power to determine its own competence as well as that of others.** In Germany, the publicists have developed a similar theory known as the 'Kompetenz-kompetenz theory'.$

1622. This, however, does not mean that the people have no right to frame the Constitution by which they would be governed. Of the people as well as the body politic, all that one can say is, not that they are sovereign, but that they have the natural right to full autonomy or to self-government. The people exercise this right when they establish a Constitution.† And, under our Constitution, the people have delegated the power to amend the instrument which they created to the Amending Body.

1623. When a person holds a material good, it cannot be owned by another. He cannot give it to another without his losing possession of it and there can only be a question of transfer of ownership or a donation. But, when it is a question of a moral or spiritual quality such as a right or power, one can invest another with a right or power without losing possession of it, if that man receives it in a vicarious manner, as a vicar of the man who transferred it. The people are possessed of their right to govern themselves in an inherent and permanent manner, their representatives are invested with power which exists in the people, but in a vicarious manner.‡

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* See Willoughby, *Fundamental Concepts of Public Law*, Pp. 99-100.
** Willoughby, 'The Nature of the State', 1928, p. 197.
$ See Merriam, *History of the Theory of Sovereignty since Rousseau*, Pp. 180-96.
† Jacques Maritain, 'Man and the State', p. 25.
‡ See *ibid*, Pp. 134-35.

1624. Delegation does not imply a parting with powers of one who grants the delegation but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. It does not mean that the delegating person parts with the power in such a way as to denude himself of his rights. ...

1625. I will assume that the people, by designating their representatives and by transmitting to them the power to amend the Constitution, did not lose or give up possession of their inherent constituent power. (There was great controversy among the civilians in the Middle Ages whether, after the Roman people had transferred their authority to legislate to the emperor, they still retained it or could reclaim it).* There is always a distinction between the possession of a right or power and the exercise of it. It was in the exercise of the constituent power that the people framed the Constitution and invested the Amending Body with the power to amend the very instrument they created with a super-added power to amend that very power. The instrument they created, by necessary implication, limits the further exercise of the power by them, though not the possession of it. The Constitution when it exists, is supreme over the people and, as the people have voluntarily excluded themselves from any direct or immediate participation in the process of making amendment to it, and have directly placed that power in their representatives without reservation, it is difficult to understand how the people can juridically resume the power to continue to exercise it. ... It would be absurd to think that there can be two bodies for doing the same thing under the Constitution. It would be most incongruous to incorporate in the Constitution a provision for amendment, if the constituent power to amend can also be exercised at the same time by the mass of the people, apart from the machinery provided for the amendment. In other words, the people having delegated the power of amendment, that power cannot be exercised in any way other than that prescribed nor by any instrumentality other than that designated for that purpose by the Constitution. There are many Constitutions which provide for active participation of the people in the mechanism for amendment either by way of initiative or referendum as in Switzerland, Australia and Eire. But, in our Constitution, there is no provision for any such popular device and the power of amendment is vested only in the Amending Body.

1626. It is said that 'it is within the power of the people who made the Constitution to un-make it, that it is the creature of their own will and exists only by their will'. ... This dictum has no direct relevancy on the question of the power of the people to amend the Constitution. It only echoes the philosophy of John Locke that people have the political right to revolution in certain circumstances and to frame a Constitution in the exercise of their revolutionary constituent power.

1627. When the French political philosophers said that the nation alone possesses the constituent power, and an authority set up by a Constitution created by the nation has no constituent power apart from a power to amend that instrument within the lines originally adopted by the people what is meant is that the nation cannot part with the constituent power, but only the power to amend the Constitution within the original scheme of the Constitution in minor details. Some jurists refer to these two powers, namely, the 'constituent power' and the 'amending power' as distinct. According to Carl, J. Friedrich, the constituent power is the power which seeks to establish a Constitution which in the exact sense, is to be understood the de-facto residuary power of a not inconsiderable part of the community to change or replace an established order by a new Constitution. The constituent power is the power exercised in establishing a Constitution, that is the fundamental decision on revolutionary measures for the organisation and limitation of a new government. From this constituent power must be distinguished the amending power which changes an existing Constitution in form provided by the Constitution itself, for the amending power is itself a constituted authority. And he further points out that in French Constitutional Law the expression *pouvoir constituant* is often used to

* See Carlyle, *A History of Medieval Political Theory in the West*, Vol. VI, Pp. 514-15.

describe the 'amending authority' as well as the constituent power, but the expression constituent power used by him is not identical with the *pouvoir constituant* of the French Constitutional Law.* It is, however, unnecessary to enter this arid tract of what Lincoln called 'pernicious abstraction' where no green things grow, or resolve the metaphysical niceties, for, under our Constitution, there is no scope for the constituent power of amendment being exercised by the people after they have delegated power of amendment to the Amending Body. To what purpose did that instrument give the Amending Body, the power to amend the amending power itself, unless it be to confer plenary power upon the Amending Body to amend all or any of the provisions of the Constitution? It is no doubt true that some German thinkers, by way of protest against indiscriminate use of the amending power under the Weimer Constitution of Germany, asserted that the power of amendment is confined to alteration within the constitutional text and that it cannot be used to change the basic structure of the Constitution. But, as I said, to say that a nation can still exercise unlimited constituent power after having framed a Constitution vesting plenary power of amendment under it in a separate body, is only to say that the people have the political power to change the existing order by means of a revolution. But this doctrine cannot be advanced to place implied limitations upon the amending power provided in a written Constitution.

1628. It is, therefore, only in a revolutionary sense that one can distinguish between constituent power and amending power. It is based on the assumption that the constituent power cannot be brought within the framework of the Constitution. 'To be sure, the amending power is set up in the hope of anticipating a revolution by the legal change and, therefore, as an additional restraint upon the existing government. But should the amending power fail to work, the constituent power may emerge at the critical point'.** The proposition that an unlimited amending authority cannot make any basic change and that the basic change can be made only by a revolution is something extra-legal that no Court can countenance it. In other words, speaking in conventional phraseology, the real sovereign, the hundred per cent sovereign - the people - can frame a Constitution, but that sovereign can come into existence thereafter unless otherwise provided, only by revolution. It exhausts itself by creation of minor and lesser sovereigns who can give any command. And, under the Indian Constitution, the original sovereign - the people - created, by the amending clause of the Constitution, a lesser sovereign, almost co-extensive in power with itself. This sovereign, the one established by the revolutionary act of the full or complete sovereign has been called by Max Radin the 'pro-sovereign', the holder of the amending power under the Constitution. The hundred per cent sovereign is established only by revolution and he can come into being again only by another revolution. See Max Radin, 'Intermittent Sovereign', 39 *Yale Law Journal* 514. As Wheare clearly puts it, once the Constitution is enacted, even when it has been submitted to the people for approval, it binds thereafter, not only the institutions which it establishes, but also the people themselves. They may amend the Constitution, if at all, only by the method which the Constitution itself provides.† This is illustrated also in the case of the sovereign power of the people to make laws. When once a Constitution is framed and the power of legislation which appertains to the people is transferred or delegated to an organ constituted under the Constitution, the people cannot thereafter exercise that power. 'The legal assumption that sovereignty is ultimately vested in the people affords no legal basis for the direct exercise by the people of any sovereign power, whose direct exercise by them has not been expressly or impliedly reserved. Thus the people possess the power of legislating directly only if their Constitution so provides'.‡

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* See Carl J. Friedrich, *Constitutional Government and Politics*, 1937, Pp. 113, 118, 162, 521.
** See J. Friedrich, *Constitutional Government and Democracy*, 1950, Pp. 130.
† Wheare, *Modern Constitutions*, 1965, p. 62.
‡ See Rottschaefer on Constitutional Law, 1939, p. 8.

1629. ... Hoar says 'The whole people in their sovereign capacity, acting through the forms of law at a regular election, may do what they will with their own frame of Government, even though that frame of Government does not expressly permit such action, and even though the frame of Government attempts to prohibit such action'.[$] Again, he says: 'Thus we come back to the fact that all conventions are valid if called by the people speaking through the electorate at a regular election. This is true regardless of whether the Constitution attempts to prohibit or authorize them, or is merely silent on the subject. Their validity rests not upon constitutional provisions, nor upon legislative act, but upon the fundamental sovereignty of the people themselves'.* As to this, I think the answer given by Willoughby is sufficient. He said: 'The position has been quite consistently taken that constitutional amendments or new Constitutions adopted in modes not provided for by the existing Constitutions cannot be recognized as legally valid unless they have received the formal approval of the old existing Government'....**

1630. I think it might be open to the Amending Body to amend Article 368 itself and provide for referendum or any other method for ascertaining the will of the people in the matter of amendment of Fundamental Rights or any other provision of the Constitution. If the basic and essential features of the Constitution can be changed only by the people, and not by a constituted authority like the Amending Body, was it open to the Amending Body, or, would it be open to the Amending Body today to amend Article 368 in such a way as to invest the people with that power to be exercised by referendum or any other popular device? If counsel for the petitioner is right in his submission that the power to amend the amending power is limited, this cannot be done, for the Constitution would lose its identity by making such a radical change in the Constitution of the Amending Body, and, therefore, there would be implied limitation upon the power to amend the amending power in such a way as to change the locus of the power to amend from the Amending Body as constituted to any other body including the people. The result is that ex-hypothesi, under Article 368 there was, or is, no power to amend the Fundamental Rights and the other essential or basic features in such a way as to destroy or damage their essence or core. Nor can the article be amended in such a way as to invest the people - the legal sovereign according to counsel for the petitioner - with power to do it. This seems to me to be an impossible position.

1631. Counsel for the petitioner submitted that the Preamble to the Constitution would operate as an implied limitation upon the power of amendment, that the Preamble sets out the great objectives of the people in establishing the Constitution, that it envisages a sovereign democratic republic with justice, social, economic and political, liberty of thought belief and expression, equality of status and opportunity, and fraternity as its fulcrums and that no succeeding generation can amend the provisions of the Constitution in such a way as to radically alter or modify the basic features of that form of Government or the great objectives of the people in establishing the Constitution. ...

1632. A Preamble, ... represents, at the most only an intention which an Act seeks to effect and it is a recital of a present intention. In the *Berubari* Case (1960), it was argued that the Preamble to the Constitution clearly postulates that like the democratic republican form of Government, the entire territory of India is beyond the reach of Parliament and cannot be affected either by ordinary legislation or even by constitutional amendment, but the Court said: 'it is not easy to accept the assumption that the first part of the Preamble postulates a very serious limitation on one of the very important attributes of sovereignty itself'. This case directly negatived any limitation of what is generally regarded as a necessary and essential attribute of sovereignty on the basis of the objectives enshrined in the Preamble.

$ Hoar, *Constitutional Convention: Their Nature, Power and Limitations*, p. 115.
* Hoar, *Constitutional Convention: Their Nature, Power and Limitations*, p. 52.
** Willoughby, *The Fundamental Concepts of Public Law*, p. 96.

1634. The broad concepts of justice, social, economic and political, equality and liberty thrown large upon the canvas of the Preamble as eternal verities are mere moral adjurations with only that content which each generation must pour into them a new in the light of its own experience. 'An independent judiciary cannot seek to fill them from its own bosom as, if it were to do so, in the end it will cease to be independent'. And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs. It must be content to stand aside from these fateful battles 'as to what these concepts mean and leave it to the representatives of the people'.*

1679. Our Constitution, in its Preamble has envisaged the establishment of a democratic sovereign republic. Democracy proceeds on the basic assumption that the representatives of the people in Parliament will reflect the will of the people and that they will not exercise their powers to betray the people or abuse the trust and confidence reposed in them by the people. Some of the great powers appertaining to the sovereignty of the State are vested in the representatives of the people. They have the power to declare war. They have power over coinage and currency. These disaster-potential powers are insulated from judicial control. These powers, if they are imprudently exercised, can bring about consequences so extensive as to carry down with them all else we value. War and inflation have released evil forces which have destroyed liberty. If these great powers could be entrusted to the representatives of the people in the hope and confidence that they will not be abused, where is the warrant for the assumption that a plenary power to amend will be abused? The remedy of the people, if these powers are abused, is in the polling booth and the ballot box.

1680. The contention that if the power to amend Fundamental Rights in such a way as to take away or abridge them were to vest in Parliament it would bring about the catastrophic consequences apprehended by counsel has an air of unreality when tested in the light of our experience of what has happened between 1951 when *Sankari Prasad's* case, (1952) recognised the power of the Parliament to amend the Fundamental Rights and 1967 when the *Golak Nath* case was decided. It should be remembered in this connection that the Parliament when it exercises its power to amend Fundamental Rights is as much the guardian of the liberties of the people as the Courts.

1681. If one of the tests to judge the essential features of the Constitution is the difficulty with which those features can be amended then it is clear that the features which are broadly described as 'federal features' contained in clauses (a) to (d) of the proviso to Article 368 are essential features of the Constitution. The articles referred to in clauses (a) to (d) deal with some of the essential features of the Constitution like the Union Judiciary, the High Courts, the legislative relation between the Union and the States, the conferment of the residual power, and so on. The power to amend the legislative lists would carry with it the power to transfer the residuary entry from the Union List to the State List. This would also enable Parliament to increase its power by transferring entries from the State List or Concurrent List to the Union List. The proviso to Article 368 thus makes it clear that the Constitution-makers visualised the amendability of the essential features of the Constitution.

1682. Mr. Palkhivala contended that Fundamental Rights are an essential feature of the Constitution, that they are the rock upon which the Constitution is built, that, by and large, they are the extensions, combinations or permutations of the natural rights of life, liberty and equality possessed by the people by virtue of the fact that they are human beings and that these rights were reserved by the people to themselves when they framed the Constitution and cannot be taken away or abridged by a constituted authority like Parliament. He said that the implied limitation stems from the character of those rights as well as the nature of the authority upon which the power is supposed to be conferred.

* See Learned Hand, *The Spirit of Liberty*, p. 125.

1683. On the other hand, the respondents submitted that the people of India have only such rights as the Constitution conferred upon them, that before the Constitution came into force, they had no Fundamental Rights, that these rights were expressly conferred upon the people by Part III of the Constitution, and that there is no provision in our Constitution like Article 10 of the United States' Constitution which reserved the rights of the people to themselves. They also said that the characterization of Fundamental Rights as transcendental, sacrosanct or primordial in the sense that they are 'not of today or yesterday but live eternally and none can date their birth', smacks of sentimentalism and is calculated to cloud the mind by an outmoded political philosophy, and would prevent a dispassionate analysis of the real issues in the case.

1684. The question presented for decision sounds partly in the realm of political philosophy but that is no reason why the Court should not solve it, for, as De Tocqueville wrote: 'scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question'.* For the purpose of appreciating the argument of Mr. Palkhivala that there is inherent limitation on the power of Parliament to amend Fundamental Rights, it is necessary to understand the source from which these rights arise and the reason for their fundamentalness.

1685. Let it be understood at the very outset that I mean by 'natural rights' those rights which are appropriate to man as a rational and moral being and which are necessary for a good life. Although called 'rights', they are not *per se* enforceable in Courts unless recognized by the positive law of a State. I agree that the word 'rights' has to be reserved for those claims and privileges which are recognized and protected by law. But to identify rights with legally recognized rights is to render oneself helpless before the authoritarian state. Your rights, on this theory, are precisely those which the State provides you and no more. To say that you have rights which the State ought to recognize is, from this point of view, a plain misuse of the language. 'However, from the point of view of the Declaration of Independence, to recognize the existence of rights prior to and independent of political enactment, is the beginning of political wisdom. If the Governments are established to 'secure these rights', the pre-existence of these rights is the whole basis of the political theory'.** The Preamble to our Constitution shows that it was to 'secure' these rights that the Constitution was established, and that, by and large, the Fundamental Rights are a recognition of the pre-existing natural rights. 'They owe nothing to their recognition in the Constitution - such recognition was necessary if the Constitution was to be regarded complete'.†

1686. The philosophical foundation of the rights of man is natural law and the history of rights of man is bound up with the history of natural law.‡ That law is deduced not from any speculative void but from the general condition of mankind in society. According to St. Thomas Aquinas, the order of the precepts of the natural law follows the order of natural inclinations because, in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances inasmuch as every substance seeks the preservation of its own being, according to its nature and by reason of this inclination, whatever is a means of preserving human life, and the warding off its obstacles, belongs to the natural law.*† In a different context Spinoza proclaimed the very same principle in his famous words 'Every being strives to persevere in being'.*‡ Secondly, according to St. Thomas Aquinas, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other

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* See De Tocqueville, *Democracy in America* (1948), Bradley Edition, p. 280.
** See Hocking, *Freedom of the Press*, footnote at p. 59.
† See Corwin *The Higher Background of the American Constitutional Law*, p. 5.
‡ See Jacques Maritain, *Man and the State*, Pp. 80-81.
*† See Summa Theologica, Part II, Section I, Question 91, Article 2 (translated by the English Dominicans), Vol. 3.
*‡ See *Ethics*, Part III, Proposition No. 6.

animals; and in virtue of this inclination, those things are said to belong to the natural law *which nature has taught to all animals*, such as sexual intercourse, the education of the offspring, and so forth.* And thirdly, there is in man an inclination to good according to the nature of his reason which inclination prompts him to know the truth and to live in society.

1687. The law of nature is both an expression of reality and a standard to measure the rightness and justice of positive law. The influence of natural law on the concept of natural justice and of the reasonable man of the common law, on the conflict of laws, the law of merchants and the law of quasi-contract, with special reference to the common law of India has been traced with great learning by Sir Frederic Pollock in his essay on the 'History of the Law of Nature'.[$]

1688. It is true that law of nature has incurred the charge of being fanciful and speculative and several of the theories advanced in support of natural law have been discredited. Mr. Max M. Laserson has rightly said that the doctrines of natural law must not be confused with natural law itself. The doctrines of natural law, like any other political and legal doctrines, may propound various arguments or theories in order to substantiate or justify natural law, but the overthrow of these theories cannot signify the overthrow of natural law itself, just as the overthrow of some theory of philosophy of law does not lead to the overthrow of law itself.**

1689. The social nature of man, the generic traits of his physical and mental constitution, his sentiments of justice and the morals within, his instinct for individual and collective preservation, his desire for happiness, his sense of human dignity, his consciousness of man's station and purpose in life, all these are not products of fancy but objective factors in the realm of existence.[†] The Law of Nature is not, as the English utilitarians in their ignorance of its history supposed, a synonym for arbitrary individual preference, but on the contrary, it is a living embodiment of the collective reason of civilized mankind, and as such is adopted by the Common Law in substance though not always by name.[‡] 'The sacred rights of mankind are not to be rummaged for among old parchments of musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be obscured by mortal power'.*[†]

1690. In ... *Subodh Gopal* (case), Patanjali Sastri, J. said that Article 19 enumerates certain freedoms under the captain 'right to freedom' and deals with those great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country.

1691. In the United States of America, reliance upon natural law on the part of vested interests inimical to the economic freedom of man was destined to prove a persistent feature in the 19th century. In the second half of 19th century, the ideas of natural law and of natural rights were resorted to an attempt to curb State interference with rights of private property and freedom of contract. The ideas of natural law and natural rights were revived and endowed with fresh vigour for that purpose.**[†] By reference to natural rights of man, Courts in the United States often declared to be unconstitutional legislation for securing humane conditions of work, for protecting the employment of women and children, for safeguarding the interests of consumers, and for controlling the powers of trusts and corporations. This past history explains why natural rights have been regarded in some quarters with suspicion and why writers affirming the supremacy of a higher law over the legislature or

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* See Summa Theologica, Part, II, Section I, Question 91, Article 2 (translated by the English Dominicans), Vol. 3.

$ See *Essays in Law*, p. 31.

** See 'Positive and Natural Law and their correlation in Interpretation of Modern Legal Philosophies', *Essays in Honour of Roscoe Pound* (New York, Oxford University Press) (1947).

† See Lauterpacht, *International Law and Human Rights*, p. 101.

‡ See Sir Frederic Pollock, *The Expansion of the Common Law*, 1904, p. 128.

*† See the passage quoted in *The History of Freedom and Other Essays*, by Lord Acton, 1907, p. 587.

**† See Haines, *The Revival of Natural Law Concepts*, Pp. 117-23.

a Constitution have spoken with impatience of the *damnosa haereditas* of natural rights. This idea of natural law in defence of causes both paltry and iniquitous has caused many to reject it with impatience. A great practical reformer like Jeremy Bentham, a great Judge like Mr. Justice Holmes and a great legal philosopher Hans Kelsen- all believers in social progress-have treated the law of nature with little respect and have rejected it as fiction. Mr. Justice Holmes remarked: 'The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbours as something that must be accepted by all men everywhere'.* Professor Kelsen considers the typical function of natural law school to have been the defence of established authority and institutions - of established Governments, of private property, of slavery, of marriage.**

1692. Despite these attacks and the ebb and flow in its fortune, there has been a revival of the law of nature in the 20th century and there is no gainsaying the fact that the doctrine of the law of nature was the bulwark and the lever of the idea of the rights of man embodied in the International Bill of Human Rights with a view to make the recognition of these rights more effective and to proclaim to the world that no State should violate these rights.† Whether you call these rights, natural rights or not, whether they flow from the law of nature or not, as I said, these are rights which belong to man as a rational and moral being. 'Man's only right, in the last analysis is the right to be a man, to live as a human person. Specific human rights are all based on man's right to live a human life'.‡
Harold Laski said:$

'I have rights which are inherent in me as a member of society; and I judge the state, as the fundamental instrument of society, by the manner in which it seeks to secure for me the substance of those rights ..... Rights in this sense, are the groundwork of the state. They are the quality which gives to the exercise of its power a moral penumbra. And they are natural rights in the sense that they are necessary to good life'.

1694. That all natural rights are liable to be limited or even taken away for common good is itself a principle recognised by all writers on natural law. 'However, even though man's natural rights are commonly termed absolute and inviolable, they are limited by the requirements of the universal Order to which they are subordinated. Specifically, the natural rights of man are limited intrinsically by the end for which he has received them as well as extrinsically by the equal rights of other men, by his duties towards others'.*‡ And when the Parliament restricts or takes away the exercise of the Fundamental Rights by military personnel or the police charged with the duty of maintaining the peace, that does not mean that there are no natural rights, or, that by and large, the Fundamental Rights are not a recognition of the natural rights. It only shows that Fundamental Rights like natural rights are liable to be limited for the common good of the society. .... In other words, because Parliament can restrict the exercise of or even take away the Fundamental Rights of the military personnel or the police charged with the duty of maintaining the peace by law, it does not follow that Fundamental Rights, by and large, are not a recognition of the basic human rights or that those rights are not liable to be limited by positive law for common good. Natural law cannot supplant positive law; positive law must provide the practical solution in the choice of one measure rather than another in a given situation. Natural justice has no means of fixing any rule to terms defined in number or measure, nor of choosing one practical solution out of two or more which are in themselves equally plausible. Positive law, whether enacted or customary, must come to our aid in such matters. It would be no great feat for natural

* Holmes, *Collected Legal Papers*, p. 312.
** See Kelsen, *General Theory of Law and State*, Pp. 413-418.
† See Lauterpacht, *International Law and Human Rights*, Pp. 112-113.
‡ See 'Weapons for Peace', by Thomas P. Neill, quoted in *The Natural Law*, by Rommen, footnote at p. 243.
$ Harold Laski, *Grammar of Politics*, New Haven, 1925, Pp. 39-40.
*‡ See Rommen, *The Natural Law*, 1947, footnote 49, p. 243.

reason to tell us that a rule of the road is desirable but it could never have told us whether to drive to the right hand or to the left, and in fact, custom has settled this differently in different countries and even, in some parts of Europe, in different provinces of one State.*

1695. Nor am I impressed by the argument that because non-citizens are not granted all the Fundamental Rights, these rights, by and large, are not a recognition of the human or natural rights. The fact that Constitution does not recognize them or enforce them as Fundamental Rights for non-citizens is not an argument against the existence of these rights. It only shows that our Constitution has chosen to withhold recognition of these rights as fundamental rights for them for reasons of State policy. The argument that Fundamental Rights can be suspended in an emergency and, therefore, they do not stem from natural rights suffers from the same fallacy, namely, the natural rights have no limits or are available as immutable attributes of human person without regard to the requirement of the social order or the common good.

1696. Mr. Palkhivala contended that there are many human rights which are strictly inalienable since they are grounded on the very nature of man which no man can part with or lose. Although this may be correct in a general sense, this does not mean that these rights are free, from any limitations. Every law, and particularly, natural law, is based on the fundamental postulate of Aristotle that man is a political animal and that his nature demands life in society. As no human being is an island and can exist by himself, no human right, which has no intrinsic relation to the common good of the society can exist. Some of the rights like the right to life and to the persuit of happiness are of such a nature that the common good would be jeopardised if the body politic would take away the possession that men naturally have of them without justifying reason. They are, to a certain extent, inalienable. Others like the right of free speech or of association are of such a nature that the common good would be jeopardised if the body politic could not restrict or even take away both the possession and the exercise of them. They cannot be said to be inalienable. And, even absolutely inalienable rights are liable to limitation both as regards their possession and as regards their exercise. They are subject to conditions and limitations dictated in each case by justice, or by considerations of the safety of the realm or the common good of the society. No society has ever admitted that in a just war it could not sacrifice individual welfare for its own existence. And as Holmes said, if conscripts are necessary for its army, it seizes them and marches them with bayonets in their rear to death.** If a criminal can be condemned to die, it is because by his crime he has deprived himself of the possibility of justly asserting this right. He has morally cut himself off from the human community as regards this right.$

1697. Perceptive writers have always taken the view that human rights are only *prima facie* rights to indicate that the claim of any one of them may be overruled in special circumstances. As I said the most fundamental of the pre-existing rights - the right to life - is sacrificed without scruple in a war. A *prima facie* right is one whose claim has *prima facie* justification, i.e., is justified, unless there are stronger counter-claims in the particular situation in which it is made, the burden of proof resting always on the counter-claims. To say that natural rights or human rights are *prima facie* rights is to say that there are cases in which it is perfectly just to disallow their claim. Unless we have definite assurance as to the limits within which this may occur, we may have no way of telling whether we are better off with these *prima facie* rights than we would be without them. 'Considerations of justice allow us to make

* See Pollock, *The Expansion of the Common Law*, 1904, p. 128.
** See *Common Law*, p. 43.
$ See Jacques Maritain, *Man and State*, p. 102.

exceptions to a natural right in special circumstances as the same considerations would require us to uphold it in general.†

PER JUSTICE BEG

1812. A modern democratic Constitution is, to my mind, an expression of the sovereign will of the people, although, as we all know, our Constitution was drawn up by a Constituent Assembly which was not chosen by adult franchise. Upon this Constituent Assembly was conferred the legal power and authority, by Section 8 of the Indian Independence Act, passed by the British Parliament, to frame our Constitution. Whether we like it or not, Sections 6 and 8 of an Act of the British Parliament transferred, in the eye of law, the legal sovereignty, which was previously vested in the British Parliament, to the Indian Parliament which was given the powers of a Constituent Assembly for framing our Constitution.

1813. The result may be described as the transfer of political as well as legal sovereignty from one nation to another, by means of their legally authorised channels. This transfer became irrevocable both as a matter of law and even more so of fact. ... The vesting of the power of making the Constitution was, however, legally in the Constituent Assembly thus constituted and recognised, and not in 'the people of India', in whose name the Constituent Assembly no doubt spoke in the Preamble to the Constitution. The Constituent Assembly thus spoke for the whole of the people of India without any specific or direct legal authority conferred by the people themselves to perform this function.

1814. The voice of the people speaking through the Constituent Assembly constituted a new 'Republic' which was both 'Sovereign and Democratic'. It no doubt sought to secure the noble objectives laid down in the Preamble primarily through both the Fundamental Rights found in Part III and the Directive Principles of State Policy found in Part IV of the Constitution. It would, however, not be correct, in my opinion, to characterise, as Mr. Palkhivala did, the Fundamental Rights contained in Part III, as merely the means where as the Directive Principles, contained in Part IV as the ends of the endeavours of the people to attain the objectives of their Constitution. On the other hand, it appears to me that it would be more correct to describe the Directive Principles as laying down the path which was to be pursued by our Parliament and State Legislatures in moving towards the objectives contained in the Preamble. Indeed, from the point of view of the Preamble, both the Fundamental Rights and the Directive Principles are means of attaining the objectives which were meant to be served both by the fundamental rights and Directive Principles.

1824. Legally, the British Parliament transferred the whole of its legal sovereignty over the people and territories of this country in British India to the Constituent Assembly which spoke in the name of the people of India. The Princely States came in through 'Instruments of accession'. This means that the legal sovereignty was vested in the Constituent Assembly whereas the people of India may be said to be only politically 'sovereign'. Their views were carefully ascertained and expressed, from various angles, by the Members of the Constituent Assembly. The political sovereign thus operated outside the ambit of law yet made its impact and effect felt upon the legal sovereign, that is to say, the Constituent Assembly. In recognition of this fact and to bring out that it was really speaking on behalf of the people of India, the Constituent Assembly began the Preamble with the words: 'We, the people of India'. This meant, in my estimation, nothing more than that the Constituent Assembly spoke for the people of India even though it was vested with the legal authority to shape the destiny of this country through the Constitution framed by it. There is not to be found, anywhere in our Constitution, any transfer of legal sovereignty to the people of India.

† See generally 'Justice and Equality', by Gregory Vlastos in *Social Justice*, p. 31, Ed. by Richard B. Brandt.

1825. The people of India speak through their representatives in the two Houses of Parliament. They approach the courts for the assertion of their rights. The courts adjudicate upon the rights claimed by them and speak for the Constitution and not directly for the people. Judges and other dignitaries of State as well as Members of Parliament take oaths of allegiance to the Constitution and not to the people of India. In other words, the Constitution is the 'legal sovereign' recognised by Courts, although the ultimate 'political' sovereignty may and does reside in 'the people'.

1833. Our Constitution-makers, who included some of the most eminent jurists in the country, could not have been ignorant of the teachings of our own ancient jurists, Manu and Parashara, who had pointed out that the laws of each age are different. In support of this view, the last Dr. Ganga Natha Jha, in his treatise on Hindu Law, has cited the original passages from Manu and Parashara, which run as follows:

(1) *Anye krita yugay dharmaah tretaayam dvaaparey parey anye kali yugey preenaam yuga roopaanusaaratah.*

-- Parashara-Manu;

(2) *anye krita yugey dharma tretaayaama dvaaparey pareye anye kali yugey preenaam yuga roopaanusaaratah.*

-- Parashara-Manu.

1834. An English translation of the sense of the above passages runs as follows:

'The fundamental laws (imposing fundamental duties or conferring fundamental rights) differ from age to age; they are different in the age known as *krita* from those in the *dvaapara* age; the fundamental laws of the *kali* age are different from all previous ages; the laws of each age conform to the distinctive character of that age (*yuga roopaanusaaratah*)'.

In other words, even our ancient jurists recognised the principle that one generation has no right to tie down future generations to its own views or laws even on fundamentals. The fundamentals may be different not merely as between one society and another but also as between one generation and another of the same society or nation.

1835. At any rate, I am convinced that we cannot infer from anything in the language of the unamended Article 368 any distinction, beyond that found in the more difficult procedure prescribed for amendment of certain Articles, between more and less basic parts of the Constitution. None are sacrosanct and transcendental, in the sense that they are immune from and outside the processes of amendment found in Article 368 and while others only are subject to and within its ambit even before its amendment.

1836. ... The Constitution, however, visualizes the progress of the whole nation towards greater equality as well as prosperity. The function of the amending provision, in such a Constitution, must necessarily be that of an instrument for dynamic and basic changes in the future visualized by our Constitution makers. The whole Constitution is based on the assumption that it is a means of progress of all the people of India towards certain goals. The course of progress may involve, as choices of lesser of two evils, occasional abrogations or sacrifices of some fundamental rights, to achieve economic emancipation of the masses without which they are unable to enjoy any fundamental rights in any real sense. The movement towards the goals may be so slow as to resemble the movement of a bullock-cart. But, in this age of the automobile and the aeroplane, the movement could be much faster.

1837. The constitutional function with which the judiciary is entrusted, in such a Constitution, is to see that the chosen vehicle does not leave the charted course or path or transgress the limits prescribed by the Constitution at a particular time. The fundamental rights, as I have said earlier, may be viewed as such limits. The power of amendment, in a Constitution such as ours, must include the power to change these limitations to suit the needs of each age and generation. As the celebrated Justice Holmes said in his 'Common Law', the life of law has not been logic, but the 'felt necessities' of the times. Every kind of law,

whether fundamental or ordinary, has to be an attempted adaptation to the needs of the people at a particular time. The power of adaptation in a progressive nation, with a Constitution which visualizes a movement towards socialism must, therefore, be construed in the context of the whole setting of urges enshrined in the Constitution and what their satisfaction demands. So construed, it may involve changes in the very features considered basic today.

1858. ... 'The history of natural law is a tale of the search of mankind for absolute justice and of its failure. Again and again, in the course of the last 2,500 years, the idea of natural law has appeared, in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. With changing social and political conditions the notions about natural law have changed. The only thing that has remained constant is the appeal to something higher than positive law. The object of that appeal has been as often the justification of existing authority as a revolt against it'.

'Natural law has fulfilled many functions. It has been the principal instrument in the transformation of the old civil law of the Romans into a broad and cosmopolitan system; it has been a weapon used by both sides in the fight between the medieval Church and the German emperors; in its name the validity of international law has been asserted, and the appeal for freedom of the individual against absolutism launched. Again it was by appeal to principles of natural law that American judges, professing to interpret the Constitution, resisted the attempt of State legislation to modify and restrict the unfettered economic freedom of the individual'.

It would be simple to dismiss the whole idea of natural law as a hypocritical disguise for concrete political aspirations and no doubt it has sometimes exercised little more than this function. But there is infinitely more in it. Natural law has been the chief though not the only way to formulate ideals and aspirations of various peoples and generations with reference to the principal moving forces of the time. When the social structure itself becomes rigid and absolute, as at the time of Schoolmen, the ideal too will take a static and absolute content. At other times, as with most modern natural law theories, natural law ideals become relative or merely formal, expressing little more than the yearning of a generation which is dissatisfied with itself and the world, which seeks something higher, but is conscious of the relativity of values. It is as easy to deride natural law as it is to deride the futility of mankind's social and political life in general, in its unceasing but hitherto vain search for a way out of the injustice and imperfection for which Western civilisation has found no other solution but to move from one extreme to another'.

'The appeal to some absolute ideal finds a response in men, particularly at a time of disillusionment and doubt, and in times of simmering revolt. Therefore natural law theories, far from being theoretical speculations, have often heralded powerful political and legal developments'.

1859. I am not prepared to use any natural law theory for putting a Construction on Article 368 of the Constitution which will defeat its plain meaning as well as the objects of the Constitution as stated in the Preamble and the Directive Principles of State Policy. I do not know of any case in which this has been done.

1860. I have already stated my point of view, that we should approach the questions placed before us from the pragmatic angle of the changing needs of social and economic orders visualised by those who were or are the final Judges of these needs in exercise of the constituent power. Checks on possible abuses of such powers do not lie through actions in Courts of law. The pressure of public opinion, and the fear of revolt due to misuse of such powers of amendment are the only practically possible checks which can operate if and when such contingencies arise. These checks lie only in the political fields of operation. They are not subject to judicial review or control. In other words, what Dicey calls the external and the internal limits may operate to control and check possible misuses of such power. Courts of justice have no means of

control over a power expressly sanctioned by the Constitution which is the legal sovereign. They can only speak for the Constitution. Through their pronouncements must be heard the voice of the Constitution and of nothing beyond it.

1861. Although the Courts must recognise the validity of the exercise of a legally sovereign constituent power, such power may itself be ineffective for actually bringing about the desired results. Whether the change is in the direction of what may be considered better may itself be a matter of dispute. The answers to such questions and disputes depend upon many conditions which are outside the control of law Courts. The very existence or absence of such conditions cannot be appropriately investigated or determined in law Courts. Therefore, such investigations lie outside the judicial domain when once a change is brought in by the exercise of constituent or sovereign law making power in accordance with the prescribed procedure.

1862. A socialistic State must have the power and make the attempt to build a new social and economic order free from exploitation, misery and poverty, in the manner those in charge of framing policies and making appropriate laws think best for serving the public good. We do not today conceive of public good or progress in terms of a 'movement from status to contract', but in terms of a movement for control of economic and other kinds of powers of exploitation by individuals so as to ensure that public good not merely appears to be served but is actually served by all individuals wherever or however placed. The emphasis today is upon due performance of their social obligations by individuals before claiming any right however fundamental or important it may be because rights and duties are correlative.

PER JUSTICE DWIVEDI

1960. Judicial review of constitutional amendments will blunt the people's vigilance, articulateness and effectiveness. True democracy and true republicanism postulate the settlement of social, economic and political issues by public discussion and by the vote of the people's elected representatives, and not by judicial opinion. The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed that they can understand and appreciate it. The more they understand it, the more they love it and the more they prize it.

1961. I do not believe that unhedged amending power would endanger the interests of the religious, linguistic and cultural minorities in the country. As long as they are prepared to enter into the political process and make combinations and permutations with others, they will not remain permanently and completely ignored or out of power. As an instance, while the Hindu Law of Succession has been amended by Parliament, no legislature from 1950 to this day has taken courage to amend the Muslim Law of Succession. A minority party has been sharing power in one State for several years. Judicial review will isolate the minorities from the main stream of the democratic process. They will lose the flexibility to form and reform alliances with others. Their self-confidence will disappear, and they will become as dependent on the Court's protection as they were once dependent on the Government's protection. It seems to me that a two-thirds majority in Parliament will give them better security than the close vote of this Court on an issue vitally affecting them.

1962. Great powers may be used for the good as well as for the detriment of the people. An apprehended abuse of power would not be a legitimate reason for denying unrestricted amending power to Parliament, if the language of Article 368 so permits without stretch or strain. While construing the Constitution, it should be presumed that power will not be abused.

1964. The argument of fear therefore is not a valid argument. Parliament as a legislature is armed with at least two very vast powers in respect of war and currency. Any imprudent exercise of these two powers may blow the whole nation into smithereens in seconds, but no court has so far sought to restrict those powers for apprehended abuse of power. Democracy is founded on the faith in self-criticism and self-correction by the people. There is nothing to fear from a critical and cathartic democracy.

1965. The conflicts of the mediaeval Pope and the Emperor put on the wane their power as well as their moral authority. Conditions in India today are not propitious for this Court to act as a Hildebrand. Unlike the Pope and the Emperor, the House of the People, the real repository of power, is chosen by the people. It is responsible to the people and they have confidence in it. The Court is not chosen by the people and is not responsible to them in the sense in which the House of the People is. However, it will win for itself a permanent place in the hearts of the people and thereby augment its moral authority if it can shift the focus of judicial review from the numerical concept of minority protection to the humanitarian concept of protection of the weaker sections of the people.

1966. It is really the poor, starved and mindless millions who need the Court's protection for securing to themselves the enjoyment of human rights. In the absence of an explicit mandate, the Court should abstain from striking down a constitutional amendment which makes an endeavour to 'wipe out every tear from every eye'. In so doing the Court will not be departing from but will be upholding the national tradition. The *Brihadaranyaka Upanishad* says:

'Then was born the Law (Dharma), the doer of good. By the law the weak could control the strong' (I.IV, 14).

Look at the national emblem, the *chakra* and *satyameva jayate*. The *chakra* stands for motion; *satyam* is sacrifice. The *chakra* signifies that the Constitution is a becoming, a moving equilibrium; *satyam* is symbolic of the Constitution's ideals of sacrifice and humanism. The Court will be doing its duty and fulfilling its oath of loyalty to the Constitution in the measure judicial review reflects these twin ideals of the Constitution.

PER JUSTICE CHANDRACHUD

2092. The argument (of the petitioners) takes this form: Constitutions must of necessity be general rather than detailed and prolix, and implication must therefore play an important part in constitutional construction. Implied limitations are those which are implicit in the scheme of the Constitution while inherent limitations are those which inhere in an authority from its very nature, character and composition. Implied limitations arise from the circumstances and historical events which led to the enactment of our Constitution, which represents the solemn balance of rights between citizens from various States of India and between various sections of the people. Most of the essential features of the Constitution are basic Human Rights, sometimes described as 'Natural Rights', which correspond to the rights enumerated in the 'Universal Declaration of Human Rights', to which India is a signatory. The ultimate sovereignty resides in the people and the power to alter or destroy the essential features of a Constitution is an attribute of that sovereignty. In Article 368, the people are not associated at all with the amending process. The Constitution gives the power of amendment to the Parliament which is only a creature of the Constitution. If the Parliament has the power to destroy the essential features, it would cease to be a creature of the Constitution, the Constitution would cease to be supreme and the Parliament would become supreme over the Constitution. The power given by the Constitution cannot be construed as authorizing the destruction of other powers conferred by the same instrument. If there are no inherent limitations on the amending power of the Parliament, that power could be used to destroy the judicial power, the executive power and even the ordinary legislative power of the Parliament and the State legislatures. The Preamble to our Constitution which is most meaningful and evocative, is beyond the reach of the amending power and therefore no amendments can be introduced into the Constitution which are inconsistent with the Preamble.....

2096. It is difficult to accept the argument that inherent limitations should be read into the amending power on the ground that Fundamental Rights are natural rights which inhere in every man. There is intrinsic evidence in Part III of the Constitution to show that the theory of natural rights was not recognised by our Constitution-makers. Article 13(2) speaks of rights 'conferred' by Part III and enjoins the States not to make laws inconsistent therewith. Article 32 of the Constitution says that the right to move the Supreme Court for the enforcement of rights 'conferred' by Part III is guaranteed. Before the Fundamental

Rights were thus conferred by the Constitution, there is no tangible evidence that these rights belonged to the Indian people. Article 19 of the Constitution restricts the grant of the seven freedoms to the citizens of India. Non-citizens were denied those rights because the conferment of some of the rights on the Indian citizens was not in recognition of the pre-existing natural rights. Article 33 confers upon the Parliament the power to determine to what extent the rights conferred by Part III should be restricted or abrogated in their application to the members of the Armed Forces. Article 359 (1) empowers the President to suspend the rights 'conferred' by Part III during the proclamation of an emergency. Articles 25 and 26 by their opening words show that the right to freedom of religion is not a natural right but is subject to the paramount interest of society and that there is no part of that right, however important, which cannot and in many cases has not been regulated in civilised societies. Denial to a section of the community the right of entry to a place of worship, may be a part of religion but such denials, it is well known, have been abrogated by the Constitution. ....

2097. The 'natural right' theory stands, by and large, repudiated today. The notion that societies and governments find their sanction on a supposed contract between independent individuals and that such a contract is the sole source of political obligation is now regarded as untenable. Calhoun and his followers have discarded this doctrine, while theorists like Story have modified it extensively. The belief is now widely held that natural rights have no other than political value. According to Burgess,

'there never was, and there never can be any liberty upon this earth among human beings, outside of State organisation'.

According to Willoughby natural rights do not even have a moral value in the supposed 'state of nature', they would really be equivalent to force and hence have no political significance. Thus, Natural Rights thinkers had once 'discovered the lost title-deeds of the human race' but it would appear that the deeds are lost once over again, perhaps never to be resurrected.

2098. The argument in regard to the Preamble is that it may be a part of the Constitution but is not a provision of the Constitution and therefore, you cannot amend the Constitution so as to destroy the Preamble. The Preamble records like a sun-beam certain glowing thoughts and concepts of history and the argument is that in its very nature it is unamendable because no present or future, however mighty, can assume the power to amend the true facts of past history. Counsel relies for a part of this submission on the decision in *Beru Bari* case (1960). Our attention was also drawn to certain passages from the chapter on 'Preamble' in *Commentaries on the Constitution of the United States* by Joseph Story.

2099. I find it impossible to accept the contention that the Preamble is not a provision of the Constitution. The record of the Constituent Assembly leaves no scope for this contention. It is transparent from the proceedings that the Preamble was put to vote and was actually voted upon to form a part of the Constitution (*Constituent Assembly Debates*, Vol. X, Pp. 429, 456). As a part and provision of the Constitution, the Preamble came into force on January 26, 1950. The view is widely accepted that the Preamble is a part of the enactment. (Craies on Statute Law, 7th Ed., p. 201; Halsbury, Vol. 36, 3rd Ed., p. 370).

2100. In considering the petitioner's argument on inherent limitation it is well to bear in mind some of the basic principles of interpretation. Absence of an express prohibition still leaves scope for the argument that there are implied or inherent limitations on a power, but absence of an express prohibition is highly relevant for inferring that there is no implied prohibition.....

2104. It is thus clear that apart from constitutional limitations, no law can be struck down on the ground that it is unreasonable or unjust. That is the view which was taken by this Court in the *State of Bihar* v. *Kameshwar Singh* 1952. Mahajan J. described the Bihar Land Reforms Act, which was under consideration in that case, as repugnant to the sense of justice of the Court. In fact, the learned Judge says in his judgment

that it was not seriously disputed by the Attorney-General, that the law was highly unjust and inequitous and the compensation provided therein in some cases was purely illusory. The Court, however, found itself powerless to rectify an 'injustice' perpetrated by the Constitution itself. No provision incorporated in a Constitution at the time of its original enactment can ever be struck down as unconstitutional. The same test must apply to what becomes a part of that Constitution by a subsequent amendment, provided that the conditions on which alone such amendments can be made are strictly complied with. Amendments, in this sense, pulsate with the vitality of the Constitution itself.

2105. The true justification of this principle is, as stated by Subba Rao, J., in *Collector of Customs, Baroda* v. *Digvijaysinhji Spinning and Weaving Mills Ltd.* (1962), that a construction which will introduce uncertainty into the law must be avoided. It is conceded by the petitioner that the power to amend the Constitution is a necessary attribute of every Constitution. In fact, amendments which were made by the Constitution (First Amendment) Act, 1951 to Articles 15 and 19 were never assailed and have been conceded before us to have been properly made. It was urged by the learned counsel that the substitution of new clause (2) in Article 19 did not abrogate the Fundamental Rights but, on the other hand, enabled the citizens at large to enjoy their fundamental freedoms more fully. This, I think, is the crux of the matter. What counsel concedes in regard to Article 19(2) as substituted by the First Amendment Act can be said to be equally true in regard to the amendments now under challenge. Their true object and purpose is to confer upon the community at large the blessings of liberty. The argument is that the Parliament may amend the provisions of Part III, but not so as to damage or destroy the core of those rights or the core of the essential principles of the Constitution. I see formidable difficulties in evolving an objective standard to determine what would constitute the core and what the peripheral layer of the essential principles of the Constitution. I consider the two to be inseparable.

BOOK REVIEWS

Krishna Anirudh, Norman Uphoff and Milton J. Esman, *'Reason for Hope', Instructive Experiences in Rural Development*, Sage Publications, New Delhi, Pp. vii+322, Price Rs 250/-.

Uphoff Norman, Anirudh Krishna and Milton J. Esman, *'Reason for Success', Learning from Instructive Experiences in Rural Development*, Sage Publications, New Delhi, Pp. x+233, Price Rs 250/-.

Here is a publication of twin volumes one giving reasons for hope and other giving reasons for success in rural development in the Third World. The volumes cover a wide range of projects, launched in Africa, Asia and Latin America. The commonality in all these regions is the little hope for development of urban sector to provide an effective pull with urbanisation and industrialisation in spite of having a push from the rural sector due to extreme poverty. Generally all these rural environs are suffering from degradation, soil erosion, deforestation, water and air pollution accompanied by ill-health, illiteracy and other debilitations. Naturally, the two volumes published with their promising titles seem a surprise in a frustrating world. In anthropological terms, the volume giving hope could be described as *'emic'* and the other analysing success could be called *'etic'*. The *'emic'* volume refers to people's subjective perceptions about what they are doing, believing, while *'etic'* volume attempts to discuss or reconstruct what is being done or believed. Thus, the first volume *emically* presents the experiences that made the projects succeed and the other attempts *etically* to analyse what is required to achieve success in rural development across varying environments. The main objective behind the presentation of these projects is the desire to have urban societies or economies supported by rigorous, progressive rural communities as they developed through these projects described in the volumes.

The *emic* volume starts with 18 cases from Asia, Africa and Latin America, observing closely the various rural programmes in action for years. Their success is noted. The success factor depends on creating organisational capabilities at local levels to mobilise and manage resources effectively for the benefit of many. The idea is to introduce learning processes of organisation and technology that complement and support each other in the poor environs lacking all hopes of socio-economic growth. The cases described in the volume for hope illustrate how inspired leaders, thoughtful planners and creative managers put together created an administrative organisation utilising appropriate technologies and effective incentives.

Reasons for Hope presents success stories in 15 countries while the other volume assesses factors behind their success to positively alter the lives of rural households. A total of 18 cases from a variety of fields dealt with include six from South Asia, four from South-East Asia and four each from Africa and Latin America, the numbers in a way representing the relative size of populations in these regions.

There are two ways, in which the general scientific world looks at the Third World. One way is pessimistic and sees no hopes for these regions for succeeding in economic development under the belief that these regions are likely to get crushed by their own population size, problems of poverty, etc. Others believe that demonstrable projects with proper leadership, organisation and managing skills producing change from top as well as bottom, may show some hopes of succeeding in building local management capability to attain their objectives. The present two volumes do not necessarily belong specifically to either of these two ways of thinking.

Some economists believe that success in projects is not so important and more achievement is possible through macro-economic policy changes by, for instance, getting prices right, or by manipulating market incentives. But among the authors of these books, there is a feeling that attempts at 'push projects' and 'move money' may also help development efforts. It may happen that investment in organisational capability produce multiple pay-offs.

The projects in the volume giving hope include quite a range of subjects handled here. For instance, Amul Dairy Cooperative in India, SANASA - the Savings and credit cooperation movement in Shri Lanka, Peasant Tree Chronicle

in Haiti, Participatory Watershed and Soil Conservation in Rajasthan, India, and so on, promise change which transformed the environment in their respective regions. Reasons behind success in these projects are analysed in the companion volume.

The experiences described in these projects throw light on the upliftment of millions of poor and marginal households, through their own efforts assisted by governmental agencies, universities, voluntary organisations or donors. They started as small pilot projects but have national and even international impact. They indicate that 'small is beautiful', but large is necessary, in view of the immensity of the problems of the poor all over the world - both rural and urban. It is necessary to expand such programmes. One begins locally but has to think globally. In such projects, organisational capabilities are very important and these are often ignored. Some of these programmes, when scaled up, did not prove successful but still they were useful. The conditions in successful projects were not often favourable for success. But organisation led to success in most projects.

Personal leadership seems very important since without these personalities there would have been no success; but they themselves gave credit to their colleagues and support staff.

Though the projects look very heterogeneous, the most common and important feature of these cases is the way local people utilise various organisational capabilities once these are created and command confidence to solve wide range of problems. The role of rural people in managing and expanding the programme showed the common feature of confidence these programmes displayed in the form of willingness and ability of rural people to cooperate with their neighbours to improve their lives, given reasonable, adequate and assured opportunities. They seemed aware of improving their own lives in spite of distressing economic environmental, political and other crises that people will have to face in the coming century. And these factors certainly demonstrate hopes for success.

Success and sustainability, the authors argue, are not once-and-for all things but rather matters of degree and probability. The development programmes that they consider as successful promote productivity, well-being and empowerment. For success, what is required are ideas, leadership and appropriate strategies, and not so much the money (or funding). Next, outside initiatives can be fruitful but local initiatives can be made more effective and widespread through amicable and respectful collaboration between external and community actors.

There are four criteria that present reasonable goals for rural development programmes as well as standards for evaluation. These are: (i) Resource mobilisation with the aim of self-reliance and self-sufficiency. (ii) Scaling up and expansion of the programmes so that a large number of people can benefit from technical and organisational innovations. (iii) Diversification so that organisational capabilities are applied to solving problems in rural areas. And (iv) continual innovation utilising learning processes and problem-solving strategies with maturing institutional relationships that enable rural people to have more control over their situation and future. In successful rural development programmes, the concept of assisted self-reliance seems to rule. The rural people contribute substantial resources from their own meagre endowments to make the new venture succeed. The contribution could be cash but could also take the form of labour, materials, land, right-of-way, local knowledge, management skills and assumption of responsibilities.

One of the most important tests of success is whether the programme is expanding, indicating that more and more persons judge its goods and services to be desirable. If the expansion is occurring because government or donor sources are promoting it, this is less persuasive than if there is spontaneous joining of the programme or if local governments take over responsibilities. Criterion of success beyond expansion is whether the capacity for collective action is used by rural people to improve their lives in other ways too.

Diversification is used as a critical measure of success and as a key factor contributing to sustainability. Of the 18 cases in reasons for hope, two-thirds demonstrate the ability to move beyond their initial problem-focus, to find other ways in which the mobilisation of local resources and talents could improve people's lives.

There is a controversy about whether single function rural organisations are more likely to be successful than multi-function ones. One could argue that more successful organisations and programmes tend to take on and perform more functions as they gain capability and confidence, having started in a very focused manner. For example, Anand cooperative in India went into road-building and construction of village-approach roads. Some dairy cooperatives have set up rural health services for their members and some are providing socio-economic services.

The most important criterion for success and sustainability is that the programme and associated organisations remain continually in a learning mode, identifying problems and weaknesses, experimenting, evaluating and modifying. This involves on-going search for relevance and excellence.

Success in rural development needs analytical skills, good inter-personal relationships, energy and persistence, willingness to take risks balanced by appropriate prudence, and ability to inspire and retain other's confidence. Here the question arises: what is to be maximised in these projects? Not private profit. What is needed badly in the Third World is the distributed benefits, especially for the disadvantaged. A lot can be achieved by raising productivity, increasing well-being and enhancing the security and dignity of the rural people through principles and practices of assisted self-reliance.

Thus, the two volumes are a good commentary about the need to keep rural issues at the front and centre of development goals in the Third World. It seems that success is possible by policies, ideas, leadership and nurturing local institutions in this region. These two publications are thus an essential reading for economists, policy planners, political scientists and those involved in development issues in the Third World.

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Shah, Ghanshyam, *Public Health and Urban Development: The Plague in Surat,* Sage Publication, 1997, Pp. 317, Price: Rs 395/-.

Urbanisation has been considered as one of the indicators of economic growth and development. In fact, some of the authors of economic development emphasised reduction of population pressure on agriculture through migration from agricultural sector and rural areas to non-agricultural sector and urban areas as a strategy for improving the agricultural productivity. The problem of disguised unemployment in the farm sector is expected to be resolved by such a strategy.

As a counter to this point of view, another school of thought brought out under the caption of 'Limits to Growth', highlights the dangers of excessive urbanisation. In fact, the 'Club of Rome' economists, brought out a cogent argument outlining the adverse experiences of different countries which passed through excessive economic growth and excessive urbanisation. Such a word of caution has to be kept in mind by the policy-makers in different countries. In case proper checks are not introduced to contain such adverse outcomes in the process of economic growth, there are likely to be checks introduced by the nature itself. The outbreak of old and forgotten diseases, emergence of new diseases, acute problems of water supply, cleanliness and sanitation problems, high levels of morbidity and low levels of nutritional status, congestion in schools and colleges, traffic congestion, delays in major economic decision-making and implementation, etc., are just a few of the symptoms of such an excess in growth process. Since all the sectors are interdependent and, also, different regions have close connectivity, the adverse

effects of such excesses may be felt all through, even though the incidence of the excess is in a single specified location.

The book by Ghanshyam Shah on *Public Health and Urban Development* provides an interesting multi-disciplinary analysis of the outbreak of plague in Surat. Surat is one of the industrially active centres of Gujarat. Being a keen observer of social processes, Ghanshyam Shah presents an absorbing analysis of different stages of outbreak of the plague. The analysis becomes all the more absorbing when the author provides sociological insights about the problems of urbanisation and health management.

The study is divided into eight chapters and four appendices. The appendices provide an authentic documentation of the technical aspects of the background and different stages of this deadly disease. The author has done a great service to the researchers on health management systems by supplying the original documents as appendices to the main study.

After providing major insights about the political economy of health in Chapter 1, the author has outlined how Surat has emerged as a major urban centre in Chapter 2. He has very rightly captioned the chapter 'Urban Growth and Social Decay', highlighting how excessive urban growth is closely correlated with social decay, illustrating this correlation with a case study of Surat. Effects of urbanisation on municipal budgetary variables, land prices and associated political and economic forces, due to the changes in land prices, etc., are presented in a convincing style by the author.

Attention, particularly to the medical aspects of the effects of urbanisation, is paid in Chapter 3 of the book. Here also, historical analysis of the disease pattern in Surat city, health and medical care practices and life style of the people in the city, the decline and fall of public health system on account of the difficulties to cope up with the health and medical care challenges thrown up by urbanisation, the role of charitable hospitals and private medical care system, etc., has been presented in a logically consistent way raising certain basic issues in connection with the negative externalities of urbanisation.

Chapter 4 considers the demand side and the insights about the failure of medical care system including the public health care system to satisfy the needs of the people. The author has given a running account of how the plague, in particular, and other diseases, in general, can spread in different parts of the city, due to various economic, socio-political reasons. It is heart-breaking that only 30 per cent of population in a particular area of the city could avail of municipal water for drinking. In some places water supply is for only half an hour! This only reminds the readers of the difficulties with regard to water supply that people in different towns and cities in the country are facing. The analysis of housing conditions shows that it was quite natural that the plague could spread so fast to different neighborhoods in the city! The nature of house construction, over-flooding of the septic tanks, failure of the municipal system with regard to cleanliness, etc., are obviously enough to contribute to the fastness of the spread of any disease in the city. The demographic classification of plague patients brings out many revealing aspects of incidence of plague. The plague affected male members more than female members. The author sees relationship of this with the life style of the male residents of Surat. The household size, immigration from Saurashtra and Maharashtra with well-knit living conditions, distress migration by many people for economic reasons into the city of Surat, compulsion to have unclean and congested housing conditions, etc., have been highlighted by the author while analysing the facts about the plague. Analysis based upon classification of the plague patients, religion-and castewise, occupationwise, income groupwise, educational statuswise, etc., also brings out interesting sociological insights about the disease and its management. It is interesting to note that 62 per cent of the households of death cases had only one earning member in the family. Households of the patients were found to have relatively less number of educated members than those of

the non-patients. It is revealing that those who are lower in the caste hierarchy (e.g., the diamond-cutting caste) were suffering from Six Phosphate Deficiency (6PD) and, hence, had less resistance capacity to any type of disease (p. 133). The case studies that the author has presented, make the whole analysis quite realistic and they provide a firm ground level base for understanding the disease and its management.

Chapter 5 on 'Perception and Response' outlines how the people of Surat reacted to the outbreak of the disease. In fact, the slowness of the news about the outbreak was largely due to the relatively non-responsive public information system and also due to the poor socio-economic background of the people. It is shocking that nearly 70 per cent of the doctors fled from Surat, when they heard about the outbreak of the plague. The author's analytical capabilities come out sharply in this chapter when he brings out how the individual considerations dominated over the community considerations and self was placed above everything else. The influence of Western capitalistic culture is alleged to be the cause for this trend in the Indian society which, otherwise, by and large, has very closely well-knit harmonious and mutual support system. The analysts, during the plague onslaught in Surat, became highly critical of the incumbent administrative machinery. Some were highly critical of the deeper aspects of the Indian society itself. Some were also critical of the strategy of development adopted by the Indian economy, in general, and the local economies, in particular. These responses show how the relatively dormant society can become dynamic and analytically alert when confronted with certain social emergencies. For keen observers of the social process, such insights suggest the need for activising this dynamism and alertness for the purpose of positive thinking and action during all times.

Crisis management is an approach to manage an emergency which the society confronts unexpectedly. The plague took Surat, Gujarat Government, and the entire country by surprise. The entire crisis of the plague suggests that the policy makers have to be in readiness with regard to any type of emergency in order to handle at least the most damaging aspects of the emergency. The detailed account presented by the author in Chapter 6, entitled 'Crisis Management' vividly brings out how the different functionaries both in the governmental sector and the private sector struggled hard to stand equal to the gravity of the plague crisis. The deficiencies with regard to the medical manpower and hospital facilities came out in the open when the city was caught under the grip of the plague. It is remarkable that, though there were many instances of inefficiency and ineffectiveness, the entire country responded very fast to the challenges thrown up by the plague crisis. Even the international community offered different types of support to tackle the crisis and thereby help the process of its control. The lesson that the policy maker has to draw from this detailed analysis is that there is a need to have a separate unit in every ministry with the requisite expertise, for crisis management.

In the Seventh Chapter entitled 'The Epilogue', the author compares the plague of yesteryears (the late nineteenth century) with the plague of this decade, particularly in Surat, and present a comparative analysis of how the system tackled the two situations. In the course of the recent experience of plague management, very serious situation of people's distrust and mistrust in the effectiveness of the governmental machinery to tackle this disease came to the forefront. It must be emphasised that any governmental system which enjoys the confidence of the people on a continuing basis would be able to be more effective in its overall functioning. The crisis of confidence is revealed mostly under the situations of emergency. Ideally, people appear to be united with the government in the face of man-made emergency, such as external aggression or war with another country, etc. When unexpected problems from nature are faced by the people, there is a likelihood of distrust about the effectiveness of the government. The Surat plague seems to bring out the validity of the latter type of response of the people.

The author also rightly points out that the morbidity conditions, in general, and outbreak of a particular disease, in particular, are symptoms of the socio-political malady. Unplanned growth and poverty, in fact, are both the cause and the effect of many social problems. The remedy for most of the problems of the social sector seem to lie outside the concerned sector itself. Surat's experience regarding the plague brings out this fact. It suggests that a well thought-out national environmental policy, national urbanisation policy and overall developmental strategy need to be worked out and effectively implemented. In all this, the government has to take the initiative which would be followed by the NGOs and the functionaries in the private sector. A positive and assertive initiative by the benevolent government would certainly play a long and effective role in not only overcoming the particular malady but also in sending messages to the other sectors of the economy also to follow the government's initiatives.

That, if the resolve of the government is firm then its role in social reconstruction is likely to be effective, is brought out by the post-plague scenario in the city of Surat. The 'Post Script: the New Surat' which is the subject matter of Chapter 8, brings out how the firm resolve by the administrative machinery with the motivated staff can bring about striking changes in the society. The Surat Municipal Corporation under the leadership of its commissioner, has literally transformed the face of the city of Surat in the post-plague situation. This experience reassures the belief that the government can surely play an effective role in solving a number of socio-economic problems that our society faces.

On the whole, the study by Ghanshyam Shah is a very interesting and a highly readable analytical work containing minute micro-level socio-cultural analysis of the problems in the field of health and medical care. The study goes beyond the problems of the plague and shows how any problem faced by people can be explained in terms of sociological, political and economic forces.

Sage Publications have done a nice job in bringing out this very useful multi-disciplinary work of in-depth analysis of a deadly disease.

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Racine, Jean-Luc, (Ed.) *Peasant Moorings Village Ties and Mobility Rationales in South India,* Sage Publications, New Delhi, 1997, Pp. 400, Price Rs 495/-.

'Peasant Moorings' edited by Jean-Luc Racine is different from most of the studies on rural -urban migration in India in the sense that it does not take lure of the city for granted. It focuses on rural people who do not migrate to cities. It is the result of collaborative research undertaken by the Indo-French team of eight members; a multi disciplinary team from various institutes, such as the University of Mysore, Madras Institute of Development Studies, French National Centre for Scientific Research, etc.

Since three-fourths of India's population continues to reside in rural areas, in spite of various push and pull factors at work, their strong attachment to roots is an important dimension which cannot be ignored by policy makers and planners. This project is a systematic effort to conceptualise the rationales behind these decisions to migrate or not to migrate. As a part of the project, extensive field work was carried out to examine these retention rationales in the socio-economic-cultural context of one state in India, viz., Karnataka.

The book is divided into three parts. The first part consisting of three chapters explains the problem under study, presents analysis of the secondary data to explain the dynamics of rural and urban life in Karnataka and also describes the four rural systems observed in Karnataka. It also examines conceptually, in an anthropoligical perspective, *'what makes people to cling to their traditional moorings'*.

The second part presents findings of the survey conducted in villages, located in different rural systems which were identified in the first part, viz., irrigated and dry areas in Deccan Plateau, hilly terrain of Western Ghats with rich coffee and cardamom plantations and finally coastal districts of Dakshina Kannada. It also evaluates the impact of non-agricultural employment on the retention of rural population.

The third part is an attempt to synthesise these rationales and strategies observed in different situations. This chapter also offers a comparative perspective by placing these observations in the larger context. Some statistics about rural population growth of different states in India is given in this part. An attempt is also made to find out the common traits from different studies in Brazil, Africa and China to envisage the possibility of developing an Asian paradigm.

The strength of the book lies in its systematic approach towards building up the force of retention rationale and exploding the myth of 'urban lures as the universal phenomenon'. Four chapters in the second part which form the core of the study are the most interesting part of the book. Meaningful tables based on the secondary data to describe the overall socio-economic setup as well as migration pattern in each rural system, observations based on village surveys, judicious use of maps and figures to illustrate the key aspects, stories of individual villagers made lively with their views quoted verbatim are the salient features of these chapters. They bring out effectively the diversity of prevailing situations and factors behind the retention rationales. Glossary given at the end will certainly help readers from other countries to understand the cultural context.

In the last chapter, one expects to arrive at some conceptual framework based on the synthesis of these individual observations but the last chapter again confirms only the diversity observed in the second part. A few significant life stories given in this chapter are no doubt interesting and help to develop deep insight into the grassroot level situations but what finally emerges in this chapter is a discussion of a few significant points and certainly not a *synthesis*. A further attempt to place the Karnataka experience not only in the all-India context but to develop some sort of Asian paradigm in just twelve pages is a sort of abrupt ending of the painstakingly meticulous research presented systematically so far.

The significant contribution of this book, no doubt, lies in the forceful argument that economic motives, though of prime importance, are not the sole deterministic factor behind the migration decision of peasants in India. There are other factors like values, traditions, kinship factors, caste factors, people's ideas about prestige and psychological cost of migration to cities. It would be highly impractical to underestimate the weight of these factors in formulating policies regarding development of villages, small towns and big cities, in India.

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Bora, R.S., *Himalayan Migration: A Study of the Hill Region of Uttar Pradesh*, Sage Publication, New Delhi, 1996; Pp. 195, Price: Rs 295.

Migration as a subject has interfaces with many social science disciplines - economics, sociology, geography, demography, public administration, to name a few. The scholars with diverse backgrounds have brought their own discipline's techniques and methods to bear on migration studies and enriched our understanding of migration process. R.S. Bora being a student of economics is concerned with economic consequences of migration.

The book under review has grown out of the researcher's Ph.D. thesis. Uttarakhand, a hilly region in Uttar Pradesh is one of the most backward regions in the country, characterised by small size of the land holdings, low productivity in agriculture, lack of infrastructure and pervasive poverty. However, it has a sizable literate population and families subsisting on remittances

received from their family members living far away from home. The regional economy is often decried as 'Money Order Economy'. Stung by such appellations, the people have been agitating for the creation of a separate state of Uttarakhand. Their expectation is that a smaller state can exploit its natural resources more rationally, generate more employment opportunities for the local people and obviate the need for them to migrate to long distances in search of greener pastures. The region is on the way to attain statehood, according to a recent announcement made by the Union Government. The author could not have chosen a better area to undertake his study on rural outmigration.

A notable feature of the study is that the researcher has collected the relevant data from two surveys - one main survey conducted in the area of the migrant's origin and a tracer survey in the city of the migrant's destination. The main survey covered ten villages located in Pithorogarh and Tehri Garwal districts of Uttarakhand region. Apart from throwing light on the economic condition of the households and villages the migrants hailed from, the main survey revealed that a considerable proportion of the migrants have landed up in Delhi. In the tracer survey that followed the main survey, the researcher trailed some of the migrants to their residence in Delhi and obtained first-hand information about the circumstances that prompted them to leave their home villages and their present condition in the city they have chosen to live in. It must have been an arduous task for the researcher to reach out to the migrants in a sprawling city like Delhi. He has done a commendable job in cross checking the data thrown up by two distinct surveys and in collating them for analysis.

The first few chapters of the book are devoted to an analysis of the migrant's selectivity in terms of their sex, age, education, marital status and caste. The information channels migrants used for moving to Delhi and finding a job there and changes in their occupations consequent on their settling down in the city have all received attention. An immediate fall-out of adult male selective migration was that Uttarakhand region was denuded of its able-bodied young men. The proportion of the elderly in the population increased aggravating the dependency load. The burden of agricultural work fell heavily on women left behind. All this is a well-trodden ground in migration literature.

The thrust of the study is in the later chapters wherein Bora makes a cost-benefit analysis of migration in the light of Sjaastad's [1962, Pp. 80-93] human investment theory with Taiwanese data. A surprising finding is that Uttarakhand region did not benefit from out-migration of its people. The net benefit accruing to out-migrant households was also, by and large, negative. The unexpected finding of the study must be taken with a pinch of salt. For calculating the opportunity cost of migration, the researcher has related the income of non-migrant households to that of migrant households, controlling the size of land-holdings owned by the households. It is possible that non-migrant households differed from migrant households in more than one way, particularly in terms of family size and composition. In the reviewer's view, the migrant households might have had more of surplus labour whose labour productivity would have remained close to zero, if some of the surplus labour had not moved out. In other words, the opportunity cost of migration would have been much lower than what was assumed in the model. Had the researcher introduced controls for varying family size, the results of his cost-benefit analysis would have been somewhat different.

In the traditional neo-classical economic thinking, rural-urban migration was viewed as an inevitable process through which surplus labour would gradually be withdrawn from rural sector to provide needed manpower for urban industrial sector. The process was considered socially and economically beneficial [Lewis, 1954, Pp. 139-91; Ranis and Fei, 1961, Pp. 533-65]. The adherents to this school of thought argue for greater investment in urban areas for creating more urban jobs and urban amenities. The findings of the study negate such optimism and policy measures.

The study rather lends credence to Michael Todaro's [1969, Pp. 138-148] model of rural-urban migration. In this model migration proceeds in response to urban-rural differences in 'expected earnings', with probability of getting an urban job acting as an equilibrating force on migration. Rural-urban migration can therefore greatly exceed rates of urban job creation. This, in turn, would exacerbate urban unemployment problems, put enormous strain on urban infrastructure and degrade urban environment. A solution to overcome the problems is to contain rural exodus by reorienting development strategies to generate income and employment opportunities in the villages themselves. Bora seems to veer round to this line of thinking. So in the last chapter of the book, he has made a number of policy recommendations - diversification of agriculture, generation of non-farm employment, land development programmes, vocational training for rural youth, and so on - all aimed at improving the rural economy of the region.

All said, what emerges from the study is a partial picture of economic consequences of rural-urban migration on the households involved in it and on the rural areas which have lost the cream of its work force. The researcher has not attempted to assess the impact of migration on the city itself though he carried out a separate survey in the city as well.

But these comments in no way should detract from the merit of the book. The researcher has been very enterprising and used innovative approaches to study the subject of his interest. The book should prove extremely useful to both researchers and planners concerned with optimum population redistribution policies.

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Shah A.M., B.S. Baviskar and E.A. Ramaswamy (Eds.), *Social Structure and Change Volume 4, - Development and Ethnicity*, Sage Publication, 1997, Pp. 261, Price: Rs 300/-.

It is indeed a measure of a scholar's contribution and impact that his various students, colleagues and friends came together to pay a wholesome tribute to Professor M.N. Srinivas. The present volume under review is the fourth volume and one more volume is also to be published. This certainly speaks of the breadth of interests and concerns of M.N. Srinivas. It is but natural that the present volume has been woven around his concerns which are reflected in his work and writings since his return from Oxford more than almost fifty years ago. Being interested in caste and religion, it was but a logical development that Srinivas would look into the various kinds of inequalities present in Indian society. Similarly the attempts made to rectify the various kinds of inequalities and inequity drew his attention, therefore he addressed himself to the various developmental programmes undertaken by the Government and other agencies to tackle this problem. No wonder, he felt impelled to pinpoint attention on the social structural factors, inhibiting the development process. Various kinds of loyalties and primordial groupings, ranging from sub-caste to sub-region, religion, education, occupation, and so on were thought of. Srinivas also talks of 'runaway ethnicity'. One is reminded of runaway inflation. What are regarded as democratic, secular and rational modalities of development, get refracted by the various factors mentioned above.

That is why various scholars were invited to contribute papers for the volumes to honour M.N. Srinivas. The present volume deals with *Social Structure and Change* (the broad heading) of which Volume 4 is specially designed to discuss *Development and Ethnicity*. One has to bear in mind the difficulties encountered by editors to piece together the writings of different authors in a common framework. How one wishes that themes were first decided upon, at least tentatively, so as to direct the contributors to stick to the themes both theoretically and substantively. The present volume is plagued by this problem in the sense that scholars were not, probably given their brief. It is quite plausible that the various contributors offered what they had more or less ready, making the task of the editors more complicated.

While the volume is entitled *Development and Ethnicity,* in terms of the various contributions I am inclined, not to say compelled, to reverse the order and discuss the essays pertaining to ethnicity first since the contributions to the theme of development are not only fewer in number, but also wanting in sophistication and substance. Hardly any conscious effort has been made to discuss the concepts, the processes, or the problems of development, as such. On the other hand, ethnicity has been discussed both conceptually and substantively in a more rewarding manner in this volume.

Ethnicity

Ethnicity has been broadly defined as shared culture, such as language, customs and institutions. There is an attempt to differentiate between a group, which claims its distinctive ethnic pattern, and the one, upon which it has been enforced by some politically superior group in the context of political conflict. Pluralism is generally thought of as a state of differences which can be ignored only, at one's peril, particularly while planning, developing and launching various programmes of social, economic and political change and development. In political parlance, it is customary to emphasise pluralism so as to take care of all the diverse groupings in society. At the same time, under the rubric of pluralism is hidden the inter-play of power and domination by the so-called main stream - majority, dominant sections, etc. The problem is further accentuated when various developmental programmes are sought to be accomplished - 'finished' in quantitative terms. It is a matter of common knowledge and experience as to how the various developmental inputs are provided, or not provided to differing ethnic groups. It should be remembered that ethnicity has to be taken in its wide context, not being confined to tribe, caste and religion but also to include geographical distance, educational system, occupational system, political apparatus, etc. The problem becomes even more complex because of a combination of factors working in favour of or against certain groups. No wonder that ethnicity is rife with discontent and struggle, which may not necessarily help to achieve the intended goal, namely, development of the tribals for the rectification of various kinds of inequality, inequity and injustice.

In his paper 'Ethnicity: Myth, History, Politics', S.C. Dube, draws pointed attention to the various dimensions of ethnicity. Emphasising tradition, Dube analyses the importance of traditions for various ethnic groups and the necessity of rediscovering traditions, when faced with the problems of identity, survival and progress. 'For the formation of an ethnic identity, a combination of factors - common descent, socially relevant cultural or physical characteristics, and a set of attitudes and behaviour patterns - is necessary. Common descent may be real or putative, and even a common racial origin is not necessary. Cultural attributes like distinctive beliefs, institutions, customs and social practices, religion, and language often form the bases of identity. In some instances, physical attributes - pigmentation of skin, or bodysshape - provide the foundation of ethnic identity. To consolidate such an identity, the members of an ethnic group must also share ideas, behaviour patterns, feelings, and meanings. They should distinguish themselves (we) from others (they). And they should perceive that they share a common destiny' (P. 198)

Ethnicity can transcend nationality, if necessary, the main point is to guard one's identity. Very rightly, Dube lays emphasis on the agenda of an ethnic group. This provides a lever for action to safeguard both the identity and interests of ethnic groups, when they have to encounter various forces of exploitation and domination. The problem is compounded in the case of a retarded economy, not to say, the facade of various political concepts, like democracy, freedom, rule of law, etc. Thus, ethnicity becomes a serious challenge to the various modalities of development, such as state, voluntary grouping and individual efforts. It has been a common usage to speak of 'the other India', meaning thereby those who are left high and dry as far as the various facilities are concerned, consolidating the historical inequalities and differences.

B.K. Roy Burman in his paper, 'Criteria for Identification of Backward Classes', very correctly pinpoints attention on the phenomenon of backwardness and its corroding impact on people - tribal or otherwise. Apart from the Constitution of India which provides a blue-print for appropriate action and also sets an agenda for change, ideological inputs have been made over a period of time so as to challenge the domination of the upper castes and groups over the deprived and dis-privileged sections of society. Enquiring into the term backward class, the author goes into the various judicial pronouncements in this respect. Likewise, the mobilisation of the intermediate castes has also been documented. While various commissions and committees are appointed to define backwardness and to suggest remedies to overcome such backwardness, the persistence of various structural features has not facilitated a faithful implementation of the measures suggested, and even the definitions of backwardness are challenged both in a court of law and the street. Though basically Roy Burman's is a conceptual exercise, his paper has a lot to say about the suffering and privations of the backward classes (castes, tribes, etc.).

G.S. Aurora in his paper, 'Ecology and Development in Arunachal Pradesh', pinpoints attention on the importance of the ecological factors and technology in tribal development. He discusses problems such as the following:

1. Ecology and economic variations in the region.
2. Economy and alternative energy-use patterns in the region.
3. Urbanisation and related process affecting the balance of man-nature relationship. And
4. alternative policy-frames concentrating on immediate gains versus future dangers to ecology.

Whatever upsets the balance between the cultures and economies of the people exerts destabilising influence. That is why the planning of developmental activities has to make sure that the process of destabilisation is kept at its minimum. Introduction of new sources of energy especially affects the younger groups by increasing the level of their aspirations and weans them away from traditional modes. The factual problems faced by the people in this region are reported.

In an important paper, Viswanathan Selvaratnam discusses the relationship between 'Ethnicity, Communalism and Class Conflict in India, Malaysia and Sri Lanka: Their Implications for Nationhood'. From the very title it is clear as to the complex nature of the problem and the manner in which he has attempted to look into it carefully and analytically. The interface between the foreign power and the local people and, particularly, the consequence it had for both, opening up new opportunities and displacement of the traditionally prestigious groups, has been very correctly highlighted. The introduction of modern education and market economy bestowed considerable advantages on individuals and groups who where already higher up in the traditional scheme of stratification. No wonder that the process and the fact of a hegemonic relationship not only continued but got strengthened. The paper takes into account the genesis of caste relationships and the motives of individuals and groups to deploy primordial loyalties to achieve power. Introduction of urban centres with modern

education and concentration of industries which attracted trained and skilled manpower, on the one hand, and the unskilled labour, on the other, certainly aggravated the various divisions in society. On the other hand, the urban centres also brought new values like individual liberty and freedom, equality, social justice, etc. The lack of fit between the ideology propagated and the structure of opportunity certainly led to disenchantment, unrest, protest and challenge. Such dissatisfaction, unrest, etc., took the proverbial downward swing which explains the problem of political organisations, whether in India or Malaysia or Sri Lanka. Uneven development and proliferation of ideological inputs made matters worse. Both, in Malaysia and India, the political process continues to be based on ethnic mobilisation and polarisation. This is further reflected in the politics of economic development. Another feature arising out of this intricate situation has been that of cultural nationalism. Cultural nationalism helped divide and mystify the common masses on these sentiments. Matters have been complicated by utilising foreign consultants to resolve these problems who perceive problems in a linear and unimaginative manner. The external and internal dualities have added to the intricacy of the problem. This is exactly why the author suggests that such problems need to be handled with care, sympathy and relentless efforts, if any results are to be expected. This means reordering and rearrangement of the availability of all kinds of resources, such as physical, intellectual and political, in favour of sections needing such resources most. The comparative analysis provided by the author enables one to get over the specifics of a given single context, which is in fact supposed to be the purpose of sociological analysis in the sense that it is a comparative study of different systems. All the same, certain features stand out which make it imperative to clink to ethnicity in order to attain new goals - political, economic, cultural.

Sachidananda in a study of 'Emergence and Growth of Tribal Ethnicity in Chotanagpur', agrees with Dube in stating that an ethnic group has to have an agenda because it has to interact with several other groups who are placed in society on a scale of hierarchy, which need to be diminished if everyone has to get minimum necessities of life and also enjoy self-respect by removing dependency. Similarly, an ethnic group should have ideology in order to mobilise its members to achieve a common goal. Migration of non-tribal groups and individuals in tribal terrain gives rise to tribal identity and the evolution of ideology and agenda in order to counter such rows which are basically economic and political in nature. Ethnicity becomes a mechanism to fight other ethnic groups, who are in a position to dominate over ethnic groups who are not so well-situated in terms of access to different resources - physical, economic, political as well as cultural. In India, as elsewhere tribal groups have been pushed into interior areas - forests and jungles, in order to make land and territory available to the invading groups, in this case the non-tribals. Moreover, such incursions lead to relationship of domination and subordination. Further, this process is heightened by modern economy, occupational system and, of course, the educational system. To say the least, there comes into being a dual labour market and economy. The problem gets even more complex when a given tribal group has had a history of organised struggle for their rights, which sometimes assumes the form of a separate political entity, for example, in the North-East frontier areas of India. In addition, there are linguistic and other layers to this problem, for example, the Bengali-Bihari controversy, Bengali Muslim controversy, and so on. Exploitation and domination by the majority community culminates into driving of ethnic groups into their own shell, which further reduces the possibility of effective communication and understanding. Equity and distributive justice are the most important victims of the multi-ethnic encounter, in this case between the tribals and the non-tribals. As early as in 1918, demands were made for protecting the tribal interests by posting European officers instead of Hindu officers. Spread of English education in particular, not to say the spread of Christianity, in this region brought about a middle class leadership, which became a vocal exponent of tribal interests. Prejudice, social distance and domination could no longer be brooked by this rising middle class.

What is known as Jharkhand movement developed in this region, and even now the movement has not abated because of the non-attainment of its goals. This is not to ignore the impact of Hindu society on the tribals which to a certain extent could be likened to the process of *Sanskritisation*. The importance of organised efforts has been properly appreciated by the Santals and, as such, it gave rise to super-tribalism. Sachidananda has very rightly traced the genesis of tribalism and suggests adoption of a truly secular and broad-minded approach to solve this problem. Ethnic movement and its necessity have been thus highlighted by the author, instead of talking glibly of plural society and its virtues. Such talk becomes not only meaningless but also annoying when economic, political and cultural domination is left untouched.

This discussion of ethnic groups, ethnicity and ethnic uprisings has been forcefully brought out by the contributions mentioned above. While it has to be accepted that there has been a considerable extension - bending, forwards and backwards, in the context of ethnicity to include all kinds of factors including migration - the basic divide between the tribals and the non-tribals remains which has to be tackled with sympathy and judicious tact. In fact, the failure to do so would give rise to what Srinivas calls the 'run-away ethnicity', which is rampant in urban areas, where seemingly it is exploited by politicians, social workers and do-gooders who have an axe to grind.

The following paragraph brings out the poignancy of the tribal problem. In Bihar which has a significantly large tribal population and particularly in the context of the move for establishing Vananchal state, it has to be mentioned that the tribal population is twenty-five per cent of the total population while the mineral wealth and industries like Tata Iron and Steel Company, Bokaro, contributed seventy per cent of the revenue of the state. However, only fifteen per cent of the total state budget are spent for the tribal areas. If this was not bad enough the misery of the tribals is compounded by self-seeking and unscrupulous leaders from the ranks of the tribals themselves, who act in collusion with the non-tribal exploiters. Forty-seven per cent of the villages in Bihar were electrified of which the tribal villages constituted as little as five per cent. Laloo Prasad objected to the setting up of development boards for the tribals, leave aside the formation of a separate state [Report in *Sakal* (Marathi), Pune, September 13, 1998]. The internal colonisation and exploitation have been largely responsible for tribal unrest and uprising in different parts of the country.

Development

Baviskar, in his paper 'Milk and Sugar - A Comparative Analysis of Co-operative Politics', confines himself mainly to political development revolving round cooperatives - sugar and milk, in Maharashtra and Gujarat, respectively. Apart from listing some of the benefits which accrued to the people, Baviskar is interested in highlighting the difference in the two kinds of experiments, sugar and milk co-operatives. Highlighting the political factor, Baviskar states that the sugar co-operative and its leadership in Maharashtra being dominated by a particular caste, namely, the Maratha, has been a great mechanism of political mobilisation, rather a political power centre. As a political centre, it has affected plural politics and even state politics. Not that the role of technocracy was unimportant but technocracy was subordinated to the political goals and processes and, therefore, the political leadership was able to subordinate technocracy more or less perfectly. In Gujarat, on the other hand, in the case of milk co-operatives, Patidars who did not enjoy a political clout depended on the technocratic expertise, initiating an innovative leadership provided by Kurien. Right from the start, the hold of technocracy was firm so that the political process was subordinated. This difference of emphasis has been mainly responsible for commercial success and the model acquiring not only national but international attention and reputation. Baviskar thus wants to emphasise the aspect of political development and contrast it with technological development which has arrested the process of political development. This paper hardly enquires into the concepts and

theory of development *per se*. The restricted focus of this paper does not allow the author to look into the problem of development as a whole, leave aside formulate a conceptual basis of development.

Pauline Kolenda in her paper, 'Foxes, Lions and Bears: The Circulation of Land-Ownership in Southernmost Tamil Nadu' addresses herself to the problem of the transfer of land ownership as an indicator of change, particularly in the fortunes of different castes and communities, and in rural-urban interaction. The paper is based on field trips to Kanyakumari district in southernmost Tamil Nadu. As per the usual and proverbial manner, a short history is given of the process of the event by which land transfers were made possible, in this case by the *Magna Carta* Proclamation of Kerala 1865. The ownership of land by new groups has been emphasised as an important aspect of social change. Further, it is maintained that there is a symbiotic - in fact a one way - relationship between the town and the country, in the sense that the money which was paid by the rural folk by receiving services from the town, such as transport and health services, was invested by those providing such services to villagers to buy land in villages and establish their domination. In a way, the rural folk paid a double price for the services since they have lost their land, in addition to the monetary payment for such services. As a consequence of such land transfers from rural society to those in towns, there has been a change in the leadership pattern and the style of the villages. There has been an invasion of 'Foxes' into the rural areas. The author has given some ideas about the caste basis of such transfers. For example, the Brahmins and the Vellalas have been the losers of land while Thevars, Kallars and Nadars have become the main gainers. The earnings of countrymen enriched the urbanised who provided transport services and medical services to the rural population, particularly to the land holders enabling the urbanised to buy land in the villages. While trying to employ the conceptual framework given by Pareto, the author states that in this whole process of circulation of elites there are no lions but only bears who cross their limits and there are the clever foxes who also benefit substantially. The substitution of the village folk by the middle class urban people is a change for the worse for the rural people. Well, this is, more or less, a time-honoured process and phenomenon which brings out the unequal nature of relationship between country and town, which has resulted in the impoverishment of the original inhabitants of villages. All the same, one fails to understand its implications for the overall process of development.

David G. Mandelbaum in his paper, 'Development Disdained and Development Engrained: The Case of the Toda Tribe and Kerala State in South India', inquires into the relevance of maintaining cultural characteristics and distinctiveness of a tribe so as to draw them into the process of development. In doing so, the author points out as to how any interference in the culture of the Todas has made them to reject programmes of development, whatever the nature. Thus, the culture of an ethnic group, if ignored and subordinated, tends to become an impediment. On the other hand, if their culture is left untempered and no attempt is made to subordinate, there are better chances of their participation in the developmental activities. The success of the steps taken to improve the quality of life underscores the importance of non-economic factors too. Thus, in Kerala tremendous success has been achieved in respect of control of population, stress on primary education, health services, equal status of women, and so on, which emphasises a model of development which is within easy reach of the common man. Therefore, the Todas have made tremendous progress in their condition by participation in this development process. In a perceptive manner, the author emphasises the importance of treating an ethnic group with respect, so that they can participate in the programmes of development. Of course, as mentioned earlier, there is no attempt made to discuss the problem of development conceptually.

We have already noted the various disprivileges and disabilities faced by ethnic groups, such as the tribals, in particular and also the various measures suggested to rectify the various ills from which the tribals suffer. The paper by T.K.

Oommen, 'Social Movements and State Response: the Indian Situation', pinpoints attention on the importance of milieu in the discussion of any social movement to redress the sufferings of the people. Contrary to what one normally expects, Oommen brings out the importance of the co-operation of the state in furthering a social movement. Obliquely though, this is a pointer in the direction of the role which can be played by the state in promoting the process of development. The contents of the paper, as elaborated by the author, are not directly relevant to the theme under consideration, i.e., development.

The paper of Chitra Sivakumar and S.S. Sivakumar on 'Rural Change, Social History and Participant Observation' can be said to amaze, at the same time reduce the reader to an undergraduate class, with its parrot like reproduction of the importance of social history, participant observation, etc., in order to understand rural change. This paper has hardly anything to do with development or ethnicity and the reviewer is at pains to understand why it was included in this volume. Perhaps, it could have found a place in the first volume: *An Evaluation of the Work of M.N. Srinivas,* since it has tried to emphasise things dear to Srinivas. But it is entirely out of place in this volume.

All in all, as mentioned, the papers pertaining to ethnicity are useful and rewarding for which the authors need to be thanked. On the other hand, the papers pertaining to the area of development are quite limited in their perspectives and, of course, discussions. The volume has not been able to sufficiently highlight the relationship between development and ethnicity, as expected by the readers. As observed earlier, this brings out the supreme necessity of planning contributions so as to give at least a semblance of coherence to the various contributions, excepting of course those on ethnicity.

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Balachandran G., *The Reserve Bank of India 1951-1967,* The Reserve Bank of India, Oxford University Press, New Delhi, 1998, Pp. 1190, Price: Rs 1,195/-.

This is an official publication of the Reserve Bank of India. It describes the activities of the Bank during the period indicated. The preface makes clear what the book is and what it is not: 'It is not an economic or financial history of India. Nor does it provide a comprehensive account of Indian economic and financial policies and their formulation. The Reserve Bank of India was, and remains, India's preeminent public financial institution entrusted with responsibility for monetary policy. It also discharged a wider range of public responsibilities than almost any other central bank'. This history of the Reserve Bank may, therefore, yield insights into many more issues of public policy than the history of other central banks. But the Reserve Bank did not have a monopoly of policy-making. 'As such, while this book is an important input into a comprehensive account, so far unwritten, of Indian economic policies during the 1950s and 1960s, it is not such an account. ... It is the first account from the inside, as it were, of the functioning of a major public institution in post-independent India. ... A notable feature of this volume is the publication, for the first time, of a selection of Bank's documents'.

The history is on the whole very well written by dividing it into suitable and significant subject heads. It very effectively conveys the cogitations and procedures that underlay the recommendations regarding different policies and how in some of these, regional and personal considerations imperceptibly intrude. The educative value of this narration is unquestioned.

The appendices and the document section are very valuable. The Mundhra Affair, and that of the Pillai Bank are discussed in great detail. It is very pleasing in the sections to meet with familiar friends and names like H.M. Patel, D.G. Karve, T.T. Krishnamachari and others flitting across the stage. One also meets with some interesting small titbits in all the happenings related here. To name

only two of the many others: One is not surprised by the lingering hangover of the empire in the reported remark of the Governor of the Bank of England (1949), 'I see no attraction in allowing the U.K. to starve in order to provide India with new railways' (p. 602). Second, it is heartwarming to come across the old lion's roar with which Gadgil begins his note in the *Report of the Working Group on Cooperation,* with reference to the National Development Council's resolution on Cooperative Policy (November 9, 1958). 'It is difficult to comment on the report of the working group. This is because the reasons which led the National Development Council to adopt the particular resolution on co-operation are not clear to me. It does not appear that the reasons are clear to the members of the working group themselves. They are evidently doubtful regarding the proper and the full meaning of the various parts of the resolution and also as to the definitive programme that is implied in the resolution. However, their attitude towards the resolution is that towards an oracular pronouncement which they diffidently try to interpret but whose possible inconsistencies, misdirection or ineffectiveness they dare not examine' (p. 989). Then he proceeds to demolish the report and the resolution of the NDC.

N.V. Sovani

Dasgupta Bipalab, *Structural Adjustment, Global Trade and the New Political Economy of Development,* Sage Publications, New Delhi, 1998, Pp. 434, Price: Rs 450/-.

A year ago I reviewed in this Journal (Vol. 9, No. 2) Catherine Caufield's book, *Masters of Illusion: The World Bank and the Poverty of Nations.* The book under review is on the same theme and the conclusions are identical. But the present book is broader in scope, since it covers not only the World Bank but also the International Monetary Fund (IMF), is more scholarly and academic, explores the theory (or, really, the theology) underlying the policies of these institutions,and verifies it with the practice and results of them all over the world. The main target is the currently famous programme of 'Structural Adjustment'. The book expresses its fallacies with the help of the experiences of several countries round the world which had or have had to adopt this programme. It shows clearly that it is a tragedy of world dimensions.

'Our analysis shows that the New Political Economy (NPE) of development is internally inconsistent, a-historical, is oriented towards justifying market-centred economic policies under authoritarian regimes, is dependent on the rich world institutions for its success and ignores the importance of institutional factors in the development process' (p. 63).

'At the end of the analysis, NPE comes out with the paradoxical conclusion that, for sustaining a liberalised market-oriented economy, a country needs its obverse in the political arena, an autocratic regime, which, like the enlightened bureaucrats, can rise above interest groups and can get things done, quickly and flexibly, in the national interest. ... While the basis for such a startling conclusion is the economic success of the East Asian countries which are mainly governed by autocratic regimes, this is a mere coincidence and cannot be generalised (Pp. 63-64).... If East Asia is a success story, that is not because of the authoritarian nature of its regimes, nor are its regimes incorruptible or impartial' (p. 379).

'Perhaps the only redeeming feature of this theory is its analysis of "rent-seeking behaviour", that has a certain relevance to the contemporary LDCs' (Less Development Countries') political economy. This explains in formalised form what had been known in India for the past five decades as "licence-permit raj", and, perhaps, with similar expressions, in the vocabulary of many other LDCs. Apart from the economic costs involved in "rent-seeking", what it can do to the political environment of a country is amply illustrated by the voluminous documentation of corruption at high places, over the past decade or two, in a large number of countries ...' (Pp. 64-65).

'(W)e hold that open and competitive economy is a myth and it is sheer wishful thinking to assume that a no-control regime can deliver development to a poor country. Nor does the experience of various countries prove that an open economy is more capable of handling corruption; in some countries, liberalisation has been accompanied by wide allegations of sleaze and corruption in high places' (Pp. 379-80).

'Though the World Bank and IMF - are controlled by the rich G7 countries in terms of voting rights, paradoxically, they operate today only in the poor countries, and have no role to play in the world economy at large. The question that inevitably follows is whether in their decision to introduce and implement structural adjustment, these very rich countries have been prompted by an altruistic motive or whether their self-interest is involved in this exercise. More particularly, we asked, how far and to what extent the adjustment package had been introduced to rescue the international banking system from bankruptcy and/or to find markets for the MNCs (Multi-National Corporations) of US origin in order to rectify the massive balance of trade deficit of the United States. In other words, whether structural adjustment is an instrument through which the burden of adjusting the trade deficit of the United States has been passed on to the fragile shoulders of the LDCs' (p. 380).

'There is no known case where a country has made the transition from backwardness to development without state support', not excluding the USA, UK, and every other developed country (p. 382). 'There is a remarkable similarity between the government activities undertaken by the East Asian tigers and those undertaken by the United States in a comparable period of its development... The market alone has never delivered, while East Asia has succeeded because, ... "the government played a critical, catalytic role" (p. 383). ...
(L)iberalisation follows growth, not the other way round' (p. 382).

Global trade relations are unequal and dominated by interests of the rich countries. 'We conclude that world trade is far from free and competitive and the prices ruling in the world market are trade-destorting, and, therefore, cannot be taken as bases for production decisions' (p. 387). These distortions are due to two reasons. 'massive subsidies and protection given by the rich countries to their own production and exports and the fact that a large proportion of what passes as international trade is intra-company transfer by MNCs at book-keeping prices that have no bearing on demand and supply for the goods in question' (p. 387).

These selections from the findings of the book can convey the flavour of the discussion in the book and it is a rewarding reading.

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Bagchi, Amiya Kumar, *The Evolution of the State Bank of India, Vol. 2, The Era of the Presidency Banks 1876-1920,* State Bank of India and Sage Publications India, New Delhi, 1997, Pp. 664, Price: Rs 450.00.

Amiya Kumar Bagchi's book is a very useful and valuable addition to the literature on Banking. Normally such a book would be of interest to students of Indian Economic History. However, as the reviewer shows later on, the book would be of enormous interest to bankers of today who have to operate in a deregulated, liberalised environment.

The Presidency Banks play a significant part in the economic development of that period. The publication of the material locked up in the State Bank of India archives goes a long way in illuminating the somewhat hazy picture. We must at this stage point out two limitations from which institutional histories suffer. It becomes extremely difficult to rely solely on such material as, many a time, the account books of *shroffs*, traders or even foreign companies operating in

India in those days are not readily available. Second, the 'official' notes, memos, etc., prepared by officials represent their view-points at a given moment of time. Unless one follows up each such case and evaluates its impact over a period of time not only on the Bank but also on the counterparts, it is difficult to draw inferences. Bagchi refers to specific cases about bills being protected, or about customers being asked to provide additional security. No doubt, the Banks protected themselves. But such decisions could have disastrous consequences for the counterparties involved. An objective assessment necessitates a closer follow-up of the cases for an evaluation of the decisions made.

Bagchi alludes to Gerschenkron's analysis of the development of financial institutions and economic growth. The Presidency Banks played a very valuable part in the furtherance of economic activities. But the 'sample' is too narrow for any specific correlations to emerge. However, one could, without much hesitation, say that these Banks did not do much for the furtherance of Indian industry and trade. First, they were not expected to and second in a colonial set-up it would indeed have been too much to expect these Banks to do so.

At the beginning of this note, we asserted that the book would be of considerable interest to a large body of persons working with the financial services industry. The financial services industry in India is undergoing a sea-change in its working environment. From a highly regulated regime, it is tending to a relaxed, deregulated operational environment. The period under review epitomises the pristine market-driven systems. The Banks did not have to worry about statutory requirements or transparency of accounts. Their prime concern was 'profits' and 'more profits'. We could choose three facets of liberalisation and deregulation and see how they coped with these and what problems they encountered. We could broadly describe these as (a) competition, (b) no directed credits/investments, and (c) 'deregulated' interest rates.

Bagchi rightly maintains that 'credit markets are necessarily imperfect and that rate discrimination and credit rationing are universal phenomena. A third dimension of imperfection in credit markets concerns the length of time for which particular creditors are prepared to extend loans to particular borrowers' (Page 42, para 2).

One has sample demonstration of how the system operated. The list of British and European companies Presidency-wise is in consonnance with their preoccupation with profits and as a logical corollary with risk-management. The use of Indian agents to supplement their scanty information system is perhaps of relevance even now. The Banks could use this by developing 'local committees' to assist managers who are many a time strangers to a given locality. Equally noticeable is the relegation/dismissal of agents, when the need was no longer felt.

These Banks were bankers to the local governments and had a steady source of deposit accretion. They could therefore, compete with their counterparts and other exchange banks. One however, fails to understand their lack of effort in securing foreign exchange business. They seem to be content to leave it to exchange banks.

Very often one is asked if over a period one would see a decline in what has come to be described as priority sector lending. The quantum may be reduced. Banks would have to handle their business. But they would extract the price for it. The *sahukars* and the Banks levied exceptionally high charges (some could well say extortionately high) for peasants or tribals. These could easily be rationalised by the cost of gathering information and the cost of monitoring. Large costs were imposed on these lower borrowers and Presidency Banks had no hesitation in subsidising the British Managing Agencies.

A similar problem had emerged in the heyday of liberalisation. The bankers who attended a meeting convened by the cabinet secretary flatly refused to consider advances to weaker sections at subsidised rates on the ground that it affected their balance sheets. The fears expressed in some

quarters that we would slowly drive the weaker sections into the clutches of *Pathans* and extortionist lenders are not unfounded.

In a deregulated interest rate regime, the rates on advances were a major tool for asset building. There were complaints that 'Bazaar' rates of discount were lower than those charged by the Presidency Banks. Perhaps, the deployment of expatriate staff pushed the transaction costs of Presidency Banks upwards. At the same time, during stringent monetary conditions, it is unlikely that other banks would undercut the Presidency Banks. This is, in fact, borne out by 'Mercator' writing to *Capital* [September 30, 1898]:

'I have had 15 years' experience of intimate relations with all the native bankers in the Calcutta bazaar, and can confidently assert that with a tight money market the Marwari trader will not underbid the Bank of Bengal....' (p. 44).

We have deliberately selected certain sections which would be of interest to today's bankers and students of financial services industry. It would be folly to ignore all that happened then!

The book is studded with references and one must hope that the State Bank of India would allow others to refer to their rich and voluminous material.

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As this issue of the Journal was in the final stages of its publication, came the sad news of the passing away of Professor M.L. Dantwala. Professor Dantwala, a National Professor, was an Indian economist of great eminence. He was President of the Indian Society of Agricultural Economics and, for a long time, worked as Editor of the *Indian Journal of Agricultural Economics.* He was the first Chairman of the Agricultural Prices Commission. An ardent nationalist and fighter for freedom, Professor Dantwala was a founder-member of the Congress Socialist Party. He was also a formulator of the idea of Trusteeship championed by Mahatma Gandhi. Right since its inception, the Indian School of Political Economy has had a special bond of relationship with Professor Dantwala, who was a Founder Honorary Fellow and the First President of the School. Though he retired from the School's activities, his wise counsel was always available to us. The Indian School of Political Economy joins his relatives and countless admirers in mourning the passing away of Professor Dantwala.

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Maital, S., 1973; 'Public Goods and Income Distribution', *Econometrica*, Vol. XLI, May, 1973.

Chakravarty, S. 1987; *Development Planning: The Indian Experience*, Clarendon Press, Oxford.

If a Reference is cited in a Note, the Note may use the shortened reference form:

4. For a critique of recent industrial policy proposals, see Marshall [Marshall, 1983, Pp. 281-98].

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