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Right to Property since Independence

V. KRISHNA ANANTH

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To Naveen Babu and Chandrashekar, who laid down
their lives in their quest for a just society.

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Series Editors' Preface

The SAGE Series on Modern Indian History is intended to bring together the growing volume of historical studies that shares a very broad common historiographic focus.

In more than 60 years of independence from colonial rule, research and writing on modern Indian history have given rise to intense debates, resulting in the emergence of different schools of thought. Prominent among them are the Cambridge school and the Subaltern school. Some of us at the Jawaharlal Nehru University, along with many colleagues in other parts of the country, have tried to promote teaching and research along somewhat different lines. We have endeavored to steer clear of colonial stereotypes, nationalist romanticization, sectarian radicalism, and rigid and dogmatic approach. We have also discouraged the *flavor of the month* approach which tries to ape whatever is currently fashionable.

Of course, a good historian is fully aware of contemporary trends in historical writing and of historical work being done elsewhere, and draws heavily on the comparative approach, that is, the historical study of other societies, states and nations, and other disciplines, especially economics, political science, sociology, and social anthropology. A historian tries to understand the past and make it relevant to the present and the future. History, thus, also caters to the changing needs of society and social development. A historian is a creature of his/her times, yet a good historian tries to use every tool available to the historian's craft to avoid a conscious bias to get as nearer to the truth as possible.

The approach we have tried to evolve looks sympathetically, though critically, at the Indian national liberation struggle and other popular movements, such as those of

labor, peasants, lower castes, tribal people, and women. It also looks at colonialism as a structure and a system, and analyzes changes in economy, society, and culture in the colonial context, and also in the context of independent India. It focuses on communalism and casteism as major features of modern Indian development. This volume in the series will tend to reflect this approach as well as its changing and developing features. At the broadest plane, our approach is committed to the enlightenment values of rationalism, humanism, democracy, and secularism.

The series will consist of well-researched volumes with a wider scope, which deal with a significant historiographic aspect even while devoting meticulous attention to details. They will have a firm empirical grounding based on an exhaustive and rigorous examination of primary sources (including those available in archives in different parts of India and often abroad); collections of private and institutional papers; newspapers and journals (including those in Indian languages); oral testimony; pamphlet literature; contemporary literary works. The books in this series, while sharing a broad historiographic approach, will invariably have considerable differences in analytical frameworks.

The many problems that hinder academic pursuit in developing societies—for example, relatively poor library facilities, forcing scholars to run from library to library and city to city, and yet not being able to find many of the necessary books, inadequate institutional support within universities, a paucity of research-funding organizations, a relatively underdeveloped publishing industry and so on—have plagued historical research and writing as well. All this had made it difficult to initiate and sustain efforts for publishing a series along the lines of the Cambridge History Series or the history series of some of the best US and European universities. But the need is there because in the absence of such an effort, a vast amount of work on Indian history being done in Delhi and other university centers in India and also in British, US, Russian, Japanese, Australian, and European universities, which shares a common historiographic approach, remains scattered and has no *voice*. Also, many fine works published

by small Indian publishers never reach the libraries and bookshops in India or abroad. We are acutely aware that one swallow does not make a summer. This series will only mark the beginning of a new attempt at presenting the efforts of scholars to evolve autonomous (but not indigenist) intellectual approaches in modern Indian history.

Bipan Chandra
Mridula Mukherjee
Aditya Mukherjee

Preface

In more than 60 years of its existence, India's Constitution has evolved into a tool for social revolution, and the idea of socialism has remained central to this evolution. This course, indeed, was determined by a constant interaction between the political leadership of the times at one level and the higher judiciary constituted by the various High Courts and the Supreme Court at another level. The sole determinant or the basis of this evolution has been the quest, common to both the institutions, to strike a harmonious balance between the idea of political justice as laid out in Part III of the Constitution (defined as Fundamental Rights), and social and economic justice as laid out in Part IV of the Constitution (defined as the Directive Principles of State Policy). The makers of the Constitution laid this framework as the foundation on which the independent nation was to be built by qualifying justice in the manner in which they did. The Preamble, which was added to the Constitution only after all other provisions were debated and approved, reflected the collective thoughts and aspirations of those in the Constituent Assembly. The final scheme of the Constitution did lay out the scope of justice as not merely an abstract political expression, but more comprehensively as a concrete goal. In defining justice, thus, the makers of the Constitution rendered to the concept a meaning by which political equality was perceived as possible only as a consequence of social and economic equality.

In other words, the founding fathers of the Constitution were convinced that while political justice shall be the ultimate objective, the road to that goal had to tackle and attack social and economic injustice. It may be argued that the injunction against the infringement of political justice,

which were contained in the various Articles in Part III of the Constitution, shall be seen in conjunction with those in the Directive Principles of State Policy enlisted in Part IV of the Constitution. The Preamble to the Constitution, indeed, was an unambiguous statement of this scheme. In more than 60 years since November 26, 1949, the day on which the Constitution was adopted by the Constituent Assembly, the experience has been one of a constant endeavor to move in that direction. Another important marker of this process has been the record where the Parliament and the judiciary acted against each other, and when one of these two institutions deviated from this central scheme. The story has been one of checks and balances, keeping the thrust of the constitutional scheme, in general, and the basic structure, in particular, as the guiding principle. In this process, the idea of socialism was never seen in an abstract sense. Instead, it was seen as a means to justice as defined in Articles 39 (b) and (c) of the Constitution; that the ownership and control of material resources are so distributed to subserve the common good and concentration of wealth, and means of production to the common detriment are to be prevented—a categorical definition of socialism as perceived by the founding fathers of the Constitution. It may be added that in the times in which the Constitution was drafted, means of production predominantly meant agricultural land. This called for a categorical mandate against the system of landlordism, legitimized by the colonial regime and prevailing under various names, such as zamindari, taluqdari, and others, and the legal framework that provided the right to a certain class of men to lord over those who cultivated on the land as tenant farmers at one level and the landless agricultural workers at another level.

The formidable challenge in this context, thus, rested in striking a harmony between the right to own property and the idea of an egalitarian setup insofar as ownership of the means of production was concerned. The members of the Constituent Assembly were aware of the concept of *eminent domain*, and that its application will inherently raise a conflict with the right to private property. The concept is defined as the right of the State or the sovereign to its or his/her own

property in absolute terms, even while the right of the citizen or the subject over such property he/she owns is only paramount. In other words, the citizen is vested with the right to own property, and such a right is subservient to the right of the State to take it over for a public purpose. The premise herein is that all the land along with the mines, the minerals, and other natural resources belonged to the State and in that sense to the community as such, and the State could compulsorily acquire such property for a public purpose. Articles 39 (b) and (c), in a sense, were made part of the Constitution from this premise. The Land Acquisition Act, 1894, too provided for this. However, the logic of colonialism and the specific context that defined the relationship between the land-owning class and the colonial state in India had led to a reality in which the rights of the zamindars over the tenants were accorded a legal sanction. Notwithstanding this, the dominant sentiment in the Constituent Assembly was in favor of the concept of *eminent domain*. It may be said that Jawaharlal Nehru articulated this within the Assembly in a forthright manner.

However, it will be erroneous to see it as merely a brainchild of Jawaharlal Nehru. It is best, instead, to see this as the culmination of a process that began with the Gandhian phase of the struggle for freedom, in which the quest for freedom from British rule was interwoven with an earnest attempt to define the meaning of freedom. Beginning with the Champaran Satyagraha and the subsequent resistance in Kheda, both of which were markers of the beginning of the Gandhian era in the struggle for freedom, the idea of security of tenure and the illegitimacy of charging rents even in times of a bad crop had begun to capture the imagination of the peasantry in various parts of the country at the same time. The resistance in the Malabar district of Madras Presidency, described by a cross section of historians as the Moplah Revolt in 1921, was, indeed, an expression against landlordism and a demand for security of tenure. The nexus between the revolt and the Indian National Congress (INC) emerged in the Manjeri Political Conference in April 1921 and manifested in the peasant revolt that followed. It is, thus, a

fact that landlordism was seen as an illegitimate institution, and the nexus between the landlords and the colonial regime was beginning to be unraveled. This unraveling also meant that the INC could not afford to remain unconcerned with the aspirations of the peasantry.

In the United Provinces, the mobilization of the peasantry led by Baba Ram Chandra began as early as in 1918, which dominated the Awadh region (present-day eastern Uttar Pradesh) for about a decade. The same spirit was evident in the Bardoli Satyagraha in 1928 and historians have documented these struggles extensively. These events had an impact that reflected in the transformation of the INC, during the decade between the Non-Cooperation Movement and the Civil Disobedience Movement, into an organization of the Indian people and into what has been described as mass nationalism. The Indian National Movement, which seemed to be an expression of Home Rule, had witnessed a renewal during this phase and emerged into a categorical statement against colonialism. The Lahore Session of the INC and the election of Jawaharlal Nehru as the Congress President was indeed a moment where this shift was pronounced in clear terms. The Karachi Session in March 1931, then, was the logical culmination of this process.

The Fundamental Rights Resolution at Karachi, where the INC resolved to define swaraj in simple terms to enable the masses to appreciate what it meant to them and in a manner that implied political freedom included real economic freedom, was a marker in the short history of the struggle for freedom. The Karachi Resolution on Fundamental Rights was, in fact, the charter on which the INC functioned thereafter and served as the basis for the charting of the Constitution. The Resolution included this statement laid out that any Constitution, which might be agreed to on its behalf, should provide or enable the swaraj government to provide for what it declared as the Fundamental Rights. It is significant that almost all those listed as Fundamental Rights in the Resolution were included in Part III of the Constitution, adopted on November 26, 1949. As for the concerns of the peasantry, the Karachi Resolution had committed the INC to reforming the

system of land tenure, and revenue and rent into one where an equitable adjustment was made to the burden on agricultural land; into one where small peasantry was relieved by a substantial reduction of agricultural rent and revenue; into a system of total exemption from rent in cases of uneconomic holdings; and such other relief as may be just and necessary, to holders of small estates affected by such exemption or reduction in rent; and a regime of graded tax on net income from land above a reasonable minimum.

It may be stressed here that Jawaharlal Nehru played a major role in articulating this shift. It is also important to stress here that Gandhi had expressed an equally radical position insofar as the peasant's right over the land he tilled long before this Resolution. Responding to the Natives Land Act, 1913, passed by the all-Whites Parliament in South Africa that declared illegal any possession of land by the native people, in the *Indian Opinion*, Gandhi wrote: "This land is theirs by birth and this Act of confiscation—for such it is—is likely to give rise to serious consequences unless the Government takes care." Gandhi, in fact, had described the Act as the most significant question of that time and even more important than the Indian question, which, until then, was his core concern. It may be argued that Gandhi had internalized this into his understanding of the crisis that afflicted the indigo farmers and adapted it to the Champaran Satyagraha, just a few years later, in 1917.

Raj Kumar Shukla's initiative to foreground the plight of the indigo farmers struck a chord in Bapu's mind as natural and his response that the farmers in Champaran should decide what they would do with their land formed the basis of the whole campaign thereon. This thinking persisted with the campaigns in Kheda and in Bardoli too. In other words, Gandhi, Nehru, Vallabhai Patel, and Rajendra Prasad were all conscious of the fact that the peasants considered security of tenure as their right because they considered the land they tilled to be theirs. They were also convinced that the peasants did not hold grudge in paying rent as long as the going was good and even otherwise, but resisted eviction. In other words, the leaders of the national struggle for independence

were against allowing the right of the landlord over his property even while denying him the right to evict his tenants.

Such a balancing act was indeed a response to the condition of the times. The leaders of the INC, even while aware of the nexus between the class of landlords and the colonial regime at one level and the aspirations of the mass of the peasantry and the inherent conflict that arose in the countryside between the zamindars and the tenant farmers, were also conscious of the logic of colonialism in this context. The application of the concept of *eminent domain*, in a colonial context, carried with it the danger of the State dispossessing the landlord whenever necessary. The Karachi Resolution, thus, sought to impose an injunction against the State's power to compulsorily acquire property. Among the Fundamental Rights, as enlisted in the Resolution, was the guarantee to every citizen to acquire property in all parts of the country and to hold such property. It may be stressed here that the right to acquire property as a Fundamental Right also included the Right to Property, and thus was an injunction against dispossession of such property. This was in response to the context where the colonial regime had assumed to itself the right to compulsorily acquire property at its will. The Land Acquisition Act, 1894 accorded the power for compulsory acquisition of property by the State for what it declared as a public purpose.

That the 1894 Act was meant to be used only in order to acquire private property for such public purposes as building roads, government offices, and hospitals was a fact that was never concealed. However, as the term public purpose remained undefined, the law, as it stood, could lend itself to acquisition of property from the landlords for redistribution among the tenant farmers too. The colonial regime, interestingly, was aware of the potential for what they considered mischief in the event of a representative government taking office under the constitutional reforms proposals of 1935. In other words, the colonial regime was conscious of the possibilities before the elected governments if the State's powers to acquire private property for public purposes were left unfettered. Such powers were available under the provisions of the

Land Acquisition Act, 1894, where the elected regimes were committed to render relief to the tenant farmers. Section 299 of the Government of India Act, 1935 meant to prohibit the elected governments from undertaking any such legislations or measures was, hence, brought into the Act. The Section, indeed, was an injunction against the compulsory acquisition of land without providing for compensation, and the provincial assemblies could introduce and pass legislations, impeding the Right to Property, only after obtaining sanction from the Governor of the province.

That the provision was a direct response to the spread of pro-peasant agitations led by the INC, across the country in the decade and half before 1935, was evident from the note submitted by the Joint Committee on Indian Constitutional Reforms.

The note contained a prescription that it was necessary for a general provision in the Constitution Act safeguarding private property against expropriation; this was intended to quiet doubts which had been aroused in recent years by certain Indian utterances. The reference to the utterances was indeed due to the pronounced commitment of the INC to the concerns of the peasantry against evictions. The Joint Committee also laid out the need for an injunction against altering the right of individuals to property. This certainly meant that even such measures to alleviate the pressure on the peasantry due to excessive rent and the right of the landlord to evict peasants for default of rent was prohibited.

It is another matter that the injunction of this nature did not come in the way of the INC government in the United Provinces of enacting the United Provinces Tenancy Act, 1939, by which the landlords were prohibited from evicting tenants who defaulted on rent payment. This Act was challenged by the landlords, and the challenge was repulsed by the Federal Court as well as the Privy Council when the landlords took the case on appeal subsequently. The important point here is that the idea of *eminent domain* and against the individual's right to property was raised in a substantive way even as early as in the 1930s, and the leadership of the INC had recorded its commitment to the thinking that property, in general, and

land, in particular, belonged to the society and in that sense the State, and that there was no way that the State could be denied of its right to compulsory acquisition of private property for a public purpose. It is also evident from the records of the times that a certain sense of clarity evolved as to the meaning of public purpose. The INC perceived public purpose as not only from the viewpoint of framework of building schools, factories, and hospitals, but had also perceived public purpose from the point of view of equitable distribution of resources, in general, and land, in particular. The movement was in the direction of building a socialist setup, and an anti-zamindari sentiment was inherent to the national struggle for independence.

This was made explicit in the manifesto of the INC for the elections in 1946 when the party committed itself to the abolition of intermediaries between the State and the tiller in the agrarian sector. Following this was Jawaharlal Nehru's speech on December 9, 1946, while moving the Objectives Resolution in the Constituent Assembly. The first draft of the Constitution, as presented by the Fundamental Rights Subcommittee, in which the Right to Property was proposed as a Fundamental Right—Article 24—raised apprehensions among a cross section of the members in the Assembly. The fact was that Article 24, as it was worded in the draft, was the same as Section 299 of the Government of India Act, 1935. When it was introduced in the Assembly on May 2, 1947, the House decided to postpone the discussion on this issue. The mandate was that it required substantive changes to the State's power to compulsorily acquire property as restricted by Section 299 of the 1935 Act. The Nehruvian imprint was evident when this provision was sought to be amended in a substantive manner and when Nehru himself moved the amendment before the Assembly on September 10, 1949. In his speech, Nehru made it abundantly clear that the Congress was committed to zamindari abolition and that the measures to eradicate it will be carried out. This was also stated with clarity in the reports of the National Planning Committee (NPC) and the Congress Agrarian Reforms Committee, both presented in 1949. It may be noted, here in this context, that the INC in

that period had refrained from addressing the rights of the landless agricultural workers over the land they tilled. It may be stressed here that the idea of land reforms, in fact, was restricted to addressing the aspirations of the middle and rich peasantry, rather than in the sense of redistribution of land to the tiller. This remains an agenda only on the margins of our political and juridical discourse even now.

Article 31 of the Constitution, as adopted on November 26, 1949, thus seemed to enable the state to acquire private property for public purpose, and the only condition in such an acquisition was that the owner of the private property be compensated. It is noteworthy that the makers of the Constitution were cautious enough to avoid qualifying that the compensation had to be adequate. These certainly were a restriction on the Right to Property, and in that sense a step closer to the concept of *eminent domain*. The debate in the Constituent Assembly and Nehru's reply before the Article was adopted revealed that the independent regime was committed to the abolition of landlordism (whether it existed in the name of zamindari, taluqdari, or any such classification in the different provinces). Clauses 4 and 6 of Article 31 made this explicit. Redistribution of land among the tenants was indeed a principle and stated categorically in the Constitution, even while guaranteeing the Right to Property as a Fundamental Right. It may be added here that while Nehru laid this forthright in the Assembly, Vallabhbhai Patel too was unambiguous on this issue at all stages during the discussion. It is also important to note that the various provincial assemblies were already in the process of enacting legislations to abolish the zamindari system and redistribute land among the tenant farmers.

However, the same Article 31 was invoked as a device by the landlords to challenge the validity of such laws, notwithstanding clear provisions in the Article—Clauses 4 and 6 in particular—that protected such legislations that were passed even before the Constitution came into force or those provincial laws that came into force within six months from the date on which the Constitution was adopted. This legal challenge, however, was repulsed by way of the Constitution

(First Amendment) Act, 1951, by which Articles 31-A and 31-B (along with the Ninth Schedule) were added to the Constitution. Interestingly, the amendment was carried out by the Constituent Assembly itself. In the 25 years since then, one finds a constant interaction, antagonistic at times, between the Parliament and the judiciary. In all those instances, the subject matter happened to be the various laws and constitutional amendments, involving the individuals' Right to Property.

The Constitution (Fourth Amendment) Act, 1955; the Constitution (Seventeenth Amendment) Act, 1965; the Constitution (Twenty-fourth) Amendment, 1971; the Constitution (Twenty-fifth Amendment) Act, 1971; and the Constitution (Twenty-ninth Amendment) Act, 1972 were all intended to overwhelm the judicial decisions on certain measures in tune with Articles 39 (b) and (c) of the Constitution; the judicial decisions, in this context, were those in the Bela Banerjee Case, the Vajravelu Mudaliar Case, and the Golaknath Case in that order. In the same period, private property also came to include industrial and financial enterprises in addition to an agricultural land. And in the end, when a 13-member constitutional bench of the Supreme Court decided, by majority, to uphold the Parliament's right to amend the Constitution in order to restrict and even curtail the scope of the Fundamental Right to Property in order to give effect to the principles laid down under Articles 39 (b) and (c) of the Constitution in the Keshavananda Case, it marked a culmination of the process that began at the time of drafting the Constitution. The decision in the Keshavananda Case, in April 1973, was also a categorical endorsement by the Supreme Court of the idea of socialism as spelt out in the Constitution and its scheme. The concept of *eminent domain* was established explicitly. It is important to note here that the majority decision in this case had proclaimed the basic structure doctrine, and it is necessary to note that the judges who proclaimed this doctrine relied upon the Preamble of the Constitution as the source from where the basic structure was to be located.

In a subsequent judgment, when by way of the Constitution (Forty-second Amendment) Act, 1976, the word *socialism* was inserted into the Preamble among many other changes to

the Constitution, another constitution bench of the Supreme Court held the insertion to be valid and even held that the insertion had only made explicit something that was implicit hitherto. That was in the Minerva Mills Case decided in 1980. The bench, in this case, had also put the stamp of approval on the Constitution (Forty-fourth Amendment) Act, 1978, by which Article 31 of the Constitution stood deleted among other changes.

Article 31 of the Constitution remained an obstacle in the path of legislations attempting to give effect to Articles 39 (b) and (c) until then. However, it is important to note here that the purpose behind the deletion of the Article was somewhat different. The experience during the Emergency, when individual liberty was annulled by the transient majority that the ruling Congress party enjoyed in the Parliament during the 19 months between June 25, 1975 and March 21, 1977, had led the Janata government to ensure that political democracy was not curtailed in the name of economic democracy with as much ease as it was sought to be done by way of the Constitution (Forty-second Amendment), 1976. The motive was to render the Fundamental Rights unimpeachable and permanent. It was considered necessary by the Janata leaders to ensure that Article 31, which guaranteed the Right to Property too as a Fundamental Right, was no longer denied its place at the same pedestal as the Freedom of Expression and the Right to Legal Remedy. The amendment that sought to render any dilution of the individual's Right to Freedom amendable only after obtaining the approval of the people by way of a referendum (which was not the case until then) did not intend to give the same status to the Right to Property, and thus laid the ground for another round of legal challenges against legislations to give effect to the provisions under Articles 39 (b) and (c).

However, the experience in the three decades since then was one where the application of the law, as settled, led to a consequence that was just the opposite of such an intention.

In what could be described as the unintended consequence, with the deletion of Article 31 from the Constitution and the rendering of the Right to Property as a mere legal

right, the State's right to compulsory acquisition of property (land in particular) began to be used, most often, to defy Articles 39 (b) and (c). It may be said that the legislative process against large landholdings through legislations in the various states by the 1960s and the system of zamindari (or the various other names by which it had existed) were rendered illegal by that time. The idea of land reforms had been completed, at least in the legislative domain, by this time. The concept of *eminent domain*, where the State's right over land overwhelmed that of the individual, was meant to sanction compulsory acquisition of land from the small and medium farmer in the name of public purpose. The emerging context also meant a redefinition of the public purpose itself.

From the earlier premise of redistribution of resources in an egalitarian sense, public purpose came to be defined as dispossessing the small and the medium farmer, and transferring the property, thus, acquired to private manufacturers and in many instances, for such purposes as housing and even amusement facilities in the private sector. This certainly meant depriving the small producer of his means of livelihood and the concentration of resources in the hands of a few. The neo-liberal state began seeing this move as inevitable and viewed it as a public purpose in the context of urbanization. Unlike in the early decades after independence, where acquisitions for industrial purpose were predominantly done in cases of barren land in the countryside and where employment opportunities for the dispossessed in the industries were a real option, the nature of industry in the neo-liberal context was such that the scope for employment for the land loser was restricted and more in the nature of ancillary services, and thus different from the factories that came up in the earlier phase. This transition is significant and had its impact in the evolution of the jurisprudence in the realm of property rights.

Meanwhile, it is another story that there was a lot left to be implemented even in the realm of land reforms and redistribution of land to the tiller even after the substantial legislative changes in the area. The caste system that sustained the unequal relationship in the countryside had lingered on

to deny the effects of the legislations in several parts of the country. The battle in this realm began with the reservation schemes in state government jobs for the Other Backward Classes (OBCs) as implemented by the different state governments during the 1960s, and a similar scheme for central government jobs after the Supreme Court upheld the partial implementation of the Mandal Commission's recommendation in 1993, which was then completed in due course. That trajectory, notwithstanding its importance to the scheme of this book given the fact that the tenant farmers invariably happened to be the OBCs in the social sense and thus relevant to the land reforms trajectory, is not dealt with in detail here. Similarly, this book does not deal with the struggle for land reforms in independent India in any detail.

This is no comment on those aspects being less important. The omission is only because this book intends tracking the evolution of the jurisprudence in the area of property rights in the changing context. In another sense, this book is limited to tracing the legislative and the juridical process by which the idea of socialism came to be located in the constitutional scheme in the 60 odd years of the life of our Constitution. In such an attempt, one finds a few pointers, such as the foregrounding of the concept of *eminent domain* and more importantly, a paradigm shift from the procedure-established-by-law to the due-process-of-law. The founding fathers had their own reasons to adopt the former. The debates in the Constituent Assembly indicate that its members, predominantly, preferred the judiciary to interpret the law merely on the basis of the letter of the law and the Constitution. The idea of socialism was indeed predominant among them and they apprehended that the judiciary shall not be allowed to throw the spanner in their work. Notwithstanding that, in the first quarter of a century after the Constitution came into being, there were many occasions where the judges from some High Courts and the Supreme Court decided against the legislations that were socialistic, which led the political leadership to assert itself against the judiciary.

In the last quarter century, beginning 1985, the story seems to be different, and in a sense moving in the opposite direction.

In this period, one finds the judiciary frustrating the attempts by the political establishment to reverse the spirit of socialism as defined in the Constitution, in general, and Articles 39 (b) and (c), in particular. The road to achieving this objective was by way of expanding the scope of Article 21 of the Constitution. In doing so, the higher judiciary moved away from the procedure-established-by-law framework to adopt the due-process-of-law paradigm. For instance, in times when compulsory acquisition of land from the small and medium farmers for setting up housing colonies and factories began to become the norm in different parts of the country and even while the procedure established under the relevant law were followed in doing so, we find the Supreme Court piercing the veil and examining the public purpose and the impact of such acquisitions on the life and the livelihood of the land loser. This, clearly, was made possible after the Supreme Court took to the due-process-of-law framework in the Maneka Gandhi Case wherein the political right of the citizen to hold a passport was declared uninfringeable. The Supreme Court's decision in that case marked a departure from the law, as established in the A. K. Gopalan Case (in 1951), and followed for at least two decades.

It is true that the departure was pronounced, even earlier than the Maneka Gandhi Case, in the Bank Nationalization Case where the Supreme Court held the Act as unconstitutional on grounds that the Act, even if it was consistent with the provisions of Article 31, the nationalization of banks infringed upon the citizen's Fundamental Right to carry on any business guaranteed under Article 19 (g) of the Constitution. This manner of reading the Constitution and the Fundamental Rights as interdependent formed the basis of broadening the scope of the constitutional guarantees, and the process of reading the Directive Principles of State Policy as integral to the Fundamental Rights formed the basis for a jurisprudence that marked the scene during the 1980s, beginning with the decision in the Olga Tellis Case in 1986. Such reading was applied by the Supreme Court while deciding instances of compulsory acquisition of property in the neo-liberal era, beginning 1991.

This study is an attempt to deal with this short history tracing the various stages through which the law on the Right to Property and its relationship with the idea of socialism as laid down in Parts III and IV of the Constitution have evolved in the 60 years following the adoption of the Constitution on November 26, 1949. The story has been one of a constant interaction between the political and the juridical. It is important to add that the dominant theme in this story has been a constant endeavor to realize the goals set in the Preamble to the Constitution. It should be added that while in the quarter century after the Constitution came into force, the political establishment was engaged with the task in real earnest as against the judiciary that seemed to hinder their efforts, in the 35 years after that, it has been the other way round. In other words, the road to social revolution has been marked by a process where attempts to give effect to the idea of justice, social, economic, and political, as laid down in the Preamble, have achieved a measure of success. If the Constitution, including the Preamble, is to be seen as a contract that the people of India had entered into with the political leadership of the times and the judiciary being the arbitrator of this contract to ensure justice, it may be held that the scheme has worked. This framework of a theory of justice, as enunciated by John Rawls, has been adopted in this book.

In Chapter 1, the various stages and the instances where the idea of socialism took concrete shape are traced in order to establish that socialism as it came to be understood and internalized as a policy by the INC was not merely a bleary-eyed notion or an abstraction. In this chapter, we see the extent of Jawaharlal Nehru's influence in making socialism the policy of the INC, as much as the fact that Nehru was also a response, so to say, to the rising aspirations of the peasantry and other sections of the common masses whose entry had turned the Congress from being a forum of the educated and the propertied classes into a mass organization. This stage, which also witnessed the transition of the idea of nationalism from a mere sentiment against foreign domination into a substantial anti-colonial and even anti-imperialist struggle, is dealt with in this chapter. The importance of Jawaharlal

Nehru is discussed in this larger context and also the idea of socialism, being a concrete economic policy closest to the way, it was defined and put effect to in the then Union of Soviet Socialist Republic. Nehru's own evolution in this regard is also discussed in this chapter.

Chapter 2 deals with the infirmity between this idea of socialism and the inclusion of Article 31 in the Constitution, conferring upon the individual the Right to Property as a Fundamental Right. In this regard, the discussion in the Constituent Assembly in all its details and the manner in which the Right to Property as spelt out in the draft prepared by the Fundamental Rights Subcommittee of the Assembly underwent substantial changes before it was finally included in the Constitution are dealt with. This is the stage in which Nehru's intervention made a huge difference. Chapter 3 is a discussion on the evolution of the Directive Principles of State Policy as distinct from the Fundamental Rights. In this chapter, this book deals with the various apprehensions raised in the Constituent Assembly over the possibilities of these principles being reduced to pious wishes, and thus defeating the very basis of the idea of socialism that was considered central to the constitutional scheme.

In Chapter 4, we deal with the instances when the legislations by the various state governments to give effect to the Directive Principles of State Policy, particularly, in the realm of land reforms and other egalitarian goals therein were declared unconstitutional by the higher judiciary and the response, by the Nehruvian regime, to overwhelm those by way of specific amendments to the Constitution. Beginning with the Constitution (First Amendment) Act, 1951, this phase was marked by a not-so-antagonistic relationship between the political establishment and the judiciary. Notwithstanding the fact that the higher judiciary's decisions seemed to hold the challenges posed by the propertied class, there seemed a general consensus, in this phase, in favor of Parliament's right to determine policy in the realm of economic policy. In that sense, while the dominant theme of the period was one where even the higher judiciary struck down some of the legislations that were essentially egalitarian on

the ground that it militated against a certain provision in Part III of the Constitution, the consensus seemed to be that the Parliament could amend those provisions in a manner to render such legislations constitutional. In other words, the experience in this phase was one of a continuous course of constitutional amendments by which restrictions were added to each of the Fundamental Rights to allow for legislations that intended to give effect to the Directive Principles.

Chapter 5 deals with the shift away from this phase to another where the relationship between the political establishment and the judiciary was beginning to take an antagonistic dimension. The Supreme Court's decision in the Golaknath Case where the law, as settled, was declared incorrect and the Parliament's right to amend the Constitution was restricted. The decision by the majority in the 11-member bench rendered the provisions in Part III of the Constitution un-amendable. The sanctity, thus, accorded to the Fundamental Rights in general meant that the injunction against the State insofar as acquiring property, even in accordance with the procedure established by law, was absolute. This also meant that the scope for giving effect to the Directive Principles of State Policy was severely limited. The immediate fallout, as witnessed in the instance, when the Supreme Court struck down the Bank Nationalization Act, 1969, in the R. C. Cooper Case and the Privy Purses abolishment are discussed in elaborate details in this chapter.

In Chapter 6, we see the Constitution (Twenty-fourth Amendment) Act, 1971, by which the effect of the Golaknath judgment was sought to be overwhelmed. This, along with the Constitution (Twenty-fifth Amendment) Act, 1971 and the Constitution (Twenty-ninth Amendment) Act, 1972, became the subject matter for a reference before a 13-member bench of the Supreme Court. All these and the humungous judgment in the Keshavananda Bharati Case are discussed in extensive detail in this chapter. The basic structure doctrine that emerged from this decision is also dealt with in all its elements to bring out the substantial addition that this judgment made to the field of constitutional law. The importance of the Keshavananda Case, being the final resolution of the

debate over the Parliament's supremacy, in law making and amending the Constitution even while it was held that the higher judiciary had the powers to scrutinize such amendments, is dealt with in detail in this chapter. A detailed discussion, in this chapter, on 11 separate judgments delivered by the 13-member bench and the process by which the majority decision was culled out by the bench in that case brings out the nuanced definition of the law and the Constitution.

The discussion about the judgments in the Minerva Mills Case and the Waman Rau Case are dealt with in Chapter 7, the thrust is on the fact that these were instances where the Supreme Court reaffirmed the basic structure doctrine and went ahead to apply that to uphold the compulsory acquisition of property. While in the Waman Rau Case, the property acquired was land, the Minerva Mills Case involved acquisition of a private textile mill by the government. These judgments were marked by explicit statements by the judges that the scope of giving effect to the goals set by Articles 39 (b) and (c) could not be restricted by provisions from Part III of the Constitution was clearly an elaboration upon the Keshavananda judgment. The Olga Tellis Case, where the Supreme Court's decision was based on a marked shift toward the due-process-of-law, is discussed in some detail in this chapter. The slow but decisive shift by the political establishment from the egalitarian principles was evident in this phase and the discussion in this chapter locates the role played by the judiciary in restoring the thrust back to the constitutional goals as set in Part IV.

In Chapter 8, we look at the overt shift away from egalitarian principles by the political establishment and the higher judiciary, to the due-process-of-law framework, by asserting itself and restoring the constitutional goals of egalitarianism. The detailed discussion on such cases as the Samatha Case and the three judgments by the apex court between March and July 2011, striking down land acquisition proceedings in Noida, bring out the implications of the paradigm shift away from the procedure established by law scheme. In this chapter, we also trace the basis for the Supreme Court's decision in the last instance to the principles enunciated in the various

cases beginning with the Keshavananda Case. This is in order to establish the legitimacy of the judgments, notwithstanding that they were not delivered by a constitutional bench. These judgments, however, drew upon the law as settled by constitutional benches in the past, and hence have the status of being unimpeachable until a bench larger than the 13-member constitutional bench is constituted in this regard.

It may be added that this was written months before the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. This law, even while appearing to address and remedy the problems in the 1894 Act, is based on a premise that land is just a commodity and compulsory acquisition is fair as long as the compensation is high. It even quantifies the extent of compensation and the solatium, an idea that was resisted by the law makers during the 60 and more years after independence. The 2013 law defies all the ground covered in the 60 years after independence and is likely to put the clock back. All that, however, is not part of this work.

In the conclusion, the juridical principles of justice and constitutional law will be discussed in some detail.

Acknowledgments

It was during a brief stint as a lawyer that I began thinking of doing some work on the retreat of the socialist project that appeared central to our constitutional scheme. The shift away from the Nehruvian socialist pattern to a market economy, beginning with the Economic Policy Resolution of July 1991, was a decade and half old by then. The space that was created until the 1990s favoring the working class and various other sections of the poor in our society in the juridical world had begun to shrink by then. The trade unions, including the rent seekers, were on the run and the higher judiciary too was beginning to reverse what were considered settled laws.

It would have remained just an idea but for the fellowship at Nehru Memorial Museum and Library (NMML), New Delhi. I thank the selection committee members who found my proposal worth a two-year term. Professor Mridula Mukherjee, then Director of NMML and my teacher at the Centre for Historical Studies, Jawaharlal Nehru University (JNU), was ever supportive of this book. Aditya Mukherjee, who taught me at JNU, was a constant source of inspiration. I learnt a lot during the discussions I have had with him, and it was a moment of satisfaction to me when he suggested that I consider this for publication as part of the SAGE Series on Modern Indian History. I owe a lot to them.

Professor Sabyasachi Bhattacharya was the one who suggested that I should restrict the enquiry to the Nehruvian idea of socialism, rather than just socialism. This made a lot of difference. It gave clarity to the enquiry. I am indebted to him for having taught me, guided me, and for this crucial intervention.

My parents were responsible to make me think the way I do; and my comrades during my university days for pushing me to read and internalize the core of Marxist ideas. This book would not have been conceived of and executed in the manner it has been without my association with some campaigns during my days as a student in JNU. The institution helped me turn into a rational being. And this clearly led me to see the brutality of the State in Nandigram and Singur as much as I did when the adivasis were sought to be dispossessed of their land in other parts of the country.

The conflict between the higher judiciary and the political establishment, in the course of attempts to bring about an egalitarian society, was disguised as one where the judges sought to preserve political democracy against the onslaught by the legislature, while the political establishment sought to present the judiciary as working against the egalitarian objectives. I must make it clear that even while striking a balance between the political and economic rights, my approach is tilted toward egalitarianism.

E.K. Santha, my wife, helped me clarify some of the conceptual issues in the course of this book. She has been a constant source of support and encouragement to me. Nishant, my son, was curious most of the time. He wondered as to how long I would take to read the judgment in the Keshavananda Case. He would tease me on that. But I must add that he put up with my tantrums and was of immense help in ordering books online. I recall the intense discussions we both had after reading Fakir Mohan Senapati's *Six Acres and a Third*. It helped me firm up my thinking that land is not merely a commodity to the farmer. I hope he will read and enjoy this book some day. Vibha, a student of mine some years ago and now a part of our family, went through the manuscript and suggested some changes. The legalese in this book was not her comfort zone, and yet she went through the manuscript to make sure that it read better and that some facts and arguments were not repeated. Bhuvaneswari Venkatesh went through the manuscript, and her skills as a copy editor made a huge difference to the text from what it was to what it is.

N. Unni Nair, Commissioning Editor at SAGE, worked hard in the making of this book. I must place on record his patience and dedication to this project. Special thanks to Sanghamitra Patowary, Associate Production Editor, SAGE, for closely monitoring the production of this book and bringing it into fruition.

I will be failing in my duty if I do not place on record that none of those whom I have named in this page are responsible for things that are wrong with this work. I shall own them up.

1

Idea of Socialism and the Indian National Congress: The Nehru Imprint

The word *socialist* came into being in our Constitution only in 1977.[1] Until then there was nothing in the Constitution that expressly spelt out the ideal. This, however, does not mean that the idea of socialism (as much as secularism and national unity being the two other insertions into the Preamble in that instance) was, in any sense, alien to the constitutional scheme and the making of the Constitution. This was clarified in the Statement of Objects and Reasons for the Constitution (Forty-second Amendment) Act, 1976.[2]

[1] The Constitution (Forty-first Amendment) Act, 1976, among many things, added socialist and secular to the Preamble of the Constitution. From being a Sovereign Democratic Republic, the Indian nation came to be defined as Sovereign Socialist Secular Democratic Republic. This part of the amendment came into effect on January 3, 1977.

[2] The amendment, as such, meant a lot of things so far as the Constitution and the scheme were concerned. Commended and passed in times when the democratic structure was under attack from the ruling establishment under Indira Gandhi, and the higher judiciary having allowed itself to be emasculated by the executive and the two Houses of Parliament as well as the legislative assemblies in all the states being reduced to Indira Gandhi's fief, the amendment and the changes it brought about in the Constitution had left a lot to be desired. The fact is

The Bill, as introduced in the Lok Sabha on September 1, 1976, by Law Minister H. R. Gokhale, declared its object as ensuring that the Constitution was a living document, stressing the need to remove impediments to growth, thus ensuring that the Constitution did not suffer a *virtual atrophy*. It also laid out the direction or the path of such a growth or change as "removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity …" and went on to argue that the amendment was imperative in order to prevent vested interests from promoting their selfish goals to the detriment of the public good.

The Objects and Reasons to the Bill did not conceal the fact that the interpretation of the Constitution by the highest court in a series of cases beginning with the Golaknath Case,[3] in 1967, was a provocation to the amendment.

It said:

> It is therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism and the integrity

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that the changes in the Preamble (the insertion of socialism and secularism) were indeed innocuous in many ways. It is also important to note here that although most of the substantial changes to the Constitution by way of this amendment were reversed or nullified by way of the Constitution (Forty-fourth Amendment) Act, 1978, the words socialist and secular continue to remain in the Constitution till this day.

[3] *I.C. Golaknath v. State of Punjab* (AIR-1967-SC-1643). In this case, the majority in 6:5 judgment held the Fundamental Rights as inviolable, and that the Directive Principles of State Policy were subservient to the Fundamental Rights. Speaking for the majority, Chief Justice K. Subba Rao held, "Fundamental Rights cannot be abridged or taken away by the amending procedure in Article 368 of the Constitution. An amendment to the Constitution is 'law' within the meaning of Article 13(2) and is therefore subject to Part III of the Constitution."

The judges added:

> If it is the duty of Parliament to enforce directive principles it is equally its duty to enforce them without infringing the fundamental rights. The verdict of Parliament on the scope of the law of social control of fundamental rights is not final but justiciable. If it were not so, the whole scheme of the Constitution would break.

> of the nation, to make the Directive Principles more comprehensive and give them precedence over the Fundamental Rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the Directive Principles….[4]

The fact is that the Constitution (Forty-second Amendment) Act, 1976, helped spell out the *high ideal* of socialism in such an express manner. The ideal was indeed an integral part of it even otherwise. The Directive Principles of State Policy, contained in Part IV of the Constitution (Articles 36–51 of the Constitution), do list out a certain set of ideals that can be described as socialist and secular; and the Constitution (Forty-second Amendment) Act, 1976, among many other things, inserted these into the Preamble of the Constitution. It is also important to mention here that the right of the Parliament to amend the Constitution, even if that meant altering some of the rights guaranteed in Part III (Fundamental Rights), was upheld by the Supreme Court (overruling the judgment in the Golaknath Case), on April 13, 1973, in the Keshavananda Case.[5] However, the majority judgment in this case also struck down one part of the Constitution (Twenty-fifth Amendment) Act, 1971, and thus restricted the scope

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Concurring with the majority, Justice M. Hidayatullah said:

> It is wrong to think of the Fundamental Rights as within Parliament's giving or taking. They are secured to the people by Articles 12, 13, 32, 136, 141, 144 and 226. The High Courts and finally this Court have been made the Judges of whether any legislative or executive action on the part of the State, considered as comprehensively as is possible, offends the Fundamental Rights and Article 13(2) declares that legislation which so offends is to be deemed to be void. The general words of Article 368 cannot be taken to mean that by calling an Act an Amendment of the Constitution Act, a majority of total strengths and a 2/3rds majority of the members present and voting in each House may remove not only any of the Fundamental Rights but the whole Chapter giving them.

[4] See Kashyap, *Constitution making since 1950*, p. 117.

[5] *Keshavananda Bharati v. State of Kerala* (AIR-1973-SC-1461). In this case, a 13-member bench overruled the Golaknath judgment. In 11 separate judgments, the 13-member bench held that Article 368 of

of Article 31-C. It will be appropriate to discuss this aspect briefly, at this stage, given the importance of this Article for the scope of this book.

Article 31-C of the Constitution is intended to save such laws that were brought in to give effect to specific aspects of the Directive Principles of State Policy from being declared ultra vires on the ground that it was in conflict with the Fundamental Rights. It read as follows in the pre-Keshavananda context:

> Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; *and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy.*[6] (Ananth, emphasis added).

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the Constitution provided the Parliament with the power to amend all the aspects of the Constitution, including the Fundamental Rights, but the majority by 7:6 also qualified that such amendments shall not alter the basic structure of the Constitution and that the court shall judge on whether amendments were in order in this context. By that, the majority also struck down Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971. The majority also held that the judicial review was a part of the basic structure of the Constitution. It is interesting to note that at least two of the judges in this case had also been part of the majority in the Golaknath Case; Justice S. M. Sikri (now the Chief Justice) and J. M. Shelat, however, seem to change their positions now. While Justice Shelat held Golaknath to be of academic interest, Chief Justice Sikri held that all the Articles of the Constitution, including the Fundamental Rights, were subject to amendment as long as the fundamental features of the Constitution were not changed or abrogated.

[6] The second leg of the Article (in italics) was struck down by the majority in the Keshavananda Case. The important point is that the first leg, which was identical in spirit with Article 31-A [inserted by the Constitution (First Amendment) Act, 1951] was upheld by the majority bench in the case. This had meant that the idea of socialism, as enunciated and specified in Articles 39 (b) and (c) of the Constitution, were internalized as a valid principle by the bench in the Keshavananda Case.

> Provided that where such law is made by the legislature of a state, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.[7]

We shall discuss the judgment and its implications in detail at a later stage in this book. For now, it is relevant to cite Articles 39 (b) and (c) of the Constitution. It lay down the following as the Principles of Policy to be followed by the state:

- 39 (b) stated that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- 39 (c) stated that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

It is, hence, legitimate to argue that the Constitution, as it was adopted on November 26, 1949, did contain an explicit commitment to socialism, and the independent Indian state was meant to strive for the building of an egalitarian society. It is also clear from this Article that the idea of socialism, as it found expression in the Constitution, was not an abstraction. On the contrary, it involved a clear understanding of property in the concrete sense of the *means of production*, as well as such other concepts as *ownership* and *control*. The Constitution, in this regard, also spoke about the role of the state policy to ensure that the means of production and wealth are not concentrated in a few hands to the common detriment. In other words, socialism in the very sense, as it was understood in the Marxist–Leninist sense of the term, was how the framers of the Constitution had understood or internalized the concept. Paradoxically, some other provisions in the Constitution (Article 31 that placed the Right to Property among the Fundamental Rights in particular) served as hurdles in the socialistic legislations that the independent Indian state

[7] Kashyap, *Constitution making since 1950*, p. 78.

sought to make even at the earliest stages of the working of the Constitution.[8]

If this was the case in the realm of economic policy, the Constitution also contained a host of provisions that sought to enforce egalitarianism in the social sense of the term. Article 340 of the Constitution, for instance, clearly laid out the scope for affirmative action in favor of the socially and educationally backward classes.[9] Similarly, a careful reading of Articles 14, 15, and 16, even in the manner as they existed in the Constitution at the stage of its adoption and prior to the changes by way of the Constitution (First Amendment) Act, 1951, were in the form of injunctions against discrimination on the basis of caste, religion, and other such denominational categories. Hence, these were provisions that made it imperative for the independent Indian state to undertake measures meant to enforce equality in an unequal society, rather than perpetuating an unequal order. It is clear that the constitutional scheme perceived equality in a concrete sense and as an objective of the independent Indian state, rather than as an abstract desire.[10] An egalitarian order, in the social sense,

[8] Article 31, after having been subjected to several qualifications and restrictions by way of constitutional amendments that added Articles 31-A, 31-B, 31-C, and 31-D, the judicial interventions at each of these stages was finally deleted from among the Fundamental Rights, by way of the Constitution (Forty-fourth Amendment) Act, 1978. By this, the Right to Property was reduced to merely a constitutional right by way of inserting Article 300-A into the Constitution.

[9] Article 340 of the Constitution provides for the appointment of a commission to investigate the conditions of the backward classes, and Clause 2 of the Article provides for such a commission to recommend measures to set right the situation, and Clause 3 warrants that the government reports the action taken on such a report to the Parliament. The two Backward Classes Commissions in independent India, one under the chairmanship of Kaka Kalekar and the second one under B. P. Mandal, were constituted under this constitutional provision. An elaborate discussion on these, however, is beyond the scope of this book.

[10] This philosophical aspect has been discussed, extensively, in the Report of the Backward Classes Commission, as well as in the leading judgments involving the question of reservations in government jobs. (See Report of the Second Backward Classes Commission, Government of India, 1980.)

was spelt out in a more concrete sense in the Constitution than the making of an egalitarian society in the economic sense of the term. This was evident from the fact that while the social justice agenda was sanctioned by way of negative injunctions that were spelt out in Part III of the Constitution (as Fundamental Rights), the ideal of an egalitarian society in the economic sense of the term was laid down only in the form of Directive Principles of State Policy.

The fact is that while social justice was clearly meant to be enforceable, the ideal of socialism, as an economic doctrine, was left to be a desirable goal and achievable in the first decade; and incidentally, there was no clear statement in the constitutional scheme to enforce it.

In this chapter, let us look into the roots of this high ideal of socialism in its restricted sense of economic equality or egalitarianism, and the process of its inclusion in the Constitution. In this sense, the attempt will be to put in place some of the important stages through which the idea of socialism came into the discourse of the Indian freedom movement. The struggle for freedom, as it evolved and culminated in the making of the Indian nation, was indeed the terrain for contest among the different sections of the Indian people—in terms that were economic, social, religious, cultural, and linguistic—as well as the crucible, where these categories were seen melting down. It is also a fact that while some of these contestations, by the very nature of the contradiction, were antagonistic in nature and, hence, incapable of being resolved without one of the two sides losing out and annihilated, there were other contradictions that were resolved in a manner that allowed the mutually contradictory groups to coexist and remain part of the freedom movement at least in the given context.[11]

[11] I am using this term *contradictions* in a commonsensical sense to denote the conflicts or distinct positions of the groups in the definite context. The usage here is not in the same sense as Mao Tse Tung explains in his essay titled *On Contradictions* that was originally meant to debate against the doctrinaire application of Marxist principles within the Chinese Communist Party. Mao delivered this text in August 1937. See Tse Tung, *Selected Works of Mao Tse Tung*, Vol. I, pp. 311–347. Althusser, too, deals with this, in his essay titled *Contradiction and Overdetermination*. See Althusser, *For Marx*, pp. 87–128.

The fact indeed is that the contest was mediated, at various stages, in the context of the freedom struggle. This was made possible as the leadership of the Indian National Congress (INC), in times when the organization emerged into the recognized voice of the national struggle, also happened to be the melting pot of ideological and aspirational groups that perceived independence as liberating the nation from the colonial order. While this perception formed the basis of the strategy for the freedom struggle, the interventions by Gandhi at one level and Jawaharlal Nehru at another brought into its core the rights perspective as well as the idea of egalitarianism into the struggle for freedom. The Constituent Assembly turned out to be the crucible of these ideas at one level, and the terrain from where the members of the Assembly *re*discovered the aspirations of the socio-economic groups they represented.[12] The various classes, through their representatives, fought new battles within the Assembly to make the

[12] The Constituent Assembly was *not* a directly elected body. The demand for an assembly directly elected on the basis of universal adult franchise was rejected by the Cabinet Mission, in its statement, on May 16, 1946. According to the Mission, the constitution-making body was to be formed with representatives from the various provinces as well as representatives from the Indian states. The basis of representation from the provinces as well as from the states was to be in the ratio of one member for every million people. While in the case of the states, the representatives were to be decided through negotiations with the rulers, the provinces were to send representatives elected by the Provincial Assembly. The Constituent Assembly, thus, was constituted in July 1946 by 296 members, elected by the various Provincial Legislative Assemblies. It is important to note here that the electorate to these elections, held in 1945, constituted only about a little more than a quarter of the adult population. This was based on the provisions (Sixth Schedule) of the Government of India Act, 1935. The plan also laid down representation on a communal basis in which the seats allocated to the various provinces were to be divided among the principal communities on the basis of their numerical strength. The classification of the communities was as Sikhs, Muslims, and General (the last one being all others except Sikhs and Muslims). The representatives of each community were to be elected by members of that community in the Provincial Assembly by the method of proportional representation.

Constitution into one that would aid their own class interests or aspirations. It will be pertinent to note here that the 296 members (this was the strength excluding the representation from the Indian states in July 1946) of the Constituent Assembly were categorized as follows: The Congress members included two broad categories, such as, the Congressmen and the Congress nominees other than Congressmen; and in each of these, they were classified as General and Muslims. The Muslim League members, similarly, were classified as General and Muslims, and apart from the Krishak Praja Party that had sent a number of its representatives from the Bengal Province, the Assembly also consisted of a lone member, each classified as communist, and the Scheduled Castes Federation and two members representing the backward tribes. Three members of the Assembly were described as representing the landlords and two members representing commerce and industry.[13]

The turn of events between the elections in July 1946 and June 1947, leading up to the partition, meant that the Muslim League did not join the Constituent Assembly. This rendered the Constituent Assembly into a body constituted predominantly by the INC. It is, however, important to note here that the INC was determined to make the Assembly a national body notwithstanding that its members were elected as its own candidates. This conscious decision, even at the time of the elections, led to a number of persons who were not members of the INC ending up in the Constituent Assembly elected on its behalf.[14]

[13] For a detailed chart of such denominational/class basis of the representatives from each province, see Rao, *The framing of India's Constitution: Select documents* (Vol. 1), pp. 287–294.

[14] The Working Committee of the INC ensured the election of at least a dozen men of eminence who were not its members. Among them were Dr B. R. Ambedkar, A. K. Ayyar, H. N. Kunzru, M. R. Jayakar, K. M. Munshi, Sachidananda Sinha, and K. Santhanam. It may be noted that all those played an active role in the Assembly, as well as in the various committees. The Fundamental Rights Subcommittee, for instance, included Ambedkar, Munshi, and Ayyar. It is also known that Ambedkar was elected the Chairman of the Drafting Committee.

In this context, it is legitimate to argue that while the struggle for freedom provided the terrain for the contest of ideologies, as well as was the melting pot for distinct and even conflicting aspirations of the different social and economic groups, the Constituent Assembly had turned into a terrain where the aspirations and the concerns of the very same social and economic groups would precipitate into distinct positions that the various members took in the debates during the making of the Constitution. It may be noted here that the most vocal section in the Assembly happened to be those who came to constitute the Socialist Party; elected as Congress nominees from the various provinces, these were associates of the Congress Socialist Party (CSP) since 1934, and had founded the Socialist Party in 1948 under the chairmanship of Jayaprakash Narayan.[15]

The point is that the concerns for a socialist direction in the Constitution were represented not only by those who constituted the Socialist block since 1948, but also evident in the Resolution on Aims and Objects that Jawaharlal Nehru moved in the Assembly on December 13, 1946.[16] Speaking of the Resolution, Nehru referred to the *limits* set by the *State Paper* on the scope of the Constituent Assembly, and stressed upon the fact that the Assembly derived its strength from the struggle for independence.

[15] Among the vocal members of this group in the Assembly were M. R. Masani, H. V. Kamath, and Damodar Swaroop Seth. We will have occasion to deal with their contribution to the socialist thought in the Constitution at a later stage in this book.

[16] The Resolution began as follows: "(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent, Sovereign Republic and to draw up for her future governance a Constitution," and Clause 5 of the Resolution read as follows: "WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and public morality; …" For the full text of the Resolution, see *Constituent Assembly Debates* (CAD hereafter), Lok Sabha Secretariat, Vol. I, p. 59.

> Governments do not come into being by State Papers. Governments are, in fact the expression of the people and the will of the people. We have met here today because of the strength of the people behind us and we shall go as far as the people—not of any party or group but the people as a whole—shall wish us to go.[17]

Nehru also clarified his intentions behind not using the specific terms *democratic* and *socialist* in the course of his address in the following words:

> The House will notice that in this resolution, although we have not used the word 'democratic' because we thought it is obvious that the word 'republic' contains that word and we did not want to use unnecessary words and redundant words, but we have done something much more than using the word. We have given the content of democracy in this resolution and not only the content of democracy but the content, if I may say so, of economic democracy in this Resolution. Others might take objection to this Resolution on the ground that we have not said that it should be a Socialist State. Well, I stand for Socialism and, I hope, that India will stand for Socialism and that India will go towards the constitution of a Socialist State and I do believe that the whole world will have to go that way. What form of Socialism again is another matter for your consideration….[18]

Nehru went on to further clarify that he had refrained from using the word *socialism* in the Resolution in order to ensure that it laid down the content of the thing that was desired, and not theoretical words and formulae. He further clarified that though he was confident that the use of the word socialism, in accordance with his own desire, would have been accepted by a majority in the Assembly but may be objected to by a few, and that it was ideal to avoid the Resolution as such to sail through without any controversy.

This being the case, it is also important to stress here that Nehru as well as the others in the Constituent Assembly were essentially representing the popular theme that was manifested in the struggle for freedom, at least from the time that it became a mass movement, and the Constituent Assembly

[17] Ibid., p. 57.
[18] Ibid., p. 62.

was indeed the venue where the idea of a Socialist Democratic Republic precipitated into a concrete expression in the statutory sense of the term. The roots of this idea or its formative stages can be traced to the Gandhian era of the struggle for freedom, beginning 1917.

The significance of this year was that it witnessed a decisive break with the past. The struggle for freedom, from then on, matured into a mass movement involving the poorest sections of the society, rather than remaining a movement involving the intelligentsia whose agenda, if scrutinized closely, revealed that their aspirations were merely restricted to seeking a share in the affairs and the spoils of the British Empire. As for instance, Gopal Krishna Gokhale's Political Testament, drafted as late as in 1914 (and a few months after the outbreak of the World War), had only sought for provincial autonomy and a legislative council with a majority of elected representatives and that such members should represent the various sections of the society, such as the chambers of commerce, the mill owners, and the land owners. Gokhale's Testament also sought some representation to these sections in the central Legislative Assembly, but was explicit in accepting the official majority in that Assembly.[19] Within a few years from then and with the arrival of Gandhi, the idea of freedom underwent a substantial change.

The dynamics of the freedom struggle, from the standpoint of the concerns of this book, may be traced to the agitation in Champaran (in Bihar), and subsequently to Ahmedabad and Kheda (in Gujarat). All the three being instances where Gandhi tried to experiment, on Indian soil, what he had tested earlier in South Africa. The idea of civil disobedience, based on the principle of collective defiance of authority, had primarily involved the peasants and the workers in the struggle for

[19] It may be added that Gokhale's Testament contained the following too: "German East Africa, if conquered from the Germans, should be reserved for Indian colonization and should be handed over to the Government of India." Cited in Rao, *The framing of India's Constitution: Select documents* (Vol. 1), pp. 15–18.

freedom and on issues that affected them directly. In many ways, the roots of the egalitarian commitment that marked the struggle for freedom must be traced into these movements. Champaran, Kheda, and Ahmedabad marked the beginning of a phase where the idea of freedom was sought to be clarified in terms of the aspirations and the immediate day-to-day life of the working people, the peasantry and in that sense marked a departure from Gokhale's Testament of 1914. It will be appropriate, in this context, to discuss Champaran, Kheda, and Ahmedabad, in as brief a manner as it can be.

The Champaran story was about the peasants across the district (in Bihar) who were forced by British planters to cultivate indigo in at least three-twentieth of their land. This was known as the *tinkathia* system, which was put in place when the textile industry in Manchester needed indigo to dye cloth manufactured there. The advent of chemical dyes (from Germany) rendered the use of indigo redundant. But then, the planters and the British revenue administrators sought to make the best of the situation by insisting that the tenants pay higher rents and some other taxes for releasing the land from mandatory cultivation of indigo. This led to unrest, and the peasantry was faced with the threat of eviction and imminent starvation. This condition was brought to Gandhi's attention by a native peasant, Raj Kumar Shukla. Gandhi landed in Champaran and began studying the situation himself, visiting village after village, in the district. After ascertaining the reality, Gandhi called upon the peasants in the district to refuse paying the additional rent as demanded. The campaign also took up the demand for abolition of the *tinkathia* system, an instance of asserting the rights of the peasant to decide on what one shall cultivate.[20]

[20] Another significant aspect of the Champaran story was the way Gandhi responded to the administration's order for externing him from the district. Unlike the leaders of the past, Gandhi refused to stay away from Champaran, and he was willing to face the consequences. Interestingly, the administration refrained from arresting Gandhi at that time in Champaran.

Soon after Champaran, Gandhi's attention was drawn to the plight of the workers at the textile industry in Ahmedabad. The mill owners there had decided to dispense with the *plague bonus* after the epidemic had passed. This was unacceptable to the workers as they realized that it would bring down their real wages substantially. The rise in prices triggered by the World War I conditions was steep, and scrapping the *plague bonus* without adequate raise in wages was bound to erode the real wages. The owners refused, and even declared a lockout. Gandhi called for a strike by the mill workers and as the strike went on, pushing the workers to starvation, he embarked upon a fast. This brought him closer to the workers, and the mill owners relented to the setting up of a tribunal to adjudicate. The tribunal awarded a 35 percent wage increase.[21]

Just as the dispute in Ahmedabad was on, information on the difficulties faced by the peasants in the Kheda district led Gandhi to address the crisis. A severe drought condition that year had left the peasants *pauperized,* and a section of them (the poor and the marginal peasants in particular) were unable to pay the revenue demanded from them. The administration resorted to repressive measures, including attachment of the household property and cattle in lieu of revenue dues. They were seeking remission and after a tour in the course of which local leaders, such as Vallabhai Patel and Indulal Yagnik joined him, Gandhi asked the peasants to refuse payment of dues. Gandhi could also convince the rich peasants in the district to refuse paying dues as long as their poor brethren were able to pay. After the campaign grew in strength, the administration issued secret instructions that revenue shall be recovered only from those peasants who could pay.

[21] It deserves mention here that Gandhi's close friend and mill owner, Ambalal Sarabhai (who had saved the Sabarmathi Ashram from a huge financial difficulty just then), canvassed for the mill owners; despite this, Gandhi insisted that the mill owners agree for a 35 percent wage increase to help the workers tide over the crisis. This, perhaps, illustrates Gandhi's idea of trusteeship.

Champaran, Ahmedabad, and Kheda were indeed dress rehearsals of the long battle that was waiting to be waged under Gandhi's leadership.[22]

The Gandhian era had begun, and the three decades after Champaran witnessed the widening of the scope for a struggle based on process of interplay of concepts, such as the principles of law, justice, and morality, apart from the idea of rights. It is also important to recognize that beside the economic concerns that were raised in these events, social concerns (caste in other words) also marked the dynamics of these movements. The peasantry, across the country, was and continues to be constituted by the Other Backward Classes, while the landowners were and are the upper castes and the Dalits being landless agricultural workers predominantly. Hence, it is inevitable that the radicalization of the freedom struggle, as it began with the Gandhian era, turned out to be the terrain from where substantial changes were initiated on the social chemistry in the countryside. While there are works that have discussed these and some have even condemned this process as a mere conspiracy by the social elite to keep the subaltern groups as merely a tool for national liberation, this book will seek to locate the process and its role in the making of the Constitution and the efficacy of that Constitution in the larger scheme of nation building.

This transformation of the idea of freedom with the arrival of Gandhi on the scene was indeed described by Bipan Chandra Pal, an eminent leader of the pre-Gandhian era, as follows:

> Today, after the downfall of German Militarism, after the destruction of the autocracy of the Czar, there has grown up all over the world a new power, the power of the people determined to rescue their legitimate rights—the right to live freely and happily without

[22] For an elaborate discussion on these three agitations, see Chandra, et al., India's struggle for independence, pp. 178–181. It is interesting to note here that E. M. S. Namboodiripad, who theorized best for the communist movement in India, treats Champaran as the crucible from where the Gandhian strategy evolved. See Namboodiripad, *The Mahatma and the Ism*.

> being exploited and victimized by the wealthier and the so called higher classes.[23]

Such an observation, in 1919, was not mere rhetoric. In the decade since Bipan Chandra Pal made this observation, we find several instances of working class actions and agitations by the peasantry in which an organic link between the demand for freedom and the aspirations of the subaltern groups in their day-to-day life, including wages, conditions of work, and such concerns was clearly evident. The strike wave across the industrial hubs reached its peak in 1927.[24] This was pronounced in the dynamics of the INC, in its Calcutta session, in December 1928.

In the words of Pattabhi Sitaramayya:

> The Calcutta session will be remembered for a demonstration in which the labourers numbering over 50,000 men from neighbouring mill areas marched in an orderly fashion and saluted the National Flag hoisted in the Congress grounds, occupied the pandal for nearly two hours, and passed their resolution deciding for independence for India and then walked out.[25]

And when the INC met at Lahore in December 1929, Jawaharlal Nehru, in his presidential address, spoke of socialism in explicit terms.

> I am a socialist and a Republican and am no believer in Kings and Princes, or in the order which produces the modern Kings of industry, who have greater power over the lives and fortunes of men than even the kings of old, and whose methods are as predatory as those of the old feudal aristocracy.[26]

[23] Cited in Chandra, et al., *India's struggle for independence*, p. 297.

[24] Sen, *Working Class of India: History of Emergence and Movement 1830-1970*.

[25] Sitaramayya, *The History of the Indian National Congress* (Vol. 1), p. 332. It is interesting to note here that the official history of the INC records, in extensive terms, the strikes that were witnessed across the country during the period.

[26] Gopal (Ed.) *Selected works of Jawaharlal Nehru*, (Vol. 4), pp. 192–193. In 1936, Nehru's presidential address to the Lucknow session defined that his commitment to socialism was not on a vague humanitarian concern, but based on a scientific and economic sense involving revolutionary changes to bring an end to private property and replacing the then present profit system with a higher form of cooperative service.

The Lahore session, in 1929, was significant in this context in another way. It was there that the INC resolved to hold its annual sessions in March every year rather than in December, as it used to be since the foundation of the party in 1885. The reason was that the masses who were now becoming delegates to the sessions would find it difficult to manage travel in the winter and to places that witnessed extreme cold. Hence, the Karachi session, where the Fundamental Rights Resolution was passed, marking a culmination of the process that began in 1917, was held in March 1931.[27]

The Resolution at Karachi was indeed wholesome; it was also a considered view of the delegates assembled at the session that the Resolution on Fundamental Rights was left for consideration, at greater leisure, and to be studied and pondered over by the members of the Working Committee as well as by the All India Congress Committee (AICC). The Fundamental Rights Resolution was indeed discussed, debated, and approved by the Working Committee before it was finally approved as the creed of the INC, in August 1931.[28] In other words, the leaders of the struggle debated in extensive detail on the time the resolution was proposed in Karachi, in March 1931, and finally approved in Bombay, in August 1931.

And finalized after much thought and deliberations, it stated:

> This Congress is of opinion that to enable the masses to appreciate what 'Swaraj,' as conceived by the Congress, will mean to them, it is desirable to state the position of the Congress in a manner easily understood by them. In order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions….[29]

It is clear that the Congress leaders, in the post-Karachi context, were guided by a vision of egalitarianism that was not merely a spiritual quest, but was made into an Article of faith

[27] Sitaramayya, *The history of the Indian National Congress* (Vol. 1), p. 357.

[28] Ibid., pp. 462–463.

[29] Ibid., p. 463.

in terms of state policy. This was pronounced in categorical terms in the Resolution. "The Congress," it said, "therefore, declares that any constitution which may be agreed to on its behalf should provide, or enable the Swaraj Government to provide, for the following: …" and listed out the Fundamental Rights and Duties thereafter.[30]

There is indeed a striking similarity between the features listed out in the Fundamental Rights Resolution at the Karachi session and the Articles in Part III of our Constitution (Fundamental Rights). Far more important is the fact that some aspects that were listed among the Fundamental Rights, at Karachi, were moved to Part IV of the Constitution (Directive Principles of State Policy).

It is also important to note, in this context, that the Constitution, as adopted on November 26, 1949, did contain a few specific provisions that can be seen as a concrete expression of the socialist principles insofar as defining the state policies were concerned.[31] All these clearly establish that *socialism,* as an idea, was integral to the discourse of the freedom struggle during the 30 years after 1917 and also that the idea, over the years, had evolved into a concrete principle and an agenda for the independent Indian state, rather than remaining an abstract desire. And in that sense, *socialism* was indeed a conceptual guide for the members of the Constituent Assembly

[30] See Sitaramayya, *The history of the Indian National Congress* (Vol. 1), pp. 463–465. The text of the Resolution with all the rights enlisted in that, along with the Fundamental Rights guaranteed in the Constitution, is provided in Appendix 1 to illustrate the fact that the scheme of Part III in our Constitution is derived from the Karachi session Resolution. It is also interesting to note that a large part of Part IV of our Constitution, dealing with the Directive Principles of State Policy, is drawn from the Fundamental Rights Resolution at Karachi.

[31] Article 39 (b), for instance, laid out that the state shall, in particular, direct its policy toward securing: "[T]hat the ownership and control of the material resources of the community are so distributed as best to sub serve the common good," and Article 39 (c) laid out that the state shall direct its policy towards securing: "[T]hat the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."

at the time of drafting the Constitution.[32] It is also inevitable, in this context, to stress that Jawaharlal Nehru was the most articulate spokesman of the socialist project and his own ideas who, in many ways, impacted in molding the socialistic features of our Constitution in the manner it was done.

It may be stressed that Jawaharlal Nehru began perceiving socialism, in the mid 1920s, perhaps in the distinct form in which it was practiced in the Soviet Union, rather than in an abstract sense. His tryst with socialism happened a few years before the Lahore session (1929) of the INC, from where he declared himself to be a socialist, during his tour of Europe. That was in 1926. Nehru recalls the impression made by M. N. Roy and V. Chattopadhyaya, both of whom he met in Moscow, during that time.[33] In the same way, Nehru was sufficiently exposed to the debate within the Second International and the causes for the birth of the Third International. Apart from the face of the Labor Party, which was an integral part of the Second International that the Indian Nationalist leadership was familiar with, he also records, with distaste, its position on the War between 1914 and 1918. So much so, Nehru, in February 1927, had converted himself to a position that was closer to communism. In his own words:

> So I turned inevitably with goodwill towards Communism, for whatever its faults, it was at least not imperialistic. It was not a doctrinal adherence, as I did not know much about the fine points of communism, my acquaintance being limited at that time to its broad features. These attracted me, as also the tremendous changes taking place in Russia. But Communists often irritated me by their dictatorial ways, their aggressive and rather vulgar methods, their

[32] Interestingly, the Resolution on Fundamental Rights was referred to, extensively, by judge after judge in their judgment in the Keshavananda Bharthi Case to uphold the Constitution (Twenty-fifth) Amendment Act, 1971 that inserted Article 31-C of the Constitution (See AIR-1973-SC-1461). The Supreme Court reaffirmed this principle again in the Minerva Mills Case (AIR-1980-SC-1789), and subsequently in the Waman Rao Case (AIR-1981-SC-271). We shall discuss these cases and the issues involved in detail in the subsequent chapters of this book.

[33] Nehru, *An Autobiography*, Oxford University Press, p. 154.

> habit of denouncing everybody who did not agree with them. This reaction was no doubt due, as they would say, to my own *bourgeois* education and up-bringing.[34]

The Soviet Union and the socialism, as it was practiced there, had left a lasting impression on Nehru, although he was critical of some of the practices there. Writing about his trip to Moscow, along with his father Motilal Nehru and others, in November 1927 when the nation was celebrating the tenth anniversary of the revolution, Jawaharlal Nehru said:

> It was a very brief visit, just three or four days in Moscow, …. But we were glad that we went, for even that glimpse was worthwhile. It did not and could not teach us much about the new Russia, but it did give us a background for our reading. *To my father, all such Soviet and collectivist ideas were wholly novel. His whole training had been legal and constitutional, and he could not easily get out of that framework. But he was definitely impressed by what he saw in Moscow.*[35] (Ananth, emphasis added)

These observations by Nehru are significant and assume a lot of importance in the process of locating the larger context of his proclamation that he was a *socialist*, at the Lahore session.[36] Nehru's notes, when he was incarcerated at the Naini Prison (in 1930), further confirms that by socialism, he meant an economic program that involved the nationalist movement committing itself to the idea where the state, in independent India, would play an interventionist role in the wellbeing of the masses in not merely the welfarist sense of the term, but in terms of determining property relations. Nehru wrote:

> Any movement which seeks to become a mass movement must necessarily have an economic programme for the masses. On general principles, therefore, it is essential that the Congress should lay

[34] Ibid., p. 163. Nehru says this while recalling his attendance at the Brussels Conference in February 1927.

[35] Ibid., p. 165. It is evident that Jawaharlal Nehru, by this time, was impressed by the Soviet ways and the idea of collectivization, and saw this as constituting socialism in a concrete sense.

[36] Gopal (Ed.), *Selected works of Jawaharlal Nehru* (Vol. 4), pp. 192–193.

> down the broad outlines of such a programme. Such a programme would have to deal with questions of capital and labour and the land laws, more the latter, as India is still overwhelmingly an agricultural country.[37]

Jawaharlal Nehru was indeed critical of the fact that the INC had prevaricated, all the while, in addressing these issues. He points out two factors as being the cause for this prevarication: "The lack of uniformity of the land laws" was one of the causes according to him, and the second being "the fear of many Congressmen lest they irritate and antagonize powerful classes like the big capitalists and the landlords."[38] The notes, indeed, put in capsule the large debate within the nationalist leadership over the strategy of the movement for freedom and reveal Nehru's mind in clear terms. Stressing the imperative for securing the good of the cultivator class, both the land owning cultivators and the "landless man who would cultivate if he had the chance," Nehru also underlined that it was necessary for the INC to draft its agrarian program not merely for the sake of precipitating a class conflict, but stressed that "the conflict has been there and is there. It is the inevitable outcome of the existing conditions…."[39]

Nehru's prescription was that the leadership of the INC had the "ultimate ideal clear-cut in their minds" and that:

> where a choice between two positions has to be made the Congress must, without fear, back the vital groups—the masses, the kisans and petty zamindars, and landless people—even though the consequences might be the driving away of the taluqdars and the big zamindars. Any weakening in such matters would end the solid and the only real support of the masses for the taluqdars shadow which we can never grasp.[40]

The notes were not mere prescriptions on the strategy for the national movement. They contained, instead, a pointer

[37] Notes made in Naini Prison, 1930. Jawaharlal Nehru Miscellaneous Papers, NMML, New Delhi.

[38] Ibid.

[39] Ibid.

[40] Ibid.

to the INC's approach to the agrarian question in the post-independence context too.

> Our ultimate ideal should be large nationalized farms, and peasant proprietors cultivating their own farms but without the rights of alienation. The latter restriction is desirable as otherwise big estates would grow up again…. The big estates can be broken up by the well recognized and usual methods employed in western countries, like England and Ireland. There is nothing socialistic or communistic about these methods. We can make it clear that there will be no confiscation of property except for definite activities against the state or national movements. Land will be acquired on payment of compensation. Almost every big zamindar will welcome this assurance today. He is afraid of the future and knows that it is not possible for present conditions to continue for long….[41]

That the INC, as a platform, did not see things in the same manner as Nehru did was revealed in the choice of the words in the Karachi Resolution. The Fundamental Rights Resolution, as it was finalized in August 1931 (after it was debated extensively by the Congress Working Committee and as amended by the AICC, revealed the hesitation by the leadership to go the Jawaharlal Nehru way, particularly insofar as the agrarian relations were concerned. The relevant portion of the Resolution read as follows:

> The system of land tenure and revenue and rent shall be reformed and an equitable adjustment made of the burden on agricultural land, immediately giving relief to the small peasantry by a substantial reduction of agricultural rent and revenue now paid by them, and in case of un-economic holdings, exempting them from rent, so long as necessary, with such relief as may be just and necessary, to holders of small estates affected by such exemption or reduction in rent, and to the same end, imposing a graded tax on net income from land above a reasonable minimum.[42]

The fact is that the INC, as a body, was willing only to render relief to the tenant and the small zamindar, rather than committing itself to any radical reforms program in

[41] Ibid.

[42] Sitaramayya, *The history of the Indian National Congress*, p. 464.

the land-owning patterns. Zamindari abolition that Nehru campaigned for was still not in the agenda of the Congress for sure. It is important to note here that this aspect was evident in the draft of the Constitution as it was presented by the Fundamental Rights Subcommittee before the Constituent Assembly, until Jawaharlal Nehru intervened during the final stages before the Constitution was adopted as Article 31 of the Constitution on November 26, 1949. We shall discuss this in extensive detail in Chapter 2 of this book.

Jawaharlal Nehru, meanwhile, persisted with his campaign in this regard. It is of significance that Nehru's campaign at this stage was carried out in the public domain. In a series of newspaper articles, in October 1933, Nehru argued the need for the INC to take sides, rather than persisting with the line of accommodating conflicting interests. The specific context of the times was the discussion over the Round Table Conference at which he derided:

> Their main concern is how to save the vested interests of various classes or groups; their main diversion, apart from feasting, is self praise…. And then there is the vague but passionate nationalism of many who find present conditions intolerable and hunger for national freedom without clearly realizing what form that freedom will take.[43]

Interestingly, Nehru invoked Gandhi's authority in this public debate. Referring to a letter that Gandhi had written to him,[44] Nehru argued in his newspaper article as follows:

> Indian freedom is necessary because the burden on the Indian masses as well as the middle classes is too heavy to be borne and must be lightened or done away with….This burden is due to the vested interests of a foreign government as well as those of certain groups and classes in India and abroad…. If an indigenous

[43] Nehru, *Whither India?* See Selected Works of Jawaharlal Nehru (Vol. 6), pp. 1–16.

[44] On September 14, 1933, Gandhi, in a letter to Nehru, wrote: "I am also in whole-hearted agreement with you, when you say that without a material revision of vested interests the condition of the masses can never be improved."

> government took the place of a foreign government and kept all the vested interests intact, this would not even be the shadow of freedom.[45]

In *Whither India?* Nehru did not make any attempt to conceal his mind that the INC had adopted a partisan line. "Nothing is more absurd," he argued, "than to imagine that all the interests in the nation can be filled in without injury to any." He stressed the linkages between the struggle for independence in India with the larger struggle in the world "for the emancipation of the oppressed." Nehru argued, "[E]ssentially, this is an economic struggle, with hunger and want as its driving forces, although it puts on nationalist and other dresses."[46] *Whither India?* was indeed a forthright statement against any attempt to simply tinker with the relations that prevailed in the agrarian sector at that time by way of striking a balance between the land-owning classes and the others. Nehru chose to call this *the special class privileges* and *vested interests*, and made a forthright statement that swaraj meant putting an end to these privileges.

> Whither India? Surely to the great human goal of social and economic equality, to the ending of all exploitation of nation by nation and class by class, to national freedom within the framework of an international cooperative socialist world federation.[47]

It is pertinent, at this point, to note that Nehru's thoughts on socialism were based upon some of the concrete experiences in the Soviet Union. On July 7, 1933, Nehru cited Lenin's New Economic Policy with a certain appreciation. "The New Economic Policy which Lenin introduced in 1921 was meant to win over the middle peasantry to socialization. The rich peasants or *kulaks*, as they are called—the word *kulak* means a fist—were not encouraged, as they were capitalists on a small scale and resisted the process of socialization," he wrote and seemed to celebrate Lenin's definition of socialism as being "electricity plus Soviets equals socialism" with approval in his

[45] Nehru, *Whither India?* pp. 1–16.
[46] Ibid.
[47] Ibid.

letter to his daughter.[48] Nehru also records his appreciation of the massive efforts toward electrification and the mechanization of the farming process in this context. A couple of days later, Nehru followed this up with yet another letter discussing Russia's Five Year Plan. On July 9, 1933, he discussed the tumult in the Soviet Union after Lenin, and espoused Stalin's line vis-à-vis Trotsky and the merits of the cooperative farms. Nehru wrote:

> One thing is clear: that the five year plan has completely changed the face of Russia. From a feudal country it has suddenly become an advanced industrial country. There has been an amazing cultural advance; and the social services, the system of social health and accident insurance, are the most inclusive and advanced in the world….[49]

Lest it be taken as merely a cosmetic change that the Soviet regime brought about on July 11, 1933, Nehru went on to explain socialism as a distinct stage, resting on fundamental changes in the concept of property relations in the following words:

> But the most interesting feature of the Plan was the spirit that lay behind it, for this was a new spirit in politics and industry. This spirit was the spirit of science, an attempt to apply a thought-out scientific method to the building up of society. No such thing had been done before in any country, even the most advanced ones, and it is this application of the methods of science to human and social affairs that is the outstanding feature of Soviet planning. It is because of this that all the world is talking of planning now, but it is difficult to plan effectively when the very basis of the social system, like the capitalistic system, rests on competition and the protection of vested rights in property.[50]

Nehru chose to explain his anxiety over the Soviet Union's attitude toward the rise of fascism in Germany and the non-aggression treaty that Stalin signed with Hitler as one among the compromises that is inevitable in the context of *building*

[48] Nehru, *Glimpses of World History*, p. 848.
[49] Ibid., p. 856.
[50] Ibid., p. 857.

up socialism in one country' and goes on to defend the Soviet Union's economic policy without reservations. In his own words, "the essential socialist basis of Soviet economy continues, and the success of this is itself the most powerful argument in favour of socialism."[51] The three letters that Nehru wrote to his daughter, in July 1933, conveyed very clearly that he had, by this time, a concrete perception of socialism, and it was based on the experience in the Soviet Union. It is also evident that Nehru perceived the collectivization of the farm sector as an inevitable course in the socialist path if socialism was to be built in one country, as much as he saw heavy industries and planning as integral to socialism. Nehru was not inimical to the curtailment of the individual's freedom as long as it was warranted in the march to socialism. Socialism, to Nehru, was no longer an abstract ideal, nor was it limited to achieving a decent standard of living. Nehru saw socialism as a system where property was divested from the individual owners. All these aspects were unambiguously expressed by Nehru, when he approvingly cites Stalin while defining socialism and its salient features to his daughter.[52]

In short, socialism, to Nehru, was necessarily a superior economic system, and a *derigistic* state was inevitable to build that superior order. There is hardly any evidence, at least from Nehru's writings of that period, to suggest his inclination to define socialism from another framework as it was sought to be done in the context of the Second International.

Notwithstanding all these, Nehru was unable to carry the INC with him insofar as committing the platform to such a definite program of socialism. This was evident at the Lucknow session of the Congress, in April 1936, where

[51] Ibid., p. 865.

[52] In elaborating the various measures during the Stalin era, Nehru deals with the definition, by the Soviet regime, of stealing of communal property as counterrevolution and the death penalty for such offence. Here, he cites Stalin as saying: "If the capitalists have pronounced *private* property sacred and inviolable, thus achieving in their time a strengthening of the capitalist order, then we, communists, must so much more pronounce *public* property sacred and inviolable, in order to strengthen the new socialist forms of economy." See ibid., p. 860.

Nehru was elected as the president of the organization, replacing Rajendra Prasad.

Stressing upon the need for a unity of forces against imperialism, Nehru was derisive of such a unity by sweeping the problems of the masses under the carpet. "There has been some talk of a joint front but, so far as I can gather, this refers to some alliance among the upper classes, probably at the expense of the masses," he said in his presidential address. "The essence of a joint popular front must be uncompromising opposition to imperialism, and the strength of it must inevitably come from the active participation of the peasantry and workers," he stressed.[53]

It is necessary to note here that Nehru's presidential address at Lucknow also brought out his own commitment to socialism in terms that revealed that it was not merely a bleary eyed notion, but a well thought-out system that he meant by socialism.

> I am convinced that the only key to the solution of the world's problems and of India's problems lies in socialism, and when I use this word I do not use it in a vague humanitarian way but in the scientific, economic sense. Socialism is, however, something even more than an economic doctrine; it is a philosophy of life and as such it appeals to me. I see no way of ending the poverty, the vast unemployment, the degradation and the subjugation of the Indian people except through socialism. That involves vast and revolutionary changes in our political and social structure, the ending of vested interests in land and industry, as well as the feudal and autocratic Indian States system. That means the ending of private property, except in a restricted sense, and the replacement of the present profit system by a higher ideal of cooperative service…. In short it means a new civilization, radically different from the present capitalist order. Some glimpse we can have of this new civilization in the territories of the USSR….[54]

An internal struggle was on within the INC to commit the organization to the idea of *socialism* as also a third alternative to both the campaign for council entry (represented by

[53] Presidential address (April 12, 1936), Jawaharlal Nehru Collection, NMML, INC, Lucknow.

[54] Ibid.

M. A. Ansari, Asaf Ali, Sathyamurthy, Bhulabhai Desai, and B. C. Roy) on the one hand, and Gandhi's Constructive Program in place of civil disobedience on the other. Nehru represented the third alternative, and he came to head the Congress socialists in this context. Interestingly, Nehru had taken this struggle into the open and rendered the campaign into a polemic with Gandhi.[55] It may be noted that this was not for the first time that Nehru had begun discussing this aspect in the public domain. He had, in fact, done this in 1933 itself.[56] The Lucknow session of the INC (April 12–14, 1936) also witnessed the unraveling of this struggle in many ways.

Nehru's address did not skirt the debate within the Congress, and there was indeed a polemical note to it. Freedom, to Nehru, was an inevitable step toward social and economic change, and not an end by itself.

> I should like the Congress to become a socialist organization and to join hands with the other forces in the world which are working for the new civilization. But I realize that the majority in the Congress, as it is constituted today, may not be prepared to go thus far. We are a nationalist organization and we think and work on the nationalist plane. It is evident enough now that this is too narrow even for the limited objective of political independence, and so we talk of the masses and their economic needs. But still most of us hesitate, because of our nationalist background, to take a step which might frighten away some vested interests. Most of those interests are already ranged against us and we can expect little from them except opposition even in the political struggle.[57]

Interestingly, Nehru placed on record his reservations against the village industries program on grounds that though it may serve as temporary expedient of a transition

[55] Chandra, et al., *India's Struggle for Independence*, pp. 311–322.

[56] *Whither India*? was a collection of three articles that Nehru wrote in newspapers on the subject.

On September 14, 1933, Gandhi, in a letter to Nehru, wrote: "I am also in whole-hearted agreement with you, when you say that without a material revision of vested interests the condition of the masses can never be improved." Nehru, *Whither India?* pp. 1–16.

[57] Presidential address (April 12, 1936), Jawaharlal Nehru Collection, NMML, INC, Lucknow.

stage, it clashed with his commitment to rapid industrialization and socialism. Even on the question of untouchability, Nehru perceived an end to it through socialism.

> The problem of untouchability and the Harijans again can be approached in different ways. For a socialist it presents no difficulty, for under socialism there can be no such differentiation or victimization. Economically speaking, the Harijans have constituted the landless proletariat, and an economic solution removes the social barriers that custom and tradition have raised.[58]

It may be noted that Nehru was elected as the president in Lucknow (1935), and he replaced Rajendra Prasad. In a clear pointer to the reality, Nehru inducted at least three prominent socialists into the Congress Working Committee: Jayaprakash Narayan, Narendra Deo, and Achyut Patwardhan. But then, the socialists were in a small minority in the 15-member Working Committee and all the others, barring Subhash Chandra Bose (who was in jail then), were committed to Gandhi against Nehru in that context. Nehru, meanwhile, ensured that the Constructive Program did not find a place in any of the resolutions in Lucknow.[59]

Explaining the situation at the Lucknow session, Nehru's presidential address and the developments in the few months after April 1936, Sitaramayya wrote:

> The president was out of tune with the majority of the Working Committee…. The address pleaded for pure communism in a country which had its own traditions built up through at least a hundred and thirty centuries of progress, and a social structure which had through these long ages, withstood the buffets of time and circumstances and which had worked itself into the life of the nation, religious, economic and ethical. You could no more write on a clean slate in India in the socio-economic realm than in the religious, but the charms of novelty are highly fascinating and though they are destined to wear off sooner or later, the interval before disillusionment is apt to be highly trying to the nation and its leaders. After all, the Marxian cult is set up as a new religion, Marx himself as the new

[58] Ibid.

[59] Sitaramayya, *The history of the Indian National Congress* (Vol. II), p. 11.

> Messiah and Marxism as the new Church and these constitute the greatest obstacle to Communist progress in India where she has a whole hierarchy of Valis, Rasuls and Paigambars, Rishis, Mahatmas and Avatars, where the mosques and temples are the dynamics that generate the electro-motor power which had all along shaped and fashioned society.[60]

Nehru too seemed to have internalized some of this in his message to the conference of the CSP in December 1936; the CSP session was held on December 20, 1936, as it was the practice since 1934, a week before the Faizpur session between December 27 and 28, 1936. In his message, Nehru wrote:

> As you know I am vastly interested in the Socialist approach to all questions. It is right that we should understand the theory underlying this approach. This helps to clarify our mind and give purpose to our activities. But two aspects of this question fill my own mind. One is how to apply this approach to Indian conditions. The other is how to speak of Socialism in the language of India. I think it is often forgotten that if we are to be understood, we must speak the language of the country. I am not merely referring to the various languages of India. I am referring much more to the language which grows from a complex of associations of past history and culture and present environment. So long as we do not speak in some language which has that Indian mentality for background, we lose a great measure of our effectiveness. Merely to use phrases, which may have meaning for us but which are not current coin among the masses of India, is often wasted effort. It is this problem of the approach to Socialism that occupies my mind—how to interpret this in terms of India, how to reach the hearts of the people, with its hope-giving and inspiring message. This is a question which I should like a socialist to consider well.[61]

Nehru was, however, forthright, that he shall not push the agenda of socialism if that would imperil the unity within the INC, and thus cause a setback to the achievement of freedom. He communicated this in so many words: "[B]efore socialism comes or can even be attempted, there must

[60] Ibid., p. 13.
[61] Ibid., p. 15.

be the power to shape our destiny."[62] The most significant marker of this struggle was the Resolution, committing the INC to shape an agrarian program, apart from preparing the election manifesto in the light of the Congress's decision to contest the elections to the provincial assemblies under the Government of India Act, 1935. Meanwhile, in the words of Pattabhi Sitaramayya, "there were adequate and compelling circumstances demanding his (Nehru's) choice" as Congress President in Lucknow.[63] Sitarammaya also notes that Nehru, who had declared himself to be a *socialist* at Lahore, in 1929, had reached the logical fulfillment of socialism—namely communism—in the seven years since then, at Lucknow. Sitarammayya, however, adds that Nehru had also by now "threw in his lot with the Congress and its creed of 'peaceful and legitimate means' for the attainment of Swaraj."[64]

It will make a lot of sense to view Nehru's presidential address at the Faizpur session, in December 1936. It may be noted, here in this context, that Nehru's choice as the president was preceded by a situation where Vallabhai Patel too seemed to be a nominee for the post. Patel, however, dropped out and Nehru was elected as the president at Faizpur, but not before a series of statements by the two leaders in the press. Of significance, from the concerns of this chapter, is Nehru's statement regarding socialism.

> It would be absurd for me to treat this presidential election as a vote for socialism or anti-office acceptance. I have expressed

[62] Ibid., p. 27.

[63] Ibid., pp. 6–10. The official historian of the INC delves elaborately into the increasing influence of the communists in the political discourse at that time, particularly, in the aftermath of the Civil Disobedience Movement being withdrawn and the division within the INC on participating in the elections to the Central Legislative Assembly, and also the Rural Reconstruction Programme advanced by Gandhi. Sitaramayya refers to the CSP turning into Communist Parties in parts of the country at that time and also that Gandhi deemed it appropriate to appoint Nehru as the Congress President by way of consolation in the immediate aftermath of Kamala Nehru's death (in February 1936).

[64] Ibid., p. 8.

> my views on Socialism and pointed out how this colours all my outlook and my activity…. I do believe political independence is the paramount issue before the country and necessity for joint, united action on this is incumbent on all of us….[65]

And this position also came out forthright in the presidential address he gave at the Faizpur session. Nehru said:

> … We cannot understand our problems without understanding the implications of imperialism and socialism. The disease is deep-seated and requires a radical and revolutionary remedy and that remedy is the socialist structure of society. We do not fight for socialism in India today for we have to go far before we can act in terms of socialism, but socialism comes in here and now to help us to understand our problem and point out the path to its solution, and to tell us the real content to swaraj to come. With no proper understanding of the problem, our actions are likely to be erratic, purposeless and ineffective.
>
> The Congress today stands for full democracy in India and fights for a democratic state, not for socialism. It is anti-imperialist and strives for great changes in our political and economic structure. I hope the logic of events will lead to socialism; for that seems to me the only remedy for India's economic ills. But the urgent and vital problem for us today is political independence and establishment of a democratic state.[66]

Apart from centralized planning and industrialization, Nehru viewed the abolition of the right to private property, both in

[65] See ibid., pp. 31–33 for a narrative of the exchange between Nehru and Patel.

[66] Presidential Address, AICC session, Faizpur, December 27, 1936. It is, however, important to take note of the context in which Nehru made this point. The INC, at that stage, was faced with a situation where a section of its ranks were poised to see the Government of India Act, 1935 as a positive means to achieve self-rule and participate in the elections to the Provincial Assemblies without qualification. That would have exposed a weak link in the nationalist movement and the Congress President seemed determined against letting that happen. An unbridled quest for socialism may have led to that. It is important to note here that Nehru, in his address, also went on to explain imperialism. He said: "It is not merely the physical possession of one country by another; its roots lie deeper. Modern imperialism is an outgrowth of capitalism and cannot be separated from it."

agriculture and industry, as integral to the socialist project. Hence, an agrarian program was indeed important in his scheme. But then the INC, as a platform, was unwilling to commit to any of these at that time. The Lucknow session of the INC, for instance, resolved that an agrarian program be formulated and mandated, and that the Provincial Congress Committees send in their recommendations to be placed before the AICC. The Resolution in Lucknow set August 31, 1936 as the date before which the Provincial Committees were to send in their recommendations.[67] The Resolution underlined the existence of different land tenure and revenue systems in the different provinces, and hence found it necessary to take these into account while formulating the program. The Resolution also listed the lines on which the Provincial Committees were to formulate the recommendations. They were:

- Freedom of organization of agricultural laborers and peasants.
- Safeguarding the interests of peasants where there are intermediaries between the state and themselves.
- Just and fair relief of agricultural indebtedness, including arrears of rent and revenue.
- Emancipation of the peasants from feudal and semi-feudal levies.
- Substantial reduction with respect to rent and revenue demands.
- A just allotment of the state expenditure for social, economic, and cultural amenities of villages.
- Protection against harassing restrictions on the utilization of local natural facilities for their domestic and agricultural needs.
- Freedom from oppression and harassment at the hands of government officials and landlords.
- Fostering industries for relieving rural unemployment.[68]

[67] Agrarian Programme Resolution 12, Lucknow Session, AICC papers, NMML.

[68] Ibid.

It may be noted that the Nehru imprint was at best very mild in this Resolution, and there was no mention, whatsoever, of such radical land reforms that Nehru spoke about in his presidential address at the session. The far more significant fact is that the provincial committees did nothing in this regard. Nor did the Working Committee move to press the Pradesh Congress Committees (PCCs) to work on the mandate. As a result, the Congress manifesto for the elections (under the Government of India Act, 1935) came to be drafted without any overt commitment to a radical program that Nehru had insisted upon in his presidential address. Nehru himself drafted the manifesto, and in that he laid out that the Congress reiterated its declaration made at Karachi. It may be recalled that the provision on agrarian relations in the Fundamental Rights Resolution, at the Karachi session, was indeed one that sought to render relief to the owners of land and the tenants from within the existing relationship, rather than being an expression of radical politics.[69]

It is striking that the lines on which the Lucknow session had mandated the Agrarian Programme to be was far more radical than the Congress stand in Karachi. But then, the platform did not take it along those lines. It is even more striking that the Congress, even while internalizing the rights perspective insofar as other aspects of life were concerned, did not find it appropriate to do so in case of the agrarian

[69] It may be recalled that the Karachi Resolution, in this regard, stated as follows:

> The system of land tenure and revenue and rent shall be reformed and an equitable adjustment made of the burden on agricultural land, immediately giving relief to the small peasantry by a substantial reduction of agricultural rent and revenue now paid by them, and in case of uneconomic holdings, exempting them from rent, so long as necessary, with such relief as may be just and necessary, to holders of small estates affected by such exemption or reduction in rent, and to the same end, imposing a graded tax on net income from land above a reasonable minimum. See Sitaramayya, *The history of the Indian National Congress* (Vol. 1), p. 464.

structure even in Karachi.[70] The Congress election manifesto, thus, restricted itself to promising relief to the agrarian classes by way of reduction in rent, revenue, and exemption from rent and revenue for uneconomic holdings.[71]

It may be of relevance to deal briefly with the record of the Provincial Ministries, between 1937 and 1939 insofar as the question of effecting land reforms were concerned. It is important to note here that the powers of the Provincial Ministries, in this regard, were bound by Section 299 of the Government of Indian Act, 1935.[72] In other words, any radical legislation on the lines of Nehru's thinking was hardly possible. It is another matter that the ministries did not last long to make any attempts in this regard. However, there were some faint efforts by some of the ministries.

In Madras, for instance, a committee went into such aspects of the relations between the landlords and the riot to suggest changes in the Madras Estates and Land Act, 1908,

[70] The legacy of the Karachi Resolution and its impact on the making of the Right to Property as a Fundamental Right in the Constitution (Article 31) as well as the infirmity that it introduced in the various other aspects of the Constitution, and independent India's tryst with egalitarianism will be dealt with in subsequent chapters in elaborate detail. It is necessary then to note that the root of all these issues lay in the internal dynamics of the INC.

[71] It is noteworthy that Nehru himself prepared the draft manifesto, and it was adopted without changes by the AICC session in Bombay, on August 22 and 23, 1936. For the full text of the manifesto of 1936, see Sitaramayya, *Why Vote Congress?* pp. 68–75.

[72] Section 299(2) of the 1935 Act reads as follows:

> Neither the Federal nor a Provincial Legislature shall have power to make any law authorizing the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, it is to be determined.

See Rao (Ed.), *The Framing of India's Constitution, Select Documents* (Vol. 2), pp. 272–273.

and recommendations by the committee did not reach the legislative stage before the ministry resigned in September 1939. In Orissa, a Bill that reduced all rents in the zamindari areas of the province was passed in 1938. The Bill, however, was not given assent by the governor general, and thus did not become an Act. If enacted, it would have caused a loss, in some cases, of up to 50 percent in the income of the zamindars. At the provincial government level in the United Provinces, where the demand for agrarian reforms was loudest, the Congress introduced amendments to the existing laws to ensure security of tenure, fixation of rent by government agencies rather than landlords, and abolished the landlords' powers on the tenant in a substantive sense. The amendments were assented only after the provincial governments resigned. In Bihar, too, the Congress ministry passed a Tenancy Act, providing for the reduction of rent to the level as it was in 1911, reduced arrears in a big way, and curtailed the zamindar's power to evict the tenant.[73]

The war and its end (in 1945) led to changes in the dynamics of the freedom movement as well as in the INC. Independence was now a reality, and Nehru had emerged as the most important leader of the Congress. In this context, Abul Kalam Azad, who had been the president since the Ramgarh session, in March 1940, handed over the baton to Nehru on July 6, 1946. Viceroy Lord Wavell's invitation to form the interim government, on August 12, 1946, was extended to Jawaharlal Nehru in his capacity as the president of the INC. Jawaharlal Nehru, in accordance with the Congress constitution, left the post to J. B. Kripalani after he was sworn in as the prime minister. Of significance from the concerns of this chapter as well as the book is that the ascendancy of Jawaharlal Nehru as the prime minister meant that his authority over the INC expanded in all senses of its term. Nehru, in other words, was no longer one who was out of tune with the majority in the Congress, as Pattabhi Sitaramayya described in the context of his presidential address in Lucknow a decade ago.

[73] Sitaramayya, *The history of the Indian National Congress* (Vol. II), pp. 697–699.

In the changed situation, Jawaharlal Nehru, was in a position to decisively influence the INC, and this was clearly evident in the Congress election manifesto, as approved by the Congress Working Committee on December 11, 1945. Unlike in 1936, the INC's manifesto for the elections to the Central Legislative Assembly and the Provincial Assemblies (for July 1946) came out with a categorical commitment to carry out radical agrarian reforms. The relevant portion read as follows:

> The reform of the land system, which is so urgently needed in India, involves the removal of intermediaries between the peasant and the state. The rights of such intermediaries should therefore be acquired on payment of equitable compensation. While individualist farming or peasant proprietorship should continue, progressive agriculture as well as the creation of new social values and incentives require some system of cooperative farming suited to Indian conditions. Any such change can, however, be made only with the goodwill and agreement of the peasantry concerned. It is desirable, therefore, that experimental cooperative farms should be organized with state help in various parts of India. There should also be large state farms for demonstrative and experimental purposes.[74]

Recall that Nehru had only celebrated this aspect of the Soviet Union's experience in his letters to his daughter, in 1933, and argued for its acceptance from inside the INC, in Lucknow and Faizpur. As for the INC, the commitment for zamindari abolition was high on its agenda. On the unanimous recommendation of a national conference of the Provincial Revenue Ministers, in December 1947, the then president, Rajendra Prasad constituted the Congress Agrarian Reforms Committee under the chairmanship of J. C. Kumarappa. The terms of reference of the committee conveyed the concerns of the Congress at that time. It said: "The Committee will have to examine and make recommendations about agrarian reforms arising out of the abolition of zamindari system in the light of conditions prevailing in the different provinces…."[75]

[74] The Congress Manifesto. See Sitaramayya, *The history of the Indian National Congress* (Vol. II), Appendix I, pp. i–v.

[75] Report of the Congress Agrarian Reforms Committee, AICC, New Delhi, 1949, pp. 3–4.

Of larger significance is that the Congress provincial governments in the United Provinces and Bihar went ahead, in real earnest, with legislations abolishing zamindaries in the two provinces even before the Constitution was drafted. It is another part of the story that these laws were contested by the zamindars after the Constitution was adopted and in one particular case, the law was struck down by the Patna High Court. We shall discuss this and the response to it in Chapter 4 of this book.[76]

As for Nehru, he took the agenda forward in the Resolution regarding the aims and objects before the Constituent Assembly on December 13, 1946. That was the fifth day in the life of the Assembly, and Nehru stressed upon the need to "clearly understand where we are going and what we intend building."[77]

The Resolution read:

- This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;
- WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India that are now outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India shall be a Union of them all; and
- WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the Law of the Constitution, shall possess and retain the status of autonomous Units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to

[76] These legal challenges, based on Article 31 of the Constitution, were overcome by way of the Constitution (First) Amendment Act, 1951.

[77] CAD Official Report (Vol. I), Book No. 1, p. 57.

the Union, or as are inherent or implied in the Union or resulting therefrom; and

- WHEREIN all power and authority of the sovereign Independent India, its constituent parts and organs of government, are derived from the people; and
- WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and
- WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and
- WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to Justice and the law of civilized nations; and
- This ancient land attains its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind.[78]

Nehru made it clear that the Resolution gave some indication of the intentions of this exercise to the members of the Assembly, the masses, and the world at large. While explaining the context and the contents of the principles, Nehru clarified some aspects of the Resolution. Of importance to the concerns of this chapter is the part of his speech stressing that the proposed constitution ought to be democratic (even if that word was not used in the Resolution), and in that context he established a link between Clauses 1 and 5 of the Resolution. Nehru said:

> Obviously we are aiming at a democracy and nothing less than a democracy…. The House will notice that in this resolution, although we have not used the word 'Democratic' because we thought that it is obvious that the word 'republic' contains that

[78] Ibid., p. 59.

> word and we did not want to use unnecessary words and redundant words, but we have done something much more than using the word. We have given the content of democracy in this resolution and not only the content of democracy but the content, if I may say so, of economic democracy in this resolution.[79]

The reference, indeed, was to Clause 5 of the Resolution and the point was not missed by M. R. Masani[80] during the debate on the Resolution in the Assembly. He said:

> As a Socialist, Sir, I welcome this aspect of the resolution because as the mover has rightly pointed out, the content of economic democracy is there although the label is not there. The resolution, in my view clearly rejects the present social structure, it rejects the social *status quo*. There can be no other meaning to the words in clause 5 which refer to justice—social, economic and political. I do not think anyone here would argue that the present state of our society is based on justice…as I understand this resolution, it would not tolerate the wide and gross inequalities which exist in our country. It would not tolerate the exploitation of man's labour by somebody else…. That, Sir, is the Socialist aspect of the resolution. It does not provide for Socialism. It would be wrong to provide for such a thing, because this House has no mandate to go in for far-reaching economic changes in the country…. All that we can do as an assembly here, is to frame a constitution which will allow those far reaching changes which are necessary to be made and I submit, Sir, that this resolution goes as far as it can in satisfying the most ardent socialist amongst us.[81]

[79] Ibid., p. 62.

[80] Minoo R Masani was a prominent member of the CSP since its formation, in 1934; he was also among those in the Nashik jail from where the CSP took shape. He left the Socialist Party in due course and traveled to the other end of the spectrum to become a votary of market capitalism and was a leading member of the Swatantra Party, turning popular as an acerbic critic of Nehru and Indira Gandhi, and a parliamentarian of repute. During the term of the Constituent Assembly, Masani was very much a part of the socialist group inside the Congress, but critical of the practice of socialism in the Soviet Union on the ground that the system curtailed the rights of the individual in the name of the larger good. It may be noted here that the Congress Socialists had stayed on within the Congress until mid-1948 and founded the Socialist Party only then.

[81] Ibid., pp. 92–93.

The Resolution regarding aims and objects, moved on December 13, 1946, was finally approved and adopted by the Constituent Assembly only on January 22, 1947. It took six weeks of debate; at least 40 amendments were submitted (and all those were withdrawn in due course of the debate), but barring Masani's speech where the *socialistic* aspects were talked about, none of those in the Assembly including those who refused to cooperate with Nehru in Lucknow and Faizpur (and all of them were members of the Assembly now) thought of raising any objections to Clause 5 of the Resolution. The debate, mostly, was on whether it was prudent for the Assembly to settle its aims and objects even while the Muslim League was staying out of the House, and hence sought postponement of the discussion and the adoption of the Resolution. There were some others who believed that Clause 4 (that the authority of the sovereign will be derived from the people) could cause objections from the rulers of the Indian states, and hence sought it to be avoided; the argument was that the states were not represented in the Assembly at that time. Both these were dismissed with as much force as he could, commanded by Nehru himself and most others from the Congress. None, in fact, raised any objections against Clause 5 of the Resolution at any stage.

Nehru, meanwhile, made his commitment to *socialism* as clear, as he did in Lucknow, once again in the Assembly while moving the Resolution. He said:

> Well, I stand for Socialism and, I hope, India will stand for Socialism and that India will go towards the constitution of a Socialist State and I do believe that the whole world will have to go that way. What form of Socialism again is another matter for your consideration. But the main thing is that in such a resolution, if, in accordance with my own desire, I had put in, that we want a Socialist State, we would have put in something which may be agreeable to many and may not be agreeable to some and we wanted this resolution not to be controversial in regard to such matters.[82]

The fact is that these aspects came up in the Assembly and were contested too. One of those was the evolution of Article 31 of

[82] Ibid., p. 62.

the Constitution by which the Right to Property became one of the Fundamental Rights. Nehru intervened in that discussion in a decisive manner. We shall discuss that in Chapter 2. As for now, it may be noted that the Preamble to our Constitution, as it was adopted on November 26, 1949, contained everything that were explicitly stated in the Resolution regarding aims and objects that Nehru moved on December 13, 1946. The words socialist and, also, secular were added to the Preamble by way of the Constitution (Forty-second Amendment) Act, 1976. It made explicit what was indeed implicit thus far.

2

Socialism and the Right to Property as a Fundamental Right: The Constituent Assembly Debates

The significance of the Fundamental Rights Resolution at the Karachi session lies in the fact that it can be described as the first draft of what came to be Parts III and IV of our Constitution.[1] The Indian National Congress (INC), notwithstanding its radical approach to nationalism, was indeed unwilling to commit itself to a radical program involving the agrarian structure and the land-owning patterns.[2] As a result, the Congress

[1] See Appendix 1 for a comparison of the Karachi Resolution and the Constitution.

[2] While Clause 7 of the Karachi Resolution seemed to stretch the INC's commitment on the land question only to the extent of relief in rent, and thus implicitly recognized the institution of landlordism, Clause 1 (viii) of the Karachi Resolution that read as "No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered, or confiscated, save in accordance with law" was clearly seen, even at that time as an explicit recognition of their Right to Property by the landlords. It is also of significance that this aspect and the fact that the socialists in the INC had been threatening to bring about the extinction of private property was addressed to Gandhi, sometime in July 1934. Gandhi, interestingly, assured his opposition to any such extinction of the Right to Property by way of "dispossession of the propertied class without just

refrained from formulating an agrarian program and Jawaharlal Nehru's ideas; in this context, it was a far cry in this context as we saw in Chapter 1. Of significance to the scope of this chapter is that the Karachi Resolution was indeed ambiguous when it came to the question of land reforms.[3] In other words, the INC clearly hedged on the question of abolition of zamindari and other such institutions of property holding, and this was pronounced at all stages beginning from the Karachi session. The issue, however, kept coming up, given the dynamics of the struggle for freedom; the involvement of the masses, drawn predominantly from the peasants, was detrimental enough to the Congress, turning it into a representative of the landed gentry. But then, a host of leaders, in the Congress, were committed to the cause of the landlords and others who owned property. However, there was a change in this regard in the 1940s when the dominant leaders of the INC from the United Provinces began speaking out against the zamindaris.[4]

The issue, however, came up before the National Planning Committee (NPC), set up by the INC, in October 1938.[5] And

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cause," but added a note of caution that the landlords shall transform themselves on the lines he had sought a transformation in the minds of the Indian industrialists. See Mukherjee, *The Penguin Gandhi Reader*, pp. 238–240.

[3] See Sitaramayya, *The History of the Indian National Congress*,Vol. I, pp. 463–465. It is interesting to read the portion on the land question: "The system of land tenure, and revenue and rent shall be reformed and an equitable adjustment made of the burden on agricultural land, immediately giving relief to the small peasantry by a substantial reduction of agricultural rent and revenue now paid by them, and in case of uneconomic holdings, exempting them from rent, so long as necessary, with such relief as may be just and necessary, to holders of small estates affected by such exemption or reduction in rent, and to the same end, imposing a graded tax on net income from land above a reasonable minimum."

[4] It may be noted here that this had to do with the predominantly large number of Muslims as landlords in the region, the Muslim League's resolution for a separate nation in 1940, and the dynamics of the INC in that context.

[5] The Committee, under the chairmanship of Jawaharlal Nehru, though engaged itself predominantly on determining the nature of industrial development in India, had also addressed the agrarian question in the course of its deliberations.

even if the Committee's brief was to formulate the framework for industrialization in India and from within the context of the powers of the provincial governments under the Government of India Act, 1935, the Committee did consider its task as formulating the plan for a free and independent India as well, rather than working within the restrictive ambit of the 1935 Act. Jawaharlal Nehru, in his capacity as the Chairman of the Committee, did hold it impossible to skirt the question of land ownership patterns and the agrarian structure as it prevailed then. In his memorandum to the Committee on June 4, 1939, Nehru put this in categorical terms:

> The resolution appointing this Committee does not mention agriculture as such, but it is impossible to conceive of any scheme of national planning in any country, and least of all in India, which does not include agriculture…. Agriculture must, therefore, inevitably be considered by this committee in its scheme of national planning.[6]

It is also relevant in this context to take note of the changing dynamics of the discourse at that time in the wake of the Muslim League pressing for Pakistan and partition. We find the otherwise conservative leader, Govind Ballabh Pant, turning into the most trenchant critic of the zamindari system and other such forms in the agrarian structure. Pant's contribution to the debate in the making of the relevant provision (Article 31, as it came to be at the time of the Constitution being adopted) in the Constituent Assembly was indeed reflective of these dynamics. We shall look into this in elaborate detail in this chapter.

The most pronounced feature of socialist thinking was evident in the attitude of the NPC. After 1940, the dominant section of the leadership of the freedom struggle, indeed, internalized the agenda of putting an end to the zamindari system, and this was one of the aspects that drew a lot of attention from the makers of the Constitution. The earliest reference to this was made by the Subcommittee on Land Policy, Agricultural Labour and Agricultural Insurance of the NPC, on June 29, 1940. Significantly the Subcommittee was chaired by K. T. Shah, whose views on private property were

[6] See Shah (Ed.), *Report of the National Planning Committee*, p. 42.

identical with those of Nehru and socialism in that sense.[7] The NPC, however, referred the question back to the Subcommittee for further consideration after laying down the parameters within which the issue was to be addressed. The *guiding principles* that the NPC laid out, on June 30, 1940 (after discussing the recommendations of the Subcommittee in elaborate details for two full days), were indeed a categorical expression against landlordism in its various forms, as they existed at that time. The *guiding principles* were laid out in the form of a resolution and that read as follows:

1. Agricultural land, mines, quarries, rivers and forests are forms of natural wealth, ownership of which must vest absolutely in the people of India collectively.
2. The co-operative principle should be applied to the exploitation of land by developing collective and co-operative farms in order that agriculture may be conducted more scientifically and efficiently, waste avoided, and production increased, and at the same time the habit of mutual co-operation for the benefit of the community developed in place of the individual profit motive.
3. No intermediaries of the type of *taluqdars*, zamindars, etc., should be recognised in any of these forms of natural wealth after the transition period is over. The rights and title possessed by these classes should be progressively bought out by granting such compensation as may be considered necessary and desirable.

   The practice of sub-infeudation and sub-letting of land should not be permitted.
4. The sub-committee is requested to consider and report on the forms of collective and cooperative forms, which may be suitable for India which they recommend. Such collective and co-operative farming must be under state supervision and regulation.[8]

[7] It is significant to note here that the NPC had set out the brief of the Subcommittee in very specific terms and among them were: (a) the use and ownership of land and their effects on cultivation and social stratification; (b) measures to be suggested for agrarian reform with a view to bring about an equitable distribution of land resources and their effective utilization for the maximum benefit of the country… See ibid., p. 67.

[8] Ibid., pp. 208–210. It may be pointed out here that the NPC did qualify its approach to land cooperatives in the form of a note to the

Subsequently, K.T. Shah presented a final report of the Subcommittee before the NPC on September 3, 1940. The NPC then adopted a note which underlined that cooperative farming shall remain the form of production in the agrarian sector. "Cultivation of land should be organised in complete collectives, wherever feasible, e.g. on culturable wastelands, and other lands acquired by the state…. This co-operative farming should include cultivation of land and all other branches of agricultural work."[9] The note, as approved by the NPC on September 3, 1940, said the following insofar as the institution of landlordism was concerned:

> It has been decided that no intermediaries between the state and the cultivators should be recognised; and that all their rights and titles should be acquired by the state paying such compensation as may be considered necessary and desirable. Where such lands are acquired, it would be feasible to have collective and co-operative organisations as indicated above.[10]

In many ways, the recommendations of the NPC marked a stage in the history of the INC, where the organization had come to adopt Jawaharlal Nehru's views on economic policy. There is nothing to suggest that Nehru's views on property, as he expressed them in the various stages until about 1940, were shared by the rest of the Congress leadership even at Faizpur, where he was elected the president of the INC. But then, things began to change by 1940, and the NPC seemed to have been the platform from where this transition was manifested insofar as the INC was concerned. The resolution on land policy, as discussed, was indeed a definite statement seeking abolition of landlordism. Such clarity was, however, evident

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Resolution. It said: "The land co-operatives mentioned above should not be construed in a restricted sense as applying to specific functions, such as, marketing, credit or collective purchase of seeds, etc., but include cultivation and all aspects of agriculture."

[9] Ibid., p. 229. The note, in fact, is indeed a detailed one on the idea of land cooperatives in all its dimensions. See Appendix 2 for the full text of the note.

[10] Ibid., p. 223.

in the election manifesto of the INC in 1946. The manifesto was indeed a categorical statement of the platform's commitment to the abolition of zamindaris and all other forms of landlordism as they existed at that time and for cooperative farming; in a sense this was stated in the report of the NPC. In short, the Congress, since September 1940, began standing up for radical land reforms and was committed to abolish landlordism and, in that sense, moved a long distance from the Fundamental Rights Resolution at the Karachi Session, in March 1931.

This shift was met with some resistance in the Constituent Assembly. Considerable time and energy was taken to tackle the sharp differences that prevailed within the INC as well as the Constituent Assembly before the status of the right to property in the Constitution was settled on November 26, 1949. Article 31 of the Constitution, by which the right to property was put as a Fundamental Right, went through substantial changes from the time the Fundamental Rights Subcommittee of the Constituent Assembly presented its report (in May 1947) to the stage when the provision was adopted by the Assembly, in September 1949. Meanwhile, it is also necessary to specifically note at this stage that this was among the provisions of the Constitution that was subjected to a number of substantial amendments during the 25 years after independence before it was deleted from among the Fundamental Rights by the Constitution (Forty-fourth Amendment) Act, 1978.[11]

[11] Even while Article 31 stood deleted, we have Articles 31-A, 31-B, and 31-C in our Constitution even now. While Articles 31-A and 31-B were inserted into the Constitution by way of the Constitution (First Amendment) Act, 1951, Article 31-C was inserted by way of the Constitution (Twenty-fifth Amendment) Act, 1971. It may be added that what remains of Article 31-C is only one portion of the insertion made by the 1971 Amendment Act; the Supreme Court struck down the portion in the Amendment Act by which Article 31-C would have meant an absolute bar on the judiciary, reviewing any constitutional amendment as long as the stated purpose of that amendment was to achieve socialism. We shall discuss this while dealing with the Kesavananda Bharti Case at a later stage.

The making of the right to property as a Fundamental Right, by the Constituent Assembly, has to be seen in this larger context. It is also important to note here that this aspect of the Constitution, as it was adopted on November 26, 1949, would turn into an obstacle in the path of the land reforms legislations in the various provinces. But then, the Nehru regime, in independent India, managed to resolve this by way of a series of constitutional amendments. This process began even before the first general elections when the Constituent Assembly was turned into the Parliament to pass the Constitution (First Amendment) Act, 1951, adding Articles 31-A and 31-B, as well as the Ninth Schedule to the Constitution. This process culminated with the passage of the Constitution (Forty-fourth Amendment) Act, 1977, by which Articles 31 and 19 (1) (f) were deleted, and a new Article 300-A was added to the Constitution.

In this chapter, we shall trace the process by which the right to property was accorded the status of a Fundamental Right in the Constitution, and the issues that the Nehru regime confronted while introducing agrarian reforms. It will be interesting to note here that all these were foreseen by articulate sections in the Assembly even at the time of drafting the Constitution, but were glossed over by the prominent leaders of the Constituent Assembly, only to be taken note of subsequently.

Early Discussions in the Constituent Assembly and the Right to Property

It is interesting to note that the earliest discussion on property, insofar as the Constituent Assembly was concerned, was in the context of listing out the Fundamental Rights. Constitutional adviser Sir B. Narsing Rau, in his preliminary notes of September 2, 1946, listed out the possible areas that could be included among those to be enshrined as Fundamental Rights, such as, equality before law, freedom of speech, freedom of press, freedom of religion, freedom of assembly, freedom of

association, security of person, and security of property. This, he made out based on the various constitutions from around the world. The constitutional adviser, thereafter, identified that the challenge before the Assembly was "in defining the precise limits in each case and in devising effective protection for the rights so limited."[12] B. N. Rau also chose to illustrate this challenge by way of a specific reference to Article 153 of the German Constitution of 1919.[13] According to the constitutional adviser, this was an instance where the Right to Property was declared inviolable, and yet the Constitution itself provided the means to violate that right when the legislature decided to dilute that right of the citizen.

The constitutional adviser, in his note, left three options before the Assembly insofar as overcoming this dilemma over the limits and restrictions that could be placed on the Fundamental Rights and over the role of the judiciary in that context:

- To take the risk and allow the rights, however imperfectly defined, to be enforced in the ordinary courts
- To set out the rights merely as moral precepts for the authorities concerned, and to bar the jurisdiction of the ordinary courts either expressly or by implication
- To allow the more easily definable rights to be enforced in the ordinary courts, and keep the rest out of their purview[14]

The note, thereafter, went about illustrating the structure of the Irish Constitution to have the various rights classified

[12] Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 2), p. 22.

[13] Article 153 of the 1919 German Constitution read as follows:

> Property is guaranteed by the constitution. Its extent and the restrictions placed upon it are defined by law. Expropriation may be effected only for the benefit of the general community and upon the basis of law. It shall be accompanied by due compensation save insofar as may be otherwise provided by a law of the Reich.

[14] Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 2), p. 22.

as enforceable and non-enforceable, and the constitutional adviser listed out a whole lot of rights that may not be enforceable; Rau chose to call them the fundamental principles of state policy and enlisted a variety of rights in specific terms there. The significance of the notes is that the constitutional adviser refrained from making a specific list when it came to the Fundamental Rights, that is, rights that are meant to be enforced by legal action. Instead, he simply made a mention that this was indeed a controversial ground, and also specified the basis of the controversy that is likely to arise on the question of the powers for judicial review as against granting the legislature with the supreme rights on the matter. In Rau's words, "In the peculiar circumstances of India, there may well be a demand for a Bill of Rights enforceable in the courts… its drafting will require great care and must be reserved for a future occasion…"[15]

There was yet another note, by Prof. K. T. Shah (dated December 23, 1946),[16] circulated to the members of the Assembly. Unlike the note circulated by the constitutional adviser, the note circulated by K. T. Shah, listed specific issues, clause by clause, and even a Draft Constitution was appended with this note. Among them, there were two clauses that specifically dealt with property and the rights vested in the individual as well as the state.

Clause 28 of K. T. Shah's draft read as follows:

> Every citizen has and is hereby guaranteed the right of acquiring, owning, holding, selling or mortgaging property, real or personal,

[15] Ibid., p. 36.

[16] Prof. K. T. Shah chaired the Subcommittee on Land Policy, Agricultural Labour and Insurance at the NPC. It is important to note that though elected on behalf of the INC, Shah represented the Congress Socialist Party (CSP) group in the Assembly. It may be recalled that those who constituted the CSP from 1934 and functioned as a ginger group from within the INC (also known as the Nashik group) left the INC in 1948 to form the Socialist Party under the leadership of Jayaprakash Narayan and Acharya Narendra Dev. Since then, they also turned into acerbic critics of the INC, and Jawaharlal Nehru in particular. The socialists functioned as a separate block inside the Constituent Assembly.

> in any part of the Union, subject to such laws as relate to tenure, taxation, public dues, local rates, stamp duties, and other such imposts, and regulations, duly enacted and in force in any such part of the Union. Provided that, in virtue of its sovereign authority, the Union of India (or any component part thereof), shall be free and entitled to acquire any private property held by any private individual or corporation as may be authorized or permitted under the law for the time being in force.[17]

Clause 34 of the draft read as follows:

> Existing rights of ownership of any degree in agricultural land and any other items mentioned in the preceding article shall be acquired by and on behalf of the State of India and vested in the Government of the Union subject to such compensation if any as may be deemed proper and reasonable.[18]

It is interesting to note here that these two clauses, in many ways, formed the basis of Article 19 (1) (f) and Article 31 of the Constitution as they were adopted in the end. It is relevant to stress here that Prof. K. T. Shah, himself, sought to add riders to these in the course of the debate in the Constituent Assembly. The substantive point, at this stage, is that the two notes were circulated among the members of the Assembly and, more importantly, served as the starting point for reference by the Subcommittee on Fundamental Rights.[19]

The Subcommittee on Fundamental Rights, subsequently, began its work based on four separate notes; while Alladi

[17] Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 2), p. 52.

[18] Ibid., p. 53.

[19] On adoption of the Objectives Resolution on January 24, 1947, the Constituent Assembly resolved to constitute an Advisory Committee consisting of 72 members (50 from the Assembly and 22 to be coopted, based on their expertise on legal and other fields of knowledge) under the chairmanship of Sardar Vallabhai Patel. The Advisory Committee, in its turn, set up five subcommittees, and among them was the subcommittee on Fundamental Rights with 10 members. While Acharya J. B. Kripalani headed thessubcommittee, others were: M. R. Masani, K. T. Shah, Rajkumari Amrit Kaur, Alladi Krishnaswami Ayyar, K. M. Munshi, Sardar Harnam Singh, Maulana Abul Kalam Azad, B. R. Ambedkar, and Jairam Das Daulatram.

Krishnaswamy Ayyar circulated a brief guideline, K. M. Munshi and B. R. Ambedkar made available elaborate drafts, so to say, on Fundamental Rights consisting of different Articles and Clauses. The fourth note was by Harnam Singh, and it dealt with the rights of minorities specifically. From the concerns of this chapter, the notes by K. M. Munshi and B. R. Ambedkar were significant because both of them dealt with the idea of Right to Property as a Fundamental Right.

Article X in K. M. Munshi's note dated March 17, 1947, was titled *Right to Property*. It read as follows:

1. The Right to Property is guaranteed by this Constitution to all citizens, corporations, and bodies—social, economic and religious.
2. *Property* in Section 1 shall include immovable property and any rights in or over such property or any undertaking run for profit or any interest in or in any company owning any such undertaking.
3. No soldier, in time of peace, be quartered in any house, without the consent of the owner and in time of war except in a manner prescribed by the law of the Union.
4. Expropriation for public reasons only shall be permitted upon conditions determined by law and in return for *just and adequate consideration* determined according to principles previously laid down by it. (Ananth, emphasis added)
5. The right to private property includes the right to the free disposal of property subject, however to limitations imposed by law or usage in the interests of such owners who are not capable of looking after their interests.[20]

B. R. Ambedkar's note, dated March 24, 1947, sought to deal with property from an entirely different perspective and in a sense put the Right to Property as a positive duty of the state than as an injunction against the state. Clause 4 of

[20] Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 2), p. 78.

Article II in his note contained the following provisions with regard to the land question:

(4) That agriculture shall be a state industry

1. That the state shall acquire the subsisting rights in such industries, insurance and agricultural land held by private individuals, whether as owners, tenants or mortgagees and pay them compensation in the form of debenture equal to the value of his or her right in the land. Provided that in reckoning the value of land, plant or security no account shall be taken of any rise therein due to emergency, of any potential or unearned value or any value for compulsory acquisition
2. The state shall determine how and when the debenture holder shall be entitled to claim cash payments
3. The debenture shall be transferable and inheritable property but neither the debenture holder nor the transferee from the original holder nor his heir shall be entitled to claim the return of the land or interest in any industrial concern acquired by the state or be entitled to deal with it anyway
4. The debenture holder shall be entitled to interest on his debenture at such rate as may be defined by law, to be paid by the state in cash or in kind as the state may deem fit.[21]

Ambedkar's note also recommended that agriculture be carried out as a cooperative farming setup, wherein the state divided farms equally and handed it over to collectives of cultivators directly, and collected taxes and other charges directly. In a sense, this could have been the basis on which the Resolution on cooperative farming passed at the Nagpur Session of the Congress (in 1959) could have been taken forward. The Resolution, however, was restricted to mere speeches and no action as such.[22]

[21] Ibid., pp. 89–90.

[22] The Nagpur Session of the Congress Party, in 1959, was marked by the Resolution on cooperative farming and the election of Indira Gandhi as party president. Nehru steered the session and its decisions. It is of significance to note here that the Swatantra Party, conceived by C. Rajagopalachari and organized by those sections in the Congress Party that was uncomfortable with the idea of land reforms, was formed in the same year and as a reaction to the resolution committing the party to the idea of cooperative farming. The landed gentry

Section 299 of the Government of India Act, 1935

Based on the notes, the Fundamental Rights Subcommittee began discussions, and a consensus was reached among the 10 members to construct the Article on the Right to Property, based upon Article X of K. M. Munshi's note. The Subcommittee also had with them Section 299 of the Government of India Act, 1935, being the provision thereon for acquisition of land for public use, as a reference point at that stage. The discussion was intense and dealt with three important aspects, namely:

- Whether the movable property is also to be added
- Whether the expression *just compensation* should be substituted for *compensation*
- Whether the legislature is to be given the power to fix the amount of compensation[23]

The Subcommittee agreed, on March 28, 1947, to delete Clauses (1), (2), (3), and (5) from Munshi's note and to carry an amended version of Clause (4) of Article X from the note as Article X.

The revised Article read as follows:

> No property, movable or immovable, of any person or corporation including any interest in any commercial or industrial undertaking shall be taken or acquired for public use unless the law provides for the payment of just compensation for the property taken or

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constituted the leadership of the party across the country. In Madras state, the Swatantra Party was constituted by the legatees of the Justice Party. The Swatantra Party was the earliest votaries of free economy (market economy in popular parlance) and after having emerged as the largest opposition in Parliament in 1967, it disintegrated with its leaders joining different parties, such as, the Jan Sangh, the Congress(O) and the Bharathiya Lok Dal, and finally the Janata Party in 1977. Rajagopalachari himself stayed clear of all that and opted out of party politics with the demise of the Swatantra Party.

[23] Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 2), p. 128.

> acquired and specifies the principles on which and the manner in which the compensation is to be determined.[24]

This was incorporated among the Fundamental Rights as Article 27 of the draft report by the Subcommittee on Fundamental Rights in its report to the Advisory Committee of the Constituent Assembly, on April 3, 1947. The Right to Property was included in Clause 11 of the draft too. It said: "No person shall be deprived of his life, liberty or property without due process of law."[25] The constitutional adviser, B. N. Rau, meanwhile, circulated his notes on the various clauses to the Subcommittee, wherein he made it clear that while Article 11 was adapted from the fifth amendment to the US Constitution, Article 27, as presented in the Draft, was adapted from Section 299 of the Government of India Act, 1935, as also from the fifth amendment of the US Constitution.[26]

The constitutional adviser also labored hard to convey, to the members of the subcommittee, the implications of the clauses being adopted as they were in the Constitution and as Fundamental Rights. Rau's elaborate notes in this regard contained the following points. Referring to Clauses 2, 11, and 27, he specifically cautioned the Assembly members, in his note, that 40 percent of the litigation in the Supreme Court of the USA during the last half century has centered around the *due process* clause and clarified that in that event, in the last analysis, *due process* means what the courts say they mean. The note laid bare the implications of that in plain and simple language if the clauses were adopted as they were.

It read:

> The result is likely to be a vast flood of litigation immediately following upon the new constitution. Tenancy laws, laws to regulate money-lending, laws to relieve debt, laws to prescribe minimum wages, laws to prescribe maximum hours of work, etc., will all be liable to be challenged….

[24] Ibid., p.129.

[25] Ibid., p. 139.

[26] B. N. Rau's notes on the draft report dated April 8, 1947. See ibid., pp. 147–150.

> It should be noted that the Fifth Amendment of the USA Constitution contains the 'due process' clause and also another clause which provides that private property shall not be taken for public use without just compensation. Our draft contains both these clauses (see Clauses 11 and 27). It must be admitted that the clauses are a safeguard against predatory legislation; but they may also stand in the way of beneficient social legislation….[27]

The constitution adviser did not stop with a mere observation in this regard. He was also proactive and went on to suggest that the Irish Constitution be followed in this context, and even recommended insertion of a new Article 27-A to be read as follows: "27-A. The State may limit by law the rights guaranteed by Sections 11, 16, and 27 whenever the exigencies of the common good so require."[28]

It may be noted that the proposed Article 27-A was a forerunner to Article 31-C that was inserted into the Constitution by way of the Constitution (Twenty-fifth Amendment) Act, 1972, by which Article 31-C was inserted into the Constitution; one part of that amendment was declared ultra vires by the majority opinion in the Kesavananda Bharathi Case.[29] While we shall discuss this in detail later in this book (Chapter 6), it will be appropriate to say that the constitutional adviser displayed foresight by way of recommending the insertion of such a clause.

The Fundamental Rights Subcommittee, however, did not find the suggestion worth accepting. Both Clauses 11 and 27 were accepted as they were. In its meeting on April 15, 1947, the Committee, by a majority, decided not to accept the suggestion of Sir B. N. Rau to insert Clause 27-A.[30]

[27] Ibid., p. 151.

[28] Ibid., p. 152. Rau explained the need to include Section 16 in this regard because that would take care of the state taking over properties of religious trusts without infringing upon the rights to such bodies in other aspects. This concern was raised by Rajkumari Amrit Kaur in a note she circulated in this context.

[29] *Keshavananda Bharati v. State of Kerala*. See AIR-1973-SC-1461.

[30] Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 2), p. 166.

At the Advisory Committee of the Constituent Assembly

Consequently, the Subcommittee on Fundamental Rights submitted a draft of the Fundamental Rights to the Advisory Committee of the Constituent Assembly on April 16, 1947 that contained the provision for property as a Fundamental Right in Article 26, which laid down that property can be taken over by the state only on payment of a just compensation or after the principles for such compensation are determined by the law. In other words, the Article laid bare any Act to acquire property to judicial intervention.

The Advisory Committee, however, thought differently, and like it happened with some other provisions in the Subcommittee's draft, there was intense debate on Articles 11 and 27. The first to throw a stone against having Article 11 in the Constitution was Govind Ballabh Pant, the then prime minister of the United Provinces. The *due process of law* clause, Pant apprehended, "will become the subject of litigation day in and day out," and K. M. Munshi concurred with him saying that "every sentence will be contested in a court of law."[31]

Intervening at that stage, Alladi Krishnaswamy Ayyar confirmed the apprehensions, but held that the clause be retained while being aware of the implications. Ayyar said:

> There is all the danger that it may stand in the way of what may be called exproprietary legislation. If you have got a set of judges who are more inclined to property, then they might put a wide construction upon the words so as to hamper what may be called a social legislation and if you have another set of judges who are imbued with modern ideas, they might put a more liberal interpretation. There is that danger inherent in 'due process' whatever provision of law may be made in the different provinces in India.[32]

And C. Rajagopalachari then intervened to add: "It is clear from what Sir Alladi says that this clause, if passed, will

[31] Ibid., p. 240.
[32] Ibid., p. 241.

make it very difficult to make any laws which affect property, because 'without due process of law' would not only apply to the procedure."[33] After elaborate discussion and based on a suggestion by B. R. Ambedkar that the question of property could be discussed while taking up Article 26 of the draft, the Advisory Committee decided to delete *property* from Article 11, and retain life and liberty alone there.[34]

When Article 26 was taken up by the Advisory Committee, the discussion straightaway was steered out to two aspects: on what compensation meant and on the meaning of public use. Govind Ballabh Pant's concern as to whether the Article would have implication for tenancy legislations was clarified by Alladi Krishnaswamy Ayyar that it will not. In the course of this, it came out clearly that the Article, as it stood, rendered compensation and the principles justiciable. In other words, Alladi Krishnaswamy Ayyar made it clear that the Article had "closely followed Section 299 of the Government of India Act"[35] and added that the only change from that was that the Constitution draft used *just compensation* instead of mere *compensation* in the 1935 Act.

[33] Ibid., p. 241. This Clause evolved into Article 21 of the Constitution, which perhaps is the most vital among the Fundamental Rights insofar as its scope is concerned. Incidentally, C. Rajagopalachari suggested, in the course of the debate in the Advisory Committee, that the entire clause be deleted. In his own words: "The idea is that these and similar clauses have been taken from countries which made laws at a time when they had no problems whatsoever. What is the good of our copying them?" he wondered! (See ibid., p. 240)

[34] Ibid., p. 247.

[35] Ibid., p. 273. The relevant portion being Section 299 (2) of the Government of India Act, 1935, read as follows:

> Neither the Federal nor a Provincial Legislature shall have power to make any law authorizing the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, it is to be determined.

It was B. R. Ambedkar who made out the fine distinction in this regard and stressed that *just compensation* was perfectly in order as long as the Article also distinguished between acquisition of property for a limited government purpose and acquisition of property for redistribution of ownership among the general public. The point he made was that *just compensation* was in order as long as it was meant for acquisition of property for use by the government; and hence suggested replacing *public purpose* with *government purpose*.[36] Govind Ballabh Pant concurred with this view and went further to stress that the Article be drafted in such a manner to provide the payment of compensation for property acquired for a social purpose must be left to be decided by the government; Pant's demand was that acquisition without compensation must be allowed under the Constitution as long as it was for a social purpose.

The fact is that the debate in the Advisory Committee saw the emergence of a fine distinction between the acquisition of property for use by the government, for such purposes as for constructing a post office or a police station, as explained by Ambedkar, and acquisition of property for redistribution of wealth in an equitable manner—social purpose in other words—as distinct from public purpose. And some of those who brought this distinction to the fore also made out a case for *just compensation* for property acquired for a public purpose, while in the case of social purpose the predominant view was that the Article shall not prohibit acquisition without compensation.

In the end, the Advisory Committee resolved to delete *just* and leave compensation undefined.[37] Govind Ballabh Pant pressed for a vote on an amendment that *public use* be replaced with *governmental purpose* in the Advisory Committee; the amendment was defeated by a margin of two votes[38] in the committee, and thus there was no change made insofar as defining what public purpose meant or

[36] Ibid., p. 274.
[37] Ibid., p. 276.
[38] Ibid., p. 291.

placing on record the fine distinction between public purpose and social purpose.

Compensation: Just or Otherwise?

The Committee did not pursue the debate as to whether such compensation paid or determined was open to challenge before the law courts at that stage. The Advisory Committee completed the debate on April 25, 1947, and left it to its Chairman, Sardar Vallabhai Patel, to take the draft, as amended, to the Constituent Assembly. On May 2, 1947, within a week after the Advisory Committee concluded the debate on Fundamental Rights, Sardar Patel moved Article 19 (which was Article 26 of the draft in the Advisory Committee, and this would become Article 31 of the Constitution as adopted on November 26, 1949) which read as follows:

> No property, movable or immovable, of any person or corporation including any interest in any commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of compensation for the property taken or acquired and specified the principles on which and the manner in which the compensation is to be determined.[39]

Raja Jagannath Baksh Singh, an independent member of the Assembly from the United Provinces, sought an amendment to the Article by which the compensation was qualified as *just* and reasoned his case on the basis of the Fifth Amendment to the US Constitution.[40] And so did Rai Bahadur Shyamanandan Sahaya, an independent member from Bihar. He relied on the German Constitution to argue that inserting *just* before compensation would reflect the spirit of the discussion in the Subcommittee on Fundamental Rights. Sahaya then concluded his arguments with the following words:

> If I may submit, Sir, the right to private property and the protection of private property are the acceptance of the principle of right over

[39] CAD, Vol. 3, p. 511.
[40] Ibid., pp. 511–512.

> might. You may chose to do away with it if you like, but we shall then all slowly drift towards jungle laws rather than good laws to keep society together.[41]

The debate, though very brief, also witnessed sharp arguments from the other end of the spectrum. Ajit Prasad Jain, Congress member of the Assembly from the United Provinces, led the charge against the very provision for compensation as given in the Article as introduced by Patel, as well as against the amendment moved by Raja Jagannath Baksh Singh seeking *just* compensation. Relying on the experience of the Congress provincial government in the United Provinces and the working of Section 299 of the Government of India Act, 1935 (which is what determined the then provincial government's resolve to abolish zamindaris), Ajit Prasad Jain held that there was ample evidence to show that such attempts were indeed frustrating because compensation was indeed interpreted as full compensation and also because compensation thus determined by the legislature was justiciable. Another argument against compensation to zamindars whose property was acquired was that the zamindaris were, in fact, a reward to those who held the land in return for helping the British by acts of treachery during the First War of Independence, in1857. Stressing that the Article be amended substantially to allow acquisition for social purposes without compensation or at best a nominal compensation, the Congress member held as follows:

> This clause, if accepted as it stands, will stand in the way of large scale social and economic reforms. It will cover all the cases where property is being acquired for social and economic improvements. It is none of my intentions that the state should act as a robber or a bandit and arbitrarily seize properties of the people, but measures of social reforms stand on quite a different level…. Fundamental Rights in my opinion are embodied in the Constitution with a view to protect the weak and the helpless. The present clause will have just the contrary effect. It will protect the microscopic minority of propertied classes and deny rights of social justice to the masses….[42]

[41] Ibid., pp. 519–520.
[42] Ibid., pp. 514–515.

There were others who held out against providing for compensation as a matter of right when it came to acquisition of property, particularly land, from the zamindars. The dominant spirit or the trend (as evident from the speeches made in the Assembly on May 2, 1947) was that compensation equivalent or even more was to be provided in the law where property was acquired for governmental use, and nominal or no compensation for property acquired for social ends. In a sense, it was clear that the Advisory Committee reflected the mood of the Constituent Assembly in this regard.

It is also evident that the predominant view in the Constituent Assembly was that the zamindaris and other systems of landholding in the country needed to be abolished and that Article 19 (as it was introduced by Sardar Patel and based on the agreement in the Advisory Committee) was bound to come in the way of such socioeconomic reforms, as abolition of zamindaris that the INC had promised in its election manifesto in 1945. The debate also witnessed points being raised against the national capitalists and their role, specifically during the war years and the massive profits they amassed during the war. Phool Singh, another Congress member from the United Provinces held that Article 19, in its form, will make nationalization of industry very difficult, if not impossible.[43]

Sardar Patel's reply to the debate, after the Article was accepted by the Assembly, seemed to reflect some of the concerns and skirted some others. Patel made it clear that Article 19 was meant not merely to facilitate the abolition of the zamindaris but was intended for a variety of other causes, and recorded that the debate had proceeded on an understanding that it was meant only to achieve zamindari abolition.

He said:

> Land will be required for many public purposes, not only and but so many other things may have to be acquired. And the state will acquire them after paying compensation and not expropriate them. That is the real meaning of the clause. But the Zamindars

[43] Ibid., p. 522.

> or some of their representatives thought that their interest must be safeguarded by moving an amendment or by making a speech here. But they are not going to safeguard these interests in this way. They must recognize the times and move with the times. This clause here will not become the law tomorrow or the day after; it will take at least a year more, and before that, most of the zamindaris will be liquidated. Even under the present acts or laws in the different provinces legislation is being brought in to liquidate zamindaris either by paying just compensation or adequate compensation or whatever the legislatures there think fit. Therefore, it is wrong to think that this clause is intended really for them. It is not so. The process of acquisition is already there and the legislatures are already taking steps to liquidate the zamindaris….[44]

With this, the Article along with all others were conveyed to the constitutional adviser, B. N. Rau, for preparation of the first draft of the Constitution. That was made available in October 1947; this draft came to be referred to as the basic document in all subsequent discussions in the Constituent Assembly, until the adoption of the Constitution on November 26, 1949. The two relevant Articles involving the Right to Property were as follows:

- 15(e) the right of every citizen to reside and settle in any part of the territories of the Federation, to acquire, hold and dispose of property and to practice any profession or to carry on any occupation, trade or business.[45]
- 25(1) No person shall be deprived of his property save by authority of law.

  25(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition unless the law provides for the payment of compensation for the property taken possession of or

[44] Ibid., p. 522.

[45] Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 2), p. 9.

> acquired and either fixes the amount of the compensation or specifies the principles on which and the manner in which the compensation is to be determined.[46]

The constitutional adviser also appended his own notes, along with the Draft Constitution, with comments and further recommendations on specific clauses. It is interesting to note here that the draft submitted at this stage listed out the Fundamental Rights and the Directive Principles of State Policy in one long chapter, consisting of Clauses 8 to 41; they were, however, sub classified as justiciable and nonjusticiable. Clause 28 (Article 32 as it stands today) dealt with the right to move the Supreme Court for the enforcement of a Fundamental Right, and pointing this out, in particular, the constitutional adviser went on to say the following:

> There is here a danger which ought to be pointed out. It may occasionally be necessary for the state for the proper discharge of one of its fundamental duties, e.g., the duty prescribed in clause 39 (to raise the standard of living and to improve public health), to invade private rights. In other words, there may be a conflict between the Directive Principles of State Policy and one of the rights or freedoms of the individual guaranteed in the fundamental rights. The latter, being justiciable under the Constitution, will in effect prevail over the former, which are not justiciable. That is to say, the private right may over-ride the public wealth….[47]

The constitutional adviser suggested thereafter that a clause be added to the Constitution to take care of this eventuality. He said:

> It is therefore a matter requiring careful consideration whether the Constitution might not expressly provide that no law made and no action taken by the state in the discharge of its duties under Chapter III of Part III (which deals with directive principles of state policy) shall be invalid merely for reason of its contravening the provisions of Chapter II of the same Part (which deals with fundamental rights).[48]

[46] Ibid., p. 11.
[47] Ibid., p. 199.
[48] Ibid.

Thereafter, the recommendation added that Clause 9(2) of the draft needed consequential modification.[49]

The Drafting Committee and Property Rights

The first draft, by B. N. Rau, along with his notes, was left to be scrutinized by a committee of the Constituent Assembly. The seven-member committee came into existence on August 29, 1947, and was authorized by the Assembly to revise the draft as and where it was considered necessary. On the following day, on August 30, 1947, the Committee elected B. R. Ambedkar as its Chairman.[50] The Drafting Committee, in its meeting on November 1, 1947, decided to reject the suggestions, by the constitutional adviser, regarding a new clause to save welfare legislations from being held unconstitutional on the ground that it infringed upon the Fundamental Right to property. The Committee decided to place the clause under the caption *Right to Property* rather than leaving it as a *Miscellaneous Right*, as it was from the time it appeared in the draft.[51]

[49] Clause 9 (2) would become Article 13 (2) of the Constitution. It limits Parliament's power to legislate by laying down that no law shall be enacted that infringes or restricts the rights guaranteed under Part III of the Constitution. It is interesting to note here that the Supreme Court's decision of holding constitutional amendments to protect land reform laws in Punjab as unconstitutional in the Golaknath Case was based on an interpretation of Article 13 (2), in the lines as foreseen by the constitutional adviser in his notes.

[50] Apart from B. R. Ambedkar, the other members of the committee were: Alladi Krishnaswamy Ayyar, N. Gopalswami Ayyangar, K. M. Munshi, Mohammad Saadulla, B. L. Mitter, and D. P. Khaitan. After the death of Khaitan, T. T. Krishnamachari was coopted into the committee in that place on February 5, 1948.

[51] Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 3), p. 330.

However, when the Committee gave its own draft on February 21, 1948, we find a proviso added to Article 24. It read:

> Nothing in Clause (2) of this Article shall affect:
> (a) the provisions of any existing law, or
> (b) the provisions of any law which the state may hereafter make for the purpose of imposing or levying any tax or for the promotion of public health or the prevention of danger to life or property.[52]

There is no explanation from the records available to the force behind the addition of Clause (3) (a). However, it is possible to presume that the addition of the proviso at that time was the outcome of definite and concrete moves in the various provincial legislatures to pass zamindari abolition laws. The fact is that Sardar Patel had spoken about this in the Constituent Assembly on May 2, 1947. Similarly, Govind Ballabh Pant had thrown positive indications in course of the discussion in the Advisory Committee of the Constituent Assembly when the question of property rights was being discussed. As for Clause (3) (b), the proviso was meant to ensure that municipal and administrative Acts, such as demolishing old buildings or cutting down and uprooting trees that are pest infected are not stalled by judicial injunctions.[53]

The next stage in the making of the Constitution was when the Drafting Committee met, in October 1948, to review and react to the comments and the suggestions from a cross section of the society, including the various provincial legislatures and the ministries in the central government, on the draft constitution, submitted on February 21, 1948. There were seven amendments suggested at that stage insofar as Article 24 was concerned. Two of them (by Pattabhi Sitaramayya and some others) pertained to seeking clarifications, and also involving some punctuation marks in the draft provisions. Three other suggestions involved amendments to provide

[52] Ibid., p. 526.

[53] Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 4), p. 48.

acquisition of property, for the purpose of larger social good, without compensation. One of the three among them was by Jayaprakash Narayan, suggesting the addition of a new Article 24-A to the draft. The Drafting Committee rejected them straightaway.

The two other amendments were indeed significant. One from the Ministry of Works, Mines and Power sought that *compensation* in Article 24 (2) be qualified as being *equitable*, or *fair*, or *just*. A similar amendment was suggested by the Ministry of Industry and Supply; it sought the word *reasonable* to be inserted before *compensation* in Clause (2) of Article 24. The Ministry's note also explained the need for such an insertion, pointing out to the government's Industrial Policy Resolution of April 16, 1948, which laid out that in the event of acquisition, "the fundamental rights guaranteed by the Constitution will be observed and compensation will be awarded on a fair and equitable basis."[54] The Drafting Committee rejected these suggestions, but then the reason given was indeed significant.

The note read:

> It is hardly necessary to insert the word 'equitable' or the word 'just' or the word 'reasonable' before the word 'compensation' … The noun 'compensation' standing by itself carries the idea of an equivalent. … even if the adjective 'equitable', 'just' or 'reasonable' is not used the natural import of the language of the existing clause (2) of article 24 would be that compensation should be equivalent of the property taken possession of or acquired….[55]

[54] Ibid., p. 48. It may be noted that this Resolution was held as a basis, by those representing the zamindar class in the Constituent Assembly, to demand that compensation must be qualified as *just* in Clause 2 of the Article. See CAD, Vol. IX, pp. 1192–1313.

[55] Ibid., p. 48. The Drafting Committee clarified that *compensation* was used in the Clause in the same meaning as it was held to be in the American Constitution, and settled in the *Monongahele Navigation Company v. United States* Case. The Committee also pointed out to the proceedings in the Constituent Assembly on May 2, 1947, when the draft from the Advisory Committee was introduced by Sardar Patel, and the discussion thereof to clarify that *compensation* as used there was to mean fair, or just, or reasonable, and cited the discussion

The appearance of finality at this stage was, however, not real. The issues that were raised in regard to the Right to Property and the question whether acquisition of property without compensation must be provided for in the Article continued to be raised in various fora within and outside the Constituent Assembly, even after the Drafting Committee completed the formal process of consultations, in October 1948. And this became evident when the Constituent Assembly was faced with taking up Article 24 of the Draft Constitution for approval on December 9, 1948. When the matter was called upon for discussion by the Chairman that day, T. T. Krishnamachari (who had joined the Drafting Committee filling up the vacancy caused by the death of D. P. Khaitan), sought that the Article be taken up later since the Drafting Committee had yet to arrive at a consensus and "considering various amendments to it so as to arrive at a compromise…." B. R. Ambedkar too concurred, and the House decided to take up Article 24 at a later date.[56]

In specific terms, the debate within and outside the Constituent Assembly on this issue (Article 24) revolved around the definition of compensation and issues involved in the context of the land reforms legislations in the various provinces. Contrary to what Sardar Patel declared—that zamindaris would have been abolished in less than a year, and hence even before the Constitution guaranteeing the Right to Property as a Fundamental Right was adopted—did not happen. The process of making such legislations in the provinces was taking time. This led the chief ministers, in general and Govind Ballabh Pant in particular, to press hard for changes in the Draft Article that will ensure that land reforms legislations are intra vires of the Constitution. The

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thereof and the subsequent withdrawal of an amendment sought as evidence to this. See *Keshavananda Bharati v. State of Kerala*. See AIR-1973-SC-1461 and Rao (Ed.), *The Framing of India's Constitution–Select Documents* (Vol. 2), p. 166.

[56] CAD, Vol. VII, p. 930. The discussion lasted only for a few minutes. Soon after the matter was called, T. T. Krishnamachari rose to place on record that the Committee's position, and the Assembly resolved to postpone the taking up of Article 24 to a future date.

other issue was that compensation, even if provided in the constitutional provision, in their view, had to be declared as nonjusticiable.

The fact that the differences were far too serious and substantial, and that they involved the terms and provisions of the land reforms laws that the provinces were in the process of enacting, became evident at the conference convened by the Drafting Committee with the premiers of the provinces, the Indian states, and the representatives of the central government between July 21 and 24, 1949. The discussion on Article 24 of the Draft Constitution began with a suggestion by B. R. Ambedkar, in his capacity as the Chairman of the Committee, that there be an entry in the legislative list empowering the Parliament to legislate on acquisition of property and on the terms of such acquisition. This was based on the Australian Constitution. Alladi Krishnaswamy Ayyar then pointed out that such an entry will not be a bar on the courts from interfering with the terms of the compensation, as to whether it was just or unjust.

Govind Ballabh Pant then suggested an amendment by way of adding two clauses as follows:

- (2) (a) The payment of compensation as referred to in Clause (2) of this Article may be in cash or in securities or in bonds or partly in cash and partly in securities.
- (2) (b) No law making provision as aforesaid shall be called in question in any court.

Alladi Krishnaswamy Ayyar's reaction to this was equally a matter of fact: "If the amendment proposed by the Premier of United Provinces was accepted, then Article 24 might as well be omitted from the list of Fundamental Rights."[57] The discussion did not lead to any conclusion and the matter

[57] Rao (Ed.), *The framing of India's Constitution: Select documents* (Vol. 4), p. 697. Another amendment suggested at the conference was by N. Gopalswami Ayyangar that Article 24 be rephrased should be read as: "No person shall be deprived of his property, save by authority of law or without compensation, the amount and form of which shall be in

was left, once again, to the Drafting Committee to settle. And there is no evidence to suggest that the Drafting Committee succeeded to resolve the dispute; as a matter of fact, the committee did not make any attempt to settle the dispute. As was stated by T. T. Krishnamachari, in the Constituent Assembly on December 9, 1948, the truth was that a resolution of the conflict was possible only by way of a compromise. And hence it was, in fact, left to the political leadership of the independent nation to decide on the terms of the compromise.

Nehru's Intervention

Jawaharlal Nehru stepped into the scene at this stage, and the terms of the compromise were revealed on the floor of the Constituent Assembly on September 10, 1949. The prime minister spelt out the terms by way of proposing an amendment that replaced Article 24, as it existed until then, with a substantially new Article.

It read:

> That for article 24, the following article be substituted
>
> 24 (1) No person shall be deprived of his property save by authority of law.
>
> (2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking shall be taken possession of or acquired for public purposes

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accordance with law." This was also rejected by K. M. Munshi's holding that the contention was on zamindari property, and that the consensus could be to exempt zamindari property alone from the operation of Article 24; in other words, to provide for acquisition of zamindaris without compensation and all other property only with compensation. The constitutional adviser also proposed adding a new clause to Article 24:

> The amount of compensation which is to be paid or the principles on which and the manner in which compensation is to be determined as fixed or specified in any such law as aforesaid shall, if the law provides, be final and shall not be called in question in any court.

under any law authorizing the taking of such possession or such acquisition unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined.

(3) No such law as is referred to in clause (2), of this article made by the Legislature of a State shall have effect unless such law having been reserved for the consideration of the President has received his assent.

(4) If any Bill pending before the Legislature of a State at the commencement of this Constitution has, after it has been passed by such Legislature, received the assent of the President, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article.

(5) Save as provided in the next succeeding clause, nothing in clause (2) of this article shall affect

(a) the provisions of any existing law, or,
(b) the provisions of any law which the state may hereafter make for the purpose of imposing or levying any tax or penalty or for the Promotion of Public health, or the prevention of danger to life or property.

(6) Any law of a State enacted, not more than one year before the commencement of this Constitution, may within three months from such commencement be submitted by the Governor of the State to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or sub-section (2) of section 299 of the Government of India Act, 1935.[58]

Nehru began his speech by placing on record that no other Clause or Article of the Draft Constitution had evoked as much debate as this one on the Right to Property, and that it was only natural given the two distinct approaches to property: the individual right to property and the community's interest in that property or the community's right. He then qualified that the amendment he had proposed tried to remove or to avoid the conflict between the two approaches, and even took into consideration fully both the rights—the right of the

[58] CAD, Vol. IX, pp. 1193–1194.

individual and the right of the community. The prime minister clarified on the dispute over the need for compensation, first making it clear that compensation was going to be an integral part of all acquisition processes; he was at odds to those who now represented the Socialist Party in the Constituent Assembly.[59] The prime minister also clarified that such compensation will be fair and equitable. He, however, sought to define equity in the following words:

> …when we consider the equity of it we have always to remember that the equity does not apply only to the individual but to the community. No individual can override ultimately the rights of the community at large. No community should injure or invade the rights of the individual unless it be, for the most urgent and important reason.[60]

The more important, rather the most important aspect that Nehru sought to clarify was whether Article 24 of the Constitution, as according to his proposed amendment, would let judicial scrutiny of the quantum of the compensation. On this, Nehru said:

> How is it going to balance all this? You may balance it to some extent by legal means, but ultimately the balancing authority can only be the sovereign legislature of the country which can keep before it all the various factors—all the public, political and other factors—that come into the picture…. Within limits no judge and no supreme court can make itself a third chamber. No supreme court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community.[61]

The prime minister's speech was indeed a political discourse and, in that sense, distinct from the debate that was witnessed

[59] Led by K. T. Shah, H. V. Kamath, and Damodhar Sheth, all stalwarts of the CSP until 1948, the socialist block in the Constituent Assembly had moved several amendments by that time to the effect that Article 24 provided for acquisition of property, whether it was land, industry, or financial institutions, without compensation. All those amendments were defeated in the Assembly.

[60] CAD, Vol. IX, p. 1194.

[61] Ibid., pp. 1195–1197.

hitherto on the question of the Right to Property in the Subcommittee on Fundamental Rights or in the Advisory Committee. Without mincing words on the issue of land reforms, Nehru said:

> It has been not today's policy, but the old policy of the National Congress laid down years ago that the Zamindari institution in India, that is the big estate system must be abolished. So far as we are concerned, we, who are connected with the Congress, shall give effect to that pledge naturally completely, one hundred percent and no legal subtlety and no change is going to come in our way. That is quite clear. We will honour our pledges.[62]

The significant aspect is that the amendment proposed by Nehru was opposed by the Muslim League representatives in the Constituent Assembly, the independent members representing the landed gentry, as well as the socialists; but then, their opposition was not for the same reasons as that of the landed gentry and the League members. While the League members and the landlords opposed the amendment for reasons that the amendments were too radical, the socialist representatives opposed it for the reason that it was not radical enough.

Shyamanandan Sahaya, representing the landed gentry, for instance, described the amendment as one sanctioning the concept of might is right, and concluded his arguments against the amendment citing Lord Byron's refrain that "my only solace is that our tyrants are after all our own countrymen."[63] At the other end of the spectrum was Damodar Swaroop Sheth, an important leader of the socialist block in the Assembly declaring that "[t]his Article 24, which is now under discussion, I am sure is soon going to be a Magna Carta in the hands of the capitalists of India…."[64] Similarly, H. V. Kamath, another socialist member opposed any role for the judiciary insofar as the compensation was concerned.

[62] Ibid., p. 1197.

[63] Ibid., p. 1283. The entire text of the long speech is interesting and reflects the attitude in a sense. See pp. 1276–1283.

[64] Ibid., p. 1201.

Kamath moved amendments to that effect and wondered as to "whether this doctrine of protection of the few, should be the foundation of the state."[65]

In the end, given the political profile of the Constituent Assembly, Nehru's amendment was adopted and all others were defeated. The high point of all that was the speech by Alladi Krishnaswamy Ayyar, who had consistently defended the Article in all its older versions and held out against any dilution of the judiciary's right to interfere in the matters of compensation, in total support of Nehru's amendment. He said:

> Mr. President, Sir, in supporting article 24 as moved by the Honourable the Prime Minister, I crave the indulgence of the House to say a few words if only because in regard to some of the points covered by the article, I have not always seen eye to eye with the Honourable Prime Minister and I have now without any mental reservation accepted his point of view.[66]

Similarly, K. M. Munshi, who had also contributed his bit to keeping the Article in such a way that it curtailed the powers of the legislature in determining compensation in the various committees of the Assembly, now ended up replying to the debate in the Assembly on behalf of Prime Minister Nehru. And he was far too sharp in his criticism of those who sought a larger and conclusive role for the judiciary in the process of acquisition of property.

K. M. Munshi said:

> If you go to a judicial review, I will tell you what will happen. By these three legislations, seven crores forty lakhs acres have been affected. Secondly, seven crores twenty lakhs of agriculturists, tillers of the soil are affected. If you take the number of zamindars who are to receive less than 16 years purchase which is always considered a liberal measure of compensation, there are thirteen thousand of them. If you take 12 years purchase, five thousand people are only affected as against seven crores and twenty lakhs of tillers. Do you want the rights of all these people should be hung up for six

[65] Ibid., p. 1213.
[66] Ibid., p. 1273.

> years so that the laborious process of litigation may proceed from the subordinate court to the district court, from the district court to the high court and so on, and that all these new adjustments which have come into being should be upset? We cannot afford to do that. It will mean a revolution. We cannot go back, only for the same of safeguarding the interests of some five thousand five hundred zamindars.[67]

The Amendments

Nehru's intervention in the debate by way of the amendment was indeed decisive. It changed the course of history in a sense. It is another matter that Article 31 (Article 24 became Article 31 as the Constitution was adopted by the Assembly on November 26, 1949) of the Constitution, as Jawaharlal Nehru desired, ended up being the hurdle in the path of land reforms legislations in the various provinces. The first stone was thrown by the Patna High Court when it struck down the Bihar Land Reforms Act, 1950, on grounds that it violated provisions of Article 31 of the Constitution. This judgment was taken on appeal before the Supreme Court. At the same time, the Allahabad High Court and the Madhya Pradesh High Court upheld similar land reforms legislations in the provinces, once again based upon their own interpretation of Article 31 of the Constitution. These were taken on appeal to the Supreme Court by the landlords. Even while the appeal was pending before the Supreme Court, the Nehruvian regime decided to intervene again. Thus, came up the Constitution (First Amendment) Bill, 1951. The rulers of independent India resorted to Article 379 of the Constitution to amend the Constitution. By this, the Constituent Assembly itself amended the Constitution that it had adopted on November 26, 1949. Article 379 of the Constitution empowered the Constituent Assembly to perform the tasks of the Parliament until such time the Parliament came into place.

[67] Ibid., p. 1304.

The Constitution (First Amendment) Act, 1951, brought about far-reaching changes and effected amendments in a host of Articles. Insofar as Article 31 and the Right to Property were concerned, the amendment added Articles 31-A and 31-B to the Constitution. Article 31-A prohibited the scope for challenging legislations for acquisition of estates, corporations, and such other properties from being challenged on grounds that they infringed upon Articles 14 or 19 of the Constitution. Article 31-B provided for the addition of the Ninth Schedule to the Constitution and that all legislations by the states will be immune from being challenged in the courts for being inconsistent with any of the Fundamental Rights. The amendment was upheld as valid by the Supreme Court.[68] Thus, the land reforms legislations in the various states were protected from legal challenges.

The peace, however, did not last long. The Supreme Court struck down the West Bengal Land Development and Planning Act, 1948, on grounds that the principles for compensation of property acquired in that law were such that it was ultra vires of the Constitution.[69] The substantial point raised by the apex court in this case was that compensation meant *just equivalent* or *full indemnification*. The same principle was followed by the Supreme Court in two other cases too.[70] The Nehruvian regime responded to this by way of the Constitution (Fourth Amendment) Act, 1955. By this, Article 31 was amended in a manner to include Article 31(2-A) that laid down that where property was acquired for redistribution, it

[68] *Shankari Prasad Singh Deo and others v. Union of India* (AIR-1952-SC-0-458).

[69] *State of West Bengal v. Mrs. Bela Banerjee and others* (AIR-1954-SC-0-170). The West Bengal law prescribed that the market value of the land as on December 31, 1946 will be the basis for payment of compensation, and not the market price on the date of acquisition. This was held ultra vires by the apex court.

[70] *State of West Bengal v. Subodh Gopal Bose* (AIR-1954-SC-92) and *Dwarakadass Shrinivas v. Sholapur Spinning and Weaving Company Ltd* (AIR-1954-SC-119).

shall not be construed as acquisition. The more significant amendment was to Article 31(2). The clause was amended to include the following sentence: "[A]nd no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate."[71]

The Supreme Court threw the spanner again while deciding the law in Vajravelu Mudaliar v. the Special Deputy Collector for Land Acquisition,[72] where it declared the Land Acquisition (Madras Amendment) Act, 1961, as invalid on grounds that Article 31 applied only to acquisition for agrarian reforms and that acquisition for slum clearance projects did not satisfy the requirements. In addition, the apex court also asserted its right to review the compensation paid in such acquisitions. The apex court continued to hold this in other cases, including, while deciding the Bank Nationalization Case.[73] The Supreme Court, by its judgment in this case, took the Clock back to where it stood while deciding the Bela Banerjee case. The Indira Gandhi regime pursued the path that Nehru took in such situations and brought the Constitution (Twenty-fifth Amendment) Act, 1972, by which Article 31-C was inserted into the Constitution. The new clause laid down that all laws with an express declaration that it is intended to give effect to Articles 39 (b) and (c) of the Constitution (Directive Principles) and that it shall not be called into the courts on grounds which it infringed upon the Fundamental Rights guaranteed by the Constitution.

The Supreme Court struck down this part of the Constitution (Twenty-fifth Amendment) Act in the Keshavananda Bharti Case,[74] in 1973, which also laid down the basic structure

[71] Similar suggestions were made by the Constitutional Adviser B. N. Rau at the time of the drafting of the Constitution, but were rejected by the members of the Drafting Committee. A similar amendment was suggested by Govind Ballabh Pant too, which was rejected by the Committee.

[72] *Vajravelu Mudaliar P. v. Special Deputy Collector of Land Acquisition, Madras* (AIR-1965-SC-0-1017).

[73] *R.C. Cooper and others v. Union of India* (AIR-1970-SC-564).

[74] *Keshavananda Bharati v. State of Kerala* (AIR-1973-SC-1461).

doctrine. It is important to state here that the court also laid down that the Right to Property did not constitute the basic structure of the Constitution. And all this laid the path to the Constitution (Forty-fourth Amendment) Act, 1979, by which Article 31 was deleted and property rights were placed as a mere constitutional right as in Article 300-A. We shall discuss these issues in elaborate detail in Chapters 6 and 7 of this book.

3

Socialism as State Policy: A Brief Discussion on the Debate on Directive Principles in the Constituent Assembly

The Karachi Resolution, in which the idea of an egalitarian socioeconomic order was seen as integral to political democracy, was also categorical in placing the onus on the independent Indian state. The only aspect in which the Indian National Congress (INC) showed ambiguity was on the question of ownership of agricultural land. We have seen in the previous chapters that the leadership of the National Movement formulated a clear position on this aspect around the time when elections were held to the provincial legislatures and the Central Legislative Assembly in 1946. The INC, in its manifesto to the elections, committed to the abolition of zamindaris and other forms of landlordism in categorical terms.[1] This, in turn, led the INC, in general, and Jawaharlal Nehru, in particular, to

[1] See Sitaramayya, *The history of the Indian National Congress* (Vol. II), Appendix I, pp. i–v.

push for substantial amendments to the provisions, involving property rights in the Draft Constitution. This aspect has been discussed in elaborate detail in Chapter 2. There was, however, a retreat, so to say in some other aspects of the egalitarian agenda that were integral to the Karachi Resolution. The comparative chart as provided in Appendix 1 will help locate this. However, some other provisions that the Karachi Session listed as Fundamental Rights, to which the INC had committed the future government of independent India, ended up in the Directive Principles of State Policy in the draft constitution. These pertained to those aspects of economic democracy that the Karachi Resolution raised in 1931, and ones that determined the dynamics of the INC and the struggle for independence in the two decades since then.[2]

The distinction between the Fundamental Rights and the Directive Principles of State Policy—the latter being nonenforceable—and the desirability of distinguishing rights on that basis was indeed debated in the Constituent Assembly. A brief discussion of the debate, intended in this chapter, will help place things in perspective in the context of the concerns of this book. The point is that this distinction, borrowed from the Irish Constitution, and the fact that the idea of socialism is in fact spelt out with utmost clarity in Part IV of the Constitution (Directive Principles of State Policy) renders a brief discussion of this nature, inevitable for the concerns of this book.

There were four separate notes[3] before the Constituent Assembly between the time when the Objectives Resolution was passed on December 13, 1946 and the draft constitution

[2] See Appendix 3 for a comparative picture.

[3] The most important of these notes was prepared by the Constitutional Adviser B. N. Rau. Another note was prepared by K. T. Shah. Subsequently, the Constituent Assembly constituted a host of subcommittees, and the Fundamental Rights Subcommittee began its work on the Constitution. In due course, the subcommittee was to deal with a few other notes too. They were prepared by K. M. Munshi, Harnam Singh, and B. R. Ambedkar.

that the committee, headed by B. R. Ambedkar, presented before the Assembly on November 4, 1949. Among them, only one of the notes (presented by the Constitutional Adviser, B. N. Rau) came out with the scheme to divide the Fundamental Rights into two: one set of rights to be made legally enforceable and the other was to be placed as rights, but not enforceable. Rau's note, stating the Irish Constitution as the basis, set out a distinct division of rights in terms of enforceable and nonenforceable. "It is useful" Rau stated in his note:

> to recognise a distinction between two broad classes of rights: there are certain rights which require positive action by the State and which can be guaranteed only so far as such action is practicable, while others merely require that the State shall abstain from prejudicial action.[4]

The Constitutional Adviser set out the following in specific terms as follows:

> Typical of the former is the right to work, which cannot be guaranteed further than by requiring the State, in the language of the Irish Constitution, 'to direct its policy towards securing that the citizens may, through their occupations, find the means of making reasonable provision for their domestic needs': Typical of the latter is the right which requires, in the language of the American Constitution, that 'the State shall not deprive any citizen of his liberty without due process of law.' It is obvious that rights of the first type are not normally either capable of, or suitable for, enforcement by legal action, while those of the second type may be so enforced. Both classes of rights are mentioned together under the head of 'Fundamental Rights' in certain Constitutions, e.g., in the Constitution of the USSR and in the Weimar Constitution of the German Reich, possibly because neither was intended to be enforced by legal action. But the distinction is clearly recognised (though not uniformly pursued) in the Irish Constitution, which deals first with 'Fundamental Rights' strictly so called, and then with 'Directive Principles of Social Policy', the latter being expressly excluded from the purview of the courts.[5]

[4] Notes on Fundamental Rights by B. N. Rau, September 2, 1946. See Rao (Vol. 2), *The framing of India's Constitution: Select documents*, p. 33.

[5] Ibid., p. 33.

Shah was in favor of all the rights being enforceable.[6]

This aspect of the draft came to be debated in the Fundamental Rights Subcommittee that the assembly had set up on January 24, 1947. In addition to the notes by B. N. Rau and K. T. Shah, the subcommittee had before it specific notes on Fundamental Rights by Alladi Krishnaswamy Ayyar, K. M. Munshi, Harnam Singh, and B. R. Ambedkar. Among them, it is of interest to note that both Munshi and Ambedkar spoke against distinguishing the rights as enforceable and nonenforceable. Munshi's note, for instance, recalled the Nehru Committee Report, the Karachi Resolution, and the Sapru Committee Report as the basis for enlisting Fundamental Rights, and his note contained all those rights that the INC had committed itself to enforce in Karachi.[7] Ambedkar's note went miles ahead in this direction to state that all economic activities, such as heavy industries, insurance, and agriculture, shall be owned and run by the state. And this prescription figured as part of the Fundamental Rights in the Constitution that Ambedkar proposed before the Fundamental Rights Subcommittee. This socialist model, in Ambedkar's draft, was to be enforceable by way of the writ jurisdiction.[8]

Explaining the need to render the social, political, and economic rights enforceable, Ambedkar said:

> So far the plan has been considered purely as a means of safeguarding individual liberty. But there is also another aspect of the plan which is worthy of note. It is an attempt to establish State Socialism without abrogating parliamentary democracy and without leaving its establishment to the will of a parliamentary democracy.... Those who want the economic structure of society to be modelled on State Socialism must realise that they cannot leave the fulfilment of so fundamental a purpose to the exigencies of ordinary law

[6] A note on Fundamental Rights by K. T. Shah, December 23, 1946. See ibid., pp. 36–55.

[7] See Munshi's note and draft Articles on Fundamental Rights, March 17, 1947, in ibid., pp. 69–80.

[8] Ambedkar's memorandum and draft Articles on the rights of states and minorities, March 24, 1947, in ibid., pp. 84–114.

> which simple majorities—whose political fortunes are never determined by rational causes—have a right to make and unmake.... The way out seems to be to retain Parliamentary democracy and to prescribe State Socialism by the law of the Constitution so that it will be beyond the reach of a Parliamentary majority to suspend, amend or abrogate it. It is only by this that one can achieve the triple object, namely, to establish socialism, retain Parliamentary democracy and avoid dictatorship.[9]

It is clear that Ambedkar's note was the closest to the Objective Resolution that the Constituent Assembly passed, and the speech that Jawaharlal Nehru made by way of commending the Resolution in the Assembly. In many ways, Ambedkar's proposal was even a bolder assertion for socialism than Nehru's in the Assembly.

Notwithstanding this, the Fundamental Rights Subcommittee, on March 29,1947, concluded discussions on the draft proposals and agreed to divide Fundamental Rights into two sections: enforceable and nonenforceable. Whatever was finalized was based on the note by Constitutional Adviser B. N. Rau. All the members of the Subcommittee, including K. M. Munshi and B. R. Ambedkar, agreed to distinguish rights as enforceable and otherwise. On that day, the Subcommittee agreed to separate Fundamental Rights from the Directive Principles of Social Policy. The Constitutional Adviser was authorized by the Subcommittee to present the draft of the revised Clauses, and the one that B. N. Rau presented on March 30, 1947 contained a categorical statement that "the application of these principles in legislation and administration shall be the care of the State and shall not be cognizable by any court."[10]

The draft report of the Subcommittee, presented on April 3, 1947, on Fundamental Rights was divided into two: Chapter I titled Justiciable Rights and Chapter II titled Non-Justiciable Rights. While Chapter I, in this case, would evolve with some changes as Part III (titled Fundamental Rights)

[9] Ibid., p. 101.

[10] Minutes of the meetings of the Sub-committee on Fundamental Rights, March 30, 1947. See ibid., p. 135.

in the Constitution as adopted on November 26, 1949, the Chapter II of the draft was reproduced, verbatim, as Part IV (titled Directive Principles of State Policy) in the Constitution of November 26, 1949.

Interestingly, K. T. Shah submitted his comments on the draft report to the Subcommittee on Fundamental Rights on April 10, 1947. He said:

> While appreciating the distinction drawn between 'justiciable' and 'non-justiciable' rights, I feel that owing to the very fact of making the distinction, the latter are likely to be treated as so many pious wishes, which can have no very great binding effect in daily life. There are, moreover, many so called non-justiciable rights, which today may not admit any judicial remedy for infringement, nor permit of immediate realisation that can be made justiciable; but if the community really so desires, this can be easily remedied. It is all a matter of the collective conscience and the degree of political consciousness we have attained to….
>
> I do not think, therefore, that some provision or arrangement should be made to impress upon the governments of the units as well as that of the Union, that in proportion as there are fundamental rights of citizens, there will be corresponding obligations upon the State which the latter cannot evade. The principles included in the so called non-justiciable rights are not mere 'directions' of policy for their general guidance; they must be regarded as objectives of national activity, which must be the endeavour of every unit as well as of the Union to give concrete effect to so that every citizen may enjoy the fruits in his daily life.[11]

The Subcommittee discussed this further in its meeting again, on April 14 and 15, 1947, and decided to take a vote on the different Clauses as were prepared. Thus, on April 15, 1947, Clause 35 was redrafted as follows:

> The principles of policy set forth in this chapter are intended for the guidance of the State. While these principles shall not be cognizable

[11] K. T. Shah's comments on the draft report, April 10, 1947. See ibid., pp. 153–157. Shah's comment, incidentally, also suggested amendments to the Clause on the Right to Property to exclude the application of Fundamental Right to property, such as, minerals, water, and other natural resources.

> by any court, they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State.[12]

This provision, as amended, though retaining a set of economic rights as nonjusticiable, was substantially different in its definition and scope from the way it stood in the draft submitted after the first round of discussion.[13] Apart from declaring these principles that dealt with economic justice as "fundamental in the governance of the country," the amendment by the Sub-committee also made out a case for its binding nature by way of stating that "their application in the making of laws shall be the duty of the State."

Along with the draft, as amended, that was presented to Sardar Patel's Committee (Advisory Committee on Fundamental Rights), on April 1, 1947, the notes of dissent submitted by members of the Fundamental Rights Subcommittee were also appended. K. T. Shah's dissenting note argued as follows:

> At the last sitting of our sub-committee, the heading of that part of our report which deals with non-justiciable rights, was changed into 'Fundamental principles of social policy.' This is an improvement, as far as it goes. But unless these 'Principles of social policy' are specifically made *obligations of the state to the citizen*, the apprehension felt by me will be more than realised. For these are not, as I view the matter, mere directions of policy. They are rather mandates of the community to its organised representative, the State, to be carried into effect at the earliest possible opportunity; and not to be played with as mere catchwords to delude or deceive. There should, therefore, be no such distinction; and the 'Principles of social policy' must be categorical injunctions, or obligations of government, to be given effect to as soon as possible.[14] (Ananth, emphasis added)

[12] Minutes of the meetings of the Subcommittee, April 14–15, 1947. See ibid., 163–169.

[13] The earlier draft said: "The principles of policy set forth in this chapter are intended for the general guidance of the State. The application of these principles in legislation and administration shall be the care of the State and shall not be cognizable in any court." See ibid., p. 142.

[14] Minutes of Dissent to the Report, April 17–20, 1947. See ibid., p. 192.

This aspect—the idea to present certain rights as fundamental, but non-justiciable—was one that could not be disposed of or settled within a fortnight. Evidence of this is available in the manner in which the Advisory Committee on Fundamental Rights, of which Vallabhai Patel was the Chairman, responded. The Advisory Committee took mere four days (between April 19, 1947, when the Fundamental Rights Subcommittee Report was presented before it, and April 23, 1947 when the Interim Report on Fundamental Rights was submitted to the President of the Constituent Assembly) to list out the justiciable rights to be enshrined in the Constitution.[15] As for the nonjusticiable rights, also addressed as *Fundamental Principles of Social Policy*, the Advisory Committee took longer to decide. It was only on August 25, 1947 that Vallabhai Patel, as Chairman of the Advisory Committee on Fundamental Rights, submitted his report to the President of the Constituent Assembly.[16] It may be noted here, in this context, that India by now was an independent nation, and Jawaharlal Nehru had delivered his *Tryst with Destiny* speech before the Constituent Assembly on August 14/15, 1947, where he had declared the determination to redeem the pledge *not wholly or in full measure, but very substantially*.

Patel's note, dated August 25, 1947, just 10 days after Nehru's famous speech, said: "We have come to the conclusion that, in addition to justiciable fundamental rights, the Constitution should include certain directives of State policy which, though not cognizable in any court of law, should be regarded as fundamental in the governance of the country."[17]

The provisions that were recommended as part of this category of rights were to be called the *Fundamental Principles of Governance* and began with a preamble. The preamble said:

> The principles of policy set forth in this part are intended for the guidance of the State. While these principles are not cognizable by

[15] Interim Report of the Advisory Committee on the subject of Fundamental Rights, April 23, 1947. See Rao (1967, Vol. 2, pp. 294–299).

[16] Supplementary report of the Advisory Committee on the subject of Fundamental Rights, August 25, 1947. See ibid., pp. 304–306.

[17] Ibid., p. 304.

> any court, they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State.[18]

Another fact that needs notice here is that the Advisory Committee, unlike the Subcommittee on Fundamental Rights, was constituted by the political leadership of the INC, and hence it is pertinent to conclude here that the decision to distinguish rights as justiciable and otherwise was taken by a cross section of the political leadership of the freedom movement and those outside that.[19] Interestingly, the Advisory Committee, in its wisdom, relegated the right of children between 6 and 14 years of age to free and compulsory education into the non-enforceable right. This commitment in the Karachi Resolution had remained as an enforceable right all along in the draft prepared by the Subcommittee on Fundamental Rights, and moved to that part containing the non-enforceable rights when the Advisory Committee gave its second interim report to the President of the Constituent Assembly on August 25, 1947.[20]

The next important stage in the evolution of the Constitution was the presentation of the Draft Constitution by

[18] Ibid., pp. 305–306.

[19] Headed by Vallabhai Patel, the other members of the Advisory Committee included, such persons as, Shyama Prasad Mukherjee (then representing the Hindu Maha Sabha), Jagjiwan Ram (then a leader of the All India Scheduled Caste Federation and a member of the Interim Cabinet), Maulana Abdul Kalam Azad, Govind Ballabh Pant, Purushotam Das Tandon, J. B. Kripalani, Gopinath Bordolai, K. M. Munshi, Thakur Das Bhargawa, and such others.

[20] It is of relevance to note here that this right was restored as belonging to the Fundamental Rights as late as on December 12, 2002, by way of the Constitution (Eighty-sixth) Amendment, Act, 2002. Article 45, by which free and compulsory education for children aged 6 and 14 years was a mere Directive Principle of State Policy to be achieved within a decade after the Constitution came into force, was accorded the status of a Fundamental Right, by way of inserting Article 21-A of the Constitution. This happened because of the Supreme Court's intervention in the *J. P. Unnikrishnan v. State of Andhra Pradesh* Case (AIR-1993-SC-2178). We shall discuss this in detail in Chapter 9 of this book.

B. R. Ambedkar, in his capacity as Chairman of the Drafting Committee.[21] The Drafting Committee, in accordance with the terms of the Constituent Assembly's resolution, had a clear brief: To prepare a draft constitution internalizing the spirit of the discussions in the Assembly and improve upon the draft that was prepared by Constitutional Adviser B. N. Rau. This brief was both limited and open–ended at the same time. In other words, the Drafting Committee's members were expected to reflect the sense of the House, and in this regard the Objectives Resolution passed by the Assembly, in December 1946, was to serve as the basis for reworking on the draft prepared by B. N. Rau.

The Drafting Committee elected B. R. Ambedkar as its Chairman on August 30, 1947, and began work from October 27, 1947. Over a period of 42 days since then, the Committee discussed the draft, Clause by Clause, and submitted the Draft Constitution to the President of the Constituent Assembly on February 21, 1948.[22] Of relevance to the concerns of this chapter is that the Drafting Committee, without much ado,

[21] The Drafting Committee was constituted by way of a resolution in the Constituent Assembly, on August 29, 1947, with a specific brief to "scrutinise and suggest necessary amendment to the draft constitution of India prepared in the office of the assembly on the basis of the decisions taken in the assembly." The members, thus, appointed were Alladi Krishnaswamy Ayyar, N. Gopalaswami Ayyangar, B. R. Ambedkar, K. M. Munshi, Saiyid Mohammed Saadulla, B. L. Mitter, and D. P. Khaitan. (See CAD, Vol. V, pp. 293–294). Mitter ceased to be a member of the Assembly soon after the session, and Khaitan died a few months later and his place was then taken by T. T. Krishnamachari. It may be noted that among those in the Drafting Committee, only K. M. Munshi participated in the struggle for independence. All others either looked at the struggle from outside or had held offices under the colonial regime.

[22] The Draft Constitution, prepared by the Drafting Committee, was put out in the public domain for debate (after it was submitted to the Constituent Assembly on February 21, 1948) in accordance with a decision to that effect in the Assembly. And by that, the provisions were debated in the public domain too by way of debates in the newspapers and elsewhere.

decided to remove the Clauses on the Directive Principles of State Policy from the part containing the Fundamental Rights and put them in a separate part that it decided to add to the existing draft.[23] This decision was taken on October 30, 1947, that is, on the fourth day after the Committee began its work. The decision was unanimous.

A motion, commending the Draft Constitution with 315 Articles and 8 Schedules, was moved before the Constituent Assembly on November 4, 1948 by B. R. Ambedkar, in his capacity as Chairman of the Committee.[24] In the middle of his long speech introducing the motion, Ambedkar specifically referred to the concept of Directive Principles of State Policy. He said:

> In the Draft Constitution the Fundamental Rights are followed by what are called 'Directive Principles'. It is a novel feature in a Constitution framed for Parliamentary Democracy. The only other Constitution framed for Parliamentary Democracy which embodies such principles is that of the Irish Free State. These Directive Principles have also come up for criticism. It is said that they are only pious declarations. They have no binding force….[25]

B. R. Ambedkar did admit that the Directive Principles did not have any legal force behind them. He, however, argued that it was wrong to say that they had no force of binding at all, and that he would not concede that they are useless because they did not have a binding force in law. In a clear departure from the explanation that the Constitutional Adviser B. N. Rau had set out when he proposed to distinguish between rights as enforceable and non-enforceable, and thus listed out such rights that were aimed at achieving economic democracy as directives rather than rights as understood insofar as the Fundamental Rights were concerned, Ambedkar sought to trace the roots of the Directive Principles to the Government

[23] Minutes of the meetings of the Drafting Committee, October 30, 1947. See Rao, *The framing of India's Constitution: Select documents* (Vol. 3), pp. 315–508.

[24] CAD, Vol. VII, p. 31.

[25] Ibid., p. 41.

of India Act, 1935.[26] Defending the inclusion of this part in the Draft Constitution, Ambedkar held:

> The Directive Principles are like the Instrument of Instructions which were issued to the Governor General and the Governors of the Colonies and to those of India by the British Government under the 1935 Act…. What are called Directive Principles is merely another name for Instrument of Instructions. The only difference is that they are instructions to the Legislature and the Executive….[27]

Ambedkar's arguments in the Constituent Assembly against rendering these *principles* as enforceable in the same way as the Fundamental Rights was at another plane. He too saw in this—to leave the provisions for achieving economic justice as enforceable—a fundamentally socialist agenda as did K. T. Shah perceive these in the Subcommittee and the Advisory Committee, where these provisions were discussed earlier. Socialism, however, was not an idea that appealed to the members of the Drafting Committee in general (all the members of the Drafting Committee, barring K. M. Munshi, were hardly involved with the struggle for independence), as much as political and social rights did to them. Ambedkar spelt this out in as explicit a manner as it could be in the Constituent Assembly, while defending the status accorded to the Directive Principles in the Draft Constitution.

> The inclusion of such instructions in a Constitution such as is proposed in the Draft becomes justifiable for another reason. The Draft Constitution as framed only provides a machinery for the Government of the country. It is not a contrivance to install any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions, which are called Directive Principles. He cannot ignore them. *He may*

[26] The Chairman of the Drafting Committee, interestingly, was not constrained by the fact that the INC and all those who were involved in the struggle for independence had dismissed the 1935 Act for many reasons.

[27] CAD, Vol. VII, p. 41.

> *not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time.* What great value these directive principles possess will be realised better when the forces of right contrive to capture power.[28] (Ananth, emphasis added)

The shift from the Karachi Resolution was indeed clear. It is also pertinent here to note that Jawaharlal Nehru, while speaking on the Objectives Resolution in the Constituent Assembly on December 13, 1946, did refrain from stating socialism as a state policy and this message was also internalized by the Drafting Committee. Those who considered it necessary to spell out socialism in forthright terms and accord to the provisions aimed at achieving economic justice the status of being enforceable were in a minority in the Subcommittee on Fundamental Rights as well as in the Advisory Committee, and virtually absent in the Drafting Committee. The story was not too different in the Constituent Assembly too as the record of the debate there reveals.

The Draft Constitution commended by B. R. Ambedkar was taken for debate in the Constituent Assembly on November 5, 1948. Damodar Swaroop Seth, elected to the Constituent Assembly on behalf of the INC (he was part of the Congress Socialist Party block),[29] moved an amendment seeking postponement of the debate on the Draft Constitution until an

[28] Ibid., p. 41.

[29] The Congress Socialists, who had been in the Indian National Congress since 1934, had developed serious differences with the leadership towards the end of 1947. In April 1948, Jayaprakash Narayan, who had by that time emerged as the most important face of the group, even declared the need for the block to walk out of the Congress and constitute the opposition in the days ahead. Though the Socialist Party as such with a distinct constitution was born in 1950, they had begun functioning as a distinct block even earlier. Apart from organizing mass agitations mobilizing workers and peasants across the country, the Socialists had also constituted themselves as a separate block inside the Constituent Assembly by this time. It may be recalled that this section had also played an important role in the making of the Karachi Resolution in 1931, and the foundation of the Congress Socialist Party from Nashik in 1934 was, in a sense, the culmination of what began in Lahore and manifested in Karachi.

assembly elected by an electorate based on universal adult suffrage was constituted. Swaroop argued that the Fundamental Rights be expanded to include some aspects from the Directive Principles of State Policy as provided for in the draft. He said:

> I have no hesitation in saying that if lakhs of villages in India had been given their share on the basis of adult franchise in drafting this Constitution its shape would have been altogether different. What a havoc is poverty causing in our country! What hunger and nakedness are they not suffering from! Was it not then necessary that the right to work and right to employment were included in the Fundamental Rights declared by this Constitution and the people of this land were freed from the worry about their daily food and clothing? Every man shall have a right to receive education; all these things should have been included in the Fundamental Rights.... Notwithstanding the reasoning of the learned Doctor (reference to Dr. Ambedkar), I find it difficult to accept that the Fundamental Rights and other rights are one and the same thing. I understand that Fundamental Rights are those rights which cannot be abrogated by anybody—nay, not even by the government.... But if the Fundamental Rights were to be at the mercy of the government, they cease to be Fundamental Rights. Sir, what I mean by all this is that if the thousands of villages of the country, the poor classes and the labourers of India had any hand in framing this constitution, it would have been quite different from what it is today....[30]

Apart from this, there was specific mention of this issue during the debate that the Directive Principles of State Policy would have to be rendered enforceable. Krishna Chandra Sharma, a Congress representative from the United Provinces, even while arguing against deferring the debate until another assembly elected on universal adult suffrage was constituted, made a plea to amend the Draft Constitution that will make the Directive Principles enforceable. He said:

> I suggest that we make a provision that any law made in contravention of these principles shall to that extent be void. This will

[30] CAD, Vol. VII, pp. 213–214. Seth's motion to postpone discussion and wait for a new assembly, however, was rejected by the Assembly on the same day after a brief debate and the Draft Constitution was taken up for debate Clause by Clause. See CAD, Vol. VII, p. 218.

> not affect the present position. It will give jurisdiction to a court of law, through only negative rights, to the people to move a court that any law which goes against the interests of the people, against providing primary education for the children and against providing work and employment to the people should be declared void. The court will have jurisdiction to declare that such and such law is void, because it contravenes the general principles laid down in Chapter IV.[31]

K. T. Shah took the same argument forward to stress the need to commit the State to the objective of social and economic justice as much as political justice, which was spelt out in the Draft Constitution. Critical of the overt bias in favour of *individualism* that the idea of rights expressed in the draft, Shah argued for the need to speak about obligations in the Constitution. He said:

> The Rights are throughout spoken of only as "Rights"; and there is not a word said about "Obligations". I would put it to the House that we are living and thinking as individuals or as a community too much of Rights and forgetting our Obligations whether as citizens, or as communities, or as a State. I for one would like to emphasise the chapter of Obligations of the State to the individual and vice versa as much, if not more, as that of rights.[32]

P. S. Deshmukh, a Congress member of the Assembly from the Central Provinces, held that there was no need to have the Directive Principles of State Policy as they existed in the draft on grounds that they sounded more like an election manifesto, particularly, when they were not of a very fundamental nature. Pleading for the deletion of the entire chapter, P. S. Deshmukh said:

> I could have understood it if it was provided that it shall be the duty of the State to establish the right of the state to ownership of all mineral resources, that all industries shall be the property of the nation, that the government derives all its authority from the people, that no person shall be permitted to be exploited by another, etc. If there was something fundamental like that there would have

[31] Ibid., p. 230.
[32] Ibid., p. 246.

> been more use. It is no use to put them in the Instrument of Instructions also as suggested by Dr. Ambedkar. They should not have, in any case, found a place in the Constitution itself.[33]

Another Congress member, Arun Chandra Guha (from West Bengal), was more forthright when it came to attacking the Draft Constitution. He argued that the Drafting Committee had gone beyond its terms laid down by the Assembly.

> When we are going to frame a Constitution, it is not only a political structure that we are going to frame; it is not only an administrative machinery that we are going to set up; it is a machinery for the social and economic future of the nation:

he stressed. And then he held:

> I feel, as for the economic side, the Draft Constitution is almost silent. It is rather anxious to safeguard the sanctity of property; it is rather anxious to safeguard the rights of those who have got something and it is silent about those who are dispossessed and who have got nothing. While there is much about the sanctity of property and the inviolability of property, things such as right to work, right to means of livelihood and right to leisure, etc., have been left out and these things should have been effectively incorporated in the Constitution.[34]

A more scathing attack on the Draft Constitution came from T. Prakasam, an associate of the INC and a leading light in the struggle for freedom. Prakasam attacked the Draft Constitution as one that would promote capitalism and that the socialist basis that characterized the struggle for freedom was now being thrown off. "Dr. Ambedkar has not been in the battlefield for thirty years," he said and sought a draft that was based on a *socialist system*.[35] Yudhisthir Mishra, representing the Orissa state, attacked the draft for similar reasons. Describing the Draft Constitution as one that lacked any program for economic independence, he urged, "The Constitution should

[33] Ibid., p. 251.
[34] Ibid., p. 255.
[35] Ibid., pp. 257–259.

firstly provide that all the lands, machinery and all other means of production and products thereof will be owned and controlled by the State in the interests of the people."[36] He also found the draft wanting in any form of commitment to nationalization of the wealth within a set time frame.

Ananthasayanam Ayyangar,[37] another Congress representative in the Assembly, was forthright in criticizing the Draft Constitution of lacking provisions to achieve economic democracy. He said:

> To the man in the street, political democracy is worth nothing unless it is followed by economic democracy. In the Fundamental Rights, the right to speak, the right to address Assemblies, the right to write as one likes, all these have been granted. But the right to live has not been guaranteed. Food and clothing are essentials of human existence. Where is a single word in the Constitution that a man shall be fed and clothed by the State? The State must provide the means of livelihood for everyone… Is there a single word in the Constitution that imposes on the future Governments the obligation to see that nobody in India dies of starvation? What is the good of saying that every man shall have education, every man shall have political rights, and so on and so forth, unless he has the wherewithal to live?
>
> There is a vague reference in the Objectives Resolution that there shall be social justice and economic justice. Economic justice may mean anything or may not mean anything. I would urge, here and now, that steps should be taken to make it impossible for any future government to give away the means of production to private agencies.[38]

[36] Ibid., p. 282.

[37] Ayyangar would become the Speaker of the First Lok Sabha and through an important ruling, he raised the office of the Speaker to stellar heights. His ruling, when Feroze Gandhi raised the Mundhra scandal, protecting the members of the House to disclose documents that were marked official secret and yet save them from action under the Official Secrets Act is considered a landmark in the parliamentary history of India.

[38] CAD, Vol. VII, p. 353. Interestingly, this aspect of establishing the critical link between the Right to Life and Livelihood was done by the Supreme Court many years after the adoption of the Constitution, in what is known as the Pavement Dwellers Case (*Olga Tellis v. Bombay Municipal Corporation*, AIR-1986-SC-180). We shall deal with this in Chapter 7.

Like many others, Ayyangar was categorical against endorsing the Soviet model of socialism and stressed the need to have socialism in a democratic framework. "Unless we make up our minds to have economic democracy in this country and provide for it in the Constitution," he stressed, "we may not be able to prevent the on-rush of communism in our land."[39]

Alladi Krishnaswamy Ayyar, on behalf of the Drafting Committee, put up a defense of the Directive Principles of State Policy as in the Draft Constitution, and his argument was that while it is true that the principles in that part were not enforceable by the courts, there was no way that elected governments could afford to not enforce them. He said:

> The next criticism is that the common man is ignored and there is no socialistic flavour about the Constitution. Sir, the Constitution, while it does not commit the country to any particular form of economic structure or social adjustment, gives ample scope for future legislatures and the future Parliament to evolve any economic order and to undertake any legislation they chose in public interests. In this connection, the various Articles which are Directive Principles of Social policy are not without significance and importance. While in the very nature they cannot be justiciable or enforceable legal rights in a court of law, they are none the less, in the language of Article 29, fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws. It is idle to suggest that any responsible government or any legislature elected on the basis of universal suffrage can or will ignore these principles.[40]

All these were part of the general discussion in the Constituent Assembly on the Draft Constitution. When the House began debating the Clauses, one after another, K. T. Shah proposed an amendment to Article 1 of the Draft Constitution. Shah's amendment sought inserting the words *secular*, *federal*, and *socialist* to Article 1 of the Draft Constitution.[41] B. R. Ambedkar, setting out his arguments against the amendment, on behalf of

[39] Ibid., p. 354.

[40] Ibid., p. 336.

[41] Article 1, Clause 1, as it was in the Draft Constitution, read as follows: "India shall be a Union of States." K. T. Shah moved an amendment by which this Clause was to be read as: "India shall be a Secular, Federal,

the Drafting Committee, stressed that the socialist principles were already embodied in the Constitution, and hence the amendment was unnecessary.

Ambedkar's thrust was that the Constitution shall not specify the policy of the State, and thus bind the generations to come to one or another policy. The Chairman of the Drafting Committee held this as undemocratic, and stressed that such things must be left to the future Parliament and to be devised in accordance with the times. He said:

> It is perfectly possible today, for the majority people to hold that the socialist organisation of society is better than the capitalist organisation of society. But it would be perfectly possible for thinking people to devise some other form of social organisation which might be better than the socialist organisation of today or of tomorrow. I do not see therefore why the Constitution should tie down the people to live in a particular form and not leave it to the people themselves to decide it for themselves.[42]

Ambedkar, however, argued otherwise too. In the same speech, the Chairman of the Drafting Committee also argued that the Draft Constitution contained ample provisions to commit the State to the ideal of socialism. Ambedkar added:

> The second reason is that the amendment is purely superfluous. My Honourable friend, Prof. Shah, does not seem to have taken into account the fact that apart from the Fundamental Rights, which we have embodied in the Constitution, we have also introduced other sections which deal with directive principles of state policy. If my honourable friend were to read the Articles contained in Part IV, he will find that both the Legislature as well as the Executive have been placed by this Constitution under certain definite obligations as to the form of their policy….[43]

Socialist Union of States." See CAD, Vol. VII, p. 399. It is relevant to point out that the Assembly had not decided, at that stage, to include the Preamble as being part of the Constitution. Interestingly, the amendment that Shah suggested, but rejected by a majority in the Assembly, was made to the Constitution in 1976.

[42] CAD, Vol. VII, p. 402.

[43] Ibid., p. 402.

After referring to Article 31 of the Draft Constitution,[44] Ambedkar stressed: "If these directive principles to which I have drawn attention are not socialistic in their direction and in their content, I fail to understand what more socialism can be." And while concluding his speech, he said: "Therefore my submission is that these socialist principles are already embodied in our Constitution and it is unnecessary to accept this amendment."[45] With this, the motion for amendment by K. T. Shah was put to vote and the Assembly rejected the motion.[46]

[44] Article 31: The State shall, in particular, direct its policy towards securing—

(i) that the citizens, men and women equally, have the right to an adequate means of livelihood;
(ii) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(iii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(iv) that there is equal pay for equal work for both men and women;
(v) that the strength and health of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
(vi) that childhood and youth are protected against exploitation and against moral and material abandonment. (See Rao, *The framing of India's Constitution: Select documents* Vol. 3, pp. 527–528.)

It may be noted here that this Article remains in our Constitution to this day as Article 39. It is also significant that the provisions were subject to extensive discussion in the higher judiciary on various instances. We shall deal with those in later portions of this book.

[45] CAD, Vol. VII, p. 402.

[46] The minutes of the CAD do not provide the voting figures as such. But from the fact that the motion was negatived by a voice vote, it may be inferred that the number of those who voted against Shah's amendment (and to retain the provisions as contained in the Draft) was overwhelming. Interestingly, these words, Secular and Socialist were inserted into the Preamble to the Constitution, in 1976, when H. R. Gokhale, then Law Minister moved the Constitution (Forty-second Amendment) Act, 1976.

It is interesting to note here the inherent contradictions in B. R. Ambedkar's logic to oppose K. T. Shah's amendment. After having stressed that it would be undemocratic to lay down the policy that the future governments should follow, insofar, as economic justice was concerned, Ambedkar held out in the same breath that a clear guideline that would bind the future governments to socialism was even otherwise provided for in the Constitution itself by way of the Directive Principles of State Policy in general, and by way of Article 31 specifically. Ambedkar, however, did not address the substantial point that these guidelines were not enforceable, which Shah and others who addressed this aspect had raised during the debate.

The matter did not rest there. It came up again in the form of specific amendments when the Assembly began debating the different Clauses in Part IV, on November 19, 1947. Kazi Syed Karimuddin, Muslim League member from Central Provinces and Berar, moved an amendment to the heading in Part IV seeking deletion of the word *directive* and that it be called *principles of state policy*, and that these provisions too are made justiciable. A more substantive amendment in this regard was moved by H. V. Kamath; though elected as Congress nominee, he had constituted the Socialist Party block by that time. It sought for the substitution of the word *directive* with *fundamental*, so that the heading for Part IV would be read as *fundamental principles of state policy*.[47] Interestingly, Kamath's amendment was in tune with the title for this part as contained in the Interim Report of the Advisory Committee on Fundamental Rights, presented by Vallabhbhai Patel on April 23, 1947; he cited that report extensively to fortify his argument.[48] Kamath then wondered as to the authority of the Drafting Committee to deviate from the report of the Advisory Committee to alter the title.

Addressing the amendment moved by Karimuddin who argued that both the Fundamental Rights and the Directive Principles must be enforceable, Ananthasayanam Ayyangar

[47] CAD, Vol. VII, p. 474.

[48] See Rao, *The framing of India's Constitution: Select documents* (Vol. 2), pp. 305–306.

brought up the question of feasibility and the issues involved if such rights contained in Part IV are made justiciable. He said:

> There is no use being carried away by sentiments. We must be practical. We cannot go on introducing various provisions here which any government, if it is indifferent to public opinion, can ignore. It is not a court that can enforce these provisions or rights. It is the public opinion and the strength of public opinion that is behind a demand that can enforce these provisions. Once in four years elections will take place, and then it is open to the electorate not to send the very same persons who are indifferent to public opinion. That is the real sanction, and not the sanction of any court of law.[49]

Ambedkar insisted on retaining the word *directive* in the title and stressed that it was necessary. Referring to the criticism against having the Directive Principles in the manner they stood in the Draft Constitution, Ambedkar stressed: "It is not the intention to introduce in this part these principles as mere pious declarations." He added:

> It is the intention of this assembly that in future both the legislature and the executive should not merely pay lip service to these principles enacted in this part, but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the country.[50]

The matter did not end there. K. T. Shah moved another amendment when Article 29 of the Draft Constitution[51] was taken up for approval. The amendment sought substitution of the draft provision with the following:

> The provisions contained in this Part shall be treated as the obligations of the State towards the citizens, shall be enforceable in such

[49] CAD, Vol. VII, p. 475.

[50] Ibid., p. 476.

[51] Article 29 in the Draft Constitution read as follows: "The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." See Rao, *The framing of India's Constitution: Select documents* (Vol. 3), p. 527.

> manner and by such authority as may be deemed appropriate in or under the respective law relating to each such obligation. It shall be the duty of the State to apply these principles in making the necessary and appropriate law.[52]

Shah's speech while moving the amendment was both rhetorical and substantive. Recalling Ambedkar's speech while rejecting amendments moved by Karimuddin and Kamath, Shah said:

> I would in the first place express my keen appreciation of Dr. Ambedkar's remarks made a few minutes ago, wherein he not only insisted that we should not leave such matters as mere pious principles, but also make them a sort of directive, which though the word mandatory is not used, may amount to that state. I was a little unhappy when, on a previous occasion, the learned Doctor was pleased to say that the Constitution was not a document for embodying such principles. It seems that the course of conversion operates very swiftly with a brain so alert, an intelligence so sharp a mind so open to new ideas as that of the learned Doctor. That is why I am very happy to express my sense of keen appreciation for the rapid conversion that he has exhibited today in agreeing to find a place for enforcement in the Constitution. In fact, he has gone a step further: and, though he does not admit their place in the name or designation of the Constitution, he has been pleased to make that as a positive thing, the enforcement of such principles, fundamentals as they are called, in the Constitution.[53]

The rhetoric apart, Shah argued that by keeping the principles enlisted in Part IV from being justiciable and out of the powers of the higher judiciary to enforce them, the most important part of the Constitution was to be exempted and exonerated from being given effect to. "It looks to me," he said:

> like a cheque on a bank payable when able, viz., only if the resources of the Bank permit. I do not think any authority connected with the drafting of this Constitution will approve of such a provision in the Negotiable Instruments Act authorising the making of a cheque payable when able. It seems to me that unless my amendment is accepted, this chapter would be nothing else, as it stands, but a

[52] CAD, Vol. VII, p. 478.
[53] Ibid., pp. 478–479.

> mere expression of some vague desire on the part of the framers that, if and when circumstances permit, conditions allow, we may do this or that or the third thing.…This is an attitude which no lover of the people would care to justify.[54]

Shah stressed the need to commit the future government to the idea of primary education as a Fundamental Right, and stressed that it was the duty of every civilized government to do that. Shah criticized the provision in this regard that the State should strive to achieve this end within a decade after the Constitution came into effect. The excuse of resources not being available for that or that it was not practicable, in his words, "amounted to an insult to the Assembly." He said:

> There may be many in this House—I am sure Dr. Ambedkar is the foremost amongst them—who will remember that when the late Gopal Krishna Gokhale first brought forward the Bill for compulsory primary education, the then officials of the then Government of India gave all sorts of reasons why such a step was simply impracticable. One of the arguments was that an expenditure of three crores spread over ten years, that is rupees thirty lakhs a year, was too heavy a burden for the Government of India's finances at that time to bear. But within four years of that, however, they were wasting not three crores but more than thirty crores over the war in which we had no concern and about which we were not consulted.[55]

Notwithstanding the force with which Shah argued for his amendment, the Assembly rejected it, and Article 29 as in the Draft Constitution was adopted as it was by the Constituent Assembly on November 19, 1948. There was another occasion when the Assembly debated this aspect when Damodar Swaroop Seth moved an amendment to Article 30 of the Draft

[54] Ibid., p. 479.

[55] Ibid., p. 480. Interestingly, the Right to Free and Compulsory Education is a Fundamental Right since 2002, and this happened only after a Supreme Court mandate, in 1993, that primary education was as much a Fundamental Right as the Right to Life was. Article 21-A was added the Constitution, adhering to the apex court's order in the *J. P. Unnikrishnan v. State of Andhra Pradesh* Case (AIR-1993-SC-2178) and by way of the Constitution (Eighty-sixth Amendment) Act, 2002.

Constitution.[56] D. S. Seth's amendment sought for substituting the Draft provision with the following:

> 30. The State shall endeavour to promote the welfare, prosperity and progress of the people by establishing and maintaining democratic socialist order and for the purpose the State shall direct its policy towards securing:
>
> (a) the transfer of public ownership of important means of communication, credit and exchange, mineral resources and the resources of natural power and such other large economic enterprise as are matured for socialisation;
> (b) the municipalisation of public utilities;
> (c) the encouragement of the organisation of agriculture, credit and industries on cooperative basis.[57]

It may be seen that this amendment, even while remaining agnostic on the aspect of justiciability of this provision, and thus refraining from affirming that they have to be made enforceable, was couched in a language that would have left the Directive Principles of State Policy as mandatory in a sense. Seth's amendment used the word *shall* that conveyed this sense unambiguously. It is also pertinent, at this stage, to recall that Jawaharlal Nehru's perception of socialism, as it evolved over the years (discussed in detail in Chapter 1 of this book), was similar to the vision envisaged in this amendment. In other words, Damodar Swaroop Seth's amendment intended to instill the socialist agenda in the Constitution. He described the amendment as necessary to convey the economic nature of the social order that the Constitution sought to establish, and that the provision in the Draft Constitution was somewhat indefinite and vague. Citing the election manifesto of the INC where it had committed to ensure the transfer of public utilities,

[56] Article 30 of the draft read as follows: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of public life." See Rao, *The framing of India's Constitution: Select documents* (Vol. 3), p. 527.

[57] CAD, Vol. VII, p. 486.

communications, production, credit, exchange to the ownership of the public.[58] Seth said:

> If we really want that something should be done for the masses, and their real welfare secured, that can only be possible through a socialist, democratic order. And if we are really keen to establish such an order, we should lay down in this Constitution that the order that we are going to establish will be a socialist democratic or democratic socialist one. The wording should be as clear as possible so that its meaning may not be changed when it is in the interest of the ruling classes to do so.[59]

It is of some interest to note here that among those who opposed Seth's amendment was Mahboob Ali Baig, a Muslim

[58] The Congress Election Manifesto for the elections in 1945 had committed to the following:

> Industry and agriculture, the social services and public utilities must be encouraged, modernized and rapidly extended in order to add to the wealth of the country and give it the capacity for self growth, without dependence on others.
>
> But all this must be done with the primary object and paramount duty of benefiting the masses of our people and raising their economic, cultural and spiritual level, removing unemployment, and adding to the dignity of the individual. *For this purpose, it will be necessary to plan and coordinate social advance in all its many fields, to prevent the concentration of wealth and power in the hands of the individuals and groups, to prevent vested interests inimical to society from growing, and to have social control of the mineral resources, means of transport and the principal methods of production and distribution in land, industry and in other departments of national activity, so that free India may develop into a co-operative commonwealth.* (Ananth, emphasis added)

See Congress Election Manifesto, October 1945, in Sitaramayya, *Why vote Congress?* pp. i–v.

[59] CAD, Vol. VII, p. 487. It is interesting to note here that Seth's apprehension of another interpretation in the future was found to be in order when the Supreme Court held, in various instances (beginning with the Golaknath Case, and also in the Bank Nationalization Case and the Privy Purses), where the State's efforts to effect provisions contained in Articles 39 (b) and (c) as unconstitutional. We shall discuss these in detail in Chapter 5.

League member from the Madras Province. "The amendment," he said, "seeks to import into the Constitution certain principles of a particular political school." Baig, incidentally, was opposed to having the entire Part (Directive Principles) itself in the Constitution. "Is it the purpose of these principles to bind and tie down the political parties in this country to a certain programme and principle laid down in this?" he wondered and argued that such things went against the spirit of parliamentary democracy. Baig then added:

> So it is the anxiety of the party in power to placate the electorate, saying we have framed a Constitution in which we have made these provisions which are as good, if not better, than the principles and programmes of some other party, say the Socialist Party.[60]

Countering Baig's criticism against a *particular political school* and its program being sought to be placed in the Constitution, K. Hanumanthayya, representing the Congress, held that it was not *sinful* to do that. Stressing the overwhelming support for socialization of property in the times as against the *laissez faire*, Hanumanthayya went on to say that it was akin to the support for the monarch in the earlier times, and how society has now turned against that and favors democracy. Hanumanthayya, however, argued that Seth's amendment was uncalled for and that Articles 30 and 31 (1) and (2), in fact, took care of the concerns expressed in the amendment even otherwise. He added:

> The Drafting Committee has very happily worded the phraseology which does not favour any of the extremes, and at the same time, it has been so wisely worded that even (the) communist party can implement its ideology under article 30 and article 31, clauses (1) and (2), if it comes to power. No party is prevented from implementing its ideology under these sections.[61]

[60] Ibid., pp. 488–489.

[61] CAD, Vol. VII, p. 490. It may be noted here that Hanumanthayya's optimism was not totally unfounded. It, however, took a long time and many amendments to the Constitution before the Supreme Court upheld this position in the Keshavananda Case. We will discuss this in detail later on in this book.

Hussain Imam, a Muslim League member of the assembly from Bihar, meanwhile, supported Seth's amendment. "The Directive Principles," he said, "have laid down a number of liabilities on the future State. What the amendment proposes to do is to supply some assets to meet these liabilities created by the Constitution as it is going to be framed." His argument was that "a political party in power can ignore these directive principles and there is no provision anywhere making it obligatory on the party to see that these principles are followed…." He then pleaded that the Assembly treat the amendment suggested in a dispassionate manner and not reject it "because of the fact that they have been brought forward by a member who is not *persona grata* with the majority…."[62]

Mahavir Tyagi, a Congress member in the assembly from United Provinces, described Article 30 as *the pivotal point in the Constitution*, and held that it was consistent with the Objectives Resolution that set the goal of the Constitution is to achieve justice, social, economic, and political. Tyagi then spoke in support of an amendment moved by Naziruddin Ahmed (of the Muslim League from West Bengal) that sought the deletion of the words *strive to* from the draft, so that it was then mandatory for the State "to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of public life." He said: "It must be incumbent on the State to promote the welfare of the people by securing justice, social, economic and political" and blamed the lawyers in the Drafting Committee for inserting such phrases. "When we want to put something real in the Constitution, why should these lawyers come in between our wishes and the Constitution," he wondered in the Assembly.[63]

Replying to the debate, Ambedkar reiterated all that he said while moving the Article for adoption, and stressed that it was not proper to define socialism in one particular manner even while laying down economic democracy as the principle on

[62] Ibid., pp. 491–492.
[63] Ibid., pp. 492–493.

which future governments were to be elected on the basis of one-man-one-vote. He then added:

> It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing. It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down our ideal is economic democracy…our object in framing this Constitution is two-fold: (i) to lay down the form of political democracy, and (ii) to lay down that our ideal is economic democracy and also to prescribe that every government whatever, is in power, shall strive to bring about economic democracy.[64]

Ambedkar also pleaded for rejection of the amendment to delete the word *strive* from Article 30 and argued that it was necessary to retain the word, rather than let the Article go as a mere mandate. And that, in fact, was a confirmation of the apprehension among those who dissented on grounds that the non-enforceability of the Directive Principles would render them as mere pious wishes. He said:

> The word "strive" which occurs in the Draft Constitution, in my judgment is very important. We have used it because our intention is that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these Directive Principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfilment of these Directives. That is why we have used the word "strive." Otherwise, it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go.[65]

[64] Ibid., pp. 494–495.

[65] Ibid., p. 495. It may be noted here that it took more than five decades and a radical interpretation by the Supreme Court before one such principle—free and compulsory education to children under 14 years of age—to become a Fundamental Right. We shall discuss this in Chapter 9. It is pertinent to note here that successive governments kept striving without any concrete measures to achieve what was a Directive Principle (Article 45 of the Constitution) that was to be achieved within a decade after the Constitution came into force.

The amendments were defeated by the Assembly on November 19, 1948, and Article 30 of the Draft Constitution was adopted as it was moved by B. R. Ambedkar. The most important aspect of the Directive Principles of State Policy, for the concerns of this book, was Article 31 of the Draft Constitution (Article 39 in the Constitution as adopted on November 26, 1949), taken up for discussion in the Constituent Assembly on November 22, 1948. Article 31, as it was in the Draft Constitution, contained the most pronounced socialistic principles of all. It read as follows:

> The State shall, in particular, direct its policy towards securing-
>
> (i) that the citizens, men and women equally, have the right to an adequate means of livelihood
> (ii) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good
> (iii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment
> (iv) that there is equal pay for equal work for both men and women
> (v) that the strength and health of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength
> (vi) that childhood and youth are protected against exploitation and against moral and material abandonment.[66]

This part of the Directive Principles will have to be treated as the most important part of our book in the specific context of Articles 31 (ii) and (iii) that deal with the pattern of ownership of the means of production, and that the State shall ensure that these are not concentrated in one or a few hands. In other words, these came closest to the idea of socialism as expressed by Jawaharlal Nehru (and dealt with in detail in Chapter 1). It is also relevant from the context

[66] Rao, *The framing of India's Constitution: Select documents* (Vol. 3), pp. 527–528.

of the commitment by the INC in its manifesto for the 1945 elections.[67]

Inasmuch as this Article was important, K. T. Shah's amendment too was significant. It read as follows:

> That for Clause (ii) of Article 31, the following be substituted:
>
> (ii) that the ownership, control and management of the natural resources of the country in the shape of mines and mineral wealth, forests, rivers and flowing waters as well as in the shape of the seas along the coast of the country shall be vested in and belong to the country collectively and shall be exploited and developed on behalf of the community by the State as represented by the Central or Provincial Governments or local governing authority or statutory corporation as may be provided for in each case by Act of Parliament;[68]

[67] The Congress election manifesto for the elections in 1945 had committed to the following:

> Industry and agriculture, the social services and public utilities must be encouraged, modernized and rapidly extended in order to add to the wealth of the country and give it the capacity for self growth, without dependence on others.
>
> But all this must be done with the primary object and paramount duty of benefiting the masses of our people and raising their economic, cultural and spiritual level, removing unemployment, and adding to the dignity of the individual. *For this purpose, it will be necessary to plan and coordinate social advance in all its many fields, to prevent the concentration of wealth and power in the hands of the individuals and groups, to prevent vested interests inimical to society from growing, and to have social control of the mineral resources, means of transport and the principal methods of production and distribution in land, industry and in other departments of national activity, so that free India may develop into a co-operative commonwealth.* (Ananth, emphasis added)

See Congress Election Manifesto, October 1945, in Sitaramayya, *Why vote Congress?*

It is necessary to note here that these two Clauses were the basis of a whole lot of amendments to the Constitution, beginning with the Constitution (First Amendment) Act, 1951, and these formed the fundamental premise from which the Supreme Court viewed the amendments. This will be dealt with in detail later on in this book.

[68] CAD, Vol. VII, p. 506.

K. T. Shah's amendment sought to prohibit privatization of natural resources by future governments. He argued that:

> the creation or even the presence of vested interests, of private monopolists, of those who seek only a profit for themselves, however useful, important or necessary the production of such natural resources may be for the welfare of the community, is an offence in my opinion against the community, against the long-range interests of the country as a whole, against the unborn generations, that those of us who are steeped to the hilt, as it were, in ideals of private property and the profit motive, do not seem to realise to the fullest.[69]

Shah described the provision, in the Draft Constitution as:

> vague, undefined and undefinable, and capable of being twisted to such a sense in any court of law, before any tribunal by clever, competent lawyers, as to be wholly divorced from the intention of the draftsman, assuming that the draftsman had such intention as I am trying to present before this House," and stressed, "we must have more positive guarantee of their proper, social and wholly beneficial utilisation; and that can only be achieved if their ownership, control and management are vested in public hands.

In the course of his speech pressing for the amendment, Shah clarified as to why he did not include agricultural land, which he described as *the biggest* of the resources among his list in this amendment. He said:

> I have not mentioned it, not because that I do not believe that land should be owned, operated and held collectively, but because I recognise that the various measures that have been in recent years been adopted to exclude landed proprietors—*zamindars*—to oust them and take over the land, would automatically involve the proposition that the agricultural or cultivable land of this country belongs to the country collectively, and must be used and developed for its benefit.[70]

[69] Ibid., p. 507.

[70] Ibid., p. 508. It may be recorded here that the Constituent Assembly decided to defer the debate on the Fundamental Rights (Part III) as were in the Draft Constitution to a further date. Among those were Article 24 (dealing with the Right to Property) and 13 (f) (dealing with the right to posses and dispose of property). That decision to defer the debate on those was arrived at, unanimously, on November 18, 1948, and take up Part IV as such for discussion. See CAD, Vol. VII, pp. 470–472.

Following on the same track, K. T. Shah also moved an amendment to Article 31 (iii) as it stood in the Draft Constitution. Shah's amendment read as follows:

> That for Clause (iii) of Article 31, the following be substituted:
> (iii) that there shall be no private monopolies in any form of production of material wealth, social service, or public utilities nor shall there be any concentration of means of production and distribution in private hands and the State shall adopt every means to prevent such concentration or accumulation.[71]

His argument in support of this amendment was that the Clause, as amended, will make the provision in the Draft Constitution clear and unambiguous. When prodded by K. Santhanam to explain what he meant by monopolies and why he was opposed to them, Shah was forthright. He said:

> The monopolies I have in mind are represented much more by Trusts, by inter-locking Directorates, by a variety of ways by which banks, insurance companies, transport concerns, electricity concerns, power corporations, utility corporations of all kinds, etc., yet all combined horizontally, vertically, angularly, sideways, backways and frontways, so that if you take up the totality of them all, you will find that this country is in the grip of between 300 to 500 people or families so far as economic life of this country is concerned. They may have their nephews and their nieces functioning in various capacities. One may work in a factory, another may shine in sports, a third may flirt with art, and a fourth may endow science and learning. One may be a manager and another may be a philanthropist and yet another may be a religious teacher, but that does not change the complexion. There are a few hundred families in this country which hold us all in economic slavery of a kind that the slavery in the Southern States of America has no comparison….[72]

Shah warned of a revolution if this was not set right.

Shibban Lal Saxena, a Congress member representing United Provinces, supported Shah's amendment to say that the Clause as put up by the Drafting Committee "is a very

[71] CAD, Vol. VII, p. 508.
[72] Ibid., pp. 510–511.

wide enunciation of a most important principle." He then went on to argue that:

> [t]he enunciation is so general that any system of economy can be based upon it. Upon it can be based a system of socialist economy where all the resources of the country belong to the State and are to be used for the well being of the community as a whole. But a majority in the next Parliament can also come forward and say that the New Deal evolved by Roosevelt is the best system and it should be adopted.[73]

The Congress member, thereafter, went on to argue the need to incorporate K. T. Shah's amendment to lay down specifically in the Constitution that the ownership of the means of production must be by the State. He said:

> I feel personally that we should today at least lay down that the key industries of the country shall be owned by the State. This has been an important programme of the Congress from 1921. The Congress has accepted the principle that key industries shall be controlled by the State. Even recently in the Committee appointed by the Congress the report mentioned that the key industries shall be owned by the State; for the present we have postponed nationalisation of the key industries for ten years. But I do feel that in our Constitution we must lay down that this is our fundamental policy. Unless we lay down in the Constitution itself that the key industries shall be nationalised and shall be primarily used to serve the needs of the nation, we shall be guilty of a great betrayal…. That is, according to the Congress, the best method of distributing the material resources of the country….[74]

Jadubans Sahaya, also of the Congress from Bihar, even while making it clear that he did not belong to the Socialist Party and that he belonged to the Congress, urged Ambedkar to consider the spirit of Shah's amendment. "May I appeal to Dr. Ambedkar," he said:

> [w]ho claims to represent the down-trodden untouchables of the country not to wash away this hope from our hearts that in the

[73] Ibid., pp. 515–516.
[74] Ibid., p. 516.

> future years the natural resources of the community may belong not to the privileged few but to the poor people of the country, for the good and benefit of all.[75]

None of these appealed to Ambedkar. Referring to Shah's amendments, Ambedkar said:

> I would have been quite prepared to consider the amendment of Professor Shah if he had shown that what he intended to do by the substitution of his own clauses was not possible to be done under the language as it stands. So far as I am able to see, I think that the language that has been used in the Draft is a much more exhaustive language which also includes the particular propositions which have been moved by Professor Shah, and I therefore do not see the necessity for substituting these limited particular clauses for the clauses which have been drafted in general language deliberately for a set purpose….[76]

With this, the amendments were put to vote, rejected overwhelmingly, and the Assembly then adopted Article 31 as proposed by the Drafting Committee. Almost a year from then, this Article would become Article 39 of the Constitution at the time it was adopted finally on November 26, 1949.

A striking feature of the debate is that while the idea of socialism was discussed in such an extensive and elaborate manner, Jawaharlal Nehru did not intervene at all. He did not rise, even once, during the long debate involving the various Articles under the Directive Principles of State Policy in the Constituent Assembly. However, he had said something in another context in the very beginning during a general discussion on the Draft Constitution. On November 8, 1948, Nehru said:

> While we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop a nation's growth, the growth of a living vital organic people. Therefore, it has to be flexible. So also, when you pass this Constitution, you will and I think it is

[75] Ibid., pp. 517–518.
[76] Ibid., pp. 518–519.

> proposed, lay down a period of years—whatever that period may be—during which changes to that Constitution can be easily made without any difficult process. That is a very necessary proviso for a number of reasons. One is this: that while we who are assembled in this House, undoubtedly represent the people of India, nevertheless I think it can be said, and truthfully, that when a new House, by whatever name it goes, is elected in terms of this Constitution, and every adult in India has the right to vote—man and woman—the House that emerges then will certainly be fully representative of every section of the Indian people. It is right that that House elected so—under this Constitution of course it will have the right to do anything—should have an easy opportunity to make such changes as it wants to….[77]

The Nehruvian dispensation did exactly that. When it was faced with situations where the implementation of some of the provisions in the Directive Principles of State Policy were sought to be frustrated, it found the way out by simply amending the Constitution. This process began even before the first general elections. The Constitution (First Amendment) Act, 1951, was passed by the very same Constituent Assembly and this was done resorting to Article 379 of the Constitution.

[77] Ibid., pp. 322–323.

4

The Socialist Agenda: Reconciling Fundamental Rights with Directive Principles

There was, indeed, a sense of hurry that was evident when the Constituent Assembly debated on the Fundamental Rights and the Directive Principles of State Policy. Jawaharlal Nehru's role in hastening the process was evident. In doing so, Nehru clearly suggested the possibilities to amend the Constitution as and when it was warranted, and where an existing provision would turn into an obstacle in the road to establish a socialist society. Jawaharlal Nehru's mention in the course of commending the Objectives Resolution that "[l]aws are made of words but this Resolution is something higher than the law," and the stress he laid on the aspect of economic democracy was contained in the Resolution itself.[1] Nehru was also categorical, when he intervened in the debate

[1] This was contained in Clause 5 of the Resolution. It read: "WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality." It is relevant to note here that Nehru, speaking on the Resolution, stressed

during the general discussions on the draft constitution, to declare that the Constitution shall not be taken as a rigid and permanent document, but flexible insofar as amendments as and when called for. Nehru revealed his mind, in a more substantive sense, when he intervened in the debate in the Constituent Assembly by introducing an amendment to Article 24 of the Draft Constitution on September 10, 1949. The amendment, in many ways, was one that comprehensively redrafted the provision in the draft.[2] Nehru, at that stage, had also declared that the commitment to reform the agrarian structure was something that was not negotiable. He said:

> It has been not today's policy, but the old policy of the National Congress laid down years ago that the Zamindari institution in India, that is the big estate system must be abolished. So far as we are concerned, we, who are connected with the Congress, shall give effect to that pledge naturally completely, one hundred percent and no legal subtlety and no change is going to come in our way. That is quite clear. We will honour our pledges.[3]

It was, thus, evident that the Indian National Congress (INC), under Jawaharlal Nehru, was determined to pursue with the socialist principles insofar as the question of property relations was concerned, and more so on the issue of property rights on agricultural land. Nehru's statement in this regard, coming as it did, in September 1949, is significant. It was made several months after the Assembly voted to have Article 31, including

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that democracy here is defined as not just political, but economic democracy. He said: "We have given the content of democracy in this Resolution and not only the content of democracy and not only the content, if I may say so, of economic democracy in this Resolution." See CAD, Vol. 1, pp. 57–65.

[2] CAD, Vol. IX, pp. 1193–94. Also see CAD, Vol. VII, p. 930. The discussion lasted only for a few minutes. Soon after the matter was called, T. T. Krishnamachari rose to place on record that the Committee's position, and the Assembly resolved to postpone the taking up of Article 24 to a future date.

[3] CAD, Vol. IX, p. 1197.

Clauses (ii) and (iii) as parts of the Directive Principles of State Policy, and after rejecting some substantive amendments, in that context, to render them as enforceable provisions. In that sense, there was indeed an inherent conflict in the Constitution as adopted on November 26, 1949. While property rights were accorded the status of Fundamental Rights [as in Articles 19 (1) (f) and 31], measures to implement the Directive Principles of State Policy, where they came in conflict with the Fundamental Rights, were left vulnerable to legal challenge. The earliest instance of this pertained to Article 39 (b), (c)[4] and Article 46[5] of the Constitution.

The original sin, so to say, laid in the wisdom (or the lack of it) of the Assembly, making such a distinction. B. R. Ambedkar's arguments against such amendments by Damodar Swaroop Seth and K. T. Shah did not hold when it came to the implementation of the State Policy. Damodar Swaroop Seth's statement that Article 24 (that would become Article 31 after November 26, 1949) would soon become the *Magna Carta* in the hands of the capitalists of India[6] turned prophetic within months after the Constitution had come into force.

In this chapter, we will discuss the long interaction between the judiciary and the legislature, through which the Nehruvian regime sought to correct the course insofar as implementing the socialist agenda was concerned. As declared by Jawaharlal Nehru, in September 1949, only a few months before the Constitution was adopted, the INC went about setting right the Constitution by way of amending it. These amendments were carried out in stages, as and when its provisions were seen as coming into conflict with the socialist agenda—in the economic and the social sense of the term—and set aside by the higher judiciary on the ground

[4] We have discussed this in greater detail in Chapters 2 and 3.

[5] It read: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation." The provision was meant to mandate the State to take measures intended to achieve social justice.

[6] CAD, Vol. IX, pp. 1197–1201.

that they were *ultra vires* of the Constitution. In all those instances, the primary area of conflict emerged in the context of the state's effort to give effect to the Directive Principles of State Policy and such efforts being seen as infringing upon the Fundamental Rights. The constitutional amendments, in fact, brought about substantive changes to the scope of Fundamental Rights, and it may be said that in most cases, if not all, they ended up imposing further restrictions on the Fundamental Rights and in some instances, they ended up removing such rights from among the Fundamental Rights.[7] It may be added that we will be dealing with such amendments those were brought in to give effect to Articles 39 (b) and (c) of the Constitution insofar as they are relevant to the scope of this book. In the process, we will discuss, in some detail, the various judgments by the courts during the time and response to those judgments in the form of constitutional amendments.

The first stone, so to say, was thrown when the Supreme Court decided on an appeal by the state of Madras against a ruling by the Madras High Court in a case, involving provision for reservation to Scheduled Castes in the admission to the Madras Medical College. The case involved a challenge in the Madras High Court, by Champakam Dorairajan, an aspirant,[8] that the provision for reservation of seats, as followed under the scheme devised by the Government Order of 1931 (also called the Communal GO) went against her Fundamental Right as guaranteed by Article 29 (2).[9]

The Government's argument in the court was that reservation in educational institutions, covered under Article 46 of

[7] The most striking example of this kind was the case of Articles 31 and Article 19 (f) of the Constitution.

[8] Champakam Dorairajan, in fact, had not even applied for admission to the course, and she stated in her affidavit that she had come to know, on mere enquiry, that she would not be admitted to the college on account that she was a Brahmin. See *State of Madras v. Champakam Dorairajan and another* (AIR-1951-SC-0-226).

[9] Article 29 (2) read as follows: "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

the Constitution, is as much a mandate of the Constitution and that the concerned GO, even where it predated the enactment of the Constitution, was valid. The Advocate General argued that Article 46 charges the State with promoting, with special care, the educational and economic interests of the weaker sections of the people in general, and of the Scheduled Castes and Scheduled Tribes in particular, and with protecting them from social injustice and all forms of exploitation.

The Supreme Court, however, refused to accept the government's position. A seven-member bench, presided over by Chief Justice M. H. Kania[10] held the argument invalid. Speaking for the bench, Justice S. R. Das held that Article 37 of the Constitution expressly holds the provisions contained in Part IV as nonenforceable. The most important aspect of the ruling, in that case, was that:

> [t]he chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive act or order, except to the extent provided in the appropriate Article in Part III. *The Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights.* In our opinion, that is the correct way in which the provision found in Parts III and IV have to be understood….[11] (Ananth, emphasis added)

The Supreme Court then interpreted that the Directive Principles of State Policy may be implemented only where there was no infringement, in the course of their implementation, on the Fundamental Rights. This indeed was a substantial restriction on what Vallabhai Patel, as the chairman of the Advisory Committee, told the Constituent Assembly that the Directive Principles are "fundamental in the governance of the country."[12] It may be added here that none of those who

[10] Apart from M. H. Kania, CJI, the bench was constituted by Saiyid Fazl Ali, M. Patanjali Sastri, M. C. Mahajan, B. K. Mukherjea, S. R. Das, and Vivian Bose, JJ. The judgment was delivered on April 9, 1951.

[11] AIR-1951-SC-0-226.

[12] Patel had made this point in his note to the Constituent Assembly. See supplementary report of the Advisory Committee on the subject of Fundamental Rights, August 25, 1947. See Rao, *The framing of India's Constitution: Select documents* (Vol. 2), p. 304.

argued against the non-enforceable character of this part had envisaged that measures to enforce the Directive Principles of State Policy would hit an obstacle on the ground in the form of a conflict with the Fundamental Rights. It may be noted here that those who argued against the distinction did not foresee this interpretation of the Constitution by the court in this way.[13]

Even as the Supreme Court struck down reservation (a measure taken on the basis of Article 46 of the Constitution), there was another blow struck on the government's measures to effect reforms in the agrarian sector. It may be noted that the various provincial governments passed laws abolishing zamindari and other forms of landlordism in the provincial legislative assemblies.[14] The common aim of these statutes, generally speaking, was to abolish zamindaris and other proprietary estates and tenures in the United Provinces, Central Provinces, and Bihar, so as to eliminate the intermediaries by means of compulsory acquisition of their rights and interests, and to bring the *raiyats* (peasants) and other occupants of lands in those areas into direct relation with the government. These laws, indeed, were discussed in the Constituent Assembly in the course of the debate on Article 24 (of the draft constitution) and Jawaharlal Nehru's amendment to the draft provision, before the Article was finally adopted for incorporation into the Constitution. The Article, according to the Right to Property, as introduced by Nehru, expressly provided Clause (4) or Clause (6) of Article 31.[15] Vallabhai Patel, in

[13] See Chapter 3 for a discussion on the debate in the Constituent Assembly.

[14] Among those were: The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950; The Bihar Land Reforms Act, 1950; and The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1951.

[15] Article 31 (4) If any Bill pending at the commencement of this Constitution before the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be

fact, had referred to these laws even earlier during the debate on the Right to Property and said:

> This clause here will not become the law tomorrow or the day after; it will take at least a year more, and before that, most of the zamindaris will be liquidated. Even under the present acts or laws in the different provinces legislation is being brought in to liquidate zamindaris either by paying just compensation or adequate compensation or whatever the legislatures there think fit. Therefore, it is wrong to think that this clause is intended really for them. It is not so. The process of acquisition is already there and the legislatures are already taking steps to liquidate the zamindaris….[16]

Notwithstanding this, the Patna High Court struck down the Bihar Land Reforms Act, 1950, as unconstitutional and void on the ground that it contravened Article 14 of the Constitution.[17] It will make sense to deal with the Act and the issues raised in that case before the Patna High Court and counter the grounds on which the Act was challenged.

On December 30, 1949, the Bihar Land Reforms Bill was introduced in the Legislative Assembly of Bihar and was passed by both the Houses of legislature. It received presidential assent on September 11, 1950, and the Act was published in the Bihar Government Gazette on September 25, 1950. A notification on the same day stated that the estates and tenures

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called in question in any court on the ground that it contravenes the provisions of clause (2).

(6) Any law of a State enacted not more than eighteen months before the commencement of this constitution may within three months from such commencement be submitted to the President for its certification; and there upon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of subsection (2) of section 299 of the Government of India Act, 1935. See CAD, Vol. IX, pp. 1193–1194.

[16] Patel said this in the Constituent Assembly as early as on May 2, 1947. See CAD, Vol. III, pp. 514–515.

[17] Interestingly, similar Acts in Madhya Pradesh and Uttar Pradesh were held as valid by the High Courts in those states.

belonging to Kameshwar Singh, the Raja of Darbanga (who was also a member of the Constituent Assembly and a vocal critic of the land reforms agenda there),[18] and two zamindars had become vested in the state of Bihar under the provisions of the Act. Kameshwar Singh filed a petition in the Patna High Court, under Article 226 of the Constitution, challenging the constitutionality of the Act and praying for a writ of mandamus on the state of Bihar, restraining it from acting under the provisions of the said Act. This application was heard along with three title suits and other similar applications filed by various zamindars of Bihar by a special bench of the High Court. In three separate but concurring judgments, the court declared the Act to be unconstitutional and void on the ground of its infringement of Fundamental Right under Article 14 of the Constitution.

Though the validity of the Act was attacked in the High Court on a number of grounds, the Patna High Court held it to be void only on the ground that it violated Article 14 of the Constitution.[19] The basis for the Patna High Court's decision

[18] It is interesting to note here that Kameshwar Singh had spearheaded the attack against Article 31 (Article 24 as in the Draft Constitution) in the Constituent Assembly. Speaking on the amendments proposed by Jawaharlal Nehru to the Article in the Draft Constitution (Sections 4 and 6), he said:

> The amendment enunciates a very vicious principle. It is vicious because it virtually discriminates between one kind of private property and another. It is vicious because it treats one section of the citizens of the Indian Union differently from another. It is vicious because it sanctions virtual expropriation of private properties. See CAD, Vol. IX, p. 1273.

[19] (1) That the Bihar legislature had no competence to pass it; (2) That it contravened Article 31 (1) of the Constitution; (3) That the vesting of the estates in the state of Bihar under the Act bring into effect an acquisition of the estates, it was invalid as that acquisition was not for a public purpose and the provision for compensation was illusory; (4) That it contravened Article 19 (1) (f) of the Constitution; (5) That some of its provisions were invalid on the ground of delegation of legislative powers; (6) That it was a fraud on the Constitution; (7) That it was unconstitutional as it contravened Article 14 of the Constitution.

was that the Bihar Act had fixed different slabs at which compensation was to be given for the land acquired. The compensation rate of those who owned large tracts of land was lesser than for those who owned smaller tracts.[20] The Patna High Court held the different rates of compensation as violating the Right to Equality guaranteed by Article 14 of the Constitution.

The Nehruvian regime reacted fast and decisively. Even while an appeal against the Patna High Court's order was filed in the Supreme Court, it decided to intervene by way of a constitutional amendment. Invoking the provisions under Article 379, the president issued an order by which the Constituent Assembly was accorded the status of *the two Houses of Parliament* until such time elections were held to the Lok Sabha and the Rajya Sabha, constituted after elected State Assemblies were brought into place.

On May 12, 1951, Prime Minister Jawaharlal Nehru introduced a comprehensive Bill to amend the Constitution. A Select Committee, to which the Bill was referred to, submitted its report on May 25, 1951. The provisional Parliament (which was constituted by those who constituted the Constituent Assembly that adopted the Constitution on November 26, 1949) passed the constitutional amendment on June 2, 1951. It received the president's assent on June 18, 1951, and became the Constitution (First Amendment) Act, 1951. The Act came into force on June 1, 1951, itself.[21]

[20] Section 24 of the Act provided the manner of determination of the compensation. It laid down a sliding scale for the assessment of compensation. Where the net income did not exceed ₹500, the compensation payable was 20 times the net income and where the net income computed exceeded ₹1,00,000, it was at three times the amount. In the case of the Maharaja of Darbhanga, the estate acquired also comprised land purchased by him by spending about a crore of rupees and also comprised mortgages to the tune of half a crore. All these vested in the Bihar State along with the inherited zamindaris of the Maharaja and arrears of rent amounting to ₹30,00,000 while the total compensation payable was nearly a sum of ₹9,00,000.

[21] Kashyap, *Constitution making since 1950* (Vol. 6), p. 17.

Jawaharlal Nehru's intention was made explicit in the Statement of Objects and Reasons in the Bill itself. It said:

> During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights….[22]

The Constitution (First Amendment) Act, 1951, was indeed a comprehensive measure to address the challenges before the government's determination to enact radical legislations. It was also on the lines of Nehru's assertion in the Constituent Assembly: That legalistic interpretation preventing the realization of some of the aspirations of the national movement, contained in the Directive Principles of State Policy, will be overcome even if that warranted changing the constitutional provisions. The Statement of Objects and Reasons said that forthright:

> Another article in regard to which unanticipated difficulties have risen is article 31. The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of article 31, formed the subject matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up. The main objects of this Bill are, accordingly to amend article 19 for the purposes indicated above and to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular. The opportunity has been taken to propose a few minor amendments to other articles in order to remove difficulties that may rise.[23]

This was how the Nehruvian regime asserted its commitment to agrarian reforms and its determination to save the Bihar Land Reforms Law that the Patna High Court had struck down. The amendment also intended to save the idea of reservation for the Scheduled Castes and Scheduled Tribes

[22] Ibid., p. 17.
[23] Ibid.

in educational institutions, struck down by the Supreme Court in the Champakam Dorairajan Case. The Statement of Aims and Objectives said that as such:

> It is laid down in Article 46 as a Directive Principle of State Policy that the state should promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. In order that any special provision that the State may make for the educational, economic or social advancement of any backward class of citizens may not be challenged on the ground of being discriminatory, it is proposed that Article 15(3) should be suitably amplified.[24]

It was significant that the Constituent Assembly, meeting now as the provisional Parliament, effected some significant changes to the Constitution and thus established the supremacy of the will of the people, rather than allowing the Constitution to remain a rigid document to be interpreted by the courts. It is also important to note here that the political leadership of the times, under Jawaharlal Nehru, stressed upon giving effect to some of the principles laid down in Part IV of the Constitution, rather than letting those remain as pious declarations.

The Constitution (First Amendment) Act, 1951, brought substantive changes in the Constitution and, in essence, those changes were to ensure that legislations aimed at effecting land reforms and achieving social justice through affirmative action were not frustrated by judicial decisions on grounds that such measures infringed upon the Fundamental Rights. Article 15 that prevented the State from undertaking measures, legislative or executive, that discriminated any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them, was qualified by way of inserting a new clause. The new Clause (4) that was added said:

> (4) 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 Schedule Tribes.[25]

[24] Ibid., p. 17.
[25] Constitution (First Amendment) Act, 1951. See ibid., p. 18.

The fact that the amendment was to come into effect from June 1, 1951 meant that the effect of the Supreme Court's judgment in the Champakam Dorairajan Case was nullified. In other words, reservation for the Scheduled Castes and Scheduled Tribes in educational institutions, set aside by the judgment as unconstitutional on the ground that it violated Article 14 of the Constitution and that any measure to affect Article 46 of the Constitution will have to be necessarily consistent with the provisions of the Fundamental Rights was, thus, handled. The scheme of reservation was now consistent with Article 15, a Fundamental Right, and thus any such measures by the Union as well as the State Governments, existing as well as taken in future, were in order.

This was not all. The substantive aspect of the Constitution (First Amendment) Act, 1951, from the concerns of this book, was in the area of zamindari abolition and the provocation coming from the Patna High Court's decision in the *Kameshwar Singh v. State of Bihar* Case. The amendment brought two new Clauses and a Schedule to the Constitution. Article 31-A, inserted by way of the amendment, read as:

> 31A Saving of laws providing for acquisition of estates, etc.
>
> 1. Notwithstanding anything in the forgoing provisions of this part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:
>
>   Provided that where such law is a law made by the Legislature of State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.
> 2. In this article,
>
>   The expression "estate" shall, in relation to any local area, having the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir, inam* or *muafi* or other similar grant.
>
>   The expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, under-proprietor,

> tenure-holder or other intermediary and any rights or privileges in respect of land revenue.[26]

Article 31-A was more in the nature of clarifying the definition of property and meant to ward off challenges in the nature of those against the Land Reform Acts passed in Bihar, Madhya Pradesh, and Uttar Pradesh. And thereafter, Article 31-B was inserted with a definite view to overcome the obstacle raised by the Patna High Court judgment in the Kameshwar Singh Case. It said:

> 31 B. Validation of certain Acts and Regulations.
>
> Without prejudice to the generality of the provisions contained in article 31 A, *none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, on the ground that such Act, regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part,* and notwithstanding any judgement, decree or order of any court or tribunal to the contrary, each of the said Acts and regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.[27] (Ananth, emphasis added)

The intention was clear and so was the language. That *no legal subtlety* was to come in the way of the INC insofar as giving effect to its commitment on land reforms. As many as 13 Acts were placed under the Ninth Schedule (an addition to the Constitution that had only eight Schedules when adopted on November 26, 1949) by this amendment. The list was illustrative. All of them pertained to land reforms in the different provinces,[28] and, interestingly, the Bihar Land Reforms Act, 1950, declared void by the Patna High Court, was on top of the list. The amendment also included the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, and Alienated Lands) Act, 1950, and

[26] Ibid., p. 19.

[27] Ibid.

[28] Ibid., pp. 20–21. See Appendix 4 for a list of the Acts that were placed under the Ninth Schedule of the Constitution by way of the various constitutional amendments.

the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, in the Ninth Schedule. The reason was that though those Acts were upheld in the two High Courts as constitutional, the landlords appealed to the Supreme Court against the High Court orders.[29]

The landlords amended their appeal before the Supreme Court, consequent to the Constitution (First Amendment) Act, 1951, and challenged its validity itself. Article 13 (2) of the Constitution that laid down that "[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void" formed the basis of the challenge. The appeal also challenged the right of the Provisional Parliament to amend the Constitution.[30]

This case, decided by a five-member[31] bench, headed by Justice M. H. Kania, Chief Justice of India, held unanimously that the Constitution (First Amendment) Act, 1951, was valid. The legal position thus held was that Acts placed under the Ninth Schedule of the Constitution were beyond legal challenge. The most substantive aspect that was settled in this judgment was that Article 13 (2) did not prohibit the right of the Parliament to amend any part of the Constitution, including those Articles of the Constitution under Part III.

Justice Patanjali Sastri, who wrote the unanimous judgment in this case, dealt with this aspect in detail and held:

> Although 'law' must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in

[29] The Supreme Court decided on the appeals in May 1952 and held all the state Acts as valid. It may be added that the decision was based on the Constitution as amended. We shall discuss this later on in this book.

[30] *Shankari Prasad Deo and Others v. Union of India* (AIR-1951-SC-458).

[31] Apart from Justice M. H. Kania, then Chief Justice of India, the bench was constituted by M. Patanjali Sastri, B. K. Mukherjea, S. R. Das, and N. Chandrasekhara Aiyar, JJ. It may be noted that all the judges, barring Justice Chandrasekara Aiyar, were part of the bench that struck down the law providing reservation for Scheduled Castes and Scheduled Tribes in the Champakam Dorairajan Case.

> exercise of constituent power. Dicey defines constitutional law as including 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State.' It is thus mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation. No doubt our constitution makers, following the American model, have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the State. We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. We are inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of the rights of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative power and not the abridgement or nullification of such rights by alterations of the Constitution itself in exercise of sovereign constituent power. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise must be difficult and rare. On the other hand, the terms of Article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. In short, we have here two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Saving regard to the considerations adverted to above, we are of opinion that in the context of Article 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368.[32]

This judgment, in the Shankari Prasad Deo Case, is significant in two ways. It cleared the path that the Parliament, in

[32] See AIR-1951-SC-458, paragraph 13. This decision, however, was overturned by the Supreme Court in the Golaknath Case, and we shall discuss that later on in this book. For now, the position that held the field was that Parliament had rights to amend all parts of the Constitution.

its wisdom, could within its rights alter any part of the Constitution in order to achieve the objectives set by the Directive Principles of State Policy, where most of the socialistic principles were listed. The second aspect is that it reiterated the law, as laid down in the Champakam Dorairajan Case that the Fundamental Rights were sacrosanct, and these overwhelmed the Directive Principles of State Policy. There was, however, a nuanced clarification that the constitutional validity of a law, under challenge, will be tested based on the Fundamental Rights as they were at the time of deciding on the challenge. The Shankari Prasad Case, decided on October 5, 1951, was based upon the Constitution, as amended, and in force since June 1, 1951.

The positive effect of the Constitution (First Amendment) Act, 1951, was to be found in the way a five-member bench of the Supreme Court[33] decided on the state of *Bihar v. Kameshwar Singh* Case on May 5, 1952. It was, however, a split verdict this time with all of them writing separate judgments. The majority held the various Acts, for land reforms under challenge, as constitutional.[34] The division, notwithstanding, the bench held: "The fact of the matter is the zamindars lost the battle in the last round when this Court upheld the Constitutionality of the Amendment Act which the Provisional Parliament enacted with the object, among others, of putting an end to this litigation. "The judges added: "[I]t is no disparagement to the learned counsel to say that what remained of the campaign has been fought with such weak arguments as over-taxed ingenuity could suggest."[35]

[33] Apart from Justice M. Patanjali Sastri, CJI, the bench was constituted by Mehr Chand Mahajan, B. K. Mukherjea, S. R. Das, and N. Chandrasekhara Aiyar, JJ. It may be noted that all of them, except Justice Mahajan, constituted the bench in the Shankari Prasad Deo Case.

[34] Apart from the Bihar Act, the Uttar Pradesh Act and the Madhya Pradesh Act too were impugned in this case; while the appeal in case of the Bihar Act was filed by the State Government, those against the two others were filed by the landlords. All of them, in any case, were against the respective orders by the High Courts.

[35] AIR-1952-SC-0-252.

The bench dealt with a number of issues in this case. Among them were whether the *public purpose* for which the land was compulsorily acquired had to be specified in the Act; whether acquisition without compensation was permitted by the Constitution; whether compensation or the principles thereof were justiciable; whether acquisition of *choses* (money due to the landlords by way of arrears of rent) was permitted and whether such money constituted property. The court, in fact, addressed to a number of issues and this, in fact, led to the judges writing separate judgments even while they all agreed on the basic question—as to whether the land reform laws in Bihar, Madhya Pradesh, and the Uttar Pradesh were constitutional. That substantive question, in their view, was answered in the Shankari Prasad Deo Case. It will be of relevance, from the concerns of this book, to deal very briefly with some parts of the judgment on these issues.

On the question as to whether it was necessary for any legislation in this regard to specify what *public purpose* was served by way of the acquisition, the bench was in agreement that it was not the case. Justice S. R. Das, however, went into this aspect in detail to hold that:

> From what I have stated so far, it follows that whatever furthers the general interests of the community as opposed to the particular interest of the individual must be regarded as a public purpose. With the onward march of civilization our notions as to the scope of the general interest of the community are fast changing and widening with the result that our old and narrower notions as to the sanctity of the private interest of the individual can no longer stem the forward flowing tide of time and must necessarily give way to the broader notions of the general interest of the community....
>
> The ideal we have set before us in Article 38 is to evolve a State which must constantly strive to promote the welfare of the people by securing and making as effectively as it may be a social order in which social, economic and political justice shall inform all the institutions of the national life. Under Article 39 the State is enjoined to direct its policy towards securing, 'inter alia' that the ownership and control of the material resources of the community are so distributed as to sub-serve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common

> detriment…. If therefore, the State is to give effect to these avowed purposes of our Constitution we must regard as a public purpose all that will be calculated to promote the welfare of the people as envisaged in these directive principles of State Policy whatever else that expression may mean.[36]

The judge did not stop with such generalities. He then came to the specific issue of land reforms legislations to say:

> In the light of this new outlook what, I ask, is the purpose of the State in adopting measures for the acquisition of the Zamindaries and the interests of the intermediaries? Surely, it is to subserve the common good by bringing the land, which feeds and sustains the community and also produces wealth by its forest, mineral and other resources, under State ownership or control. This State ownership or control over land is a necessary preliminary step towards the implementation of the directive principles of State policy and it cannot but be a public purpose. It cannot be overlooked that the directive principles set forth in Part IV of the Constitution are not merely the policy of any particular political party but are intended to be principles fixed by the Constitution for directing the State policy whatever party may come into power.[37]

The next important question that the bench dealt with involved the idea of compensation, as to whether acquisition without compensation was possible, and as to whether compensation as such was justiciable. Justice Patanjali Sastri, who held that even while Article 31(2) rendered compensation as necessary for the acquisition of property, Article 31 (4) and Article 31 (5) (b) authorized acquisition even without a public purpose and compensation. Justice Mehr Chand Mahajan concurred with this. This, however, was a minority view and the majority in the case held compensation as a necessary condition for acquisition laws protected by Article 31 of the Constitution. As for the quantum of compensation and whether that was justiciable, the bench unanimously held that while compensation was necessary, the quantum was out of the judiciary's purview. This certainly was based

[36] AIR-1952-SC-0-252, paragraph 106.
[37] Ibid., paragraph 106.

on Article 31 (4) and laws that were protected by this Clause were, however, saved from the application of Article 31 (2) that laid down compensation necessary for acquisition.[38] Justice Patanjali Sastri went a step further to hold that even where all these failed, Article 31-B rendered the laws as non-justiciable. Insofar as the question of whether choses was also property and can be acquired, the majority view in the Kameshwar Case was against such a provision. Justice Patanjali Sastri was the lone dissenter in that regard.[39]

[38] While Article 31 (2) laid down that:

> [n]o property, movable or immovable including any interest in or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

Article 31 (4) exempted its application to such cases where:

> If any Bill pending at the commencement of this Constitution before the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

[39] Justice Sastri held:

> Whatever may be the position as regards the acquisition of money as such, it is not correct to say that a law made under Entry 36 of List 2 cannot authorise acquisition of choses in action like arrears of rent due from the tenants which are covered by the term "property" used in that Entry and in Article 31. It is equally fallacious to argue that a payment in cash or in Government bonds of half the amount of such arrears leaves the zamindar without compensation for the balance. It is unrealistic to assume that arrears which had remained uncollected over a period of years during which the zamindar as landlord had the advantage of summary remedies and

It is important, from the concerns of this book, to note that the Supreme Court's decision on the issue of compensation was indeed categorical: that Articles 31 (4) and 31-A allowed laws for acquisition of private property for a public purpose as long as there was provision for compensation, and that the quantum of compensation was beyond the scope of judicial scrutiny. This position, in fact, was derived out of a reading of the concerned constitutional provisions as ones which flowed out of Section 299 of the Government of India Act, 1935[40] and judicial decisions in that context. However, the possibility of "compensation" being interpreted as "money equivalent" was addressed in the Constituent Assembly at the time of passage of Article 24 (that became Article 31), by Alladi Krishnaswamy Aiyar, a member of the Drafting

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other facilities for collection, represented so much money or money's worth in his hands when he was to cease to be a landlord and to have no longer those remedies and facilities. When allowance is made for doubtful and irrecoverable arrears and the trouble and expense involved in the collection of the rest of them, the payment of 50 per cent, of the face-value of the entire arrears must, as it seems to me, be considered reasonable and fair compensation for taking them over. Indeed, the contention leaves one almost wondering what advantage the zamindars would gain by seeking to overthrow a provision in the Act which may well prove beneficial to them…Article 31 (4) bars a challenge on these two grounds, and the objections to S. 4 (b) cannot be entertained. Ibid., paragraph 19.

[40] Section 299 (2) of the 1935 Act read as follows:

Neither the Federal nor a Provincial Legislature shall have power to make any law authorizing the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, it is to be determined. See Anand, *Constitutional law and history of Government of India* (8th Ed.), pp. 811–813.

Committee. Referring to Clause (2) of Article 24 in the Draft Constitution, he said:

> … On the one side it has been urged that the expression 'compensation' by itself carries with it the significance that it must be equivalent in money value of the property on the date of the acquisition, i.e. its market value. On the other side it has been urged that taking the cause as it is which refers to the law specifying the principles on which and the manner in which the compensation is to be determined, it gives a latitude to the Legislature in the matter of formulating the principles on which and the manner in which the compensation is to be determined…. The expression 'just' which finds a place in the American and the Australian Constitutions is omitted in Section 299 and in Article 24….[41]

He had also made a specific reference to the question of whether the provision for compensation in such laws passed by the competent legislature would be open for intervention and interrogation by the court. He told the Constituent Assembly:

> It is an accepted principle of Constitutional Law that when a Legislature, be it the Parliament at the Centre or Provincial Legislature, is invested with the power to pass a law in regard to a particular subject matter under the provisions of the Constitution, it is not for the court to sit in judgment over the act of the Legislature. The court is not to regard itself as a super-Legislature and sit in judgment over the act of the Legislature as a Court of Appeal or a review. The Legislature may act wisely or unwisely…. The province of Court is normally to administer the law as enacted by the Legislature within the limits of its power. Ofcourse if the legislation is a colourable device, a contrivance to outstep the limits of the legislative power, or to use the language of private law, is a fraudulent exercise of the power, the court may pronounce the legislation to be invalid or ultra vires….[42]

Aiyar pointed out that the state legislatures, in the context of Article 24 of the Draft Constitution (Article 31 of the Constitution), drew their powers to enact land reform laws from entry

[41] CAD, Vol. IX, pp. 1273–1274.
[42] Ibid., p. 1274.

35 of the Seventh Schedule of the Constitution and that it was unambiguous and clear that the legislatures concerned alone had the power to determine the compensation due or the principles on which compensation was to be determined.[43]

This argument was based on legal premises that were settled even at that time. The case therein pertained to the validity of the United Provinces Tenancy Act, 1939. By this, the provincial government of the United Provinces, headed by Govind Ballabh Pant, sought to abolish the zamindari system and the rights of the landlords to evict tenants therein on the ground that they had defaulted paying rent.[44] The challenge

[43] Alladi was referring to Entry 35 in the Concurrent List in Schedule 7 as it was in the Draft Constitution: It read as follows: "The principles on which compensation is to be determined for property acquired or requisitioned for the purpose of the Union or the State." This provision was initially included in the Union List alone as entry 43, which read: "Acquisition or requisitioning of property for the purposes of the Union subject to the provision of List III with respect to the regulation of the principles on which compensation is to be determined for property acquired or requisitioned for the purpose of the Union." The Drafting Committee, however, preferred to have this power—to determine the compensation or the principles on which it shall be determined—listed in the Concurrent List rather than in the Union List. See Rao (ed.), *The framing of India's Constitution: Select documents* (Vol. 3), pp. 664 and 670.

It may be added that in the Constitution, as it was adopted on November 26, 1949, the powers in this regard were provided in all the three lists: Entry 33 of List I, 36 of List II, and 42 of List III. The Constitution (Seventh Amendment) Act, 1956, however, deleted the relevant entries from List I and List II and replaced entry 42 in List III with a simple phrase that read "Acquisition and requisitioning of property." See Kashyap, *Constitution making since 1950 (*Vol. 6), pp. 32 and 43.

[44] The provincial legislation was, indeed, an evidence of the commitment of the INC, laid down so clearly in the Karachi session. It may be recalled that the Fundamental Rights Resolution in Karachi had said:

> The system of land tenure and revenue and rent shall be reformed and an equitable adjustment made of the burden on agricultural land, immediately giving relief to the smaller peasantry, by a substantial reduction of agricultural rent and revenue now paid by

against this Act was mounted by Thakur Jaganath Baksh Singh, a prominent landlord at that time, and his plea was that it went against Section 299 of the Government of India Act, 1935.[45]

Sir Maurice Gwyer, then the Chief Justice of the Federal Court, referring to whether the Uttar Pradesh Act violated Section 299 of the 1935 Act, held:

> The answer to this is that a law which regulates the relation of landlord and the tenant and thereby diminishes the rights which the landlord has hitherto exercised in connection with his land does not authorize the compulsory acquisition of the land for public or any other purpose; and, therefore, the question of compensation does not arise….We desire, however, to point out that what they are now claiming is that no Legislature in India has any right to alter the arrangements embodied in their *sanads* nearly a century ago; and for all we know, they would deny the right of Parliament to do so. We hope that no responsible Legislature or Government would ever treat as of no account solemn pledges given by their predecessors; but the readjustment of rights and duties is an inevitable process, and one of the functions of the Legislature in a modern State is to effect that re-adjustment, where circumstances have made it necessary, with justice to all concerned. It is, however, not for this court, to pronounce upon on the wisdom or the in the broader sense of legislative acts;….[46]

and declared the United Provinces Tenancy Act, 1939, as valid. The landlords went on appeal against this judgment to the Privy Council, only to lose the case again. Lord Robert

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> them, and in case of uneconomic holdings, exempting them from rent, so long as necessary, with such relief as may be just and necessary to holders of small estates affected by such exemption or reduction in rent, and to the same end, imposing a graded tax on net incomes from land above a reasonable minimum. (See Sitaramayya, *The history of the Indian National Congress* (Vol. 1), p. 464.

[45] See Seervai, *Constitutional law of India* (Vol. 2), p. 1362. Also see AIR-1943-FC-49.

[46] AIR-1943-FC-29. See p. 87.

Alderson Wright, as judge in the Privy Council, referring to Section 299 of the 1935 Act, held:

> In the present case, there is no question of confiscatory legislation. To regulate the relations of landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connection with his land is different from the compulsory acquisition of land….[47]

The Privy Council laid down two important principles in that case: (i) That no contract or grant could fetter the rights conferred by a constitutional Act and that the limitation on legislative power must be found in the Constitution itself; and (ii) that the deprivation of the rights of property arising from regulating the relation of landlord and tenant was not acquisition for a public or any other purpose, and the question of payment of compensation did not arise.[48]

In his long speech in the Constituent Assembly, Jawaharlal Nehru dwelt at length on the question of compensation.[49] Introducing an amended version of Article 24 of the Draft Constitution (that became Article 31) on September 10, 1949, Nehru did draw a distinction between acquisition of property (property in that debate primarily connoted to land) of small bits of property for public use and acquisitions for large schemes of social reforms. In this, Nehru did suggest that acquisitions for such large schemes cannot be treated with the same standard as in the cases of public purposes. Vallabhbhai Patel too had talked about this distinction while presenting the earliest draft of the Clause (on behalf of the Advisory Committee) to the Constituent Assembly. There was further clarity when Nehru spoke on the question of justiciability of compensation. Referring to Clause 2 of Article 24, Nehru said:

> The next clause says that the law should provide for the compensation for the property and should either fix the amount of compensation or specify the principles under which or the manner in

[47] *Thakur Jaganath Baksh Singh v. United Provinces* (IA-73-1946-123). See p. 131.

[48] See Seervai, *Constitutional law of India* (Vol. 2), p. 1363.

[49] See Appendix 5 for the full text of Nehru's speech in that regard.

> which the compensation is to be determined. *The law should do it. Parliament should do it. There is no reference in this to any judiciary coming into the picture*.... Parliament fixes either the compensation itself or the principles governing that compensation and they should not be challenged except for one reason, where it is thought that there has been gross abuse of the law, where in fact there has been a fraud on the Constitution....[50] (Ananth, emphasis added)

All these, indeed, must have gone into the considerations of the five-member bench while deciding the Kameshwar Singh Case to dismiss the challenges against the various land reforms legislations passed until then. The bench, in the Kameshwar Singh Case, dealt with yet another ground on which the land reform laws were challenged. Appearing for the landlords who agitated against the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (which was upheld by the Allahabad High Court earlier), B. R. Ambedkar argued that the impugned Act went against the *spirit of the Constitution*. Ambedkar's argument was:

> The Constitution, being avowedly one for establishing liberty, justice and equality and a government of a free people with only limited powers, must be held to contain an implied prohibition against taking private property without just compensation and in the absence of a public purpose.[51]

It is interesting to note here that the Chairman of the Drafting Committee and someone who had also participated in the process of the passage of the Constitution (First Amendment) Act, 1951, was seen arguing against acquisition of zamindari property and on behalf of the zamindars in the Supreme Court. Ambedkar relied on the decisions by the American judiciary to drive home his contention. His argument was:

> Articles 31-A and 31-B barred only objections based on alleged infringements of the fundamental rights conferred by Part III, but if, from the other provisions thereof, it could be inferred that there must be a public purpose and payment of compensation before

[50] CAD, Vol. IX, p. 1195.
[51] See AIR-1952-SC-0-252, paragraph 7.

> private property could be compulsorily acquired by the State, there was nothing in the two articles aforesaid to preclude objection on the ground that the impugned Acts do not satisfy these requirements and are, therefore, unconstitutional.[52]

Justice Patanjali Sastri described this argument as "based on a quibbling distinction without a difference in substance"[53] and held as follows:

> It is true that under the common law of eminent domain as recognised in the jurisprudence of all civilized countries, the State cannot take the property of its subject unless such property it required for a public purpose and without compensating the owner for its loss. But, when these limitations are expressly provided for and it is further enacted that no law shall be made which takes away or abridges these safeguards, and any such law, if made, shall be void, there can be no room for implication, and the words "acquisition of property" must be understood in their natural sense of the act of acquiring property, without importing into the phrase an obligation to pay compensation or a condition as to the existence of a public purpose.[54]

Justice M. C. Mahajan too dealt with this argument and said the following:

> It is convenient now to examine the point made by Dr. Ambedkar that the obligation to pay compensation is implicit in the spirit of the Constitution. It is well settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicit in respect of a certain right or matter. When the fundamental law has not limited either in terms or by necessary implication the general powers conferred on the legislature, it is not possible to deduce a limitation from something supposed to be inherent in the spirit of the Constitution. This elusive spirit is no guide in this matter. The spirit of the Constitution cannot prevail as against its letter.[55]

Ambedkar's arguments also involved a definition of *public purpose* and that it certainly did not imply purposes which

[52] See AIR-1952-SC-0-252, paragraph 7.
[53] Ibid., paragraph 11.
[54] Ibid., paragraph 13.
[55] Ibid., paragraph 201.

aimed at implementing the Directive Principles of State Policy. The Chairman of the Drafting Committee went on to add that Part IV of the Constitution merely contained glittering generalities which had no justification behind them and should not be taken into consideration in construing the phrase *public purpose*.[56]

Justice Mahajan dealt with this argument in detail and held:

> In my opinion, the contentions raised by Dr. Ambedkar, though interesting, are not sound because they are based on the assumption that the concept of public purpose is a rigid concept and has a settled meaning. Dr. Ambedkar is right in saying that in the concept of public purpose there is a negative element in that no private interest can be created in the property acquired compulsorily; in other words, property of A cannot be acquired to be given to B of his own private purpose and that there is a positive element in the concept that the property taken must be for public benefit. Both these concepts are present in the acquisition of the zamindari estates. Zamindaris are not being taken for the private benefit to any particular individual or individuals, but are being acquired by the State in the general interests of the community. Property acquired will be vested either in the State or in the body corporate, the 'gaon samaj' which has to function under the supervision of the State. Tenants, sirdars, asamis etc. are already in possession of the lands in which their status is to be raised to that of bhumidar. Zamindars who are being reduced to the status of bhumidars are also in possession of the lands. There is no question in these circumstances of taking property of A and giving it to B. All that the Act achieves is the equality of the status of the different persons holding lands in the State. It is not correct to say that Government is acquiring the properties for the purpose of carrying on a business or a trade. The moneys received from persons seeking bhumidari status or from the income of zamindari estates will be used for State purposes and for the benefit o the community at large. For the reasons given above, I hold that the impugned Act is not void by reason of the circumstance that it does not postulate a public purpose.[57]

[56] Ibid., paragraph 209. Justice Mahajan summarized Ambedkar's argument in this way. It may be added that even if it was only a summary, it must be taken as a faithful reproduction of Ambedkar's argument for want of the actual text.

[57] Ibid., paragraph 210.

The point here is that by the time the bench took up the case for arguments and judgment, the scope of Article 31 was clarified further by way of Articles 31-A and 31-B (and the Ninth Schedule consequently) and added by way of the Constitution (First Amendment) Act, 1951. The Supreme Court, by majority, upheld the Bihar Land Reforms Act, 1950 (barring Sections 4 (b) and 23 (f) of the Act that dealt with acquisition of a portion of the arrears in rent, which were declared to be unconstitutional and void). As for the Madhya Pradesh Abolition of Proprietary Rights (Estates, *Mahals*, and Alienated Lands) Act, 1950, and the Uttar Pradesh Zamindari Abolition and Land Reforms Act, the court held them as valid in their entirety.

The bench, in the Kameshwar Singh Case, however, did not delve into the question of justiciability of the adequacy of compensation in as elaborate a manner as it was warranted, even while it declared that the court had no powers to pierce the veil neither in case of the *public purpose* nor in the adequacy of compensation. This provided the scope for challenge against the West Bengal Land Development and Planning Act, 1948, enacted by the state government in West Bengal.

The Act, passed on October 1, 1948, was meant to acquire land for the settlement of immigrants who had migrated into West Bengal in the wake of the communal disturbances in East Bengal, triggered by the demand for partition. A registered society called the West Bengal Settlement Kanungoe Co-operative Credit Society Limited was authorized to undertake a development scheme, and the government of the state of West Bengal acquired and made over certain lands to the society for purposes of the development scheme on payment of the estimated cost of the acquisition. On July 28, 1950, the owners of the lands, thus, acquired (among them was one Ms. Bela Banerjee), instituted a suit in the Court of the Subordinate Judge, II Court at Alipore, District 24-Parganas, against the society for a declaration that the Act was void as contravening the Constitution. The state of West Bengal was subsequently impleaded as a defendant. As the suit involved questions of interpretation of the Constitution, the Government of West Bengal also moved the High Court

under Article 228 of the Constitution to withdraw the suit and determine the constitutional question.

The suit was accordingly transferred to the High Court, and a Division Bench held the West Bengal Land Development and Planning Act, 1948, void. The Act had limited the amount of compensation to be based on the market value of the land acquired as on December 31, 1946. For that reason, the Calcutta High Court declared the Act *ultra vires* of the Constitution. Shorn of *legalese*, the High Court, in that case, went into the adequacy of the compensation and, in that sense, against the settled principle in the Kameshwar Singh Case. The Government of West Bengal preferred an appeal in the Supreme Court, and the case[58] heard by a five-member bench presided over by Justice M. Patanjali Sastri, CJI,[59] was decided on December 11, 1953.

Speaking for the bench as a whole, Justice Patanjali Sastri held as follows:

> While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, *such principles must ensure that what is determined as payable must be compensation, that is a just equivalent of what the owner has been deprived of.* Within the limits of *this basic requirement of full indemnification of the expropriated owner*, the constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. *Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court.*[60] (Ananth, emphasis added)

[58] *State of West Bengal v. Mrs. Bela Banerjee and Others* (AIR-1954-SC-0-170).

[59] Apart from Justice Patanjali Sastri, CJI, the others who constituted the bench were M. C. Mahajan, S. R. Das, Ghulam Hasan, and B. Jagannadhadas, JJ. It may be noted that three out of the five members in this bench were part of the bench that decided the Kameshwar Singh Case and held that a dispute over the adequacy of the compensation was nonjusticiable.

[60] AIR-1954-SC-0-170, paragraph 6.

The premise was that the Act, being a permanent statute, lands may be acquired under it many years to come and that fixing the market value on December 31, 1946, as the ceiling on the compensation, without reference to the value of the land at the time of the acquisition, is arbitrary and cannot be regarded as due compliance in letter and spirit with, the requirement of Article 31 (2). The bench held that:

> The fixing of an anterior date for the ascertainment of value may not, in certain circumstances, be a violation of the constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it, but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired, may, be many years later cannot but be regarded as arbitrary.

Justice Patanjali Sastri went on to add:

> … it is common knowledge that since the end of the war, land, particularly, around Calcutta, has increased enormously in value and might still further increase very considerably in value when the pace of industrialisation increases. Any principle for determining compensation which denies to the owner this increment in value cannot result in the ascertainment of the true equivalent of the land appropriated.[61]

In dismissing the case, the bench, in fact, altered the existing law to hold that adequacy of compensation or the principles for compensation were justiciable. This was clearly against what Jawaharlal Nehru told the Constituent Assembly while explaining Article 24 of the Draft Constitution and his amendment to that Article, in September 1949. Unlike in the Kameshwar Singh Case, where the judges went into Articles 38 and 39 of the Constitution while deciding on the law involving acquisition of land for a public purpose, the bench in the Bela Banerjee Case did throw a spanner in the works of the government. It is necessary, however, to stress here that the West Bengal Act did not have anything to do

[61] Ibid., paragraph 8.

with land reforms, and in that sense Articles 38 and 39 of the Constitution did not have any scope insofar as the decision was concerned. The Act, in this case, had to do with rehabilitation of refugees and acquisition of land to provide them with housing sites. But then, the fact that the Supreme Court went on to explain that *compensation*, according to Article 31(2), meant a *just equivalent* of the property acquired, and held that it had to be *full indemnification to the owner expropriated*. In other words, it was held that the actual compensation or the principles thereof in any legislation were justiciable. This change of the law was to raise hurdles in the path of land reforms legislations once again.

The immediate fallout of this was the Calcutta High Court decision that held the Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950, as unconstitutional. The amendment, as such, prohibited eviction of under-tenants for nonpayment of rents, and thus restricted the power of the landlords who were vested with such rights in the law as it existed. Such a restriction was warranted in the context of the sharp increase in land prices at that time (in the immediate aftermath of independence), particularly around Calcutta, and eviction suits had become the order of the times. The Calcutta High Court, under Article 228 of the Constitution, declared the amendment as void on grounds that it was violative of Articles 19 (1) (f) and 31 of the Constitution. It may be stressed here that the amended Act, as such, was not placed in the Ninth Schedule of the Constitution (to be saved from judicial challenge under Article 31-B). Nor was the Act protected by Article 31 (4) and (6) of the Constitution. In that sense, the High Court might have decided the case rightly.

However, the impugned amendment in the case did not involve any acquisition or requisition of property for Article 31 to be invoked. The amendment, in fact, was the only one that regulated the relation between the landlord and the tenant, and decided as valid by the Federal Court and the Privy Council in the Jaganath Baksh Singh Case (discussed earlier in this chapter).[62] The Government of West Bengal, however,

[62] Seervai holds this opinion. See Seervai, *Constitutional law of India* (Vol. 2), p. 1371.

appealed against the Calcutta High Court's decision and the Supreme Court on December 17, 1953; decided by majority,[63] that the law, as amended, was valid and that Articles 19 (1) (f), and 31 did not apply in that case.

Justice Patanjali Sastri, however, held that the amendment effected the substantial deprivation of the rights of the landlords over property, and hence amounted to acquisition of the property, and thus attracted the provisions of Article 31 (2) that property shall not be acquired without compensation and held this to be the ground to dismiss the appeal.[64] The relevance of this judgment, insofar as the concerns of this book is concerned, was that at least two of the five judges raised the issue of compensation and considered that aspect as central to their decision. Justice Patanjali Sastri, in fact, defined Article 31 of the Constitution in the following terms:

> The purpose of Article 31 … is not to declare the right of the State to deprive a person of his property, but as the heading of the Article shows, to protect the 'right to property' of every person.[65]

This *principle* was the basis on which the Dwarakadas Case was decided on December 18, 1953.

The five-member bench[66] in this case dealt with the definition of acquisition as did Justice Sastri in the Subodh Gopal Case to allow the appeal and declare the Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950, as unconstitutional. The case involved the taking over the management and assets of the Sholapur Spinning and Weaving

[63] *West Bengal v. Subodh Gopal Bose* (AIR-1954-SC-92). The bench, consisting of Justice Patanjali Sastri, CJI, M. C. Mahajan, S. R. Das, Ghulam Hasan, and Jaganadhadas JJ, delivered a split verdict. Justice Sastri and Mahajan dismissed the appeal to hold that the amendment was void; but the majority held that the amendment was in order.

[64] Ibid., paragraph 13. Justice Mahajan too concurred with this with some qualification. See ibid., paragraph 26. Justice Mahajan espoused the same argument in another case (*Dwarakadas Sriniwas v. Sholapur Spinning and Weaving Mills Private Limited*), decided on December 18, 1953, just a day after the apex court decided the Subodh Gopal Case.

[65] Ibid., paragraph 13.

[66] Apart from Justice Patanjali Sastri CJI, the bench consisted of M. C. Mahajan, S. R. Das, Vivian Bose, and Ghulam Hasan JJ.

Mills, a private company, by the Government of Bombay by an Ordinance on January 9, 1950; the ordinance was replaced by an Act of the Bombay Legislature subsequently. The company had run into difficulties and its directors had served notice of closure earlier. Consequent to the government's decision to take over the company, the board of directors, now consisting of appointees of the government, resolved to call upon the preferential share holders to pay up for their shares. The preferential share holders had filed a suit against this, and the suit was dismissed against them by the Bombay High Court. They went on appeal before the Supreme Court, challenging the validity of the Act thereafter.

The Supreme Court, decided, the appeal on December 18, 1953. In this case,[67] the Supreme Court held the Bombay Act to be unconstitutional. The Court held that the Act provided for the acquisition of the property of the company, and dismissed the argument by the government that there was no acquisition as such and that the Act had only provided for taking over the management of the company and saved the mill from closure. The court held that on the facts, there was little doubt that the State had taken possession of the company and that where the judges were convinced on that fact, Article 31 (2) of the Constitution came into force. This, the bench held, meant that the Act provided for the acquisition of property without payment of compensation, and hence was void. In doing this, the bench, in fact, unsettled the law, as decided in the A. K. Gopalan Case.[68] In that case, the full court had held that Article 19 of the Constitution shall not be read along with Article 21, and that the validity of a law protected by Article 22 of the Constitution (the law under challenge in this case being the Preventive Detention Law) cannot be tested against Article 19 of the Constitution. The court, in that case, laid down that each of the provisions in Part III of the Constitution must be seen as separate and complete in themselves,

[67] *Dwarakadas Shriniwas v. Sholapur Spinning and Weaving Company, Private Limited* (AIR-1954-SC-119).

[68] *A. K. Gopalan v. State of Madras* (AIR-1950-SC-0-27).

and cannot be read along with another. However, the court, in the Dwarakadas Case adopted the principle that Article 31 (1) and Article 31 (2) will have to be read together, and thus set aside the Bombay Act as unconstitutional.[69]

The judgments in the three cases—Kameshwar Singh Case, Subodh Gopal Case, and Dwarakadas Case—revealed the infirmities in the Constitution insofar as the Right to Property on the one hand and the efforts by the independent Indian government to effect some of the provisions contained in the Directive Principles of State Policy on the other hand. It did emerge that the Constitution (First Amendment) Act, 1951, was not enough to harmonize the provisions of Part III and Part IV of the Constitution.

The INC, under Jawaharlal Nehru, responded to this situation by way of the Constitution (Fourth Amendment) Act, 1954.[70] By this, changes were made to Articles 31, 31A, and 305 and the Ninth Schedule of the Constitution. The aims and objectives, behind the amendment, as stated in the Bill, were as follows:

> Recent decisions of the Supreme Court have given a very wide meaning to clauses (1) and (2) of article 31. Despite the difference in the wording of the two clauses, they are regarded as dealing with the same subject. The deprivation of property referred to in clause (1) is to be construed in the widest sense as including any curtailment of a right to property. Even where it is caused by a purely regulatory provision of law and is not accompanied by an acquisition or taking possession of that or any other property right by

[69] It may be noted, here in this context, that the majority, while deciding the Bank Nationalization Case in 1970 invoked this principle. We shall discuss this in detail later on in this book.

[70] On December 20, 1954, almost a year after the Supreme Court decided the Subodh Gopal Case and the Dwarakadas Case, Prime Minister Jawaharlal Nehru introduced the Constitution Amendment Bill in the Lok Sabha. It was referred to a joint committee of the two Houses, whose report was presented on March 31, 1955. The Bill was passed by the Lok Sabha on April 12, 1955 and the Rajya Sabha on April 20, 1955. The Bill received the president's assent on April 27, 1955 as the Constitution (Fourth Amendment) Act, 1955. It came into force the same day.

> the State, the law, in order to be valid according to these decisions, has to provide for compensation under clause (2) of the article. It is considered necessary, therefore, to re-state more precisely the State's power of compulsory acquisition and requisitioning of private property and distinguish it from cases where the operation of regulatory or prohibitory laws of the State results in 'deprivation of property.'[71]

The Statement of Aims and Objects, by itself, was an affirmation that the regime was committed to social welfare legislations not merely in the area of zamindari abolition, but in all areas where the State's powers vis-à-vis the property owners were concerned. It said:

> It will be recalled that the zamindari abolition laws which came first in our programme of social welfare legislation were attacked by the interests affected mainly with reference to articles 14, 19 and 31, and that in order to put an end to the dilatory and wasteful litigation and place these laws above challenge in the courts, articles 31A and 31B and the Ninth Schedule were enacted by the Constitution (First Amendment) Act. Subsequent judicial decisions interpreting articles 14, 19 and 31 have raised serious difficulties in the way of the Union and the States putting through other and equally important social welfare legislation on the desired lines, e.g., the following:
>
> 1. While the abolition of zamindaris and the numerous intermediaries between the State and the tiller of the soil has been achieved for the most part, our next objectives in land reform are the fixing of limits to the extent of agricultural land that may be owned or occupied by any person, the disposal of any land held in excess of the prescribed maximum and the further modification of the rights of land owners and tenants in agricultural holdings.
> 2. The proper planning of urban and rural areas requires the beneficial utilisation of vacant and waste lands and the clearance of slum areas.
> 3. In the interest of national economy the State should have full control over the mineral and oil resources of the country, including in particular, the power to cancel or modify the terms and conditions of prospecting licenses, mining leases and similar agreements. This is also necessary in relation to public utility

[71] See Kashyap, *Constitution making since 1950*, pp. 23–24.

undertakings which supply power, light or water to the public under licences granted by the State.

4. It is often necessary to take over under State management for temporary period a commercial or industrial undertaking or other property in the public interest or in order to secure the better management of the undertaking or property. Laws providing for such temporary transference to State management should be permissible under the Constitution.
5. The reforms in company law now under contemplation, like the progressive elimination of the managing agency system, provision for the compulsory amalgamation of two or more companies in the national interest, the transfer of an undertaking from one company to another etc., require to be placed above challenge. It is accordingly proposed in clause 3 of the Bill to extend the scope of article 31A so as to cover these categories of essential welfare legislation.[72]

The Constitution (Fourth Amendment) Act, 1955, indeed, was a comprehensive response to the hurdles placed by the judiciary in effecting some of the government's policies. The guiding principle behind this was that the Constitution and its provisions would have to be changed where such a change was warranted to pursue the government's agenda. It is indeed relevant to note in this context that the INC, under Jawaharlal Nehru, was also explicit around this time about its commitment to a socialistic pattern of society. The Resolution at its Avadi Session, in 1955, was forthright: "Planning should take place with a view to the establishment of a socialistic pattern of society, where the principal means of production are under social ownership or control, production is progressively speeded up and there is equitable distribution of the national wealth."[73]

The significance of the Avadi Resolution is best understood in the context of the Constitution (Fourth Amendment) Act, 1955. The Bill, in fact, was moved by Jawaharlal Nehru in the

[72] Ibid., p. 24.

[73] See AICC (1956, p. 1). It may be noted that Jawaharlal Nehru had led the party as well as the government until then, and even while he was replaced by U. N. Dhebbar, as president at the Avadi Session, the socialist imprint remained pronounced.

Lok Sabha only a couple of weeks before the INC session affirmed its commitment to the socialistic pattern of society, and defined what it meant by socialistic in terms of ensuring social control over the principal means of production. The Constitution, as amended, made these clear. Article 31 (2), for instance, was amended to read as follows:

> (2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principle on which, and the manner in which, the compensation is to be determined and given*; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate*. (Ananth, emphasis added)
>
> (2A) Where a law does not provide for the 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 the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.[74]

The amendment to Article 31 (2) was meant to overcome and negate the effect of the Supreme Court's judgment in the Kameshwar Singh Case (that the adequacy of compensation was within the purview of the court); and the insertion of a new Article 31 (2-A) was meant to overcome the obstacle put up by the court in the Dwarakadas Case (that substantial control by the government of a property too constituted acquisition or

[74] Kashyap, *Constitution making since 1950* (Vol. 6), p. 25. It may be noted that Article 31 (2), as it then existed, read as follows:

> No property, movable or immovable including any interest in or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

requisition). Article 31, thus, was amended in a manner that it barred the courts from looking into the adequacy of compensation, and defined acquisition as being only where the title to the property was transferred, and thus excluded the taking over of management of property, even without police powers without having to pay compensation at all.[75] The Constitution (Fourth Amendment) Act, 1955, went beyond such immediate concerns. Article 31-A, added to the Constitution by way of the Constitution (First Amendment) Act, 1951, was further amended. The amended Article 31-A (1) read as follows:

> Not withstanding anything contained in article 13, no law providing for-
>
> 1. the acquisition by the State of any estate or of any rights therein or the extinguish[ing] or modification of any such rights, or
> 2. the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property or
> 3. the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
> 4. the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
> 5. the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes

[75] It may be noted that the Supreme Court, even in the Dwarakadas Case, distinguished between the state's powers to take over property against the police power to take over property as such.

> away or abridges any of the rights conferred by article 14, article 19 or article 31.[76]

Article 31-A, as amended, in fact, clarified a number of terms and it was clearly meant to enable laws on acquiring the property that was not necessarily agrarian and, in that sense, intended to prevent obstacles coming in the way of such measures in future. In this regard, the amendment also made changes in Article 31-A (2) to include definitions of *grant*, and also that of *tenure holder* to include *raiyats* and *under-raiyats*. The Constitution (Fourth Amendment) Act, 1955, also amended Article 31-B to include a further list of Acts in the Ninth Schedule of the Constitution.[77] The effect of this amendment was its complete, retrospective validation under the provisions of Article 31-B.

Jawaharlal Nehru's speech, in the Lok Sabha, during the debate on the amendment Bill was a categorical statement of the political intentions behind the amendment. The government was determined to carry forward with the task of effecting the provisions of Article 38 of the Constitution in general, and those in Articles 39 (b) and (c) in particular. On March 14, 1955, commending the Bill for reference to a Joint Select Committee of Parliament, Nehru told the Lok Sabha:

> The responsibility for the economic and social welfare policies of the nation should lie with Parliament and not with the courts…. The decisions of the Supreme Court show an inherent contradiction between the Fundamental Rights and the Directive Principles. *It is upto this Parliament to remove this contradiction and make the*

[76] Ibid., pp. 25–26. The Article, as it stood before the amendment read as:

> 31 A (1) Notwithstanding anything in the forgoing provisions of this part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part.

[77] See Appendix 4 for the list of Acts that were added to the Ninth Schedule through the various constitutional amendment Acts.

> *Fundamental Rights subserve the Directive Principles of State Policy.*[78] (Ananth, emphasis added)

The Constitution (Fourth Amendment) Act, 1955, also contained changes to the provision pertaining to property, other than land. Article 305 of the Constitution, which provided for state monopolies, was amended to read as follows:

> 305. Saving of existing laws and laws providing for State monopolies. Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; and nothing in article 30 shall affect the operation by any law made before the commencement of the Constitution (Fourth Amendment) Act,1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in subclause (ii) of clause (6) of article 19.[79]

This part of the amendment, in fact, was more to clarify the provisions in the Constitution so that laws or executive measures to bring a certain kind of business or commercial activity under the State's monopoly was not defeated by judicial interventions as it happened in a case of that kind.[80] The Aims and Objects behind the amendment act said that in so many words:

> It appears from the judgement of the Supreme Court that notwithstanding the clear authority of Parliament or of a State Legislature

[78] Lok Sabha Debates, March 14, 1955.

[79] Articles 301 to 307 in Part XIII of the Constitution, dealt with provisions regulating private enterprise in trade and commerce in the domain of monopolies. The unamended Article read as follows: "Nothing in Articles 301 and 303 shall affect the provisions of any existing law except insofar as the President may by order otherwise provide." See Rao (Ed.), *The framing of India's Constitution: Select documents* (Vol. 4), p. 858.

[80] *Sagir Ahmed v. State of Uttar Pradesh* (AIR-1954-SC-728). In that case, the question was whether an Act providing for a state monopoly in a particular trade or business conflicts with the freedom of trade and commerce guaranteed by Article 301, but left the question undecided. Though Clause (6) of Article 19 was amended by the Constitution (First Amendment) Act in order to take such State monopolies out of the purview of sub clause (g) of clause (1) of that Article, but no corresponding provision was made in Part XIII of the Constitution with reference to the opening words of Article 301.

> to introduce State monopoly in a particular sphere of trade or commerce, the law might have to be justified before the courts as being "in the public interest" under article 301 or as amounting to a "reasonable restriction" under article 304(b). It is considered that any such question ought to be left to the final decision of the Legislature. Clause 4 of the Bill accordingly proposes an amendment of article 305 to make this clear.[81]

In short, the Constitution (Fourth Amendment) Act, 1955, was meant to render null the Supreme Court's decision on a variety of issues pertaining to property laws, and where it involved the State's right to compulsorily acquire or requisition property. The amendment clarified that the adequacy of compensation was beyond the scope of judicial interrogation, and also laid down that where the law did not contain the scope for transfer of title to ownership, the provisions of Article 31 (2) of the Constitution, that no property shall be acquired without compensation, shall not apply. Thus, the Constitution laid out clearly that acquisition or requisition of property for a public purpose was beyond challenge and that disputes over the adequacy of compensation was outside the scope of challenge. The law, as it stood, in the wake of the Supreme Court's decision in the Bela Banerjee Case and the Dwarakadas Case stood altered. Moreover, this was done in order to ensure that the Fundamental Rights subserved the Directive Principles of State Policy. A certain sense of clarity had emerged by now and the gray area that existed in the realm of definition was also removed by the Constitution (Seventeenth Amendment) Act, 1964. Article 31-A was amended by this to contain all forms of property that came under the definition of *estate*.[82] The amendment also excluded such land under cultivation for personal consumption of the

[81] Kashyap, *Constitution making since 1950* (Vol. 6), pp. 24–25.

[82] Ibid., p. 66. Article 31 (2) (a) was substituted with the following:

> The expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent as in the existing law relating to land tenures in force in that area and shall also include-
>
> (i) Any *jagir, inam or muafi* or other similar grant and in the States of Madras and Kerala, any janmam right;

landlord from acquisition under Article 31, unless the compensation paid in such cases was not less than the market value of the property.[83] Article 31-B too was amended to include 44 more laws to the Ninth Schedule, taking the total number of Acts in the Schedule to 64.[84]

The Constitution (Seventeenth Amendment) Act, 1964, was challenged in the Supreme Court. In that case,[85] the challenge was on a substantive ground as to whether the Parliament had the powers to amend provisions that had implications on the scope of Article 226 of the Constitution. A five-member bench,[86] headed by Justice P. B. Gajendragadkar, CJI then, held the constitutional amendment valid by a majority judgment. Speaking for the majority,[87] Justice Gajendragadkar discussed

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(ii) Any land held under *ryotwari* settlement;

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

[83] Ibid. p. 66. Article 31 A (1) (i), inserted by the amendment, read as follows:

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

[84] See Appendix 4 for the list of Acts included in the Ninth Schedule.

[85] *Sajjan Singh and Others v. State of Rajastan and others* (AIR-1965-SC-0-845).

[86] Apart from Justice P. B. Gajendragadkar, CJI, the bench was constituted by K. N. Wanchoo, M. Hidayatullah, Raghubir Dayal, and J. R. Mudholkar, JJ.

[87] K. N. Wanchoo and Raghubir Dayal, JJ, concurred with Justice Gajendragadkar, CJI, in that case, to uphold the right of the Parliament to amend all parts of the Constitution. Justice Hidayatullah and Justice

the scope of Article 368 of the Constitution as the relevant provision in deciding the case and held:

> It is obvious that the fundamental rights enshrined in Part III are not included in the proviso, and so, if Parliament intends to amend any of the provisions contained in Articles 12 to 35 which are included in Part III, it is not necessary to take recourse to the proviso and to satisfy the additional requirement prescribed by it. Thus far, there is no difficulty. But, in considering the scope of Article 368, it is necessary to remember that Article 226, which is included in Chapter V of Part VI of the Constitution, is one of the constitutional provisions which fall under clause (b) of the proviso and so, it is clear that if Parliament intends to amend the provisions of Article 226, the bill proposing to make such an amendment must satisfy the requirements of the proviso. The question which calls for our decision: what would be the requirement about making an amendment in a constitution provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Article 226 are likely to be affected? The petitioners contend that since it appears that the powers prescribed by Article 226 are likely to be affected by the intended amendment of the provisions contained in Part III, the bill introduced for the purpose of making such an amendment, must attract the proviso, and as the impugned Act has admittedly not gone through the procedure prescribed by the proviso, it is invalid; and that raises the question about the construction of the provisions contained in Article 368 and the relation between the substantive part of Article 368 with its proviso.[88]

Justice Gajendragadkar went on to discuss the extent of the implication in this regard and referred, in detail, to the historical context in which the Parliament had amended the Constitution in 1951 and 1955 (the First and the Fourth

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Mudholkar, in separate but concurring judgments, also held the Constitution (Seventeenth Amendment) Act, 1964 valid, however, held that they were not in a position to state with finality on the question of Parliament's unbridled powers to amend the Constitution. Justice Mudholkar's judgment also talked about the basic structure of the Constitution, a concept that would emerge as central in the Kesavananda Case, which we shall deal with in detail at a later stage in this book.

[88] AIR-1965-SC-0-845, paragraph 6.

Amendments), and the law as upheld by the Supreme Court in that context. "The genesis of the amendments made by Parliament in 1951 by adding Articles 31-A and 31-B to the Constitution," he said,

> clearly is to assist the State Legislatures in this country to give effect to the economic policy in which the party in power passionately believes to bring about much needed agrarian reform. It is with the same object that the second amendment was made by Parliament in 1955, and as we have just indicated, the object underlying the amendment made by the impugned Act is also the same. *Parliament desire that agrarian reform in a broad and comprehensive sense must be introduced in the interests of a very large section of Indian citizens who live in village and whose financial prospects are integrally connected with the pursuit of progressive agrarian policy.* Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfillment of the socio-economic policy in which the party in power believes.[89] (Ananth, emphasis added)

Before upholding the amendment as valid, Justice Gajendragadkar went on to suggest that Parliament may consider an amendment to Article 368 as such.[90]

Justice Hidayatullah, who in a separate judgment, agreed with the majority insofar as the validity of the Constitution (Seventeenth Amendment) Act, 1964, was concerned, however,

[89] Ibid., paragraph 14.

[90] Ibid., paragraph 36. It read:

> Before we part with this matter, we would like to observe that Parliament may consider whether it would not be expedient and reasonable to include the Provisions of Part III in the proviso to Article 368. It is not easy to appreciate why the Constitution-makers did not include the said provisions in the proviso when Article 368 was adopted…. Parliament may consider whether the anomaly which is apparent in the different modes prescribed by Article 368 for amending Articles 226 and 32 respectively, should not be remedied by including Part III itself in the proviso. If that is done, difficult questions as to whether the amendment made in the provisions of Part III substantially, directly and materially affects the jurisdiction and powers of the High Courts under Article 226 may be easily avoided.

raised some issues that were not raised in the petition as such. He said:

> I would require stronger reasons than those given in Shankari Prasad's case, 1952 SCR 89 : (AIR-1951-SC-458) to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the states. No doubt, Article 19 by clauses numbered 2 to 6 allows a curtailment of rights in the public interest. This shows that Part III is not static. It visualises change and progress but at the same time it preserves the individual rights. There is hardly any measure of reform, which cannot be, introduced reasonably, the guarantee of individual liberty notwithstanding. Even the agrarian reforms could have been partly carried out without Articles 31-A and 31-B but they would have cost more to the public exchequer. *The rights of society are made paramount and they are placed above those of the individual. This is as it should be. But restricting the Fundamental Rights by resort to clauses 2 to 6 of 19 is one thing and removing the rights from the Constitution or debilitating them by an amendment is quite another.* This is the implication of Shankari Prasad's case, 1952 SC 89: (AIR-1951-SC-458). It is true that such things would never be, but one is concerned to know if such a doing would be possible.[91] (Ananth, emphasis added)

Justice J. R. Mudholkar, similarly, concurred with the majority insofar as the constitutional validity of the amendment was concerned. He, however, raised a doubt over whether Parliament's powers to amend the Constitution were unbridled as held in Shankari Prasad Deo Case. He said:

> 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 executives 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 form…. 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

[91] Ibid., paragraph 45.

> that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?[92]

These turned out to be raised as ground against legislations soon. The issue as to whether the Parliament had the powers to amend the provisions in Part III of the Constitution and whether Fundamental Rights were sacrosanct were raised in the Golaknath Case, while the bar on the courts delving into the adequacy of compensation was raised again in the Vajravelu Mudaliar Case. In both those instances, the Supreme Court clearly overruled the law that held the field until then. Golaknath Case happened in 1967; and the Vajravelu Case, in fact, was decided just about the same time as the Supreme Court upheld the Constitution (Seventeenth Amendment) Act, 1964, in the Sajjan Singh Case.[93]

The decision in the Vajravelu Case had its impact on the Bank Nationalization Case later on. Similarly, the issues raised by Justice Hidayatullah and Justice Mudholkar in the Sajjan Singh case had its impact on the Golaknath Case. We shall discuss these developments, in the post-Nehru era, in Chapter 5.

[92] Ibid., paragraph 57.

[93] The Vajravelu Mudaliar Case, where the Supreme Court declared the Land Acquisition (Madras Amendment) Act, 1961, as invalid, was decided on October 5, 1964; the Sajjan Singh Case was decided on October 30, 1964. It may be pointed out here that Justice K. Subba Rao, speaking for the bench, in the Vajravelu Case, held the Madras Act void on grounds that Article 31 A of the Constitution, even after the Constitution (Fourth Amendment) Act, 1955, saved acquisitions only in case of such laws related to agrarian reforms. In this case, acquisitions were done for purposes of slum clearance, and hence compensation had to be *just* and take into consideration the market value of the property acquired. We shall discuss this in detail later on in this book.

5

Property as Fundamental Right: The Judiciary Strikes Again

The Constitution (Seventeenth Amendment) Act, 1964, indeed, belonged to the Nehru era. The Bill, in fact, was introduced in the Lok Sabha in the morning of May 27, 1964, and only a few hours before Jawaharlal Nehru died.[1] The immediate provocation for the amendment came from another judgment of the Supreme Court on December 5, 1961.[2] The Kerala Agrarian Relations Act, 1961, which provided to do away with intermediaries and fix a ceiling on land holdings, and give the excess land, if any, to the landless or those who held land

[1] Jawaharlal Nehru suffered a stroke at the Indian National Congress (INC) session at Bhubaneswar on January 6, 1964. He continued to work despite that until he suffered a rupture of the abdominal aorta early in the morning on May 27, 1967. His life ended at 2 PM that day. A small note, on his bedside table, with a few lines scribbled from Robert Frost's poem, reflected his thoughts the night before. It read:

The woods are lovely dark and deep,
But I have promises to keep,
And miles to go before I sleep,

And miles to go before I sleep. (See Zachariah, *Nehru*)

[2] *Karimbil Kunhikoman and Another v. State of Kerala* (AIR-1962-SC-723).

much below the ceiling.[3] This was also the context when the economic policy of the Nehru regime was challenged, perhaps for the first time, at the political realm too.

The Swatantra Party made rapid strides in the general elections in 1962.[4] The Sino-Indian conflict, in October 1962, rendered the Nehruvian leadership vulnerable to attack. It did appear that the high days of Nehru were ending. A strong message to this effect came in through the by-elections to three Lok Sabha constituencies in May 1963 that the Congress lost. Among the winners were J. B. Kripalani, Ram Manohar Lohia, and Minoo R Masani. Even while the three winners represented a disparate opposition, with Masani alone belonging to the Swatantra Party, a no-confidence motion that Kripalani moved against the government provided the basis for a unity of the opposition. The architect of this unity, Ram Manohar Lohia, was now prepared to rally behind the Swatantra Party, notwithstanding his own party's claims to inherit the legacy of such strong votaries of socialism, such as K. T. Shah, D. P. Seth, and H. V. Kamath.[5] Though the no-confidence motion as

[3] See Chapters II and III of the Kerala Agrarian Relations Act, 1961.

[4] The Swatantra Party, founded in 1959, was explicit about its opposition to the Nehruvian socialist agenda. Founded in Madras, immediately after the INC session in Nagpur resolved to pursue cooperative farming, the Swatantra Party emerged as the earliest voice against the Congress and its socialist commitment. In the 1962 elections, the party won as many as 18 seats in the Lok Sabha. The fledgling outfit secured as much as 7.9 percent of the votes. A close look at the profile of the Swatantra Party MPs would reveal that most of them were either landlords or descendents of the former rulers of the various states. This aspect and the larger political context have been discussed in extensive detail elsewhere by the author. See Ananth, *India since independence: Making sense of Indian politics*.

[5] The amendments by Shah, Sheth, and Kamath, dealt with in detail in the earlier parts of this book, were certainly against the core principles of what the Swatantra Party came to represent since its formation in 1959. The Socialist Party that Lohia led, in 1963, was indeed a claimant to the legacy of the Congress Socialist Party. Lohia was among those who founded the party in 1934, working as a joint secretary of the INC, under Nehru for at least a decade after that, and among those who walked out of the Congress to found the Socialist Party in 1948.

such was defeated, Nehru, at that point of time, was considerably weakened. The Kamaraj Plan was indeed a response to these.[6] The Congress session at Bhubaneswar and the stroke that Nehru suffered while the session was in progress, in a sense, manifested these concerns and challenges before Jawaharlal Nehru and the Congress as such. The Constitution (Seventeenth Amendment) Act, 1964, was the Nehruvian regime's response to this challenge in as much as the Constitution (First Amendment) Act, 1951, and the Constitution (Fourth Amendment) Act, 1955. It was indeed another step in order to set right the drafting language in Article 31, which indeed was an issue.[7]

It is significant that the Constitution (Seventeenth Amendment) Act, 1964, became the point of issue before the Supreme Court in two instances. The apex court, in the first instance,[8] held the amendment valid based on the principle followed in the Shankari Prasad Deo Case. However, a larger bench of the Supreme Court, subsequently, overruled the position that held the field until then. This was in the Golaknath Case. In that case, the Supreme Court, by majority, held that the

[6] In August 1963, at a conclave of Congress leaders at Tirupati, Nehru approved a suggestion by K. Kamaraj to accept the resignation of six Union Ministers (Lal Bahadur Sastri, Morarji Desai, Jagjivan Ram, S. K. Patil, B. Gopala Reddy, and K. L. Shrimali) and six Chief Ministers (K. Kamaraj, Biju Pattnaik, Jivraj N. Mehta, Bhagwati Rai Mandloi, Chandra Bhanu Gupta, and Bhakshi Ghulam Mohammed) as part of a program to revitalize the Congress. I have discussed the implications of this move and the impact of the Kamaraj Plan on the political mosaic in detail elsewhere. See Ananth, *India Since Independence: Making Sense of Indian Politics*.

[7] Constitutional Historian H. M. Seervai is of the opinion that the use of the word *compensation* in Article 31 laid the basis for a whole lot of issues by way of allowing the judiciary to interfere in legislations that sought the implementation of the mandate in Articles 39 (b) and (c) of the Constitution. "… [I]n using the word 'compensation' the eminent lawyers who advised the constituent assembly, that 'compensation', in the context of Article 31 did not mean a just equivalent or market value, made a serious error, for to use a word in a sense which it does not ordinarily bear is a serious error in drafting.…" See Seervai, *Constitutional law of India* (Vol. 2), p. 1984.

[8] *Sajjan Singh and Others v. State of Rajastan* (AIR-1965-SC-0-845).

Fundamental Rights were outside the scope of Parliament's power to amend the Constitution.[9] In the meanwhile, in October 1964, the Supreme Court, in another case had taken the clock back to the pre-Constitution (Fourth Amendment) stage by striking down a land acquisition order in Madras State on the grounds of inadequate compensation.[10] The law, insofar as the State's power to acquire land for public purpose had undergone substantive changes in the Nehruvian era and yet at the time of Jawaharlal Nehru's death, was in a state where the judiciary seemed to set up hurdles one after another.

In this chapter, we shall deal with the context in which the Constitution (Seventeenth Amendment) Act, 1964, came into place, the provisions that were included in the Constitution by the amendment its implications, the substantive challenges that were posed against the amendment, leading to the Supreme Court declaring the amendment as valid (invoking the principle of *stare decisis*) but also ruling that Parliament, henceforth, shall not amend any part of the Fundamental Rights, and then see the implication of these in two important cases—the Bank Nationalization Case and the Privy Purses Case—where the government's measures to give effect to Articles 39 (b) and (c) were declared unconstitutional by the Supreme Court.

The Constitution (Seventeenth Amendment) Act, 1964

In the aftermath of the Constitution (Fourth Amendment) Act, 1955, the land reforms agenda seemed to be on track. The effect of the Bela Banerjee judgment, where the Supreme

[9] L. C. Golaknath and others v. State of Punjab and another (AIR-1967-SC-1643). The 11-member bench, in this case, consisted of K. Subba Rao, Chief Justice of India; Justices K. N. Wanchoo; M. Hidayatullah; J. C. Shah, S. M. Sikri; R. S. Bachawat; V. Ramaswami; J. M. Shelat; V. Bhargava; G. K. Mitter; and C. A. Vaidyalingam.

[10] *P. Vajravelu Mudaliar v. The Special Deputy Collector for Land Acqusition, West Bengal and Another* (AIR-1965-SC-0-1017).

Court asserted the judiciary's power to enquire into the adequacy of compensation, was reversed by way of the changes brought about in Article 31 (2) through the amendment. Similarly, the Constitution, as it stood after the First Amendment and the Shankari Prasad Deo Case, upholding Parliament's right to amend all parts of the Constitution, rendered immunity from judicial challenge to laws, passed by state legislative assemblies as long as they were added to the Ninth Schedule of the Constitution under Article 31-B. This, however, was found to be inadequate. In the Karimbil Kunhikoman Case,[11] the Supreme Court struck down the Kerala Agrarian Relations Act, 1961, holding it unconstitutional. The law, in this case, was passed in the first instance by the state government, headed by E. M. S. Namboodiripad, but the state assembly was dissolved after the dismissal of the state government invoking provisions of Article 356 of the Constitution, even before the Bill, as passed by the legislature, was given presidential assent. However, the state assembly passed the same Bill in 1961, and the presidential assent came soon after.

The Act provided for doing away with intermediaries insofar as land holdings were concerned. In order to achieve this shift, it provided for a ceiling over the extent of land of the existing landowners (who owned land in this case under the ryotwari system) and give the excess land, if any, to the landless cultivators or those who held land much below the ceiling. The Act sought to carry out this object in two stages: First, to acquire the land for the State, and thereafter to assign it to the cultivating tenants, or to the landless, or to those with small amounts of land. The law, in this case, was specific to the region consisting of the Hosdurg and Kasaragode *taluks* that were earlier a part of the South Canara district of Madras state, and became part of Kerala state after the States Reorganisation Act, 1956 and the formation of Kerala state.

The landowners raised the challenge against the law on a variety of grounds, including the provisions in the Act that

[11] *Karimbil Kunhikoman and Another v. State of Kerala* (AIR-1962-SC-723).

provided for the determination of the compensation. The Supreme Court rejected all the contentions against the law except the one about the adequacy of the compensation. The Kerala Agrarian Relations Act, 1961, was struck down as unconstitutional on the ground that the land involved, in this instance, being *ryotwari* settlements, it did not fall under the meaning of *estates*, as defined in Article 31-A (2) (a) of the Constitution to claim protection from the provisions of Article 31-A (1).[12] In short, the five-judge bench of the Supreme Court interpreted the constitutional bar on judicial scrutiny of the adequacy of compensation in case of acquisition as applicable to only such lands rights as specified in the Article and since the ryotwari lands were not specified in that, the court held the land reforms law as unconstitutional.[13]

Speaking for the bench, Justice K. N. Wanchoo went on to explain the reason behind the decision. He said:

> Though therefore the ryotwari pattadar is virtually like a proprietor and has many of the advantages of such a proprietor, he could still relinquish or abandon his land in favour of the Government. It is because of this position that the ryotwari pattadar was never considered a proprietor of the land under his patta, though he had many of the advantages of a proprietor. Considering, however, that

[12] Article 31-A, after the Constitution (Fourth Amendment) Act, 1955, had imposed a bar on the courts from looking into the adequacy of compensation. Similarly, the Constitution (Fourth Amendment) Act, 1955, had also laid down specific kinds of land rights, such as *janmam* lands, raiyat, and under-raiyats in Article 31-A (2) (a) and rendered acquisition of property belonging to such categories as immune from legal challenges on grounds that it was violative of the rights guaranteed under Articles 14, 19, and 31 of the Constitution.

[13] The bench consisted of Justices P. B. Gajendragadkar, A. K. Sarkar, K. N. Wanchoo, K. C. Das Gupta, and N. Rajagopala Ayyangar. It may be noted here that Justices Gajendragadkar and Wanchoo were part of the bench that upheld the Constitution (Seventeent Amendment) Act, 1964, in the Sajjan Singh Case. This has been dealt with in the Chapter 4. The point is that the Supreme Court struck down the Kerala Agrarian Relations Act, 1961, on the mere ground that the property that was acquired under the Act being ryotwari lands, did not qualify for acquisition without *just* compensation.

> the Act of 1908 was in force all over the State of Madras but did not apply to lands held on ryotwari settlement and contained a definition of the word "estate" which was also applicable throughout the State of Madras except the areas indicated above, it is clear that in the existing law relating to land-tenures the word "estate" did not include the lands of ryotwari pattadars, however valuable might be their rights in lands as they eventually came to be recognised.... We are therefore of opinion that lands held by ryotwari pattadars in this part which has come to the State of Kerala by virtue of the States Reorganisation Act from the State of Madras are not estates within the meaning of Art. 31A (2) (a) of the Constitution and therefore the Act is not protected under Art. 31A (1) from attack under Articles 14, 19, and 31of the Constitution.[14]

Having taken the view that the protection under Article 31-A was not available to the Kerala Act (because the land proposed to be acquired fell in the category of ryotwari land), the bench then went about dealing with the compensation rates that were provided for in the Kerala Act, 1961. Justice Wanchoo's judgment, with which the majority concurred, referred to the Kameshwar Singh Case, in which the question with respect to compensation provided in the Bihar Land Reforms Act, 1950, came up for consideration before the Patna High Court.[15] Pursuing this line, Justice Wanchoo held:

> We are of opinion that the view taken in that case is correct and the same applies to the present case. We may point out that case came in appeal to this Court (see *State of Bihar v. Kameshwar Singh* and AIR-1952-SC-252). The appeal, however, was heard after Article 31A and the Ninth Schedule had been introduced in

[14] AIR-1962-SC-723, paragraph 13.

[15] The Bihar Act provided compensation at different rates depending upon the net income. The landowner having the smallest net income below ₹500 was to get 20 times the net income as compensation while the landowner having the largest net income, that is, above ₹1,00,000 was to get only three times of the net income. Intermediate slabs provided different multiples for different amounts of net income. That provision was struck down by the Special Bench of the Patna High Court as violative of Article 14. However, the Supreme Court held the Act valid; thanks to the Constitution (First Amendment) Act, 1951, that added Article 31-A to the Constitution. We have discussed this in detail in Chapter 4.

> the Constitution and therefore this Court had no occasion to consider whether such difference in payment of compensation would be violative of Article 14. We are therefore clearly of opinion that the manner in which progressive cuts have been imposed on the purchase price under Section 52 and the market value under Section 64 in order to determine the compensation payable to land owners or intermediaries in one case and to persons from whom excess land is taken in another, results in discrimination and cannot be justified on any intelligible differentia which has any relation to the objects and purposes of the Act. As the provision as to compensation is all pervasive, the entire Act must be struck down as violative of Art. 14 in its application to ryotwari lands which have come to the State of Kerala from the State of Madras.[16]

The Constitution (Seventeenth Amendment) Act, 1964, was a response to this judgement. The Objects and Reasons made this clear.[17] The Bill was moved in the Lok Sabha on May 27, 1964,

[16] AIR-1962-SC-723, paragraph 29.

[17] The Objects and Reasons read as follows:

> Article 31A of the Constitution provides that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19, or Article 31. The protection of this article is available only in respect of such tenures as were estates on the 26th January, 1950, when the constitution came into force. The expression 'estate' has been defined differently in different States and, as a result of the transfer of land from one State to another on account of the reorganization of States, the expression has come to be defined differently in different parts of the same State. Moreover, many of the land reform enactments relate to lands which are not included in an estate. Several State Acts relating to land reform were struck down on the ground that the provisions of those Acts were violative of articles 14, 19, and 31 of the Constitution and that the protection of Article 31 A was not available to them. It is therefore proposed to amend the definition of `estate' in Article 31 A of the Constitution by including therein, lands held under ryotwari settlement and also other lands in respect of which provisions are normally made in land reform enactments.

See Kashyap, *Constitution making since 1950* (Vol. 6), p. 65.

a few hours before Jawaharlal Nehru died, and was debated in the Lok Sabha on June 1 and 2, 1964, and in Rajya Sabha on June 4 and 5, 1964. It received the president's assent on June 20, 1964, as the Constitution (Seventeenth Amendment) Act, 1964, and came into force the same day.[18] We have discussed the changes brought about by this in Chapter 4, and also the fact that they were held constitutional by the Supreme Court in the Sajjan Singh Case. The Supreme Court's decision, in the Vajravelu Mudaliar Case, however, unsettled the question once again. The Vajravelu Mudaliar Case, incidentally, was decided on October 5, 1964, and a few weeks before the Sajjan Singh Case (decided on October 30, 1964). The significance of the dates, as it will emerge in the course of the discussion hereafter, is that the principles that were evolved in the Vajravelu Mudaliar Case would determine the apex court's thinking in the Bank Nationalization Case and the Privy Purses Case; similarly, the apex court would soon overrule the settled law from the Shankari Prasad Deo and Sajjan Singh Case while deciding the Golaknath Case, and soon take the Constitution to where it stood prior to the Constitution (First Amendment) Act, 1951, insofar as the Right to Property was concerned.

From Vajravelu Mudaliar to Metal Corporation

The Vajravelu Mudaliar Case, a landmark in the judicial history on property rights, involved the Land Acquisition (Madras Amendment) Act, 1961. The Act, passed by the Madras Legislative Assembly, providing for acquisition of lands for construction of houses and other amenities in the city of Madras, was challenged on the grounds that the amended provisions violated the guarantees under Articles 14, 19, and 31 (2) of the Constitution. P. Vajravelu Mudaliar was the owner of land measuring about 7 acres, lying in the outskirts of Madras city. By a notification dated November 7, 1960, published in the Fort St. George Gazette dated November 16, 1960, the government

[18] Ibid., p. 65.

notification, under Section 4 (1) of the Land Acquisition Act, 1894, declared that his lands were needed for a public purpose. The notification specified that the land was needed for the development of the area as *neighbourhood* in the Madras city. On November 23, 1960, the Special Deputy Collector for Land Acquisition issued a notification under Section 4(1), read with Section 17(4) of the Land Acquisition Act, 1894, by which the enquiry provided for under Section 5-A of the Act was dispensed with, thus enabling the government to take possession of the land forthwith. The Madras Legislature subsequently enacted the Land Acquisition (Madras Amendment) Act, 1961, providing for the acquisition of lands for housing schemes and laying down principles for fixing compensation in a manner that was different from the existing provisions.

The effect of the amendment was that where acquisition of land was for the purpose of housing, the owner of that land got only the value of the land on the date of publication of the notification under Section 4(1) of the Land Acquisition Act, 1894, or an amount equal to the average market value of the land during the five years immediately preceding such date, whichever was less. As for the solatium, the Act, after amendment, provided for only 5 percent of such value instead of 15 percent, as provided before the amendment. The amendment also ensured that the land owner did not get the market value the particular piece of land would fetch if he had sold it as housing sites. The value was fixed for the nature of the land as it stood on the date of publication of the notification. These amendments to the law were challenged on grounds including that it violated Article 14 of the Constitution; the point was that by fixing different compensation packages for land based on the purpose for which it was acquired was a violation of the Right to Equality.

The five-member bench found merit in this argument. Speaking for the bench,[19] Justice K. Subba Rao held:

> From whatever aspect the matter is looked at, the alleged differences have no reasonable relation to the object sought to be achieved. It is said that the object of the Amending Act in itself may

[19] The five-member bench was constituted by Justices K. Subba Rao, K. N. Wanchoo, M. Hidayatullah, Raghubir Dayal, and S. M. Sikri.

> project the differences in the lands sought to be acquired under the two Acts. This argument puts the cart before the horse. It is one thing to say that the existing differences between persons and properties have a reasonable relation to the object sought to be achieved and it is totally a different thing to say that the object of the Act itself created the differences. Assuming that the said proposition is sound, we cannot discover any differences in the people owning lands or in the lands on the basis of the object. The object is to acquire lands for housing schemes at a low price. For achieving that object, any land falling in any of the said categories can be acquired under the Amending Act. So too, for a public purpose any such land can be acquired under the Principal Act. We, therefore, hold that discrimination is writ large on the Amending Act and it cannot be sustained on the principle of reasonable classification. We, therefore, hold that the Amending Act clearly infringes Article 14 of the Constitution and is void.[20]

The important point here is that the bench arrived at this conclusion based on a scrutiny of the principles on which the compensation was to be given to the land owners. And in that sense, the bench did take the law to where it stood before the Constitution (Fourth Amendment) Act, 1955. Justice Subba Rao, speaking for the bench, took a convoluted route to hold that the adequacy of compensation was a justiciable aspect even after the Constitution (Fourth Amendment) Act, 1955. It will be appropriate to cite Justice Subba Rao's judgment in the Vajravelu Mudaliar Case in this regard. Referring to a catena of cases beginning with Bela Banerjee and the changes made to Article 31 (2) by way of the Constitution (Fourth Amendment) Act, 1955,[21] Justice Subba Rao, speaking for the five-member bench, held:

> A scrutiny of the amended Article discloses that it accepted the meaning of the expressions "compensation" and "principles" as defined by this Court in Mrs. Bela Banerjee's case 1954 SCR 558:

[20] *Vajravelu Mudaliar and Another v. The Special Deputy Collector for Land Acquisition, West Madras* (AIR-1965-SC-0-1017), paragraph 20.

[21] The addition to the clause being: "and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate."

> (AIR-1954-SC-170). It may be recalled that this Court in the said case defined the scope of the said expressions and then stated whether the principles laid down take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court. Under the amended Article, the law fixing the amount of compensation or laying down the principles governing the said fixation cannot be questioned in any court on the ground that the compensation provided by that law was inadequate. If the definition of "compensation" and the question of justiciability are kept distinct, much of the cloud raised will be dispelled. Even after the amendment, provision for compensation or laying down of the principles for determining the compensation is a condition for the making of a law of acquisition or requisition. A Legislature, if it intends to make a law for compulsory acquisition or requisition must provide for compensation or specify the principles for ascertaining the compensation. *The fact that Parliament used the same expressions, namely, "compensation" and "principles" as were found in Art. 31 before the Amendment is a clear indication that it accepted the meaning given by this Court to those expressions in Mrs. Bela Banerjee's case, 1954 SCR 558: (AIR 1954 SC 170).* It follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the "just equivalent" of what the owner has been deprived of.[22] (Ananth, emphasis added)

Justice Subba Rao's argument (with which the entire bench concurred) was that "if a law lays down principles which are not relevant to the property acquired or to the value of the property at or about the time it is acquired, it may be said that they are not principles contemplated by Article 31(2) of the Constitution" and that "in such cases the validity of the principles can be scrutinised."[23] The judge rejected the argument that treating compensation as just equivalent of the property deprived was to render the Constitution (Fourth Amendment) Act, 1955, as nugatory saying that "it will be arguing in a circle" and this clearly was not consistent with

[22] Ibid., paragraph 14.
[23] Ibid., paragraph 15.

the established principles of judicial discipline. Justice Subba Rao and the bench, in fact, overruled the law as settled at that point of time.

The bench, then, took this argument as the basis to hold that the Land Acquisition (Madras Amendment) Act, 1961, was a fraud on the Constitution and struck it down. It held:

> Briefly stated the legal position is as follows: If the question pertains to the adequacy of compensation, it is not justiciable; if the compensation fixed or the principles evolved for fixing it disclose that the Legislature made the law in fraud of powers [*sic*] in the sense we have explained, the question is within the jurisdiction of the Court.[24]

Yet another ground that the bench adopted to uphold the claims for compensation as a just equivalent and in defence of the court's powers to decide on the adequacy of compensation was that the ban on the applicability of Articles 13, 14, 19, and 31 of the Constitution (provided by Article 31-A) was relevant only to acquisitions for effecting agrarian reforms, and not for any other public purpose. Justice Subba Rao's judgment held:

> Under Article 31 (2) and (2A) of the Constitution a State is prohibited from making a law for acquiring land unless it is for a public purpose and unless it fixes the amount of compensation or specifies the principles for determining the amount of compensation. But Article 31-A lifts the ban to enable the State to implement the pressing agrarian reforms. The said object of the Constitution is implicit in Article 31-A. If the argument of the respondents be accepted, it would enable the State to acquire the lands of citizens without reference to any agrarian reform in derogation of their fundamental rights without payment of compensation and thus deprive Article 31 (2) practically of its content. If the intention of Parliament was to make Article 31 (2) a dead-letter, it would have clearly expressed its intention. This Court cannot by interpretation enlarge the scope of Article 31-A. *On the other hand, the Article, … by necessary implication, is confined only to agrarian reforms. Therefore, we hold that Art. 31-A would apply only to a law made for acquisition by the State of any "estate" or any rights therein or for extinguishment or modification of such rights if such*

[24] Ibid., paragraph 16.

> *acquisition, extinguishment or modification is connected with agrarian reform.*[25] (Ananth, emphasis added)

Justice Subba Rao labored hard and the substantive aspect of that was his observation, with which the rest of the bench agreed, that went on to presume the legislative intention behind the Constitution (Fourth Amendment) Act, 1955. Leaning upon authority on statutory drafting, the bench held:

> If Parliament intended to enable a Legislature to make such a law without providing for compensation so defined, it would have used other expressions like "price," "consideration" etc.[26]

It is important to note here that these observations, by Justice Subba Rao and with which the bench agreed, was considered obiter and, hence, not binding in subsequent cases by even the Supreme Court.[27] Similarly, Justice Subba Rao's observation here was squarely addressed in the Constitution (Twenty Fifth Amendment) Act, 1971, by which Article 31 (2) of the Constitution was amended accordingly, and this was in direct response, in letter and the spirit, to Justice Subba Rao's observation.[28] We shall discuss this aspect in detail later on (in Chapter 6) in this

[25] Ibid., paragraph 11. The judgment added that even if the argument that the amendment was meant to ensure slum clearance, and hence fell under an enlarged definition of reforms: "we cannot hold that such a slum clearance relates to an agrarian reform in its limited or wider sense." Ibid., paragraph 12.

[26] Ibid., paragraph 14. The judgment cited from Edgar's commentary on statute law: "There is a well-known principle of construction that where the legislature used in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted unless a contrary intention appears." See Edgar (Ed.), *Craies on Statute Law*, p. 167.

[27] Justice Hidayatullah, for instance, made this point while deciding on the Shantilal Mangaldas Case (involving acquisition of land in Bombay city for purpose of improvement of the housing colonies). We shall discuss this point later in this chapter.

[28] The Constitution (Twenty-fifth Amendment) Act, 1971, among other things, altered Article 31 (2) to read as:

> No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides

book. It is pertinent, however, to note here that this amendment was held valid by the Supreme Court in the Keshavananda Bharti Case.

Meanwhile, the principle set out in the Vajravelu Mudaliar Case—that compensation meant just equivalent or full indemnification and that the adequacy was justiciable—was taken to its extremes when Justice Subba Rao, as Chief Justice of India, decided the Metal Corporation Case along with Justice J. M. Shelat on September 5, 1966.[29]

The Metal Corporation of India Limited, a limited company, was engaged in the development of zinc and lead mines in Rajasthan and the construction of a zinc smelter and other connected works for producing electrolytic zinc and by-products. The company was acquired by the central government, by way of an ordinance on October 22, 1965. The ordinance was replaced by an Act of Parliament subsequently, and the Act received the assent of the President of India on December 12, 1965. A writ petition against the Act was upheld by the Punjab High Court on the ground that the Act contravened Article 31 of the Constitution. The central government appealed against the High Court order before a two-member bench of the Supreme Court.

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for acquisition or requisitioning of the property for an *amount* which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such *amount* is to be given otherwise than in cash:

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in Clause (1) of article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such a property is such as would not restrict or abrogate the right guaranteed under that clause. (Ananth, emphasis added)

[29] *Union of India v. Metal Corporation of India and Another* (AIR-1967-SC-637).

Section 10 (1) of the Metal Corporation of India (Acquisition of Undertaking) Act, 1965, along with the Schedules to the Act, provided for the principles on which the compensation was to be paid. The plant machinery or other equipment which had not been worked on or used and was in good condition were to be valued at the actual cost incurred by the corporation in acquiring them. As for the plant, machinery, or equipment that were used, the compensation was to be calculated on the basis of the written-down value determined in accordance with the provisions of the Indian Income Tax Act, 1961, taking into account the depreciation allowed for, under the Act. The High Court, applying the principles adopted in the Vajravelu Mudaliar Case by the Supreme Court earlier, held that the principles for compensation cannot be called relevant to the determination of *just equivalent*, as it did not take into account the fact that prices have been steadily rising during the past several years, particularly of imported *machinery and plant*." It also held that the depreciation rule does not even pretend to determine the actual depreciation in a particular case, and it is obvious that such depreciation has no real relationship with the actual value of any machinery at any particular point of time.[30]

On September 9, 1966, Justice Subba Rao, along with Justice J. M. Shelat, went on to explain the implications of Article 31 (2) of the Constitution as follows:

> Under Article 31 (2) of the Constitution, no property shall be compulsorily acquired except under a law which provides for compensation for the property acquired and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given. The second limb of the provision says that no such law shall be called in question in any court on the ground that the compensation provided by the law is not adequate. If the two concepts, namely, 'compensation' and the jurisdiction of the court are kept apart, the meaning of the provisions is clear. The law to justify itself has to provide for the payment of a 'just equivalent' to the land acquired or lay down

[30] Cited by Justice Subba Rao in *Union of India v. Metal Corporation of India and Another* (AIR-1967-SC-637, paragraph 4).

> principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product cannot be questioned in a court of law. The validity of the principles, judged by the above tests, falls within the judicial scrutiny, and if they stand the tests, the adequacy of the product falls outside its jurisdiction. Judged by the said tests, it is manifest that the two principles laid down in Clause (b) of paragraph II of the Schedule to the Act, namely, (i) compensation equated to the cost price in the case of unused machinery in good condition, and (ii) written-down value as understood in the Income-tax law is the value of used machinery, are irrelevant to the fixation of the value of the said machinery as on the date of acquisition. It follows that the impugned Act has not provided for 'compensation' within the meaning of Article 31 (2) of the Constitution and therefore, it is void.[31]

[31] AIR-1967-SC-637, paragraph 9. The judge went on to establish the basis for his conclusion that the principles were irrelevant by way of calculating the cost of machinery from the time of its purchase and the date of acquisition. In the case of the undertaking in question, the machinery is the most valuable part of the undertaking. Apropos the unused machinery in good condition, how can the price for which the said machinery was purchased years ago possibly represent its price at the time of its acquisition? A simple illustration will disclose the irrelevance of the principle. Suppose, in 1950 machinery was purchased for ₹100 and, for some reasons, the same has not been used in the working of the undertaking, but has been maintained in good condition. That machinery has become obsolete, but can still be used effectively. If purchased in the open market, it will cost the owner ₹1000. A compensation of ₹100 for that machinery cannot be said to be a just equivalent. It is common knowledge that there has been an upward spiral in prices of the machinery in recent years. The cost price of machinery purchased about 10 years ago is a consideration not relevant for fixing compensation for its acquisition in 1965. The principle must be such as to enable the ascertainment of its price at or about the time of its acquisition. Nor the doctrine of written-down value accepted in the income-tax law can afford any guide for ascertaining the compensation for the used machinery acquired under the Act. Under the general scheme of the Income Tax Act, the income is to be charged regardless of the diminution in the value of the capital. But the rigour of this hard principle is mitigated by the Act granting allowances in respect of depreciation in the value of certain assets, such as machinery buildings, plant, furniture, etc. These allowances are worked out on a notional basis for giving relief

The principle adopted in this judgment was that compensation, as provided for in Article 31 (2), meant the just equivalent of the property acquired and that it was open for the courts to decide on the adequacy of the compensation. In other words, the Supreme Court in the Vajravelu Mudaliar Case and in the Metal Corporation Case restored the law, as it stood at the time of deciding the Bela Banerjee Case and notwithstanding the Constitution (Fourth Amendment) Act, 1955. The clock was put back, decisively, once again when a constitutional bench of the Supreme Court decided on the Golaknath Case. The apex court, in this instance, addressed the larger question of parliament's powers to amend provisions in Part III of the Constitution, and thus overruled the law as decided in the Shankari Prasad Case and in the Sajjan Singh Case in this instance. We shall now deal with the Golaknath Case in detail.

The Golaknath Case

The dispute in this case[32] involved an order by the Financial Commissioner, Punjab, based on the provisions of the Punjab Security of Land Tenures Act, 1953, and also the Mysore Land

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to the income-tax assessee. This artificial rule of depreciation evolved for income tax purposes has no relation with the value of the said assets to illustrate a machinery that was purchased in the year 1950 for ₹1,000. The aggregate of all the depreciation allowances made year after year for 10 years may exhaust the sum of ₹1,000 with the result, after the tenth year, the assessee will not be entitled to any depreciation. From this, it cannot be said that after the tenth year, the machinery has no value. Indeed, machinery purchased for ₹1,000 in 1950, because of subsequent rise in prices, may be sold in 1965 for ₹10,000. But the application of the principle laid down in Clause (b) of para II of the Schedule to the Act in regard to used machinery gives the owner no compensation at all. Yet, the government takes the machinery worth ₹10,000 gratis. This illustration exposes the extreme arbitrariness of the principle. (See ibid., paragraph 7).

[32] *L. C. Golaknath and Others v. State of Punjab and Another* (AIR-1967-SC-1643).

Reforms (Amendment) Act, 1965. Both the Acts provided for imposition of ceiling on the extent of land in the possession of an entity, and empowered the government to declare such extent of land over and above the ceiling as surplus and distribute the extent of surplus land among the tenants. The owners of such land—the legal heirs of one Henry Golak Nath, who died on July 30, 1953, in the case of the Punjab Act and a certain number of land owners in the case of the Mysore Act—who were sought to be dispossessed of their property, appealed before the Supreme Court on grounds that the said Acts violated the rights guaranteed to them under Articles 14, 19 (1) (f) and (g), and 31 of the Constitution.

The 11-member bench,[33] before which the cases came up, was indeed competent to consider afresh the law, and, in that sense, decided to address, as central concern, the question of Parliament's powers to amend the Constitution. The point is that the Constitution, as it stood, provided Parliament all the powers to amend all the parts of the Constitution and that the restrictions imposed by Article 13 (2) did not apply to constitutional amendments passed in accordance with the provisions under Article 368 of the Constitution. The Supreme Court, as we had seen in the Chapter 4, in the context of the Constitution (First Amendment) Act, 1951, and subsequently in the Sajjan Singh Case in the context of the Constitution (Seventeenth Amendment) Act, 1955, had held that Article 13 (2) pertained to ordinary legislations and that constitutional amendments were not restricted. If the law, as it stood, had to be followed, the Punjab Act and the Mysore Act were placed in the Ninth Schedule of the Constitution, and thus immune from attack on the grounds that they violated Articles 14, 19, and 31 of

[33] Headed by Justice K. Subba Rao, Chief Justice of India, the others who constituted the bench were: Justices K. N. Wanchoo, M. Hidayatullah, J. C. Shah, S. M. Sikri, R. S. Bachawat, V. Ramaswami, J. M. Shelat, V. Bhargava, G. K. Mitter, and C. A. Vaidyalingam. The bench delivered a split verdict with the majority holding that parliament's powers to amend the Constitution was restricted, and that the Fundamental Rights were beyond the amending powers. We shall discuss the details of the judgment later in this chapter.

the Constitution.[34] But then, there is no bar, as in the law, for a larger bench to reopen a point of law that was settled. In other words, an 11-member bench was eminently qualified to reopen the issue and decide one way or the other as to whether amendments to Part III of the Constitution constituted law in the sense as prohibited by Article 13 (2) of the Constitution.

Justice Subba Rao, speaking for himself and for Justices Shah, Sikri, Shelat, and Vaidyalingam, recalled the judgment in the Shankari Prasad Case to hold that "a careful perusal of the judgment indicates that the whole decision turned upon an assumption that the expression 'law' in Article 13 (2) does not include constitutional law and on that assumption an attempt was made to harmonise Articles 13(2) and 368 of the Constitution."[35] The learned judge then proceeded to define the scope and the place of the Fundamental Rights, which according to him was necessary to answer the question in the proper perspective. Citing the Preamble of the Constitution,[36] Chief Justice Subba Rao went on to place the Fundamental Rights and the Directive Principles of the Constitution in the following manner:

> The preamble is not a platitude but the mode of its realisation is worked out in detail in the Constitution. The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.... No authority created under the Constitution is supreme: the

[34] The Constitution (Seventeenth Amendment) Act, 1964, had placed as many as 44 Acts in the Ninth Schedule of the Constitution, and thus accorded protection to those Acts under Article 31-B of the Constitution. The Mysore Act, challenged in the Golaknath Case was entry number 51 in that list, and the Punjab Act was entry number 54 in the list. (See Appendix 4 for the list).

[35] AIR-1967-SC-1643, paragraph 13.

[36] "We the people of India have solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens justice, liberty, equality and fraternity."

> Constitution is supreme and all the authorities function under the supreme law of the land. The rule of law under the Constitution has a glorious content…. It empowers the Legislatures to make laws in respect of matters enumerated in the 3 Lists annexed to Schedule VII. In Part IV of the Constitution, the Directive Principles of State Policy are laid down. It enjoins it to bring about a social order in which justice, social, economic and political, shall inform all the institutions of national life. It directs it to work for an egalitarian society where there is no concentration of wealth where there is plenty, where there is equal opportunity for all, to education, to work, to livelihood, and where there is social justice. But, having regard to the past history of our country, it could not implicitly believe the representatives of the people, for uncontrolled and unrestricted power might lead to an authoritarian State… In short, the fundamental rights, subject to social control, have been incorporated in the rule of law.[37]

Having laid out the premise, Justice Subba Rao went on to add that:

> In the implementation of the Directive Principles, Parliament or the Legislature of a State makes laws in respect of matter or matters allotted to it. But the higher Judiciary tests their validity on certain objective criteria, namely, (i) whether the appropriate Legislature has the legislative competency to make the law (ii) whether the said law infringes any of the fundamental rights: (iii) even if it infringes the freedoms under Article 19 whether the infringement only amounts to 'reasonable restriction' on such rights in 'public interest.'[38]

Justice Subba Rao thereafter set out the paradigm from which the highest judiciary shall test the validity of laws, including amendments to the Constitution. Speaking for himself and four others in the bench, Justice Subba Rao stressed:

> By this process of scrutiny, the court maintains the validity of only such laws as [*sic*] keep a just balance between freedoms and social control. The duty of reconciling fundamental rights in Article 19 and the laws of social control is cast upon the courts and the touchstone or the standard is contained in the said two expressions. The standard is an elastic one; it varies with time, space and

[37] AIR-1967-SC-1643, paragraph 15.
[38] Ibid.

> condition. What is reasonable under certain circumstances may not be so under different circumstances. The constitutional philosophy of law is reflected in Parts III and IV of the Constitution. The rule of law under the Constitution serves the needs of the people without unduly infringing their rights. It recognizes the social reality and tries to adjust itself to it from time to time avoiding the authoritarian path. Every institution or political party that functions under the Constitution must accept it: otherwise it has no place under the Constitution.[39]

Discussing the implications of the law, as held by the Supreme Court in the Shankari Prasad Deo Case and in the Sajjan Singh Case, Justice Subba Rao held that it enabled Parliament to abrogate the Fundamental Rights at one stroke, provided the party in power, either singly or in combination with other parties, commanded the necessary majority. He said:

> The entire super-structure built with precision and high ideals may crumble at one false step. Such a conclusion would attribute unreasonableness to the makers of the Constitution for, in that event, they would be speaking in two voices. Such an intention cannot be attributed to the makers of the Constitution unless the provisions of the Constitution compel us to do so.[40]

Having laid the basis thus by placing the Fundamental Rights on a pedestal, Justice Subba Rao then went on to interpret Article 368 of the Constitution that dealt with amendment to the Constitution and concluded that the Parliament was bound to make only such laws that were within the four corners of Article 13 (2). The learned judge argued that "the marginal note to Article 368 describes that Article as one prescribing the procedure for amendment" and the view that "the completion of the procedural steps culminates in the exercise of the power to amend may be subtle but does not carry conviction."[41]

[39] Ibid.

[40] Ibid., paragraph 23.

[41] Ibid., paragraph 25. It may be noted here that this argument was sought to be overcome by way of the Constitution (Twenty-fourth) Amendment, 1971, which altered Articles 13 and 368 of the Constitution accordingly. The amendment was upheld by the 13-judge bench,

Justice Subba Rao, speaking for Justices Shah, Sikri, Shelat, and Vaidyalingam then stressed:

> If that was the intention of the provisions, nothing prevented the makers of the Constitution from stating that the Constitution may be amended in the manner suggested….The alternative contention that the said power shall be implied either from Article 368 or from the nature of the articles sought to be amended, cannot be accepted, for the simple reason that the doctrine of necessary implication cannot be invoked if there is an express provision or unless but for such implication the article will become otiose or nugatory. There is no necessity to imply any such power, as Parliament has the plenary power to make any law including the law to amend the Constitution subject to the limitations laid down therein.[42]

Justice Subba Rao and the four others, who concurred with him and let him speak on their behalf, in the Golaknath Case, then held that:

> there is, therefore, no inherent inconsistency between [the] legislative process and the amending one. Whether in the field of a constitutional law or statutory law amendment can be brought about only by law. The residuary power of Parliament, unless there is anything contrary in the Constitution, certainly takes in the power to amend the Constitution…. If the article of the Constitution expressly says that it cannot be amended, a law cannot be made amending it, as the power of Parliament to make a law is subject to the Article.[43]

The premise adopted by Justice Subba Rao and his brother judges who agreed with him in this case was that there was no inherent inconsistency between ordinary legislations and constitutional amendments, and held that amendments to the Constitution too fell within the ambit of law as intended in Article 13 (2). This logic then meant that amendments to

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by majority ruling, in the Keshavananda Case. We shall discuss this in detail later in this book.

[42] Ibid.

[43] Ibid., paragraph 26.

the Constitution too shall not alter the provisions in Part III of the Constitution. It was also held that the distinct procedure prescribed in Article 368 for constitutional amendments from those laid out in Article 245 (and the three lists in that connection) did not render constitutional amendments any less a law. The judge said:

> In short, amendment cannot be made otherwise than by following the legislative process. The fact that there are other conditions, such as, a larger majority and in the case of articles as mentioned in the proviso a ratification by Legislatures is provided, does not make the amendment any the less a law. The imposition of further conditions is only a safeguard against hasty action or a protection to the States but does not change the legislative character of the amendment.[44]

The fact that amendments too had to follow the same procedure set for legislations otherwise, led them to conclude that "the amendment to the Constitution can be nothing but 'law.'"[45]

Justice Subba Rao then went on to describe Article 13 (2) as unique to the Indian Constitution and held that "India adopted a different system altogether: *it empowered the Parliament to amend the Constitution by the Legislative process subject to the fundamental rights.* The Indian Constitution has made the amending process comparatively flexible, but it is made subject to fundamental rights"[46] (Ananth, emphasis added). The judge then cited various commentaries on constitutional law against unbridled amending powers to Parliament and against keeping such amendments outside the scope of judicial scrutiny. Justice Subba Rao and the four others for whom he spoke cited with approval eminent commentator, William Bennett Munro's conclusions that "it is impossible to conceive of an amendable Constitution as anything but a contradiction in terms" and that such a Constitution would constitute a "government by the

[44] Ibid., paragraph 28.
[45] Ibid., paragraph 32.
[46] Ibid., paragraph 35.

graveyards."[47] Following these, Justice Subba Rao and the four others whom he spoke for held:

> The result is that the Constitution (Seventeenth Amendment) Act, 1964, inasmuch as it takes away or abridges the fundamental rights is void under Article 13 (2) of the Constitution.[48]

The learned judges then referred to the context in which the Constitution (Seventeenth Amendment) Act, 1964, was passed,[49] as well as the various legislations in the Ninth Schedule of the Constitution inserted by way of the Constitution (First Amendment) Act, 1951, and the Constitution (Fourth Amendment) Act, 1955, and said:

> From the history of these amendments, two things appear, namely unconstitutional laws were made and they were protected by the amendments [which] were made in order to protect the future laws which would be void but for the amendments. But the fact remains that this Court held as early as in 1951 that Parliament had power to amend the fundamental rights. It may, therefore, be said that the Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, were based upon the scope of the power to amend [as] recognized by this Court.[50]

This line of reasoning by Justice Subba Rao, and the four others on whose behalf he spoke, received concurrence from Justice Hidayatullah.[51] In his separate but concurring judgment, Justice Hidayatullah distanced himself from the argument

[47] Ibid., paragraph 36. The reference was to Munro (1919).

[48] Ibid., paragraph 42.

[49] The amendment was a direct response to the Supreme Court's judgment in the *Karimbil Kunhikoman and Another v. State of Kerala* (AIR-1962-SC-723) as has been seen earlier in this chapter.

[50] AIR-1967-SC-1643, paragraph 43.

[51] It may be recalled that Justice Hidayatullah had dissented from the majority's view and held against Parliament's unbridled right to amend the Constitution even in the Sajjan Singh Case. Justice Hidayatullah, in that instance, had held, "I would require stronger reasons than those given in Shankari Prasad's case, 1952 SCR 89: (AIR-1951-SC-458) to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in

that amendments to the Constitution was not ordinary law, and hence did not attract the restrictions placed by Article 13 (2). Dealing with the historical context in which the Fundamental Rights had evolved, Justice Hidayatullah went on to place Article 13 (2) in that context. He then held:

> It is thus that Parliament cannot today abridge or take away a single Fundamental Right even by a unanimous vote in both the Chambers. But on the argument of the State, it has only to change the title of the same Act to an Amendment of the Constitution Act and then a majority of the total strength and a 2/3rd majority of the members present and voting in each House may remove not only any of the Fundamental Rights but the whole Chapter giving them.[52]

Justice Hidayatullah, however, went on to deal with the question as to whether the Fundamental Rights were absolute for all times and whether amendments were possible at all. Citing authority on constitutional law, Justice Hidayatullah added:

> A Republic must possess the means for altering and improving the fabric of the Government so as to promote the happiness and safety of the people. The power is also needed to disarm opposition

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common with the other parts of the Constitution and without the concurrence of the states. No doubt, Article 19 by clauses numbered 2 to 6 allows a curtailment of rights in the public interest. This shows that Part III is not static. It visualises change and progress but at the same time it preserves the individual rights. There is hardly any measure of reform, which cannot be, introduced reasonably, the guarantee of individual liberty notwithstanding. Even the agrarian reforms could have been partly carried out without Articles 31-A and 31-B but they would have cost more to the public exchequer. The rights of society are made paramount and they are placed above those of the individual. This is as it should be. But restricting the Fundamental Rights by resort to clauses 2 to 6 of 19 is one thing and removing the rights from the Constitution or debilitating them by an amendment is quite another. This is the implication of Shankari Prasad's case, 1952 SC 89: (AIR-1951-SC-458). It is true that such things would never be, but one is concerned to know if such a doing would be possible" (AIR-1965-SC-0-845, paragraph 45). Apart from Justice P. B. Gajendragadkar, CJI, the bench was constituted by K. N.Wanchoo, M. Hidayatullah, Raghubir Dayal, and J.R.Mudholkar, JJ.

[52] AIR- 1967-SC-1643, paragraph 131.

> and prevent factions over the Constitution. The power, however, is not intended to be used for experiments or as an escape from restrictions against undue state action enacted in the Constitution itself. Nor is the power of amendment available for the purpose of removing express or implied restrictions against the State.[53]

It was his argument that all aspects of the Constitution were amendable and this included the Fundamental Rights. His agreement with Justice Subba Rao and the four others, however, was on the point that Parliament did not have the powers to amend the Fundamental Rights of the Constitution under Article 368 of the Constitution. Justice Hidayatullah held that Article 13 (2) was an impediment created by the State on its own supremacy, and it prohibited all laws including amendments to the Constitution.[54] The judge then went on to further define the scope and the place of Fundamental Rights in the Constitution.

He said:

> In Sajjan Singh's case, 1965-1 SCR 93 3=(AIR 1965 SC 845) I said that if amendments of the Constitution were meant to be excluded from the word "law" it was the easiest thing to add to the definition the further words "but shall not include an amendment of the Constitution". It is argued, now before us, that this was not necessary because Article 368 does not make any exception. This argument came at all stages like a refrain and is the real cause of the obfuscation in the opposite view; Those who entertain this thought do not pause to consider: why make a prohibition against the State?... If the State wields more power than the functionaries there must be a difference between the State and its agencies such as Government, Parliament, the Legislatures of the States and the local and other authorities. Obviously, the State means more than any of these or all of them put together. By making the State subject

[53] Justice Hidayatullah relied on the commentary by Story, *Commentaries on the Constitution of the United States* (Vol. 3), pp. 686–687. See ibid., paragraph 136.

[54] The reasoning here was that the Constitution was supreme, and that the State as well as the government (the judge defines the two as distinct) were subordinate to the Constitution and that this was the meaning of Article 13 (2) of the Constitution. See AIR-1967-SC-1643, paragraph 137.

> to Fundamental Rights it is clearly stated in Article 13(2) that any of the agencies acting alone or all the agencies acting together are not above the Fundamental Rights. Therefore, when the House of the People or the Council of States introduces a Bill for the abridgement of the Fundamental Rights, it ignores the injunction against it and even if the two Houses pass the Bill the injunction is next operative against the President since the expression 'Government of India' in the General Clauses Act means the President of India. This is equally true of ordinary laws and laws seeking to amend the Constitution…In our Constitution the agencies of the State are controlled jointly and separately and the prohibition is against the whole force of the State acting either in its executive or legislative capacity. The control of the Executive is more important than even the Legislature. In modern politics run on parliamentary democracy the Cabinet attains a position of dominance over the Legislature.[55]

Justice Hidayatullah then raised the experience from Germany to press his line of argument. "The Executive, therefore, can use the Legislature as a means of securing changes in the laws which it desires. It happened in Germany under Hitler…."[56] The learned judge maintained that the Fundamental Rights were inalienable, and that the individual's right against State action was a guarantee on which the whole world moved, went on to delve into the philosophy of constitutional freedom in the following words:

> While the world is anxious to secure Fundamental Rights internationally, it is a little surprising that some intellectuals in our country, whom we may call 'classe non classe' after Hegel, think of the Directive Principles in our Constitution as if they were superior to Fundamental Rights. As a modern philosopher *(Benedetto Croce)* said such people 'do lip service' to freedom, thinking all the time in terms of social justice 'with *freedom* as a by-product.' Therefore in their scheme of things Fundamental Rights become only an epitheton ornans. One does not know what they believe in: the communistic millennium of Marx or the individualistic Utopia of Bastiat. To them an amendment of the Fundamental Rights is permissible if it can be said to be within a scheme of a supposed socio-economic

[55] Ibid., paragraph 140.
[56] Ibid.

> reform however, much the danger to liberty, dignity and freedom of the Individual. There are others who hold to liberty and freedom of the individual under all conditions. Compare the attitude of Middleton Murray who would have Communism provided 'there was universal freedom of speech, of association, of elections and of Parliament.' To such the liberty and dignity of the Individual are inviolable. Of course, the liberty of the individual under our Constitution, though meant to be fundamental is subject to such restrictions as the needs of society dictate. These are expressly mentioned in the Constitution itself in the hope that no further limitations would require to be imposed at any time.[57]

It was clear that Justice Hidayatullah was not merely applying his mind to the case before the bench, in that instance, as to whether the Constitution (Seventeenth Amendment) Act, 1964, was valid. Instead, the learned judge was concerned with a larger question as to whether such unbridled powers to Parliament was inimical to the premises on which the Fundamental Rights were placed in the Constitution and whether the rights of the individual as guaranteed by the various Articles in Part III could be taken away by way of constitutional amendments. This he expressed in his judgment in the following words:

> The liberty of the individual has to be fundamental and it has been so declared by the people. Parliament today is not the constituent body as the Constituent Assembly was, but is a constituted body which must bear true allegiance to the Constitution as by law established. To change the Fundamental part of the individual's liberty is a usurpation of constituent functions because they have been placed outside the scope of the power of constituted Parliament. It is obvious that Parliament need not now legislate at all.

[57] Ibid., paragraph 144. It may be recorded here that Justice Hidayatullah, unlike Justice Subba Rao and others whom the then Chief Justice spoke for, raised the task of interpretation of statutes to the level of a philosophical debate and placed the Directive Principles of State Policy as subservient to the Fundamental Rights. This indeed was a distinct departure from the position enunciated by Justice P. B. Gajendragadkar in the course of deciding on the Sajjan Singh Case, and also the predominant thinking in the Constituent Assembly while drafting the Constitution.

> It has spread the umbrella of Article 31-B and has only to add a clause that all legislation involving Fundamental Rights would be deemed to be within that protection hereafter. Thus the only palladium against legislative dictatorship may be removed by a 2/3rds majority not only in praesenti but de future. This can hardly be open to a constituted Parliament.[58]

Justice Hidayatullah then proceeded to pronounce the most important part of his judgment from this premise, and there he differed with Justice Subba Rao and others in a substantive sense. Even while holding that Parliament's powers to amend the Constitution was restricted by Article 13 (2) as much as the restrictions applied to laws otherwise, and that such amendments that infringed upon the Fundamental Rights were illegal; Justice Hidayatullah suggested a means to amend Part III of the Constitution. He said:

> There is a legal method. Parliament must act in a different way to reach the Fundamental Rights. The State must reproduce the power which it has chosen to put under a restraint. Just as the French or the Japanese, etc. cannot change the articles of their Constitution which are made free from the power of amendment and must call a convention or a constituent body, so also *we in India cannot abridge or take away the Fundamental Rights by the ordinary amending process. Parliament must amend Article 368 to convoke, another Constituent Assembly, pass a law under Item 97 of the First List of Schedule 7 to call a Constituent Assembly and then that assembly may be able to abridge or take away the Fundamental Rights if desired.* It cannot be done otherwise.[59] (Ananth, emphasis added).

It is important to deal with some other points raised by Justice Hidayatullah in his judgment to comprehend the substantial differences he had from Justice Subba Rao's line

[58] Ibid., paragraph 146. Justice Hidayatullah, indeed, seemed to foretell what Parliament would do, in subsequent years, by way of the Constitution (Twenty-fifth Amendment) Act, 1972, inserting Article 31-C into the Constitution. We shall discuss this and the Supreme Court's decision to uphold one part of Article 31-C and striking down another in the Keshavananda Case later in this book.

[59] Ibid., paragraph 163.

of thinking even while concurring with it.[60] As for instance, Justice Hidayatullah held that the Right to Property must not have been placed among the Fundamental Rights of the Constitution. He said:

> Our Constitution accepted the theory that Right of Property is a fundamental right. *In my opinion it was an error to place it in that category*… the right of property should have been placed in a different chapter. Of all the fundamental rights it is the weakest. Even in the most democratic of Constitutions, (namely, the West German Constitution of 1949) there was a provision that lands, minerals and means of production might be socialised or subjected to control. Article 31, if it contemplated socialization in the same way in India, should not have insisted so plainly "upon payment of compensation." Several speakers warned Pandit Nehru and others of the danger of the second clause of Article 31, but it seems that the Constituent Assembly was quite content that under it the Judiciary would have no say in the matter of compensation. *Perhaps the dead hand of Section 299 of the Constitution Act of 1935 was upon the Constituent Assembly*.[61] (Ananth, emphasis added)

[60] Justice Hidayatullah, for instance, referred to the Constitution (First Amendment) Act, 1951, and the insertion of Article 16 (4) therein.

> To remove the effect of centuries of discriminatory treatment and to raise the down trodden to an equal status cannot be regarded as discriminatory against any one. It is no doubt true that in 1951 SCR 525 = (AIR-1951-SC-226), the reservation of seats for Backward Classes, Scheduled Castes and Tribes in public educational institutions was considered invalid. Articles 16 (4) and 340 had already provided for special treatment for these backward classes, and Article 46 had provided that the State shall promote with special care their educational and economic interests. With all due respect, the question of discrimination hardly arose because in view of these provisions any reasonable attempt to raise the status of the backward classes could have been upheld on the principle of classification. In any event, the inclusion of this clause to Article 16 does not abridge or take away any one's Fundamental Rights unless the view be taken that the backward classes for ever must remain backward. (See AIR-1967-SC-1643, paragraph 164)

In that, the judge seemed to take the position that amendments by Parliament were justiciable, rather than imposing a ban on amendments.

[61] AIR-1967-SC-1643, paragraph 175. It is interesting to find Justice Hidayatullah citing extensively from the debates in the Constituent

Having said these, Justice Hidayatullah then went on to hold his position against unbridled powers to Parliament to amend the Constitution. And to this end, the learned judge went on to raise some apprehensions in the event the courts held Parliament's powers to amend the Constitution as absolute. He said:

> I am apprehensive that the erosion of the right to property may be practiced against other Fundamental Rights. If a halt is to be called, we must declare the right of Parliament to abridge or take away Fundamental Rights. Small inroads lead to larger inroads and become as habitual as before our freedom was won. The history of freedom, is not only how freedom is achieved but how it is preserved. I am of opinion that an attempt to abridge or take away Fundamental Rights even through an amendment of the Constitution can be declared void. This Court has the power and jurisdiction to make the declaration. I dissent from the opposite view expressed in Sajjan Singh's case, 1965-1 SCR 933= (AIR 1965 SC 845), and I overrule that decision.[62]

Assembly at this stage. Justice Hidayatullah recalled resolutions by the National Plan Committee of the INC for cooperative exploitation of land and mineral resources and the resolutions by the Congress Agrarian Reforms Committee, and pointed out the fact that all those were not considered at the time of drafting the Constitution and Article 31 in particular. The judge also recalled Gandhi's views on compensation: "that if compensation had to be paid, we would have to rob Peter to pay Paul." Socialist member Shibban Lal Saxena quoted Gandhi's speech in the Round Table Conference (in 1931) during the debate in the Constituent Assembly on Article 24 of the Draft Constitution (that became Article 31) on September 10, 1949, but was rejected by the majority (see CAD, Vol. IX, pp. 1206–1208). Gandhi had placed the need to reform the agrarian structure as central to the government of free India at the Round Table Conference. And in that context, he said: "If the national government comes to the conclusion that that place is necessary, no matter what interests are concerned they will be dispossessed. I may tell you, without any compensation, because if you want this government to pay compensation it will have to rob Peter to pay Paul, and that would be impossible."

[62] Ibid., paragraph 188. Justice Hidayatullah's apprehensions were to come true, in less than a decade from then, during the Emergency and the law that fundamental rights including the right to seek a writ of Habeas Corpus stood suspended during the Emergency. The Supreme

Justice Hidayatullah, in the end, concurred with Justice Subba Rao (who spoke for Justices Shah, Sikri, Shelat, and Vaidyalingam) to hold as follows:

(i) that the Fundamental Rights are outside the amendatory process *if the amendment seeks to abridge or take away any of the rights;* (Ananth, emphasis added)
(ii) that Shankari Prasad's case…(AIR 1951 SC 458) and Sajjan Singh's case…, (AIR 1965 SC 845) which followed it conceded the power of amendment over part III of the Constitution on an erroneous view of Articles 13 (2) and 368.
(iii) that the First, Fourth and Seventh Amendments being part of the Constitution by acquiescence for a long time, cannot now be challenged and they contain authority for the Seventeenth Amendment;
(iv) that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in Article 368, any further inroad into these rights as they exist today will be illegal and unconstitutional unless it complies with part III in general and Article 13 (2) in particular;
(v) that for abridging or taking away Fundamental Rights, a Constituent body will have to be convoked; and
(vi) that the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1953 (10 of 1953) and the Mysore Land Reforms Act, 1953 (10 of 1953), as amended by Act 14 of 1955 are valid under the Constitution not because they are included in Sch. 9 of Constitution but because they are protected by Article 31-A, and the President's assent.[63]

Meanwhile, it is interesting to note here that Justice Subba Rao too suggested the means to amend Part III of the Constitution,

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Court, sadly, held this position barring the dissent by Justice H. R. Khanna. It is, however, a commentary on the constitutional scheme and the dynamics of political democracy that the Constitution (44th Amendment) Act, 1978, remedied this fear expressed by Justice Hidayatullah. These belong to another era and another area of our jurisprudence and hence outside the scope of this book. However, it will be appropriate to say here that the Constitution (Forty-fourth Amendment) Act, 1978, also deleted Article 31 from the Constitution and added Article 300-A to the Constitution.

[63] Ibid., paragraph 195.

if the need arose; and that was to reconstitute a Constituent Assembly.[64] Justice Subba Rao held similar views as did Justice Hidayatullah insofar as the sanctity of the Fundamental Rights was concerned, and that only those amendments that were found violative of the Fundamental Rights could be held as unconstitutional.[65]

The substantial aspect of the judgment, thus, was that it restricted Parliament's powers to amend the Constitution insofar as such amendments led to taking away or abridgement of the rights guaranteed under Part III of the Constitution. The majority in the Golaknath Case, thus overruled the law, as held by the Supreme Court in the Shankari Prasad Deo Case and in the Sajjan Singh Case; in both these instances, the apex court had upheld restrictions on the Fundamental Rights in order to give effect to provisions in the Directive Principles of State Policy. The law, as held in the Golaknath Case, however, was as follows:

> If it is the duty of the Parliament to enforce the directive principles, it is equally its duty to enforce them without infringing the fundamental rights. The Constitution makers thought that it could be done and we also think that the directive principles can reasonably be enforced within the self-regulatory machinery provided by Part III. Indeed both Parts III and IV of the Constitution form an integrated scheme and is elastic enough to respond to the changing needs of the society. *The verdict of the Parliament on the scope of the law of social control of fundamental rights is not final, but justiciab1e.*[66] (Ananth, emphasis added).

[64] "Nor are we impressed by the argument that if the power of amendment is not all comprehensive there will be no way to change the structure of our Constitution or abridge the fundamental rights even if the whole country demands for such a change. Firstly, this visualizes an extremely unforeseeable and extravagant demand; but even if such a contingency arises, the residuary power of the Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it." See ibid., paragraph 55.

[65] We have not said that the provisions of the Constitution cannot be amended but what we have said is that they cannot be amended so as to take away or abridge the fundamental rights." Ibid., paragraph 54.

[66] Ibid., paragraph 54.

The significance of the majority verdict in the Golaknath Case was its impact on such laws as the nationalization of private banks and the abolition of privy purses. The majority in the Golaknath Case, in the end, held the Punjab Security of Land Tenures Act, 1953, and also the Mysore Land Reforms (Amendment) Act, 1965, both of which were challenged in this case, as valid. In making this decision, the majority applied the principle of *stare decisis* and rejected the plea to apply the doctrine of *prospective overruling*. Justice Subba Rao, for instance, went on to explain the reasons for rejecting the doctrine of *prospective overruling* in his judgment in the following words:

> From the history of these amendments, two things appear, namely unconstitutional laws were made and they were protected by the amendments that were made in order to protect the future laws which would be void but for the amendments. But the fact remains that this Court held as early as in 1951 that Parliament had power to amend the fundamental rights. It may, therefore, be said that the Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, were based upon the scope of the power to amend recognized by this Court.[67]

[67] Ibid., paragraph 43. It is interesting that the learned judge went on, in the subsequent paragraphs, to deal with the effect of the changes by way of the various laws and the amendments between 1950 and 1967.

> Between 1950 and 1967 the Legislatures of various States made laws bringing about an agrarian revolution in our country-zamindaris, inams and other intermediary estates were abolished, vested rights were created in tenants, consolidation of holdings of villages was made, ceilings were fixed and the surplus lands transferred to tenants. All these were done on the basis of the correctness of the decisions in Sankari Prasad's case, 1952 SCR 89 = (AIR 1951 SC 458) (supra) and Sajjan Singh's case, 1965-1 SCR 933 = (AIR 1965 SC 845) (supra), namely, that Parliament had the power to amend the fundamental rights and that Acts in regard to estates were outside judicial scrutiny on the ground they infringed the said rights. The agrarian structure of our country has been revolutionised on the basis of the said laws. Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequences Parliament

On this premise, even while holding the Constitution (17th Amendment) Act, 1964, as void and imposing restrictions on Parliament's power to amend the Constitution, the majority in the Golaknath Case laid the law afresh for the times to come. The judges described this as a "pragmatic solution" and disagreed with the argument that such orders were mere obiter. Justice Subba Rao said:

> It does not do away with the doctrine of *stare decisis*, but confines it to past transactions. It is true that in one sense the court only declares the law, either customary or statutory or personal law. While in strict theory it may be said that the doctrine involves making of law, what the court really does is to declare the law but refuses to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make law. It finds law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors

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had power to take away fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule. Learned counsel for the petitioners as well as those for the respondents persuade us to hold that Parliament has unlimited power and, if it chooses, it can do away with fundamental rights. We do not think that this Court is so helpless. As the highest Court in the land we must evolve some reasonable principle to meet this extraordinary situation. There is an essential distinction between Constitution and Statutes. Comparatively speaking, Constitution is permanent; it is an organic statute; it grows by its own inherent force. The constitutional concepts are couched in elastic terms. Courts are expected to and indeed should interpret, its terms without doing violence to the language to suit the expanding needs of the society. In this process and in a real sense they make laws. Though it is not admitted, the said role of this Court is effective and cannot be ignored. Even in the realm of ordinary statutes, the subtle working of the process is apparent though the approach is more conservative and inhibitive. In the constitutional field, therefore, to meet the present extraordinary situation that may be caused by our decision, we must evolve some doctrine which has roots in reason and precedents so that *the past may be preserved and the future protected*. (Ibid., paragraph 44) (Ananth, emphasis added)

> on the past transactions. It is left to the discretion of the court to prescribe the limits of the retrospectivity and thereby it enables it to mould the relief to meet the ends of justice.[68]

Meanwhile, it is necessary to note here that the 11-member bench in the Golaknath Case had delivered a split judgment. While Justice Hidayatullah, with his separate judgment concurred with Justice Subba Rao and four others, making it the majority view and hence the order of the bench, there were three other judgments in that case that held the opposite view. Justice K. N. Wanchoo, speaking for Justices Bhargawa and Mitter, held the Constitution (Seventeenth Amendment) Act, 1964, valid and also pronounced that Parliament's power to amend the Constitution, including provisions in Part III as supreme. Justice Wanchoo, speaking for Justices Bhargawa and Mitter, went on to argue that the court's power was restricted to delve into the effect of a certain act in question rather than going into the prospects of Parliament's powers in an abstract sense. He said:

> *The question whether the power of amendment given by Article 368 also includes the power to abrogate the Constitution completely and to replace it by an entire new Constitution, does not really arise in the present case, for the Seventeenth Amendment has not done any such thing and need not be considered.* It is enough to say that it may be open to doubt whether the power of amendment contained in Article 368 goes to the extent of completely abrogating the present constitution and substituting it by an entirely new one. But short of that, we are of opinion that the power to amend includes the power to add any provision to the Constitution, to alter any provision and substitute any other provision in its place and to delete any provision. The Seventeenth Amendment is merely in exercise of the power of amendment as indicated above and cannot be struck down on the ground that it goes beyond the power conferred on Parliament to amend the Constitution by Article 368.[69] (Ananth, emphasis added).

Justice Wanchoo laid down two things: That the courts shall not be held back by the fear of freedom (as did Justice

[68] Ibid., paragraph 48.
[69] Ibid., paragraph 88.

Hidayatullah in the instant case); and that the courts may, in that event, sit on judgment whether Parliament had the power to abrogate the Constitution and replace it with another. In other words, Justice Wanchoo did suggest that the amendments were justiciable, a principle that was held by the majority, in the Keshavananda Case in April 1973. Justice Wanchoo, incidentally, had agreed with Justice P. B. Gajendragadkar to uphold the Constitution (Seventeenth Amendment) Act, 1964, in the Sajjan Singh Case. In that instance, it was held that the amendments to the Constitution abridging some of the Fundamental Rights with the object of removing any possible obstacle in the fulfillment of the socioeconomic policy in which the party in power believed was valid.[70]

[70] This has been dealt with in detail in Chapter 4. See Appendix 4 for the list of Acts included in the Ninth Schedule. Justice Wanchoo and Justice Hidayatullah were part of both the benches and both were consistent in their views. The important point is that the minority view in Sajjan Singh gathered majority in the Golaknath Case. It need not be a mere coincidence that the political discourse across the country had witnessed a shift during that time, and Nehru's idea of socialism had ceased to be as dominant as it used to be during his lifetime. In the general elections, held in February–March 1967, the Congress party's strength dwindled to 283 seats in the Lok Sabha (from 361 in the previous elections in 1962); the party lost power in as many as nine states, and its strength in the Uttar Pradesh Assembly too came down substantially. The Golaknath verdict, coming as it did on February 27, 1967, seemed to reflect the popular thinking in the highest judiciary too. Justice Subba Rao, interestingly, agreed to be the opposition's candidate in the presidential elections in 1967. The opposition, at that stage, consisted of an amorphous lot of parties, including the Bharathiya Jan Sangh and the emergence of the Swatantra Party as its ideological face. With 44 Lok Sabha MPs, after the general elections of 1967, the Swatantra Party led the opposition charge. Justice Subba Rao, after his retirement, contested the presidential elections as the combined opposition's nominee and polled 43.4 percent of the votes against Zakir Hussain. This was unprecedented in the short history of presidential elections until then. It may be noted that the Swatantra Party's formation was in reaction to the Resolution at the Nagpur Session of the INC, committing the party to cooperative farming and nationalization of property. Similarly, the Bharathiya Jan Sangh too had spelt out, by 1966, its opposition

On Justice Subba Rao's point that the Constituent Assembly would have specified that Article 13 (2) did not apply to constitutional amendments in the event they felt that way and that there was no such opinion expressed at any point of time in the Assembly even while Article 368 was discussed and approved, Justice Wanchoo held:

> We are of opinion that we cannot and should not look into the debates that took place in the Constituent Assembly to determine the interpretation of Article 368 and the scope and extent of the provision contained therein. It may be conceded that historical background and perhaps what was accepted or what was rejected by the Constituent Assembly while the Constitution was being framed, may be taken into account in finding out the scope and extent of Article 368. But we have no doubt that what was spoken in the debates in the Constituent Assembly cannot and should not be looked into in order to interpret Article 368.[71]

Rejecting the argument based on fear of freedom, on which Justice Hidayatllah based his judgment, Justice Wanchoo, speaking for Justices Bhargawa and Mitter, held, "what Parliament in fact did by including various Acts in the Ninth Schedule read with Article 31-B was to amend the various provisions in Part III, which affected these Acts by making them an exception to those provisions in Part III."[72] Justice Wanchoo held:

> If we may say so, possibility of abuse of any power granted to any authority is always there; and if possibility of abuse is a reason

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to several features of the Nehruvian socialist approach in general, and the idea of planning in particular. The Jan Sangh, in fact, was opposed to the nationalization of the insurance sector (as early as in 1956) even when it happened in the context of Firoz Gandhi's expose of the scandalous ways of the private players in the sector.

[71] AIR-1967-SC-1643, paragraph 92. Justice Wanchoo cited from Craies on Statute Law, accepted as authority on interpretation of statutes, to arrive at this. It says: "It is not permissible in discussing the meaning of an obscure enactment, to refer to 'the parliamentary history' of a statute, in the sense of the debate which took place in Parliament when the statute was under consideration." See Edgar, *Craies on Statute Law,* pp. 128–129.

[72] Ibid., paragraph 109.

> for withholding the power, no power whatever can ever be conferred on any authority, be it executive, legislative or even judicial. Therefore the so-called fear of frightful consequences, which has been urged on behalf of the petitioners (if we hold, as we do that the power to amend the Constitution is unfettered by any implied limitation), is no ground for withholding the power, for we have no reason to suppose that Parliament on whom such power is conferred will abuse it. Further even if it abuses the power of constitutional amendment under Article 368 the check in such circumstances is not in courts but is in the people who elect members of Parliament. The argument for giving a limited meaning to Article 368 because of possibility of abuse must therefore be rejected.[73]

Justice V. Ramaswami, similarly, held Parliament's power to amend as unbridled and sought to place economic freedom as a higher objective than political liberty in the context of interpreting the Fundamental Rights. Leaning on Harold Laski and de Tocqueville, Justice Ramaswami held:

> If the fundamental rights are unamendable and if Article 368 does not include any such power it follows that the amendment of, say Article 31 by insertion of Articles 31-A and 31-B can only be made by a violent revolution.... If, therefore, the petitioners are right in their contention that Article 31 is not amendable within the frame-work of the present Constitution, the only other recourse for making the amendment would, as I have already said, be by revolution and not through peaceful means. It cannot he reasonably supposed that the Constitution makers contemplated that Article 31 or any other article on fundamental rights should be altered by a violent revolution and not by peaceful change....[74]

Justice Ramaswami then pointed to Article 38 of the Constitution, and elaborated on the need to harmonize rights and State policies in that context. The learned judge added:

> The adjustment between freedom and compulsion, between the rights of individuals and the social interest and welfare must

[73] Ibid., paragraph 112.
[74] Ibid., paragraph 270.

> necessarily be a matter for changing needs and conditions. The proper approach is, therefore, to look upon the fundamental rights of the individual as conditioned by the social responsibility by the necessities of the Society, by the balancing of interests and not as preordained and untouchable private rights.[75]

Justice Bachawat, who too wrote a separate judgment and constituted the minority in the bench, among other things, held that "the objective of the preamble is secured not only by Part III but also by Part IV and Article 368. The dynamic character of Part IV may require drastic amendments of Part III by recourse to Article 368."[76] It was his view that "the dynamics of the social revolution in our country may require more rapid changes"[77] and that "if the Parliament has the power to make the amendments, the choice of making any particular amendment must be left to it. Questions of policy cannot be debated in this Court."[78]

The order in the Golaknath Case, however, was based on the majority view (as is the norm) and it was that "fundamental rights are outside the amendatory process and Parliament will have no power in future to amend provisions of Part III so as to abridge or take away fundamental rights therein." The Supreme Court, by majority, declared that any further inroad into the Fundamental Rights will be illegal and unconstitutional. Having said this, the majority also held the Constitution (Seventeenth Amendment) Act, 1964, to be valid on application of the principle that the amendment was carried out on the strength of the then law, as laid down by the Supreme Court in the Shankari Prasad Deo Case, and held as valid in the Sajjan Singh Case. The majority, however, held this to be an erroneous interpretation of Articles 13 (2) and 368. It added:

> While ordinarily the Supreme Court will be reluctant to reverse its previous decision, its duty in the constitutional field [is] to correct

[75] Ibid., paragraph 264.
[76] Ibid., paragraph 229.
[77] Ibid., paragraph 234.
[78] Ibid., paragraph 235.

> itself as early as possible, for otherwise the further progress of the country and the happiness of the people will be at stake.

Referring to the decision in the Shankari Prasad Deo Case, the majority held:

> The longer it holds the field the greater will be the scope for erosion of fundamental rights. As it contains the seeds of destruction of the cherished rights of the people the sooner it is overruled the better for the country.[79]

This judgment, changing the law and restricting the Parliament's powers to amend the Constitution had its most pronounced implication in the Bank Nationalization Case. It is also necessary to note, at this stage, that most of the arguments in this case were raised again in the Keshavananda Case and the majority there overruled the position, as held in the Golaknath Case. The issue before a larger bench then was the validity of the Constitution (Twenty-fourth Amendment) Act, 1971, by which Articles 13 and 368 of the Constitution were amended in a manner that overwhelmed the arguments that the majority had based their decision in the Golaknath Case.[80] All these, indeed, belonged to another era, and, for now, the relevant point is that the impact of Golaknath was evident in the Bank Nationalization Case and the Privy Purses Case.

It will be relevant, however, to deal with the Shantilal Mangaldas Case, decided on January 13, 1969, in which a five-member bench of the Supreme Court held that the adequacy of compensation as beyond its jurisdiction and nonjusticiable.

[79] The Supreme Court, in an earlier case, had settled the law on overruling the law, even if it was laid down by the court earlier. See *Superintendent and Legal Remembrancer State of West Bengal v. Corporation of Calcutta* (AIR-1967-SC-997).

[80] Apart from the validity of the Constitution (Twenty-fourth Amendment) Act, 1971, the Supreme Court bench in the Keshavananda Case was also concerned with the Constitution (Twenty-fifth Amendment) Act, 1972, and the Constitution (Twenty-ninth Amendment) Act, 1972. We shall discuss these in detail later on in this book.

Shantilal Mangaldas Case[81]

The case involved an appeal before the Supreme Court against an order by the Gujarat High Court striking down provisions of the Bombay Town Planning Act, 1955. The Bombay Act involved acquisition of land in the city of Ahmedabad for construction of residential quarters and other facilities for the workers in the textile factories.[82] As early as in April 1927, the Borough Municipality of Ahmedabad had declared its intention to take over a plot of land measuring about 18,219 square yards as part of the City Wall Improvement Town Planning Scheme, and the necessary sanction for the scheme was obtained from the provincial government. The process went on for several years, and it was only on August 28, 1957, that the town planning officer conveyed to the land owner that a compensation amount of ₹25,411 was awarded for the land acquired in this case. It may be mentioned here that the compensation amount was arrived at, based on the value of the land acquired as on the date of the declaration of the intention to acquire the land as on April 18, 1927. The scheme, sanctioned finally on July 21, 1965, and brought into operation on September 1, 1965, involved allotting a part of the land acquired to the erstwhile owner and using only another part for the purpose of building houses for the textile workers. The compensation was calculated after deducting the value of the land that was to be returned to the owner after development of the large tract as housing sites.

Shantilal Mangaldas, who owned the land, approached the Gujarat High Court with a plea that the Act itself be struck down on grounds that the compensation was inadequate, and thus violative of Article 31 (2) of the Constitution. The central argument here was that the compensation based

[81] *State of Gujarat v. Shantilal Mangaldas and Others* (AIR-1969-SC-634).

[82] The Bombay State, at that time, included present day Gujarat. This was until the State was bifurcated to form the Gujarat state on May 1, 1960. The 1955 Act, in fact, was an improvement of the Bombay Town Planning Act, 1915.

on a calculation of the value of the property on the date of the declaration of intention did not reflect the actual value of the property at the time of deprivation of the property, and hence was inadequate. The Gujarat High Court, relying on the Supreme Court judgments in the Bela Banerjee Case and the Vajravelu Mudaliar Case, held that the compensation was grossly inadequate, and thus struck down the Bombay Act of 1955 as unconstitutional. The state government's appeal against the Gujarat High Court judgment came up to be decided before a five-member bench of the Supreme Court.[83] The Supreme Court, in a unanimous order, struck down the decision of the Gujarat High Court and held the Bombay Town Planning Act, 1955, as valid and remitted the case back to the High Court to pass orders in accordance with that position. Interestingly, the bench consisted of Justice M. Hidayatullah, who had agreed with the bench in the Vajravelu Mudaliar Case that held the adequacy of compensation as justiciable, agreed with the others in this case to uphold a law that too had adopted similar principles for awarding compensation.

Justice Hidayatullah, while expressing agreement with Justice Shah in this case, went on to clarify his own view on the Vajravelu Mudaliar Case as follows:

> I have read the weighty judgment proposed to be delivered by my brother Shah and I find myself so much in agreement with it that I consider it unnecessary for me to express myself. However, it is proper for me to say a few words in explanation since I was a party to P. Vajravelu Mudaliar's case—(1965) 1 SCR 614=(AIR 1965 SC 1017) and the obiter pronouncement of some opinions there. That case was heard with N. B. Jeejeebhoy's case, (1965) 1 SCR 636 = (AIR 1965 C 1096). One was a post Constitution (Fourth Amendment) case and the other a pre-Constitution case. The judgments in the two cases were delivered on the same day. It appears that the reasoning in the two cases was not kept separate and the whole of the matter was discussed in a case in which it was not necessary for the ultimate conclusion. Because of the close proximity of the

[83] The bench, presided over by Justice M. Hidayatullah, CJI, also consisted of Justices J. C. Shah, V. Ramaswami, G. K. Mitter, and A. N. Grover. Justice Shah wrote the judgment for the bench.

> decisions, it escaped me that the discussion was in the wrong case and the other merely followed it. My brother Shah has now made the two cases to fall in their proper places. It is certainly out of the question that the adequacy of compensation (apart from compensation which is illusory or proceeds upon principles irrelevant to its determination) should be questioned after the Amendment of the Constitution. The Amendment was expressly made to get over the effect of the earlier cases which had defined compensation as just equivalent. Such a question could not arise after the amendment. *I am in agreement that the remarks in P. Vajravelu's case (1965) 1 SCR 614=(AIR 1965 SC 1017) must be treated as obiter and not binding on us. I am also of the opinion that the Metal Corporation case, (1967) I SCR 255=(AIR 1967 SC 637) was wrongly decided and should be overruled.*[84] (Ananth, emphasis added)

It will be appropriate in this context to refer, in some detail, to Justice Shah's order on behalf of the bench. Reading into the provisions of Article 31 (2), Justice Shah stressed that Sections 53 and 67 of the Bombay Town Planning Act specified the principles on which the compensation was to be decided. This, he held was sufficient to render the Act valid from within the scope of Article 31 (2). Thereafter, he went on to specifically discuss the distinct shift in the law after the Constitution (Fourth Amendment) Act, 1955. Justice Shah held:

> Reverting to the amendment made in Clause (2) of Article 31 by the Constitution (4th Amendment) Act, 1955 it is clear that adequacy of compensation fixed by the Legislature or awarded according to the principles specified by the legislature for determination is not justiciable. It clearly follows from the terms of Article 31(2) as amended that the amount of compensation payable, if fixed by

[84] AIR-1969-SC-634. See paragraph 1. We have discussed the two cases, Vajravelu Mudaliar Case and the Metal Corporation Case, in detail earlier in this chapter. While Justice Hidayatullah was part of the five-member bench that decided the Vajravelu Mudaliar Case, the Metal Corporation Case was decided by Justice K. Subba Rao, CJI, and Justice J. M. Shelat. The Supreme Court, in both the instances, had held the adequacy of compensation as justiciable, notwithstanding the Constitution (Fourth Amendment) Act, 1955, and thus struck down the acquisition laws in both the instances on grounds that the compensation awarded was inadequate.

> the Legislature is not justiciable, because the challenge in such a case, apart from a plea of abuse of legislative power, would be only a challenge to the adequacy of compensation. If compensation fixed by the Legislature — and by the use of the expression "compensation" we mean what the Legislature justly regards as proper and fair recompense for compulsory expropriation of property and not something which by abuse of legislative power though called compensation is not a recompense at all or is something illusory — is not justiciable, on the plea that it is not a just equivalent of the property compulsorily acquired, is it open to the Courts to enter upon an enquiry whether the principles which are specified by the Legislature for determining compensation do not award to the expropriated owner a just equivalent? In our view, such an enquiry is not open to the Courts under the statutes enacted after the amendments made in the Constitution by the Constitution (Fourth Amendment) Act… *Principles may be challenged on the ground that they are irrelevant to the determination of compensation, but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation*….[85] (Ananth, emphasis added)

Justice Shah, in his order, went further to speak on the judgment in the Vajravelu Mudaliar Case and Justice K. Subba Rao's observation that the word *compensation* as long as it existed in Article 31 (2), even after the Constitution (Fourth Amendment) Act, 1955, would be construed to be *just equivalent*, and hence justiciable. Justice Shah held that "these observations were, however, not necessary for the purpose of the decision in P. Vajravelu Mudaliar's case…."[86] and pointed out to the fact that the Supreme Court, even in that case, had held the Madras Act as valid. Justice Shah then added:

> In our view, Article 31 (2) as amended is clear in its purport. If what is fixed or is determined by the application of specified principles is compensation for compulsory acquisition of property, the Courts

[85] Ibid., paragraph 46. The second leg of this, that the court will intervene where the principles are irrelevant to the determination or illusory, was indeed an important aspect and the Supreme Court invoked this while deciding against the Bank Nationalisation Act in a few months from then. We shall deal with this later in this chapter.

[86] Ibid., paragraph 47.

> cannot be invited to determine whether it is a just equivalent of the value of the property expropriated. In P. Vajravelu Mudaliar's case, the Court held that the principles laid down by the impugned statute were not open to question. That was sufficient for the purpose of the decision of the case, and the other observations were not necessary for deciding that case, and cannot be regarded as a binding decision.[87]

In the same breadth, Justice Shah, speaking for the bench, dealt with the judgment in the Metal Corporation Case too. He held:

> The Parliament had specified the principles for determining compensation of the undertaking of the company. The principles expressly related to the determination of compensation payable in respect of unused machinery in good condition and used machinery. The principles were set out avowedly for determination of compensation. The principles were not irrelevant to the determination of compensation and the compensation was not illusory. In our judgment, the Metal Corporation of India Ltd.'s case, was wrongly decided and must be overruled.[88]

The five-member bench, in many ways, sought to restore the law, as it stood in the wake of the Supreme Court judgment in the Shankari Prasad Deo Case insofar as legislations that provided for acquisition of property was concerned. That the bench did not shy away from delving into the larger question of the socialistic premises of the Constitution was evident in the Shantilal Mangaldas Case judgment. Justice Shah, for instance, went into this aspect in his judgment, even if briefly while discussing the context in which the Constitution (Fourth Amendment) Act, 1955, was passed. Justice Shah held:

> Right to compensation, in the view of this Court, was intended by the Constitution to be a right to a just equivalent of the property of which a person was deprived. But the just equivalent was not capable of precise determination by the application of any recognised rules. The decisions of this Court in the two cases—Mrs. Bela Banerjee's case and Subodh Gopal Bose's case—were therefore likely to give

[87] Ibid., paragraph 48.
[88] Ibid., paragraph 50.

> rise to formidable problems when the principles specified by the Legislature as well as the amounts determined by the application of those principles, were declared justiciable. By qualifying "equivalent" by the adjective "just" the enquiry was made more controversial; *and apart from the practical difficulties, the law declared by this Court also placed serious obstacles in giving effect to the directive principles of State policy incorporated in Article 39.*[89] (Ananth, emphasis added).

All these, however, were turned on its head, when an 11-member bench of the Supreme Court, decided by majority to strike down the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, on grounds that the compensation based on principles provided under the Act were not adequate. Justice Shah, incidentally, spoke for the majority in that case. Justices G. K. Mitter and A. N. Grover, who had agreed with Justice Shah in the Shantilal Mangaldas Case, too were part of the bench that decided the Bank Nationalization Case and as part of the majority. The Bank Nationalization Case, in fact, was also a watershed in another way. The bench, in this case, overruled the law, as settled in the A. K. Gopalan Case and held the field for about two decades. The law, as held by the Supreme Court in the A. K. Gopalan Case, was that Article 19 of the Constitution, guaranteeing freedom of movement apart from others shall not be read while dealing with a law that was consistent with Article 22 of the Constitution.[90] The issue in that case was whether preventive detention laws, even while being in conformity with Article 22, were constitutional where they violated Article 19 of the Constitution. The apex court held that Article 19 did not apply there. That was in 1950. In the Bank Nationalization Case, in 1970, the Supreme Court held Article 19 as relevant even while dealing with laws that are consistent with Article 31 of the Constitution.[91]

[89] Ibid., paragraph 38.

[90] *A. K. Gopalan v. State of Madras* (AIR-1950-SC-27).

[91] Justice O. Chinnappa Reddy is of the view that this change was the consequence of a *greater sensitivity*' shown by the Supreme Court in view of the fact that the Right to Property was involved in the Bank Nationalisation Case, and hence went back upon its view in A. K. Gopalan

R. C. Cooper Case[92]

Banking industry in India had remained a preserve of the private sector at the time of independence, and there was no government control over the banking business. The exception, however, was the State Bank of India and its subsidiaries. This, however, changed in 1949 when the Central Legislative Assembly passed the Banking Companies Act, 1949 (later called *The Banking Regulation Act*) to consolidate and amend the law relating to certain matters concerning banking. Apart from defining *banking* as *the accepting for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise*, the Act also provided for banking companies to engage in one or more of the forms of business, specified as nonbanking business. The Act prohibited employment of managing agents, imposed minimum paid up capital and reserves, regulated voting rights of shareholders, and election of board of directors. The 1949 Act also prohibited the companies from raising a charge on unpaid capital, restricted payment of dividend, and laid out a charge for the maintenance of a percentage of assets, return of unclaimed deposits, and accounts and balance sheets. The Reserve Bank was authorized to issue directions to and for trial of proceedings against the banks and for speedy disposal of proceedings against the banks.

The 1949 Act was amended in 1968 in order to enforce *social control* over commercial banks. By this, provisions were brought in to reconstitute the boards of directors of commercial banks with a chairman who had practical experience of the working of a bank or financial, economic, and

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(see Reddy, *The Court and the Constitution of India: Summits and Shallows*, p. 30). H. M. Seervai, meanwhile, celebrates the shift and is of the view that the law had to necessarily consider the Fundamental Rights as a whole, as against treating each one as independent. Seervai calls the position, as held in A. K. Gopalan as erroneous and that the error was corrected in the Bank Nationalisation Case. See Seervai, *Constitutional Law in India* (Vol. 2), pp. 992–997.

[92] *Rustom Covasjee Cooper v. Union of India* (AIR-1970-SC-0-564).

business administration, and with a membership not less than 51 percent with persons having special knowledge or practical experience in accountancy, agriculture and rural economy, banking, cooperation, economics, finance, law, and small-scale industry. The Act also provided that no loans shall be granted to any director of the bank or to any concern in which he is interested as managing director, manager, employee, or guarantor, or partner, or in which he holds substantial interest. The Reserve Bank was vested with the power to give directions to commercial banks and to appoint directors or observers in the interest of depositors or proper management of the banking companies, or in the interest of banking policy. The Act, as amended, vested the Reserve Bank with powers to remove the managerial and other personnel from office and to appoint additional directors, and to issue directions prohibiting certain activities in relation to banking companies.

Another important aspect of the 1968 amendment was that the central government was empowered to acquire the business of any bank if it failed repeatedly to comply with any direction issued by the Reserve Bank; and if acquisition of the bank was considered necessary in the interest of the depositors, or in the interest of the banking policy, or for the better provision of credit generally, or of credit to any particular section of the community, or in a particular area.[93] These regulations led to the amalgamation of a number of banks and the winding up of some others between 1951 and 1969. The total number of commercial banking institutions had reduced from 566 to 89 during this period. The concept of *social control* was indeed a compromise that the then ruling party—the INC—arrived at, even while the demand for nationalization of the banking sector were heard vociferously from within the fold. The demand, as well as the decision to impose social control, was guided by the internal

[93] It is important to note here that there was a provision for acquisition of banks and this was brought about by way of the amendment in the Banking Act in 1968. This provision, however, was conditional upon a certain bank defying orders by the RBI in particular and notwithstanding the larger provision for acquisition as stated in the second leg.

dynamics of the party and, more specifically, the early stirrings of the struggle between Indira Gandhi and her detractors. The opposition to the idea of nationalization came from Morarji Desai, then Deputy Prime Minister and Finance Minister. An ordinance on July 19, 1969, which was replaced by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, passed on August 9, 1969, nationalizing 14 Scheduled Banks may be seen in the larger context of the internal dynamics in the INC and as Indira Gandhi's way to confront her detractors.[94]

Insofar as the scope of this book is concerned, each of the 14 banks named in the ordinance and the subsequent law had a deposit of over ₹50 crores. This was the criteria adopted for choosing the 14 banks; banks with lesser amounts of deposits were left out of the ambit of nationalization. In other words, all those banks with over ₹50 crores as deposits came to be nationalized.[95] The validity of the ordinance was challenged by way of a writ petition before the Supreme Court by one R. C. Cooper,[96] on grounds that the Ordinance and the Act passed subsequently impaired his rights guaranteed under Articles 14, 19, and 31 of the Constitution, and are on that account invalid. The case came up for hearing before an 11-member bench of the Supreme Court.[97] And 10 out of the

[94] This story has been discussed in elaborate detail elsewhere. See Ananth, *India Since Independence*, pp. 78–81.

[95] The banks were: (i) The Central Bank of India Ltd.; (ii) The Bank of India Ltd.; (iii) The Punjab National Bank Ltd.; (iv) The Bank of Baroda Ltd.; (v) The United Commercial Bank Ltd.; (vi) Canara Bank Ltd.; (vii) United Bank of India Ltd.; (viii) Dena Bank Ltd.; (ix) Syndicate Bank Ltd.; (x) The Union Bank of India Ltd.; (xi) Allahabad Bank Ltd.; (xii) The Indian Bank Ltd.; (13) The Bank of Maharashtra Ltd.; (14) The Indian Overseas Bank Ltd.

[96] Cooper held shares in the Central Bank of India Ltd., the Bank of Baroda Ltd., and the Bank of India Ltd., and had accounts—current and fixed deposit—with those banks; he was also a director of the Central Bank of India Ltd.

[97] The bench was constituted by Justices J. C. Shah, S. M. Sikri, J. M. Shelat, V. Bhargava, G. K. Mitter, C. A.Vaidyalingam, K. S. Hegde, A. N. Grover, A. N. Ray, P. Jaganmohan Reddy, and I. D. Dua. Incidentally,

11 judges struck down the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, as unconstitutional on February 10, 1970. Justice J. C. Shah spoke for the majority in this case. Justice A. N. Ray was the lone dissenter. The most striking feature of the majority judgment was that the learned judges delved into the adequacy of the compensation awarded, and held that to be a ground for striking down the Act. The majority bench also changed the way the law, as it stood, in another aspect: That Articles 31 (2) and 19 (1) (f) of the Constitution cannot be treated as exclusive. By this, the law as it stood since the apex court decided the A. K. Gopalan Case in 1950[98] was turned on its head. Justice Shah, speaking for the majority, held as follows:

> We have found it necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which justifies this apparently inconsistent

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Justice M. Hidayatullah, Chief Justice of India, during the period when the R. C. Cooper Case was heard and decided (he was the CJI between February 25, 1968 and December 17, 1970) did not sit on this bench. Justice Shah, who was next in order of seniority to the CJI, presided over the bench and also spoke for the majority in this case. He also succeeded Hidayatullah as the CJI. Interestingly, Justice J. C. Shah was chosen by the Janata Party, headed by Morarji Desai, to enquire into the emergency regime between June 25, 1975 and March 21, 1977.

[98] A. *K. Gopalan v. State of Madras* (AIR-1950-SC-0-27). The case involved a challenge against the preventive detention law on grounds that even while the law was consistent with Article 22 of the Constitution, it was violative of the guarantee under Article 19 (1) (d) of the Constitution of free movement within the territory of India. A. K. Gopalan, the petitioner in this case, was a leader of the Communist Party of India. The majority, consisting of Justice M. H. Kania, CJI, and Justices M. Patanjali Sastri, M. C. Mahajan, B. K. Mukherjea, and S. R. Das held that Article 22 of the Constitution was a self-contained provision, and, in that sense, exclusive of Article 19 (1) of the Constitution and rejected the argument that the two provisions of the Constitution shall not be treated as exclusive. Justice Saiyid Fazl Ali, however, dissented with the majority and held that "[p]reventive detention is a direct infringement of the right guaranteed in Article 19(1)(d), even if a narrow construction is placed on the said sub-clause, and a law

> development of the law. In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters and determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and [that the] effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. We hold that the validity of 'law' which authorises deprivation of property and 'a law' which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same test. A citizen may claim in an appropriate case that the law authorising compulsory acquisition of property imposes fetters upon his right to hold property, which are not reasonable restrictions in the interests of the general public. It is immaterial that the scope for such challenge may be attenuated because of the nature of the law of acquisition which providing as it does for expropriation of property of the individual for public purpose may be presumed to impose reasonable restrictions in the interests of the general public.[99]

The premise from which the majority came to this conclusion was indeed interesting. The judges held that the effect

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relating to preventive detention is therefore subject to such limited judicial review as is permitted by Article 19(5)." See headnotes to AIR-1950-SC-0-27. Incidentally, this case was the first ever to come up before the Supreme Court involving the Fundamental Rights after the commencement of the Constitution. In the R. C. Cooper Case, the majority clearly adapted Justice Fazl Ali's dissenting judgment to strike down the law, nationalizing private banks. This is what Justice Chinnappa Reddy refers to as *greater sensitivity*, shown by the courts to Fundamental Rights when the issue involved the Right to Property. It may be noted here that the bench, in the R. C. Cooper Case dealt with Article 19 (1) (f) along with Article 31 (2), whereas the issue in the A. K. Gopalan Case was whether Article 22 and Article 19 (1) (d) were mutually exclusive.

[99] AIR-1970-SC-0-564, paragraph 64. Meanwhile, Justice A. N. Ray, in his dissenting judgment, spelt out his own reasons in this regard. "The consensus of opinion in Gopalan's case," he held, "was that so far as substantive law was concerned, Article 22 of the Constitution gave a clear authority to the legislature to take away fundamental rights relating to arrest and detention which were secured by the

of a law on the rights of the people rather than the intention behind the law was important and had to be considered. The bench held:

> We have carefully considered the weighty pronouncements of the eminent Judge who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of Legislature nor by the form of the action, but by its direct operation upon the individual's rights.[100]

The majority in this case found the Bank Nationalization Act as violative of guarantees under Article 19 (1) (f) of the Constitution in that the Act prevented the banking companies, now nationalized, from carrying out any other business other than

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first two clauses of that Article." Justice Ray then cited Justice B. K. Mukherjea to fortify his line

> Any legislation on the subject would only have to conform to the requirements of clauses (4) to (7) of Article 22 and provided that is done, there is nothing in the language employed nor in the context in which it appears which affords any ground for suggestion that such law must be reasonable in its character and that it would be reviewable by the Court on that ground. Both Articles 19 and 22 occur in the same Part of the constitution and both of them purport to lay down the fundamental rights which the Constitution guarantees. *It is well settled that the Constitution must be interpreted in a broad and liberal manner giving effect to all its parts and the presumption would be that no conflict or repugnance was intended by its framers.* See AIR-1970-SC-0-564, paragraph 149. (Ananth, emphasis added)

[100] Ibid., paragraph 56.

banking. The bench held that even while the Act did not prevent the companies from such business other than banking, the fact that the compensation, as per the principles provided for in the Act, did specify that the compensation was to be given by way of bonds that would be redeemable at a distant unspecified date. This, according to the learned judges amounted to preventing the bankers from carrying out any other business and hence violative of guarantees under Article 19 (1) (f) of the Constitution. In its own words:

> The named banks are declared entitled to engage in business other than banking: but they have no assets with which that business may be carried on, and since they are prohibited from carrying on banking business, by virtue of Section 7 of the Reserve Bank of India Act, they cannot use in their title the words 'Bank' or 'Banking', and even engage in "non-banking business" in their old names. *A business organization deprived of its entire assets and undertaking, its managerial and other staff, its premises, and its name, even if it has a theoretical right to carry on non-banking business, would not be able to do so, especially when even the fraction of the value of its undertaking made payable to it as compensation, is not made immediately payable to it.*[101] (Ananth, emphasis added)

[101] Ibid., paragraph 66. Justice A. N. Ray, in his dissenting judgment took another view in this regard. He held:

> India is a predominantly agricultural country and one-half of national income, viz., 53.2 percent is from agriculture. Out of 5,64,000 villages only 5,000 are served by banks. Not even 1 percent have bank facilities. Credit requirements for agriculture are of great importance. Agriculturists have 34 percent credit from Co-operatives, 5 percent from banks and the rest from money lenders. The requirements are said to be ₹2,000 crores for agriculturists. The small-scale industries are said to employ one-third of the total industrial population and 40 percent of the industrial workers are in small-scale industries. Banks will have to meet their needs. Small artisans and retail trade have all need for credit. It is said that barely 1.8 percent of the total bank advances goes to small-scale industries. It is said in the affidavit that the policy of the Government is to take up direct management of credit resources for massive expansion of branches, vigorous principles for mobilisation of deposits and wide range programmes to fill the credit gaps of agriculture, small-scale industries, small artisans, retail trade, and consumer credit. This

While this position was indeed a reversal of the law as it stood, the larger aspect of the decision in the R. C. Cooper Case had to do with the position of the bench that put restriction on the court in examining the adequacy of the compensation was not absolute. The court's decision in this case to strike down the Bank Nationalization Act relied heavily on this premise, and in that sense went against the letter and the spirit of the Constitution (Fourth Amendment) Act, 1955, as held by the Supreme Court in the Shantilal Mangaldas Case. In other words, the Supreme Court took the position back to where it stood in the Vajravelu Mudaliar Case and overruled the line in the Shantilal Mangaldas Case.

The bench held that "under the scheme of determination of compensation, the total amount payable to the banks will be a fraction of the value of their net assets, and that compensation will not be available to the Banks immediately,"[102] and then found fault with the fact that only 14 banks were identified for nationalization. It said: "It must also be held that the guarantee of equality is impaired by preventing the named banks carrying on the non-banking business."[103] Justice Shah, speaking for the majority, then proceeded to deal with Article 31 (2) and its implications for the case. He said:

> Two questions immediately arise for determination. What is the true meaning of the expression 'compensation' as used in Article 31 (2),

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policy can be achieved only by direct management by State and not merely by social control. *Almost all the banks are in favour of large scale industry. This direct control and expansion of bank credit is intended to make available deposit resources and expand the same to serve the country in the light to Directive Principles…* I wish to make it clear that in my opinion Articles 19 (1) (f) and (g) do not at all enter the domain of Article 31 (2) because a legislation for acquisition and requisition of property for public purpose is not required to be tested again on the touchstone of reasonableness of restriction. Such reasonable restriction is inherent and implicit in public purpose. That is why public purpose is dealt with separately in Article 31 (2) (Ananth, emphasis added). See ibid., paragraph 222.

[102] Ibid., paragraph 81.

[103] Ibid., paragraph 87.

> and what is the extent of the jurisdiction of the Court when the validity of a law providing for compulsory acquisition of property for a public purpose is challenged?[104]

The learned judge, speaking for the majority, then went into the question as to whether Parliament must be allowed to have the final word in the award of compensation or to declare the principles of compensation, even if it amounted to expropriation of property. Drawing upon the authority in common law, Justice Shah held:

> The British Parliament is supreme and its powers are not subject to any constitutional limitations. But the British parliament has rarely, if at all, exercised power to take property without payment of the cash value of the property taken. In Attorney-General v. De Keyser's Royal Hotel, 1920 AC 508, the House of Lords held that the Crown is not entitled as of right either by virtue of its prerogative or under any statute, to take possession of the land or building of a subject for administrative purposes in connection with the defence of the realm, without compensation for their use and occupation.[105]

It was indeed strange, to say so, that the learned judge decided to resort to common law principles to overrule a position that was settled and held as valid by the Supreme Court earlier: that the adequacy of compensation was beyond the scrutiny of the courts in the aftermath of the Constitution (Fourth Amendment) Act, 1955. Justice Shah's line of argument, in this regard, was that even while compensation, after the Constitution (Fourth Amendment) Act, 1955, shall not mean *just equivalent*, and that the courts shall not sit on judgment on whether the principles specified in the law would lead to just compensation, the courts had the power to interfere where the compensation was grossly illusory or where the principles were based on irrelevant factors. He held:

> The right declared by the Constitution guarantees that compensation shall be given before a person is compulsorily expropriated of his property for a public purpose. *What is fixed as compensation*

[104] Ibid., paragraph 92.
[105] Ibid., paragraph 94.

> *by statute, or by the application of principles specified for determination of compensation is guaranteed, it does not mean, however, that something fixed or determined by the application of specified principle which is illusory or can in no sense be regarded as compensation must be upheld by the Courts for, to do so, would be to grant charter of arbitrariness and permit a device to defeat the constitutional guarantee…*[106] (Ananth, emphasis added)

Justice Shah, speaking for the majority, went into the court's view in both the Vajravelu Mudaliar Case and in the Shantilal Mangaldas Case to stress that "compensation being the equivalent in terms of money of the property compulsorily acquired, the principle for determination of compensation is intended to award to the expropriated owner the value of the property acquired."[107] The learned judge then said:

> We are unable to hold that a principle specified by the Parliament for determining compensation of the property to be acquired is conclusive. If that view be accepted, the Parliament will be invested with a charter of arbitrariness and by abuse of legislative process, the constitutional guarantee of the right to compensation may be severely impaired….[108]

Thereafter, the judgment said:

> The broad object underlying the principle of valuation is to award to the owner the equivalent of his property with its existing advantages and its potentialities. Where there is an established market for the property acquired the problem of valuation presents little

[106] Ibid., paragraph 97. Justice A. N. Ray countered this in his dissenting judgment in the following manner:

> By the word 'illusory' is meant something which is obvious, patent and shocking. If for a property worth ₹1 lakh compensation is fixed at ₹100 that would be illusory. One need not be astute to find out as to what would be at sight illusory. Furthermore, illusoriness must be in respect of the whole property and there cannot be illusoriness as to part in regard to the amount fixed or the result of application of principles laid down. (See ibid., paragraph 203).

[107] Ibid., paragraph 100.
[108] Ibid., paragraph 101.

> difficulty. Where there is no established market for the property, the object of the principle of valuation must be to pay to the owner for what he has lost, including the benefit of advantages present as well as future, without taking into account the urgency of acquisition, the disinclination of the owner to part with the property, and the benefit which the acquirer is likely to obtain by the acquisition. Under the Land Acquisition Acts compensation paid is the value to the owner together with all its potentialities and its special adaptability if the land is peculiarly suitable for a particular use, if it gives an enhanced value at the date of acquisition.[109]

The apex court, in other words, sought to define compensation as just equivalent from a different plane. From here, Justice Shah went about examining the principles, as set out in the Act, to determine compensation to the erstwhile owners of the 14 banks.[110] In doing so, the bench imported a number of factors

[109] Ibid., paragraph 102.

[110] Schedule II of the Act wherein the principles for determination of compensation and the manner of payment were specified read as follows:

> Interim compensation may be paid to a named bank if it agrees to distribute to its shareholders in accordance with their rights and interests. The value of any land or buildings to be taken into account in valuing the assets is to be the market value of the land or buildings, but where such market value exceeds the 'ascertained value', that 'ascertained value' is to be taken into account, and by Explanation II the 'ascertained value' of any building wholly occupied on the date of the commencement of the Act is to be twelve times the amount of the annual rent or the rent for which the building may reasonably be expected to be let out from year to year, and reduced by one-sixth of the amount of the rent on account of maintenance and repairs, annual premium paid to insure the building against risk of damage or destruction, annual charge, if any, on the building, ground rent, interest on any mortgage or other capital charge on the building, interest on borrowed capital if the building has been acquired, constructed, repaired, renewed or re-constructed, with borrowed capital, and the sums paid on account of land revenue or other taxes in respect of such building.

It may be noted here that this was different from the principle specified in the Ordinance proclaimed earlier. The Ordinance laid out that

apart from the provision that the compensation arrived at on the basis of the principles outlined would be paid in marketable Central Government Securities.[111] Speaking for the majority, Justice Shah interpreted the provision for compensation or the principles thereof under Article 31 (2) as meaning "when an undertaking is acquired as a unit the principles for determination of compensation must be relevant and also appropriate to the acquisition of the entire undertaking."[112]

From this framework, Justice Shah went on to hold that the principles specified in the Act were against the law and held:

> Compensation to be determined under the Act is for acquisition of the undertaking, but the Act instead of providing for valuing the entire undertaking as a unit provides for determining the value of some of the components only, which constitute the undertaking, and reduced by the liabilities. It also provides different methods of determining compensation in respect of each such component. This method for determination of compensation is prima facie not a method relevant to the determination of compensation for acquisition of the undertaking. Aggregate of the value of components is not necessarily the value of the entirety of a unit of property acquired, especially when the property is a going concern, with an organized business. On that ground alone, acquisition of the undertaking is liable to be declared invalid, for it impairs the constitutional guarantee for payment of compensation for acquisition of property by law.[113]

The judge then went on to dissect Schedule II of the Bank Nationalization Act which dealt with the basis on which

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compensation shall be determined either by mutual agreement between the government and the owners of the banks; and where such agreement was not possible the compensation was to be determined through arbitration.

[111] The Ordinance as well as the Act that replaced it did not specify a time by which the bonds can be encashed and this was one of the grounds that the bench found to declare the compensation as grossly illusory. The court held that this arrangement amounted to an unreasonable restriction on the owners of the banking companies acquired for nationalization engaging in other business.

[112] AIR-1970-SC-0-564, paragraph 105.

[113] Ibid., paragraph 106.

compensation was to be determined, and there was a great sense of ingenuity manifest here. Justice Shah's line, with which the majority agreed, was that the banking business thrived on the goodwill enjoyed by the companies and the trust that the investing public reposed on them flowed out of the goodwill. The judge held that the Act had debarred the companies from using the name and the other markers held by them hitherto, even while embarking upon other business activities and that meant that the goodwill too had been acquired. This, according to Justice Shah and the majority, was acquired without compensation, and hence violative of guarantees under Article 31 (2) of the Constitution. Justice Shah, speaking for the majority, held: "We are unable to agree with the contention raised in the Union's affidavit that a banking establishment has no goodwill, nor are we able to accept the plea raised by the Attorney General that the value of the goodwill of bank is insignificant and it may be ignored in valuing the undertaking as a going concern."[114]

The learned judge went on, in a similar way, to hold that the principles laid out in the Act to determine compensation did not account for the unexpired lease for the premises that the banking companies had let out at the time of the Act coming into force and held that to be another ground for the illusory nature of the compensation. "Having regard to the present day conditions," the judge held, "it is clear that with rent control on leases operating in various states the unexpired period of leases has also a substantial value."[115] The majority then held:

> The value determined by excluding important components of the undertaking, such as the goodwill and value of the unexpired period of leases, will not, in our judgment, be compensation for the undertaking.[116]

Yet another ground that the judges found against the Bank Nationalization Act was that principle laid out in the Act insofar as the value of the buildings possessed by the banking

[114] Ibid., paragraph 109.
[115] Ibid., paragraph 110.
[116] Ibid., paragraph 111.

companies at the time of valuation.[117] Delving into this, the bench held:

> This provision, in our judgment, does not lay down a relevant principle of valuation of buildings. In the first place, making a provision for payment of capitalised annual rental at twelve times the amount of rent cannot reasonably be regarded as payment of compensation having regard to the conditions prevailing in the money market. Capitalization of annual rental which is generally based on controlled rent under some State Acts at rates pegged down to the rates prevailing in 1940 and on the footing that investment in building yields 8 1/3 % return furnishes a wholly misleading result which cannot be called compensation. Value of immovable property has spiraled during the last few years and the rental, which is mostly controlled, does not bear any reasonable relation to the economic return from property. If the building is partly occupied by the Bank itself and partly by a tenant, the ascertained value will be twelve times the annual rental received, and the rent for which the remaining part occupied by the Bank may reasonably be expected to be let out. By the Act the corresponding new banks take over possession of the vacant lands and buildings belonging to the named banks. There is in the present conditions considerable value attached to vacant business premises in urban areas. True compensation for vacant premises can be ascertained by finding out the market value of comparable premises at or about the time of the vesting of the undertaking and not by capitalising the rental - actual or estimated. Vacant premises have a considerably larger value than business premises, which are occupied by tenants. The Act instead of taking into account the value of the premises as vacant premises adopted a method which cannot be regarded as relevant. Prima facie, this would not give any reliable basis for determining the compensation for the land and buildings.[118]

[117] The relevant clause in the Act laid out that the *value* shall be deemed to be the market value of the land or buildings, but where such market value exceeds the *ascertained value* determined in the manner specified, the value shall be deemed to mean such *ascertained value* of the land and buildings or the market value, whichever is less. It further laid out that the *ascertained value* in respect of buildings which are wholly occupied on the date of the commencement of the Act to be 12 times the amount of the annual rent, or the rent for which the building may reasonably be expected to be let from year to year reduced by certain specific items.

[118] AIR-1970-SC-0-564, paragraph 113.

The point is that Justice Shah and the majority for whom he spoke for, in fact, dealt with such aspects as the goodwill and the rental value of the property acquired and in doing so, had gone into investigating into the inadequacy of the compensation. This clearly was outside the scope of the judiciary, given the provisions of Article 31 (2) of the Constitution, particularly with the way it stood after the Constitution (Fourth Amendment) Act, 1955. The Constitution, in fact, had clearly laid out that an Act cannot be challenged on account of the inadequacy of the compensation. On this, Justice Shah, speaking for the majority, held:

> We are unable to agree with that contention. The constitution guarantees a right to compensation an equivalent in money of the property compulsorily acquired. That is the basic guarantee. The law must therefore provide compensation, and for determining compensation relevant principles must be specified; if the principles are not relevant the ultimate value determined is not compensation.[119]

In the end, the majority decision was as follows:

(a) the Act is within the legislative competence of the Parliament; but
(b) it makes hostile discrimination against the named banks in that it prohibits the named banks from carrying on banking business, whereas other Banks -Indian and Foreign-are permitted to carry on banking business, and even new Banks may be formed which may engage in banking business;
(c) it in reality restricts the named banks from carrying on business other than banking as defined in Section 5 (b) of the Banking Regulation Act, 1949; and
(d) that the Act violates the guarantee of compensation under Article 31 (2) in that it provides for giving certain amounts determined according to principles which are not relevant in the determination of compensation of the undertaking of the named banks and by the method prescribed the amounts so declared cannot be regarded as compensation.[120]

[119] Ibid., paragraph 122.
[120] Ibid., paragraph 131.

In conclusion, the Supreme Court, by majority in the R. C. Cooper Case, simply put the clock back and the law, insofar as the acquisition of property for public purposes were concerned; it was taken back to where it stood in pre-Constitution (Fourth Amendment) Act, 1955. Article 39 of the Constitution in general and Clauses (b) and (c) in particular were, once again, reduced to mere pious wishes as apprehended, by a section, in the Constituent Assembly. The sanctity that the various judges had accorded to the Directive Principles of State Policy while deciding the Shankari Prasad Deo Case, the Kameshwar Singh Case, and the Sajjan Singh Case to uphold land reforms laws and constitution amendment Acts since 1951, was now rendered a thing of the past. Justice A. N. Ray spoke for himself when he said:

> The meaning of the phrase public purpose is predominantly a purpose for the welfare of the general public. These 14 banks are acquired for the purpose of developing the national economy. It is intended to confer benefit on weaker sections and sectors. It is not that the legislation will have the effect of denuding the depositors in the 14 banks of their deposits. The deposits will all be there. The object of the Act according to the legislation is to use the deposits in wider public interest. What was true of public purpose when the Constitution was ushered in the mid century is a greater truth after two decades. *One cannot be guided either by passion for property on the one hand or prejudice against deprivation on the other. Public purpose steers clear of both passion and prejudice.*[121] (Ananth, emphasis added)

This, however, was the voice of a lone dissenter. The political establishment, however, resolved to make amendments. The Constitution (Twenty-fifth Amendment) Act, 1972, replaced the word *compensation* in Article 31 (2) with *amount*, and thus overcame the hurdles placed. This leg of the amendment, interestingly, was upheld by the majority of a 13-member bench in the Keshavananda Case.[122] Of relevance to us from the scope of this chapter is that the attitude of the higher

[121] Ibid., paragraph 157.

[122] *Keshavananda Bharati v. State of Kerala* (AIR-1973-SC-1461). We shall discuss this in detail in Chapter 6.

judiciary vis-à-vis private property persisted in the same way as reflected in the Bank Nationalization Case, when the Supreme Court decided the law abolishing privy purses in December 1970. Although the Privy Purses Case does not fall in the category of land reforms and property relations, it will be appropriate to discuss the case very briefly before moving on to the next stage.

Privy Purses Case[123]

There were 555 Princely States, also known as the Indian States, covering 48 percent of the Indian Union at the time of independence. Of those, 216 States merged in the adjoining provinces, 61 states were converted into centrally administered areas, and 275 states formed unions. Only three states retained their integrity: Hyderabad, Mysore, and Jammu and Kashmir. But when the Constitution came into force, they too became part of the Union of India on a later date. Vallabhbhai Patel, as Home Minister in the Cabinet, had entered into merger agreements with each of those and had committed to an arrangement that involved the payment of privy purses and some other concessions, including their personal privileges and properties. The privy purses were fixed with due regard to the incomes of the rulers before integration with a ceiling of ₹10 lakhs. Eleven rulers were to be paid more than that sum as a personal privy purse. The total amount of the privy purses came to ₹5.8 crores at that time.[124]

In less than a couple of decades after the Constitution was adopted and in the context of the rise of the Swatantra Party, whose composition was dominated by the former rulers and landlords, sections within the INC began speaking against the

[123] *H H Maharajadhiraja Madhav Rao Jivaji Rao Scindia and Others v. Union of India* (AIR-1971-SC-0-530).

[124] See Appendix 6, being the text of Vallabhbhai Patel's speech in the Constituent Assembly, explaining the rationale behind the insertion of Article 291 of the Constitution (267-A in the Draft Constitution) at the time of moving the Clause for approval.

privy purses and other privileges to the former rulers. A resolution seeking abolition of the provisions for privy purses and other privileges was made ever since the Congress returned to power in March 1967, and Indira Gandhi had become Prime Minister, in her own right this time. The demand was raised at the All India Congress Committee (AICC) session, Delhi, in May 1967, and a resolution seeking abolition of privy purses was passed at the AICC session in subsequent session of the AICC on June 25, 1967.[125] Since then, the Union Home Ministry held several conferences with the representatives of the rulers. Six such meetings held between November 3, 1967 and January 8, 1970, did not achieve any tangible ends.[126] The government, meanwhile, conveyed its determination to put an end to the arrangement.

In this context, a constitution amendment Bill (described at that stage as the Constitution Twenty-fourth Amendment Bill) was moved in the Lok Sabha on May 14, 1970, by the then Union Home Minister, Y. B. Chavan. The Bill was taken up for voting, after being put through the various stages of discussion, in the Lok Sabha on September 2, 1970, and passed with the requisite majority of two-thirds of the members present and voting. The tally was 332 votes for and 154 votes against. However, when the Rajya Sabha took up voting on the constitution amendment Bill on September 5, 1970, the voting tally was 149 for and 75 against. This was a vote shorter than the requisite two-thirds majority of the members present and voting. It meant that the constitution amendment to scrap Articles 291, 362, and 366 (22) (iii), which dealt with the provisions for privy purses and other privileges to the former rulers of the Indian states failed passage in the Parliament.[127]

[125] The political context has been dealt with in elaborate details elsewhere by the author. See Ananth, *India since independence: Making sense of Indian politics,* pp 78–81.

[126] AIR-1971-SC-0-530, paragraph 23.

[127] Article 291 of the Constitution, as it stood, read as:

> 291 (1) Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this

However, the Union Cabinet met the same evening and recommended to the Acting President, V.V. Giri, to withdraw the recognition of the rulers. Acting President Giri, who was at Hyderabad at that time, signed an instrument withdrawing recognition of all the rulers. Separate orders were issued to all the rulers the day after and the same was notified in the Gazette on September 19, 1971. Meanwhile, the Union Finance Minister (Prime Minister Indira Gandhi held

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Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as Privy Purse-

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India, and
(b) the sums so paid to any Ruler shall be exempt from all taxes on Income.

(2) Where the territories of any such Indian State as aforesaid are comprised within a State specified in Part A or Part B of the First Schedule, there shall be charged on, and paid out of, the Consolidated Fund of that State such contribution, if any, in respect of the payments made by the Government of India under clause (1) and for such period as may, subject to any agreement entered into in that behalf under clause (1) of article 278, be determined by order of the President.

Article 362 read as:

In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in clause (1) of article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State.

And Article 366(22)(iii) read as:

'Ruler' in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler;

the portfolio at that time) laid a statement on the table of both Houses of the Parliament, announcing the decision to scrap the privy purses, consequent to the presidential order of September 5, 1971, withdrawing his recognition of the princes and their privileges.[128]

It is important to note here that the President's order to scrap the privy purses and other privileges, guaranteed under Article 291 of the Constitution, was a consequence of his withdrawing recognition to the princes in accordance with Article 366 (22) (iii) of the Constitution. In other words, the political establishment's failure in getting the constitution amendment to scrap Article 291 and other related provisions in the Constitution passed with the requisite two-third majority in the Parliament was sought to be overcome by the government by way of interpreting Article 366 (22) (iii) of the Constitution and the President's powers therein. The central question that came to be discussed in that case was whether Article 366 (22) (iii) of the Constitution enabled the President to deny a right accorded to the former rulers under Article 291 of the Constitution.[129]

There were several writ petitions, filed under Article 32 of the Constitution, by individuals who were erstwhile rulers and now deprived of the privy purses and other privileges by the presidential order. Madhavrao Scindia, the descendent

[128] The order, signed by the Secretary to the Government of India and in the name of the President, read as follows:

> In exercise of the powers vested in him under Article 366 (22) of the Constitution, the President hereby directs that with effect from the date of this Order His Highness Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur do cease to be recognised as the Ruler of Gwalior.
>
> Similar orders were issued in the name of all the rulers drawing privy purses at that time.

[129] Though the petition challenged the order on grounds that it violated freedoms guaranteed under Articles 14, 19, 21, and 31 of the Constitution, the bench treated this as nonconsequential. We shall deal with this separately.

of the erstwhile Maharaja of Gwalior, was among the petitioners and the Supreme Court decided to deal with his petition as illustrative, the decision which would be applicable to the others too.[130] The 11-member bench delivered a split verdict with the majority declaring the presidential order as unconstitutional.[131]

The government's argument was that "the concept of rulership, the privy purse and the privileges without any relatable function or responsibility have become incompatible with democracy, equality and social justice in the context of India of today…." It then proceeded on the premise that since the commencement of the Constitution, many things

[130] It may be noted here that Madhavrao Scindia was an MP, belonging to the Bharathiya Jan Sangh, whose members had opposed the constitution amendment Act in both Houses of the Parliament at the time of voting, along with such other parties in the opposition then, such as the Congress(O) and the Swatantra Party among others. Scindia contested the elections to the Lok Sabha in March 1971, as a Bharathiya Jan Sangh nominee from Gwallior. He left the Jan Sangh before the 1977 general elections, retained his place in the Lok Sabha as a Gwalior MP independently, supported by the Congress(I); joined the Congress(I) subsequently and retained his membership in the Lok Sabha from Gwallior in the 1980 general elections; Scindia defeated BJP's Atal Behari Vajpayee from Gwalior in the 1984 elections and joined the Congress(I) government in 1984 as a minister. He remained an important leader of the Congress(I) for about a decade after that, but was implicated in a scandal involving hawala transactions and on being denied a party nomination, he contested and won from Gwalior as an independent candidate only to return to the Congress(I) in a couple of years and become the Deputy Leader of the Congress Party in the Lok Sabha in 1999. He died in an air crash subsequently and his son, Jyotiraditya Scindia inherited his Lok Sabha constituency in 2004 and in 2009.

[131] The bench consisted of Justice M. Hidayatullah, CJI and Justices J. C. Shah, S. M. Sikri, J. M. Shelat, V. Bhargava, G. K. Mitter, C. A.Vaidyalingam, K. S. Hegde, A. N. Grover, A. N. Ray, and I. D. Dua. The majority judgment in this case was delivered by Justice Shah, speaking for Justices Sikri, Shelat, Bhargava, Vaidyalingam, Grover, and Dua. Justice Hidayatullah and Justice Hegde delivered separate judgments, concurring with the majority. Justices Mitter and Ray, meanwhile, dissented with the majority in separate judgments.

have changed, many hereditary rights and unearned income have been restricted, and many privileges and vested interests have been done away with, and many laws have been passed with the object of checking the concentration of economic power, both rural and industrial, to hold that "the Union of India have decided that the concept of rulership, the privy purse and the privileges should be abolished."[132] Justice J. C. Shah, speaking for the majority, described this as an instance of the executive, arrogating to itself a power which it does not possess. He held: "Our Constitution does not invest the power claimed in the executive branch of the Union."[133] Thus, holding that Article 366 (22) of the Constitution did not accord to the President any such sovereign power in the political domain, Justice Shah, on behalf of the majority, went into the history and the context in which Article 291 came into the Constitution. In doing that, Justice Shah, on behalf of the majority, held:

> The history of negotiations which culminated in the integration of the territories of the Princely States before the commencement of the Constitution clearly indicates that the recognition of the status

[132] From the affidavit filed by the Government of India and cited by Justice Shah in his judgment. See AIR-1971-SC-0-530, paragraph 93.

[133] Ibid. The bench, in fact, was circumventing about such powers in the hands of the legislature. It held:

> Whether the Parliament may by constitutional amendment abolish the rights and privileges accorded to the Rulers is not, and cannot be, debated in this petition, for no such constitutional amendment has been made. The petitioner challenges the authority of the President by an order purporting to be made under Article 366 (22) to withdraw recognition of Rulers so as to deprive them of the rights and privileges to which they are entitled by virtue of their status as Rulers. See ibid., paragraph 95.

This aspect of the judgment is important because the Indira Gandhi regime, after it gathered the sufficient numbers in both Houses of the Parliament, achieved the end by way of the Constitution (Twenty-sixth Amendment) Act, 1971. Privy purses stood abolished since December 28, 1971; this was only a little more than a year after the Supreme Court quashed the presidential order on December 15, 1970.

> of the Rulers and their rights was not temporary, and also not liable to be varied or repudiated in accordance with 'State policy.' Power of the President to determine the status of the Rulers by cancelling or withdrawing recognition to effectuate the policy of the Government to abolish the concept of Rulership is therefore liable to be challenged in these petitions.[134]

The learned judge, thereafter, went on to cite Vallabhbhai Patel's speech in the Constituent Assembly on October 13, 1949, before Article 267-A (which became Article 291 of the Constitution subsequently) was adopted.[135] Justice Shah, on behalf of the majority, then held as follows:

> In the larger interest of achieving the unity of the country our statesmen chose to appeal to the patriotism of the Princes and not to rely upon the force of arms or methods of political agitation within the States. Negotiation of a friendly settlement was in the circumstances then prevailing the only advisable course. A discontented group of Princes was a serious threat to a smooth and orderly transition. The Constituent Assembly resolved to honour, without reservation, the promises made to the Princes from time to time. *Clauses in the draft Constitution relating to the obligation of the Union to pay the privy purses and recognising certain rights, privileges and dignities till then enjoyed by the Princes, were intended to incorporate a just quid pro quo for surrender by them of their authority and powers and dissolution of their States.*[136] (Ananth, emphasis added).

The judgment then described the right to receive privy purses as flowing from a constitutional mandate under Article 291 and that the President did not have any power transcending the Constitution. With this, the majority declared the order made by the President on September 5, 1970, derecognizing the rulers as illegal and on that account inoperative. Madhavrao Scindia and the others, who were descendents of the erstwhile rulers, were thus declared to be entitled to

[134] AIR-1971-SC-0-530, paragraph 97.

[135] See Appendix 6 for a full text of Patel's speech. Also, see AIR-1970-SC-0-530, paragraph 113 for an extensive citation of the speech by Justice Shah on behalf of the majority.

[136] AIR-1971-SC-0-530, paragraph 113.

all preexisting rights and privileges including the right to the privy purses, as if the order had not been made.

While Justice Shah and the majority for whom he spoke did not delve into whether privy purses were property, and whether the President's order was an infringement on rights guaranteed by Article 19 (1) (f), (g) and 31 of the Constitution, Justice M. Hidayatullah, in his separate but concurring judgment did say so.[137]

Justice Hegde too expressed similar views in his separate judgment. In addition, he also pointed out the fact that the president's order was issued in the immediate aftermath of the Constitution Amendment Bill falling by one vote in the Rajya Sabha. This, Justice Hegde held that this attempt was similar to whatever happened to the Weimar Constitution. Justice Hegde held:

> The Government of India sought to amend the Constitution by deleting Articles 291, 362 and Clause 22 of Article 366. But as the Bill seeking the amendment of the Constitution failed to get the required majority in the Rajya Sabha, that attempt failed. Within hours after the said bill was rejected, the cabinet met and advised the President to pass the impugned orders. This is clearly an attempt to do indirectly what the Government could not do directly…. Breach of any of the constitutional provisions even if made to further a popular cause is bound to be a dangerous precedent. Disrespect to the Constitution is bound to be broadened from precedent to precedent and before long the entire Constitution

[137] Justice Hidayatullah held:

> It is sufficient for this purpose to find out if any right of property is involved. The most outstanding effect of the order is the deprivation of the Privy Purses. These Privy Purses are charge[d] on and paid out of, the Consolidated Fund of India, free of all taxes on income (Article 291) If the payments are obligatory and they can be regarded as property a petition under Article 32 will lie as the action to deprive the Rulers of their Privy Purses must be an infringement of Articles 19 and 31. (See ibid., paragraph 52.)
>
> The CJI also held that "As soon as an Appropriation Act is passed there is established a credit–debt and the outstanding Privy Purse becomes the property of the Ruler in the hands of Government. It is also a sum certain and absolutely payable." (Ibid., paragraph 60.)

> may be treated with contempt and held up to ridicule. That is what happened to the Weimar Constitution. If the Constitution or any of its provisions have ceased to serve the needs of the people, ways must be found to change them but it is impermissible to bypass the Constitution or its provisions. Every contravention of the letter or the spirit of the Constitution is bound to have [a] chain reaction. For that reason also the impugned orders must be held to be ultra vires Article 366 (22).[138]

It will be in order, at this stage, to discuss very briefly, the important points from the dissenting judgments by Justice A. N. Ray and Justice G. K. Mitter. Both the learned judges, in separate judgments, argued that the merger of the Indian states into the Union was indeed inevitable in the context of the surge of people's movement in the various states to that end. Justice Mitter observed as follows:

> With the advent of independence in India the popular urge in the States for attaining the same measure of freedom as was enjoyed by the people in the Provinces gained momentum and unleashed strong movements for the transfer of power from the Rulers to the people.[139]

Justice A. N. Ray, in a similar way, held:

> In order to appreciate the true scope and content of Article 363 it is necessary to find out as to why this Article and Articles 291, 362, 366 (22) found place in the Constitution… The roots of these Articles lie deep in the past…. The Constitution which was evolved represented the national ethos forged by the aims and aspirations of the people throughout the length and breadth of our country. A great problem which awaited solution on the eve of our independence was the relation between our country and the Indian States…. The Cabinet Mission in no uncertain terms said that when India was going to be an independent country it was not only necessary but also desirable that the Indian States should combine with free India for security, stability and solidarity. The Rulers of Indian States

[138] Ibid., paragraph 271. Interestingly, this was how the privy purses were abolished in just over a year's time after the Supreme Court decided the case. The (Constitution Twenty-sixth Amendment) Act, 1971, achieved the aim.

[139] Ibid., paragraph 168.

> also realised the importance of such a measure in an advanced age when the leaders of our country impressed upon the Rulers the wisdom of such a course of action to avert the upheaval and upsurge of the people in the Indian States which were also tottering with the decline of British imperialism….[140]

Though being a minority opinion and hence not binding, the argument was indeed relevant and in line with the ideological premise on which the constitution amendment was attempted and the presidential order was issued on September 5, 1970. The measures, even while being taken in the specific context of the rise of the Swatantra Party and the response to that by Indira Gandhi and her Congress party, were also signals that the political establishment was determined to further its egalitarian agenda. The importance of the Supreme Court judgments in the Golaknath Case (decided on February 27, 1967), the Bank Nationalization Case (decided on February 10, 1970), and in the Privy Purses Case (decided on December 15, 1970) is to be located in the subsequent developments, beginning with the amendments to the Constitution (the Twenty-fourth, Twenty-fifth, Twenty-sixth, and Twenty-ninth) and the Supreme Court's judgment in the Keshavananda Case.

It is significant from the scope of this book to note that within a few days after the Supreme Court decided against the abolition of privy purses (on December 15, 1970), Prime Minister Indira Gandhi decided to take the battle to the streets. On December 27, 1970, only 12 days after the Supreme Court struck down the order abolishing privy purses, Indira Gandhi spoke to the nation on the All India Radio. She said:

> Time will not wait for us. The millions who wait for food, shelter, and jobs are pressing for action. Power in a Democracy resides with the people. That is why we have decided to go to our people and seek a fresh mandate from them.

[140] Ibid., paragraph 353. Justice Ray went on to discuss that any implication from the Cabinet Mission's plans involving the Indian States as deriving their existence from the Crown was indeed "an imperialist imposition on the Rulers of the Indian States."

She recommended dissolution of the Parliament and elections, which was held almost a year before schedule, in March 1971. The voters gave the Congress party a huge majority in the Lok Sabha. The Congress (O) and the Swatantra Party were decimated. The Constitution was amended to overcome the Supreme Court's orders in the Golaknath Case and the Privy Purses Case.

6

Restoring the Balance: Keshavananda and the Basic Structure Doctrine

The sequence of events, beginning with the Supreme Court delivering its judgment in the Golaknath Case and in the Privy Purses Case, culminated in the snap polls to the Lok Sabha in March 1971. This period was also marked by a growing conflict between the political establishment led by Indira Gandhi and the judiciary. Declaring her intention to seek the peoples' mandate, a year ahead of schedule, Indira Gandhi and her Congress party foregrounded the juridical into a political dispute as well. The Congress party sought to implicate the higher judiciary as participants in a conspiracy, along with the opposition in the Parliament, against the socialist agenda. The ideological gloss that was evident in her battle against her detractors in the Congress in 1969[1] was put to further use, and the Supreme Court's decisions in Golaknath, R. C. Cooper, and the Privy Purses Cases were presented as evidence that the conspiracy against socialism was not restricted to the political domain and that sections

[1] See Ananth, *India since independence: Making sense of Indian politics*, pp. 78–89.

in the higher judiciary too were involved in frustrating it. The debate, thus, was taken to a plane as to whether the judiciary must be allowed to overwhelm the Parliament, which represented the will of the people, in determining the government's policy and frustrate measures to put an egalitarian socioeconomic order in place.

The outcome of the general elections in March 1971 proved that Indira Gandhi's reading of the writing on the wall was to the point. From being a minority in the Lok Sabha and dependent on the Left parties and few other outfits for survival, Indira's Congress won 342 seats out of the total of 518. This was a lot more than a two-third majority in the House. A few months after the elections, the government set out to overcome the effect of the Supreme Court's decisions in the Golaknath, Bank Nationalization, and the Privy Purses Cases by way of constitution amendments. The Constitution (Twenty-fourth Amendment) Act, 1971, was meant to overwhelm the judgment in the Golaknath Case; the Constitution (Twenty-fifth Amendment) Act, 1971, was aimed to reverse the effect of the Supreme Court's decision in the Bank Nationalization Case; and the Constitution (Twenty-sixth Amendment) Act, 1971 intended to overwhelm the Supreme Court's decision, striking down the presidential order in Privy Purses Case. The validity of these three constitution amendment Acts as well as the Constitution (Twenty-ninth Amendment) Act, 1972, by which two Acts passed by the Kerala State Legislative Assembly were added to the Ninth Schedule of the Constitution, were challenged in the Supreme Court. This case—*Keshavananda Bharati v. State of Kerala*—by far the most important in the constitutional history of India, was referred to the largest bench ever, consisting of 13 judges (that was all the number of judges in the Supreme Court then), for opinion. The importance of the case was not merely because this was decided by the largest number of judges ever. In this case, the Supreme Court, by a majority of 7 against 6, settled the law insofar as constitutional amendments and the Parliament's powers in that regard as seamless, and thus overruled the decision in

Golaknath.[2] However, it laid down that such amendments shall not alter the basic structure of the Constitution. The power to determine whether the basic structure was altered was left with the judiciary. This position was held as valid by the apex court in the Minerva Mills Case and in the Waman Rao Case. This remains the law till date. We shall look into the decision in the Keshavananda Case in detail in this chapter. But before that, a brief outline of the various constitution amendments that were challenged in the case will be in order.

The Constitution (Twenty-fourth, Twenty-fifth, Twenty-sixth, and Twenty-ninth) Amendments

On July 28, 1971, Minister of Law and Justice H. R. Gokhale, introduced the Constitution (Twenty-fourth Amendment) Bill in the Lok Sabha. The Bill was taken up for debate on August 3 and 4, 1971, and after passage on August 5, 1971, it was taken up for consideration in the Rajya Sabha on August 10 and 11, 1971. The Rajya Sabha approved the Bill on August 11, 1971. The Bill, as passed by the two Houses and ratified by more than half the state legislatures, received the President's assent on November 5, 1971, as the Constitution (Twenty-fourth Amendment) Act, 1971, and came into force the same day.[3] The government did not mince words while stating the aims and objectives of the Bill. It said:

> The Supreme Court in the well-known Golak Nath's case (1967, 2 SCR 762) reversed, by a narrow majority, its own earlier decisions upholding the power of Parliament to amend all parts of the Constitution including Part III relating to fundamental rights.

[2] The Supreme Court, in the Golaknath Case, held that Parliament did not have the power to amend any of the provisions contained in Part III of the Constitution. The Constitution (Twenty-fourth Amendment) Act, 1971, inserted amendments to Articles 13 and 368 of the Constitution with the express purpose of setting the Golaknath judgment to naught.

[3] Pylee, *Constitutional Amendments in India* (3rd Ed.), pp. 121–122.

> The result of the judgement is that Parliament is considered to have no power to take away or curtail any of the fundamental rights guaranteed by Part III of the Constitution even if it becomes necessary to do so for giving effect to the Directive Principles of State Policy and for the attainment of the objectives set out in the Preamble to the Constitution. It is, therefore, considered necessary to provide expressly that parliament has power to amend any provision of the constitution so as to include the provisions of Part III within the scope of the amending power.[4]

Towards this end, the Bill sought to amend Article 368 in order to make it clear that Article 368 provided for amendment of the Constitution as well as the procedure to amend. It laid down that when a constitution amendment Bill was passed by both Houses of the Parliament and presented to the President for his assent, he should give his assent thereto. It also contained changes to Article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under Article 368.

Article 13 (4), inserted by way of the Constitution (Twenty-fourth Amendment) Act, 1971, read as follows:

> 13(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.[5]

This was meant to overcome the law, as held in the Golaknath Case, that constitutional amendments too were to be seen as ordinary law, that is, within the limitations imposed by Article 13 (2) of the Constitution.

In addition, the Constitution (Twenty-fourth Amendment) Act, 1971, brought the following changes into Article 368 of the Constitution.

> Article 368 of the Constitution shall be re-numbered as clause (2) thereof, and
>
> 1. For the marginal heading to that article, the following marginal heading shall be substituted, namely:
>
> "Power of Parliament to amend the Constitution and procedure thereof."

[4] Kashyap, *Constitution making since 1950* (Vol. 6), pp. 75–76.
[5] Ibid., p. 76.

2. Before clause (2) as so re-numbered, the following clause shall be inserted, namely:-

   (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power may amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
3. In clause (2) as so re-numbered, for the words "it shall be presented to the President for his assent and upon such assent being given to the Bill," the words "it shall be presented to the President who shall give his assent to the Bill and thereupon" shall be substituted;
4. After clause (2) as so re-numbered, the following clause shall be inserted, namely:

   (3) Nothing in article 13 shall apply to any amendment made under this article.[6]

The second leg of the Constitution (Twenty-fourth Amendment) Act, 1971, was meant to overwhelm two other aspects of the decision in the Golaknath Case. One was in response to the law, as laid down in the decision, that the power to amend the Constitution laid in Article 248, List I, entry 97 of the Constitution.[7] The other aspect of the Constitution (Twenty-fifth Amendment) Act, 1971, was an addition to Article 368 and was meant to be a corollary to the addition in Article 13. In all, as it was made clear in the Statement of Aims and Objects, the amendment was in order to unsettle the law, as laid down in the Golaknath Case, with a view to ensure the Parliament's supreme power to amend the Constitution, including the provisions in Part III of the Constitution. The amendment, thus, was intended to undo the effect of the decision in the Golaknath Case.

[6] Ibid., p. 76.

[7] This was the view held by Justice K. Subba Rao, Chief Justice, speaking for four others in the Golaknath Case. Justice Rao held that the power to amend the Constitution was found in Article 248, List I, entry 97, and that Article 368 merely dealt with the procedure for amendment of the Constitution. Entry 97 in List I of the Seventh Schedule of the Constitution read as follows: Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

On the same day, that is, on July 27, 1971, Law Minister H. R. Gokhale introduced the Constitution (Twenty-fifth Amendment) Bill, 1971. It was debated in the Lok Sabha on November 30 and December 1, 1971, and in the Rajya Sabha on December 7 and 8, 1971, and after it was adopted by both the Houses and ratified by more than half the state legislatures, the Bill received the President's assent on April 20, 1972. The Constitution (Twenty-fifth Amendment) Act, 1971, came into force the same day. The Statement of Aims and Objects laid bare that the amendment was meant to undo the effect of another Supreme Court's decision. It said:

> Article 31 of the Constitution as it stands specifically provides that no law providing for the compulsory acquisition or requisitioning of property which either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given shall be called in question in any court on the ground that the compensation provided by that law is not adequate. In the Bank Nationalization case (1970, 3 SCR 530), the Supreme Court has held that the Constitution guarantees right to compensation, that is, the equivalent in money of the property compulsorily acquired. Thus in effect the adequacy of compensation and the relevancy of the principles laid down by the Legislature for determining the amount of compensation have virtuality become justciable in as much as the Court can go into the question whether the amount paid to the owner of the property is what may be regarded reasonably a compensation for loss of property. In the same case, the Court has also held that a law which seeks to acquire or requisition property for a public purpose should also satisfy the requirements of article 19 (1) (f).
>
> The Bill seeks to surmount the difficulties placed in the way of giving effect to the Directive Principles of State Policy by the aforesaid interpretation. The word "compensation" is sought to be omitted from article 31(2) and replaced by the word "amount." It is being clarified that the said amount may be given otherwise than in cash. It is also proposed to provide that article 19(1)(f) shall not apply to any law relating to the acquisition or requisitioning of property for a public purpose.
>
> The Bill further seeks to introduce a new article 31C which provides that if any law is passed to give effect to the Directive Principles contained in article 14, 19, or 31 and shall not be questioned on the ground that it does not give effect to those principles. For this provision to apply in the case of laws made by State Legislatures, it

> is necessary that the relevant Bill should be reserved for the consideration of the President and receive his assent.[8]

There were, thus, two important aspects to the amendment. One was to directly address the challenge posed before the government against the acquisition of property and brought to the fore in the Supreme Court's decision in the Bank Nationalization Case: that the court shall sit on judgment on the adequacy of compensation and that a law for acquisition of property was liable to be set aside on the ground of inadequate compensation. The second part of the amendment was to add Article 31-C to the Constitution, being a provision for a sweeping exemption from the application of Articles 14, 19, and 31 of the Constitution to such legislations that were intended to give effect to Articles 39 (b) and (c) of the Constitution, and that a mere declaration of such an intent being good enough for invoking Article 31-C of the Constitution.

Section 2 of the Constitution (Twenty-fifth Amendment) Bill replaced the word *compensation*, as it was in Article 31 (2) of the Constitution, with the word *amount*, and also added a paragraph to deal with such a property held by educational institutions established by religious minorities, and thus protected by Article 30 (1) of the Constitution. Thus, Article 31 (2), as amended read as follows:

> No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an *amount* which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the *amount* so fixed or determined is not adequate or that the whole or any part of such *amount* is to be given otherwise than in cash.
>
> Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of article 30, the State shall ensure that the amount fixed by or determined under

[8] Kashyap, *Constitution making since 1950* (Vol. 6), p. 77.

> such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.[9] (Ananth, emphasis added)

Similarly, a new Clause 31(2B) was inserted to Article 31 and it read as follows: Nothing in sub-Clause (f) of Clause (1) of Article 19 shall affect any such law as is referred to in Clause (2).[10]

The more substantive change, by way of the Constitution (Twenty-fifth Amendment) Act, 1972, however, was brought by Section 3 of the Bill, and it involved addition of Article 31-C to the Constitution. It read as follows:

> 31C. Saving of laws giving effect to certain directive principles. Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31; *and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy;*
>
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.[11] (Ananth, emphasis added)

It may be stated here that while the changes brought about by Section 2 of the amendment Act by which the word *compensation* was replaced with *amount* was a direct response by the political leadership, through the Parliament, to overcome the impact of the decision in the Bank Nationalization Case and ensure that the definition of compensation as just equivalent of the property acquired did not apply to future acquisition of property; the addition of Article 31-C to the Constitution was

[9] Ibid., p. 78. (The second leg of Article 31-C, as a whole, was an addition and added to keep the amended provision consistent with Article 29 of the Constitution. This was also intended to save the amendment in the light of the Supreme Court's judgment in the Kerala Education Bill.)

[10] Ibid.

[11] Ibid.

a substantive change. With this, challenge against acquisition of property in order to give effect to the provisions in Articles 39 (b) and (c) were made impossible.[12]

As for the Constitution (Twenty-sixth Amendment) Act, 1971, the Bill was introduced in the Lok Sabha on August 9, 1971, and passed by a two-third majority on December 2, 1971. The Rajya Sabha took it up for discussion and passage on December 9, 1971, and received the President's assent on December 28, 1971. It was brought into force the same day. Through this Bill, the privy purses enjoyed by the descendants of the former rulers of the Indian states stood abolished.[13]

By the Constitution (Twenty-sixth Amendment) Act, 1971, Articles 291 and 362 of the Constitution stood deleted. Apart from this, Article 363-A was added, and some changes were made to Article 366 (22) of the Constitution. With these changes, the grounds on which the Supreme Court set aside the presidential order abolishing privy purses were taken off from the Constitution. In other words, the constitution amendment that failed in the Rajya Sabha, for want of a single vote on September 5, 1970, was carried out this time with ease.

The Constitution (Twenty-ninth Amendment) Bill was introduced in the Lok Sabha on May 26, 1972, by Law Minister H. R. Gokhale and passed by the House the same day. The Rajya Sabha took it up for passage on May 31, 1972, and obtained President's assent on June 9, 1972 and came into force the same day. The amendment added two more Acts from the Kerala state to the Ninth Schedule of the Constitution. The two Acts included in the Ninth Schedule, thus,

[12] It may be stated here that the Supreme Court, in the Keshavananda Case, struck down the second leg of Article 31-C (the portion emphasized) even while holding the first leg as valid. We shall discus this in detail later on in this chapter.

[13] It is significant that Prime Minister Indira Gandhi chose to introduce the Bill herself. The measure, it may be recalled, was defeated in the Rajya Sabha on September 5, 1970, by a single vote and the presidential order abolishing privy purses was struck down by the Supreme Court on December 15, 1970.

barred from legal challenge were the Kerala Land Reforms (Amendment) Act, 1969, and the Kerala Land Reforms (Amendment) Act, 1971.[14] The amendments by way of these two Acts were only minor changes and were intended to save the land reforms program that the state government had begun in Kerala from further litigation, and thus protect the tenants who benefited from the measures. There had been some litigation by the landlords against these amendments in the Kerala High Court, and appeals were filed in the Supreme Court too.

In the aftermath of the decision in the Golaknath Case, where the Supreme Court had barred additions to the Ninth Schedule of such laws that were seen as affecting provisions in Part III of the Constitution), the scope for such constitution amendments stood abrogated. But then, the Constitution, as amended by the Constitution (Twenty-fourth Amendment) Act, 1971, had unsettled the law, as laid down in the Golaknath Case, and thus there was no way that the inclusion of the two legislations from Kerala in the Ninth Schedule could be challenged.

It was in this context that a petition challenging the constitutional validity of the two amendment Acts that brought minor alterations to the Kerala Land Reforms Act, 1963, was moved before the Supreme Court. The petitioner in this case, His Holiness Keshavananda Bharati Sripadgavaralu, represented a religious *mutt* (a Hindu religious organization), whose property was also acquired for redistribution under the land reforms program undertaken by the state government in Kerala under the provisions of the 1963 Act. The case turned out to be the most significant in the constitutional history of India; the hearings went on for 67 days and in the end there were 11 separate judgments delivered.[15]

[14] Items 65 and 66 in Appendix 4. Both these amendments were carried out in the Kerala Land Reforms Act, 1963, which was a part of the Ninth Schedule even earlier by way of the Constitution (Seventeenth Amendment) Act, 1964 (Entry 39 of the Ninth Schedule). It may be recalled that the amendment was upheld by the Supreme Court in the Sajjan Singh Case in 1965.

[15] *Keshavananda Bharati v. State of Kerala* (AIR-1973-SC-1461).

Keshavananda Case

A writ petition was filed by His Holiness Keshavananda Bharati Sripadgavaralu, on March 21, 1970, under Article 32 of the Constitution for enforcement of his Fundamental Rights under Articles 25, 26, 14, 19 (1) (f), and 31 of the Constitution. Through that he sought that the provisions of the Kerala Land Reforms Act 1963, as amended by the Kerala Land Reforms (Amendment) Act 1969, be declared unconstitutional, *ultra vires,* and void. He further prayed for an appropriate writ or order to issue during the pendency of the petition and the apex court issued *rule nisi* (the ruling of a court becomes final unless one or both parties show cause for it not to be) on March 25, 1970. During the pendency of the writ petition, the Kerala Land Reforms (Amendment) Act 1971 was passed, and it received the assent of the President on August 7, 1971. The petitioner filed an application for permission to urge additional grounds and to impugn the constitutional validity of the Kerala Land Reforms (Amendment) Act 1971 too.

The Supreme Court, in the meantime, had passed a judgment on a case of similar nature with a similar prayer on April 26, 1971. In that case (*Kunjukutty Sahib v. State of Kerala*), the apex court upheld the majority judgment of the Kerala High Court in *Narayanan Nair v. State of Kerala,* whereby certain sections of the Act were struck down.

Subsequently, the Constitution (Twenty-fourth Amendment) Act, 1971, came into force (with effect from November 5, 1971), and the Constitution (Twenty-fifth Amendment) Act, 1972, came into force on April 20, 1972. The Constitution (Twenty-Ninth Amendment) Act, 1972, too came into force on June 9, 1972, and by this, the Acts amending the Kerala Land Reforms Act, 1963, were included in the Ninth Schedule of the Constitution. At that stage, Keshavananda Bharati moved another application for raising additional grounds and for amendment of the writ petition in order to challenge the constitutional amendments. The apex court allowed the application and for the amendment of the writ petition on August 10, 1972, and issued notices to the Advocates General to appear before

the Court and take part in such proceedings. In the process, the Union Government as well as various state governments were drawn into the dispute, and the matter was referred to a 13-member bench of the Supreme Court.[16] The arguments that lasted for 67 days, spread over three months, found luminaries in the legal arena appearing on either sides.[17] And in the end, the 13 judges delivered 11 separate judgments[18] on April 24, 1973,[19] along with a summary presenting the *ratio decidendi* (The legal principle upon which the decision in a specific case is founded) in the case. The summary, signed by only 9 of the 13 judges[20] read as follows:

> The view by the majority in these writ petitions is as follows:-
>
> 1. Golaknath's case is overruled;
> 2. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution;
> 3. The Constitution (Twenty Fourth Amendment) Act, 1971, is valid;
> 4. Section 2a and 2b of the Constitution (Twenty Fifth Amendment) Act, 1971, is valid;
> 5. The first part of Section 3 of the Constitution (Twenty Fifth Amendment) Act, 1971, is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such

[16] Apart from the Chief Justice S. M. Sikri, the bench was constituted by Justices J. M. Shelat, K. S. Hegde, A. N. Grover, A. N. Ray, P. Jaganmohan Reddy, D. G. Palekar, H. R. Khanna, K. K. Mathew, M. H. Beg, S. N. Dwivedi, A. K. Mukherjea, and Y. V. Chandrachud.

[17] Among those were Nani Palkhiwala, C. K. Daphtary, M. C. Chagla, and Soli Sorabjee for the petitioners; and Niren De, H. M. Seervai, T. R. Anthyarjuna, and M. K. Ramamurthy for the respondents.

[18] Chief Justice Sikri gave a separate judgment. And so did Justices Khanna, Reddy, Ray, Palekar, Mathew, Beg, Dwivedi, and Chandrachud. Justice Shelat spoke for Justice Grover too while Justice Hegde spoke for Justice Mukherjea as well. Thus, it was 11 separate judgments running into 594 pages in the report (AIR-1973-SC-1461).

[19] It happened to be the day before Chief Justice Sikri was to retire and it was hence that the bench decided to deliver its opinion on the reference.

[20] Apart from Chief Justice Sikri, the summary was signed by Justices Shelat, Hegde, Grover, Reddy, Palekar, Khanna, Mukherjea, and Chandrachud. Those who refrained from signing the summary were Justices Ray, Mathew, Beg, and Dwivedi. See Introductory Editorial Note, AIR-1973-SC-1461, pp. 1461–1462.

policy shall be called into question in any Court on the ground that it does not give effect to such policy" is invalid;

6. The Constitution (Twenty Ninth Amendment) Act, 1971, is valid.

The Constitution Bench will determine the validity of the Constitution (Twenty Sixth Amendment) Act, 1971, relating to the abolition of Privy Purses and privileges of princes, in accordance with law.[21]

It is significant to note here that even while the judges decided to deliver separate judgments and that a summary was warranted, there was unanimity among all the 13 judges insofar as a large number of issues raised. As for instance, there was near unanimity insofar as overruling the decision in the Golaknath Case was concerned.[22] In the same way, all the 13 judges upheld the Constitution (Twenty-fourth Amendment) Act, 1971, by which amending powers under Article 368 was explicitly exempted from the provisions under Article 13 (2). Similarly, Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, by which the word *compensation* in Article 31 (2) was replaced with the word *amount* was upheld by all the 13 judges in the bench. The basis on which the law to nationalize private sector banks was struck down—that the principle to determine compensation according to the act violated the provisions of compensation in Article 31 (2)—stood removed by Section 2 of the amendment act.[23]

[21] Ibid., p. 1462.

[22] It may be noted that Justice Sikri was part of the 11-member bench in the Golaknath Case, where he had agreed with Justice K. Subba Rao to hold that the amending powers rested in Article 248, List I, Entry 97. He agreed with the decision that amendments to the Constitution too were bound by the limitation under Article 13 (2) of the Constitution, and hence amendments that abridged or abrogated provisions in Part III of the Constitution were void. So did Justice Shelat in the Golaknath Case. And yet, they held a distinct view, in this instance. While Justice Sikri skirted any reference to the the Golaknath decision, Justice Shelat held that Golaknath decision was now only of academic interest (see AIR-1973-SC-1461).

[23] Interestingly, Justices Hegde, Grover, and Reddy had agreed with Justice J. C. Shah (then the CJI) in the R. C. Cooper case to constitute the majority that struck down the act to nationalize private banks. It may be noted here that the learned judges had their own explanations for this move.

The bench, however, was divided insofar as Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, inserting Article 31-C to the Constitution was concerned. Five out of the 13 judges struck it down in its entirety, while six out of the 13 judges upheld it in its entirety. Justice Khanna and Justice Reddy held parts of it as valid and struck down some other parts as void, and this led to a majority view holding the first leg of Article 31-C valid.[24] A similar pattern was evident insofar as the basic structure doctrine was concerned. Therein lay the importance of the Keshavananda Case. The decision that the Parliament did not have the powers to alter the basic structure or framework of the Constitution was a point on which six of the 13 judges did not agree. The majority, meanwhile, identified judicial review as part of the basic structure. It may be added here that even those who constituted the minority held the second leg of Article 31-C valid on grounds that there was a scope, even if the provision was retained, for the judiciary to probe the nexus between the law in question and Articles 39 (b) and (c), and strike down such laws where the nexus was absent.

It may be relevant, from the scope of this book, to delve into some parts of the judgment in detail. The issues that the judges raised and their speaking orders were indeed significant in the making of constitutional law in India.

Chief Justice Sikri, for instance, stressed that the point in issue before the bench, in this case, was not merely to decide whether the power of amendment of the Constitution under Article 368 was bound by the limitations imposed by Article 13 (2); according to him, this was a limited point before the court in the Golaknath Case. In this case, he held, "what is the extent of the amending power conferred by Article 368 of

[24] Chief Justice Sikri along with Justices Shelat, Grover, Hegde, and Mukherjea struck down Article 31-C in its entirety. Justice Reddy and Khanna held some parts of it valid and struck down some other parts. Those who held the provision as a whole as valid were Justices Ray, Palekar, Chandrachud, Mathew, Beg, and Dwivedi. (It may be noted here that Justices Ray, Mathew, Beg, and Dwivedi had refrained from signing the summary of the judgment delivered in this case.)

the Constitution apart from Article 13 (2) on Parliament?"[25] Describing the issues, now raised in this case as *grave*, Justice Sikri went on to say:

> I need hardly observe that I am not interpreting an ordinary statute, but a Constitution which apart from setting up a machinery for government, has a noble and grand vision. The vision was put in words in the Preamble and carried out in part by conferring fundamental rights on the people. The vision was directed to be further carried out by the application of directive principles.[26]

Justice Sikri thereafter dwelt at length into the apex court's decisions in the Shankari Prasad Deo Case, the Sajjan Singh Case, and also the Golaknath Case, and then held that all those were decided while Article 13 (2) remained as part of the Constitution. He then added:

> It must be borne in mind that these conclusions were given in the light of the Constitution as it stood then i.e. while Article 13 (2) subsisted in the Constitution. It was then not necessary to decide the ambit of Article 368 with respect to the powers of Parliament to amend Article 13 (2) or to amend Article 368 itself. It is these points that have now to be decided.[27]

The judge then went on to interpret what *amendment* meant, as used in Article 368 of the Constitution and elsewhere in the Constitution, and came to the conclusion that:

> In view of the great variation of the phrases used all through the Constitution it follows that the word "amendment" must derive its colour from Article 368 and the rest of the provisions of the Constitution. There is no doubt that it is not intended that the whole constitution could be repealed.[28]

[25] Ibid., paragraph 10.
[26] Ibid., paragraph 15.
[27] Ibid., paragraph 40.
[28] Ibid., paragraph 88. It may be noted that Justice Sikri depended, in large measure, on the fact that an attempt in the Constituent Assembly to define amendment in a manner that it included variation, addition, or repeal was rejected in the assembly, to buttress his position. (Ibid., paragraph 75). Justice Sikri's reference was to amendment number

Justice Sikri then went on to say that the scope for amendment must be seen from the larger structure of the Constitution as such, and more particularly from the Preamble. Citing from the Constituent Assembly debates and making a specific reference to a statement by Alladi Krishnaswamy Ayyar in that context,[29] Justice Sikri stressed that the scope of amendments and the Parliament's power had to be located from the Preamble to the Constitution. Citing from Common Law judgments, Justice Sikri held that "… if on reading Article 368 in the context of the Constitution I find the word 'Amendment' ambiguous I can refer to the Preamble to find which construction would fit in with the Preamble"[30] and then held: "It seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble."[31]

The entire burden of the decision, by Justice Sikri, was that there were implied limitations in the Constitution itself, and

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3239 moved by H.V. Kamath on September 17, 1949, while Article 304 of the Draft Constitution (that became Article 368 of the Constitution) was taken up for approval. Kamath's amendment sought the insertion of a clause to Article 304 that read as: "Any provision of this Constitution may be amended, whether by way of variation, addition or repeal, in the manner provided in this article." This was negated by the assembly. (See CAD, Vol. IX, p. 1665).

[29] Justice Sikri, in his judgment (AIR-1973-SC-1461, paragraph 98) quotes Alladi Krishnaswamy Ayyar as having said: "So far as the Preamble is concerned, though in an ordinary statute we do not attach any importance to the Preamble, all importance has to be attached to the Preamble in a Constitutional statute." (See CAD, Vol. X, p. 417). However, in the report, it appears that Justice Sikri attributes to Alladi the following statement too: "Our Preamble outlines the objectives of the whole constitution. It expresses "*what we had thought or dreamt for so long* (Ananth, emphasis added)." This last sentence (in italics), however, does not figure in the texts of the CAD reporting Alladi's speech. It could have been the judge's opinion.

[30] AIR-1973-SC-1461, paragraph 113.

[31] Ibid., paragraph 121.

that the scope of Article 368 had to be read in that framework and after considering the Constitution in its entirety. "It seems to me" he said:

> 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 … an irresistible conclusion emerges that it was not the intention to use the word 'amendment' in the widest sense.[32]

In the same breath, the judge went on to add that:

> [i]t 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.[33]

And he held as follows:

> 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….[34]

Referring to the arguments from both sides, and more particularly to those of the government that Article 368 accorded seamless powers, and that Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and *un*amendable, Justice Sikri pointed to the dangers in that event. He said:

> If this is so, a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar

[32] Ibid., paragraph 292.
[33] Ibid., paragraph 293.
[34] Ibid., paragraph 294.

> 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.[35]

In a nuanced departure from the position he had held (by his association with Justice K. Subba Rao) in the Golaknath Case, Justice Sikri said:

> … 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.[36]

The thrust here was that amendments that abridged the Fundamental Rights were valid in the scheme of the Constitution and where it was necessary to give effect to the Directive Principles. The restriction to this general rule, however, was that such amendments shall be within the basic structure of the Constitution. Justice Sikri then listed out what he meant by the basic structure as consisting 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, executive and the judiciary;
5. Federal character of the Constitution.[37]

The judge stressed that these were principles that ensured the dignity and freedom of the individual, and hence of supreme importance which cannot be destroyed by any

[35] Ibid., paragraph 295.
[36] Ibid., paragraph 297.
[37] Ibid., paragraph 302.

form of amendment. He added that the basic features were easily discernible not only from the Preamble, but the whole scheme of the Constitution. From this framework, Justice Sikri went on to state that "the touchstone" to test the validity of a constitutional amendment "will be the intention of the Constitution-makers, which we can discern from the Constitution and the circumstances in which it was drafted and enacted"[38] to hold the Constitution (Twenty-fourth Amendment) Act, 1971, as valid. Justice Sikri also held that part of the Constitution (Twenty-fifth Amendment) Act, 1971, which replaced *compensation* with *amount* as valid on the ground that even after the amendment, Article 31 (2) remained, and that the amount specified or the principles for fixing the amount were liable to be struck down where they were found illusory.

Justice Sikri, however, struck down that part of the Constitution (Twenty-fifth Amendment) Act, 1971, by which Article 31-C was added to the Constitution. The judge held that he was "concerned with the amplitude of the power conferred by Article 31-C and not with what the legislatures may or may not do under the powers so conferred."[39] On that ground, he said:

> I have already held that Parliament cannot under Article 368 abrogate fundamental rights. Parliament equally cannot enable the legislatures to abrogate them. This provision thus enables legislatures to abrogate fundamental rights and therefore must be declared unconstitutional.[40]

[38] Ibid., paragraph 350.

[39] Ibid., paragraph 447.

[40] Ibid., paragraph 448. It may be noted here that Justice Sikri's position in striking down Article 31-C in its entirety was a minority. Justices Shelat, Grover, Hegde, and Mukherjea too agreed with him on this. Justice Khanna upheld the first leg and struck down the second leg of Article 31-C, while Justice Reddy upheld Article 31-C in a manner as altered by him. Six other judges in the bench upheld the entire Article as it stood. However, Justice Sikri agreed to sign the summary which upheld the first leg of Article 31-C.

The approach by Justice Shelat,[41] speaking for Justice Grover as well, was not very different from that of Justice Sikri. "The decision in Golaknath," Justice Shelat said:

> has become academic, for even on the assumption that the majority decision in that case was not correct, the result on the questions now raised before us, in our opinion, would just be the same. The issues that have been raised travel far beyond that decision and the main question to be determined now is the scope, ambit and extent of the amending power conferred by Article 368.[42]

Justice Shelat, speaking for Justice Grover too, recalled the amendment that H.V. Kamath had sought to Article 304 of the Draft Constitution in the Constituent Assembly (as did Justice Sikri in his judgment) along with another amendment moved by Kamath again (that any amendment upon presentation to the President receive his assent) and then said: 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.[43]

Justice Shelat, however, hastened to add:

> Although prima facie it would appear that the Constitution makers did not employ the composite expression in Article 368 for certain reasons and even rejected Mr. Kamath's amendment which pointedly brought to their notice that it was of material importance that the expanded expression should be used, it may not be possible to consider this aspect as conclusive for the purpose of determining the meaning of the word "amendment" in Article 368.[44]

He then took the issue to the relevance of the Preamble to the Constitution to reinforce the point that the basic feature

[41] Justice Shelat, incidentally, was part of the 11-member bench in the Golaknath Case, and he too had concurred with Justice Shah who delivered the majority judgment in that case to hold that the Parliament had no right to amend any of the provisions in Part III of the Constitution.

[42] AIR-1973-SC-1461, paragraph 496.

[43] Ibid., paragraph 516.

[44] Ibid., paragraph 519.

of the Constitution must be located in the Preamble there. Justice Shelat, speaking for Justice Grover as well, delved into the context in which the Preamble was debated in the Constituent Assembly and how it was drawn from the Objectives Resolution in its entirety. Justice Shelat said:

> The Drafting Committee felt that the Preamble should be restricted to defining the essential features of the new State and its basic socio-political objectives and that the other matters dealt with in the Resolution could be more appropriately provided in the substantial parts of the Constitution. Accordingly it drafted the Preamble, which substantially was in the present form.[45]

The judges then conceded that "on a concept such as social and economic justice there may be different schools of thought" and went on to say that:

> the Constitution makers knew what they meant by those concepts and it was with a view to implement them that they enacted Parts III (Fundamental Rights) and Part IV (Directive Principles of State Policy)—both fundamental in character—on the one hand, basic freedoms to the individual and on the other social security, justice and freedom from exploitation—by laying down guiding principles for future governments.[46]

The two judges thereafter delved into a catena of case laws to stress: "Our Court has consistently looked to the preamble for guidance and given it a transcendental position while interpreting the Constitution or other laws."[47] The Preamble, the judges maintained:

> 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.[48]

[45] Ibid., paragraph 526.
[46] Ibid., paragraph 532.
[47] Ibid., paragraph 533.
[48] Ibid., paragraph 538.

From this position, the judges went on to deal with whether Article 368 provided for seamless powers to the Parliament to amend the Constitution; and in response to the government's argument that though it claimed powers to alter all the parts of the Constitution, the courts shall not be guided by the ominous possibilities but whether such changes have as such been made. Justices Shelat and Grover held "that the real consequences can be taken into account while judging [that] 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."[49] To stress this aspect further, the judges said:

> 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 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.*[50] (Ananth, emphasis added)

The judges then delved into the historical context in which the Constituent Assembly came into place to underscore the imperative for checks against any one of the institutions—legislature, judiciary and executive—assuming supreme

[49] Ibid., paragraph 548.
[50] Ibid., paragraph 549.

powers. In doing so, Justices Shelat and Grover culled out the German experience and the Weimar Republic that brought about a substantive shift in jurisprudence. They said:

> … Before reference is made to the Objectives Resolution adopted in January 22, 1947 it must be borne in mind that the post war period in Europe had witnessed a fundamental orientation in juristic thinking, particularly in West Germany, characterized by a farewell to positivism. Under the influence of positivist legal thinking, during the pre-war period most of the German Constitutions did not provide for judicial review which was conspicuously absent from the Weimar Constitution even though Hugo Preuss, often called the Father of that Constitution, insisted on its inclusion. After World War II when the disastrous effects of the positivist doctrines came to be realized there was a reaction in favour of making certain norms immune from amendment or abrogation. This was done in the Constitution of the Federal Republic of Germany. The atrocities committed during Second World War and the worldwide agitation for human rights ultimately embodied in the U. N. Declaration of Human Rights on which a number of the provisions in Parts III and IV of our Constitution are fashioned must not be forgotten while considering these matters….[51]

The thrust herein was that if the power to amend Article 368 was to be held as seamless, it cannot be conducive to the survival of the Constitution itself, and that the amending power itself could be taken away and the Constitution can be made *un*amendable, both in the literal and in the virtual sense by providing for an impossible majority. Justices Shelat and Grover then pointed out the fact that the quest for identifying implied limitations to amendment under Article 368 was skirted by the bench in the Golaknath Case and that it was imperative to be done in this instance.[52] Thereafter, the two judges went on to underscore the need for locating the restrictions on the powers of the legislature, under Article 368, in the hands of the judiciary. The power of judicial review the

[51] Ibid., paragraph 551.

[52] Justice Shelat, incidentally, was part of the bench in the Golaknath Case and was part of the majority decision in that case that found the scope of Article 368 restricted by Article 13 (2).

judges held was indeed a part of the basic features of the Constitution and said:

> 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.[53]

In response to the government's 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, the judges held:

> 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 Das, C. J., 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 [of] any vital provision out of them is cut out or denuded of its identity.[54]

[53] AIR-1973-SC-1461, paragraph 594. In this, Justices Shelat and Grover relied on Justice Patanjali Sastri's words in the *State of Madras v. V. G. Row* (AIR-1952-SC-196), where the then Chief Justice had held that 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."

[54] Ibid., paragraph 598.

Justice Shelat, speaking for Justice Grover as well, then stressed that the implied limitations of amending powers under Article 368 of the Constitution could be culled out from the basic structure of the Constitution. This, he said, was not a vague doctrine but based on a reading of the historical context in which the Constitution was made. Justice Shelat then put out a list of features that was illustrative (and not a catalogue) of the basic structure. These were:

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.[55]

From this, the judges went ahead to pronounce the validity of the Constitution (Twenty-fourth Amendment) Act, 1971, as valid. In their words:

> 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.[56]

As for the validity of the Constitution (Twenty-fifth Amendment) Act, 1971, Justices Shelat and Grover took the same position as Justice Sikri and held Section 2 of the amendment Act valid. Their reasoning too was similar to that of Justice Sikri that even with the word *compensation* replaced with

[55] Ibid., paragraph 599. It may be noted that the illustrative list of basic features provided by Justices Shelat and Grover was almost identical with that given by Justice Sikri; there was one critical addition, however, in this list, and that is the mention of the rights in Part III and the principles in Part IV.

[56] Ibid., paragraph 600.

amount the court's domain to scrutinize was left wide open and Acts that provided for illusory compensation for property acquired were liable to be struck down as unconstitutional.[57] Article 31-C was similarly struck down on the ground that "… Article 31-C impinges with full force on several fundamental rights which are enabled to be abrogated by the Parliament and the State Legislatures."[58]

The judgment by Justice Hegde, speaking for Justice Mukherjea, even while leading to similar conclusions, was based on different premises. They began by stating that the power to amend the Constitution lay in Article 368, and thus distanced themselves from the view held by Justice K. Subba Rao (along with J. C. Shah, Sikri, Shelat, and Vaidyalingam) that the power to amend lay in Article 248, List I, Entry 97. Justice Hegde, speaking for Justice Mukherjea as well, rested upon the fact that the Constitution devoted the whole of Part XX exclusively for this. This, according to them, was a circumstance of great significance. Justices Hegde and Mukherjea also held that while Article 248 laid restricted legislative scope to the provisions of the Constitution, the scope of Article 368 had to be seen in a wider sense. In their own words, "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."[59] They also made it clear that in their view, law, as in Article 13, did not include constitutional amendments. In other words, Justices Hegde and Mukherjea took the stage back to where the law in this regard stood before Golaknath, and as upheld by the Supreme Court in the Shankari Prasad Deo Case and the Sajjan Singh Case. The judges also maintained that amendments to the Constitution, including ones that abridge the Fundamental Rights, were in order. They said:

> Therefore to implement the duties imposed on the State under Part IV, it may be necessary to abridge in certain respects the rights

[57] Ibid., paragraph 608.
[58] Ibid.. paragraph 616.
[59] Ibid., paragraph 635.

> 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 maintain 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.[60]

Looking for precedents, not just from the past judgments, but from the makers of the Constitution, Justices Hegde and Mukherjea recalled the Constitution (First Amendment) Act, 1951, and the fact that this was done by the members of the Constituent Assembly itself. "They must have been aware of the intention with which Article 368 was enacted," they stressed.[61] The judges distanced themselves from the idea of interpreting the scope of Article 368 on the basis of a dictionary meaning of the word *amendment*, and insisted upon the need to interpret in a way where "the various parts of the Constitution must be construed harmoniously for ascertaining the true purpose of Article 368."[62] They said:

> 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.[63]

Justice Hegde, speaking for Justice Mukherjea as well, then went into the history of the Constitution-making process in India, its roots in the struggle for independence, the circumstances leading to World War II and its impact on constitutional law in

[60] Ibid., paragraph 650.
[61] Ibid., paragraph 652.
[62] Ibid., paragraph 655.
[63] Ibid., paragraph 657.

general, and on the minds of the members of the Constituent Assembly to make the following observation:

> In evolving the Fundamental Rights and the Directive Principles, our founding fathers, in addition to the experience gathered by them from the events that took place in other parts of the World, also drew largely on their experience in the past. The Directive Principles and the Fundamental Rights mainly proceed on the basis of human rights. Representative democracies will have no meaning without economic and social justice to the common man. This is a universal experience. Freedom from foreign rule can be looked upon only as an opportunity to bring about economic and social advancement. After all freedom is nothing else but a chance to be better. It is this liberty to do better that is the theme of the Directive Principles of State Policy in Part IV of the Constitution.[64]

Citing the Preamble as a clear indication of the objectives that were before the Constituent Assembly, Justice Hegde, speaking for Justice Mukherjea as well, held that the constitutional plan was to build a welfare state and an egalitarian society. From this, the judges raised a question as to whether the founding fathers of the Constitution would 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."[65] In what could be an intention to clarify, the judges went on to say that it warranted the intervention of the judiciary in this instance not because the constitution amendments now under challenge were as inimical to the constitutional scheme, but because an interpretation that the amending powers were seamless would have serious implications due to the potential for abuse then. They averred to some of the arguments during the hearing in this context.

> 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

[64] Ibid., paragraph 662.
[65] Ibid., paragraph 665.

> of this country and substitute the same by a theocratic form of Government; (5) abrogate completely the venous 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…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.[66]

Stressing that the Parliament's power to amend the Constitution was extensive, the judges, however, maintained that "the personality of the Constitution must remain unchanged."[67] Averring to the argument that the idea of basic features would put the legislatures in a difficult situation and that every constitutional amendment will face the uncertainty, the judges said:

> The broad contours of the basic elements or fundamental features of our Constitution are clearly delineated in the preamble…. The

[66] Ibid., paragraph 666. The judges, in this instance, may not have expected something of that kind actually happening, within a few years after they made this pronouncement when the Parliament passed the Constitution (Forty-second Amendment) Act, 1976. It is relevant, however, that the law, as laid down in this case—the basic structure doctrine—served as the basis by the Supreme Court in the Minerva Mills Case to strike down some such provisions. We shall discuss these provisions later in this chapter.

[67] Ibid., paragraph 667.

> 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… 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.[68]

Thereafter, the judges went on to hold that the Parliament did not have the power to abrogate or emasculate the basic elements or fundamental features of the Constitution. Justice Hegde, speaking for Justice Mukherjea as well, then laid down what they considered as basic elements or fundamental features of the Constitution as follows:

1. Sovereignty of India
2. The democratic character of our polity
3. The unity of the country
4. The essential features of the individual freedoms secured to the citizens and went on to add another aspect
5. Nor has the Parliament the power to revoke the mandate to build a welfare state and an egalitarian society.

"These limitations," they said, "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."[69] Further on in the same breath, the judges said:

> That power can be used to reshape the Constitution to fulfill 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

[68] Ibid., paragraph 677.
[69] Ibid., paragraph 682.

> 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.... Our constitutional plan is to eradicate poverty without destruction of individual freedoms.[70]

From this approach, Justices Hegde and Mukherjea held the Constitution (Twenty-fourth Amendment) Act, 1971, valid. The amendment, in their view, did not alter Article 368 in any substantive sense and insofar as adding Clause 4 to Article 13 was concerned, their opinion was that the amendment made explicit what was implicit: Article 13 (2) did not apply to Article 368 for the reason that a constitution amendment was not a *law* as meant in Article 13. They also held the amendment to Article 31 (2), where the word *compensation* was replaced by *amount* by way of the Constitution (Twenty-fifth Amendment) Act, 1971, as valid. In doing so, the judges followed the same logic that had been adopted by Justices Sikri, Shelat, and Grover.

Dealing with the question of the validity of Article 31-C, now inserted into the Constitution, the judges dwelled at length on the importance of the Directive Principles of State Policy. "The aim of the Constitution," they stressed, "is not to guarantee certain liberties to only a few of the citizens but for all," and that "to ignore Part IV is to ignore the sustenance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built." Justices Hegde and Mukherjea went on to say, "[A] society like ours steeped in poverty and ignorance cannot realize the benefit of human rights without satisfying the minimum economic needs of every citizen of this country."[71] They, however, hastened to stress on the need to achieve all these without denying the individual his liberty. The role of

[70] Ibid., paragraph 682.
[71] Ibid., paragraph 729.

the judiciary, they held, was important in this context. In their own words,

> Indeed the balancing process between the individual rights and the social needs is a delicate one. This is primarily the responsibility of the 'State' and in the ultimate analysis of the courts as interpreters of the Constitution and the laws.[72]

From this premise, the judges went on to interpret the scope and the reach of Article 31-C. They held it to be very wide. "It is possible," they said, "to fit into the scheme of that Article almost any economic and social legislation." They refused to consider the concession, on behalf of the government, that it was open to the courts to examine whether there is a nexus between the laws made under Article 31-C and Articles 39 (b) and (c) and all that the courts are precluded from examining is the effectiveness of the law in achieving the intended purpose. "Such a power in its very nature is tenuous. There can be few laws which can be held to have no nexus with Article 39 (b) and (c). At any rate, most laws may be given the appearance of aiming to achieve the objectives mentioned in Article 39 (b) and (c)," they held:

> Once that facade is projected, the laws made can proceed to destroy the very foundation of our Constitution. Encroachment of valuable constitutional guarantees generally begins imperceptibly and is made with the best of intentions but, once that attempt is successful further encroachments follow as a matter of course, not perhaps with any evil motives, and may be, out of strong convictions regarding the righteousness of the course adopted and the objectives intended to be achieved but they may all the same be wholly unconstitutional.[73]

For these reasons, Justices Hegde and Mukherjea held (as did Justices Sikri, Shelat and Grover) that adding Article 31-C through Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, as void.

[72] Ibid., paragraph 731.
[73] Ibid., paragraph 741.

Justice P. Jaganmohan Reddy,[74] too, was among those who upheld the basic structure doctrine in this case. His conclusions were in agreement with Justices Sikri, Shelat, Grover, Hegde, and Mukherjea. His line or argument, however, was different. As for instance, Justice Reddy began with the position that Article 13 (2) did not apply to amendments under Article 368 and in that sense rejected the law, as held in Golaknath, outright. He said:

> …on examination of the provisions of Part III, there is intrinsic evidence therein which points to the irresistible conclusion that Article 13 (2) was meant only to place an embargo on a law made by a Legislature so-called in contradistinction to an amendment of the Constitution under Article 368 which no doubt is also a law in its generic sense….[75]

His position was that the various rights in Part III, when read with Article 13 (2) would prohibit the taking away or abridging of the Fundamental Rights by a law. "The object of incorporating Article 13 (2)" the judge held, "was to avoid its repetition in each of the Articles conferring Fundamental rights." He then went on with an exercise to substantiate this.[76] Justice Reddy's

[74] Justice Reddy, incidentally, agreed with Justice J. C. Shah, who spoke for the majority judgment in the R. C. Cooper case to strike down the Act nationalizing private sector banks.

[75] AIR-1973-SC-1461, paragraph 1089.

[76] Clauses (2) to (6) of Article 19, which are limitations on the freedoms in Articles 19 (1) (a) to (d), respectively, are couched in similar terms, and if I were to take one of these clauses for illustrating the point, it would amply demonstrate that the framers used the word *law* in both Article 13 (2) and Clause (2)–(6) of Article 19, only in the sense of an ordinary law. Sub-clause (a) of Clause (1) of Article 19 and Clause (2) of that Article, if so read with Article 13 (2) of the Constitution as it stood on January 26, 1950, may be redrafted as under:

19 (1) All citizens shall have the right

(a) to freedom of speech and expression;

19 (2) The State shall not make any law which takes away or abridges the rights conferred by this *article* and any law made in contravention of this Clause shall, to the extent of the contravention be void, provided that nothing in sub-clause (a) of Clause (1) shall affect the operation of

point was that the Constitution, as such, permitted the making of laws to restrict the Fundamental Rights and that there was no need for an amendment of the Constitution to achieve that.

Justice Reddy then went on to delve into the speeches made in the Constituent Assembly; here he departed from the predominant view against leaning on speeches and using them as a tool for interpretation, and in doing so, he distinguished between speeches made in the course of the making of an ordinary statute and speeches made while making the

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any existing law in so far as it relates to or prevent the State from making any law relations to libel, slander, defamation, contempt of court, or any matter which offends against decency or morality, or which undermines the security of, tends to overthrow the State.

Clause (2) in the above draft incorporates the entire Clause (2) of Article 13 except that instead of Part III the word *article* has been used, and Clause (2) of Article 19 has been incorporated as a proviso.

As an alternative, if Clause (2) to (6) of Article 19 are read as a proviso to Article 13 (2), they would appear as follows:

> The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void:
>
> Provided nothing in sub-clause (a) of clause (1) of Article 19 shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against the decency or morality or which undermines the security of, tends to overthrow, the State.
>
> In each of the clause (3) to (6) of Article 19, the expression 'any existing law in so far as it imposes or prevents the State from making any law imposing' has been uniformly used, and if these clauses are read as provisos just in the same way as clause (2) of Article 19 has been read in either of the manner indicated above, the word "law" in all these clauses as well as in clause (2) of Article 13 would be the same and must have the same meaning. Similarly, Article 16 (3) and (5) and Article 23 (3) may also be so read. In reading the above articles or any other article in Part III with Article 13(2) it appears to me that the words "law," "in accordance with law," or "authority of law" clearly indicate that "law" in Article 13(2) is that which may be made by the ordinary legislative organs. (See AIR-1973-SC-1461, paragraphs 1095 and 1096).

Constitution.[77] It may be noted, in this context, that speeches in the Constituent Assembly were quoted extensively by the judges in the Golaknath Case and the Privy Purses Case, and the dictum against such usage while interpreting the statute was defied by the learned judges even earlier. It is also pertinent to note here that there are authoritative works on rules of interpretation in favor of quoting from speeches made in the course of legislation.[78] He cited from the Constituent

[77] Justice Reddy said:

> In proceedings of a legislature on an ordinary draft bill … there may be a partisan and heated debate, which oftentimes may not throw any light on the issues which come before the Court but the proceedings in a Constituent Assembly have no such partisan nuances and their only concern is to give the nation a working instrument with its basic structure and human values sufficiently balanced and stable enough to allow an inter-play of forces which will subserve the needs of future generations. The highest Court created under it and charged with the duty of understanding and expounding it, should not, if it has to catch the objectives of the framers, deny itself the benefit of the guidance derivable from the records of the proceedings and the deliberations of the Assembly (See ibid., paragraph 1100).

[78] Julius Stone, for instance, is of the view that the canon established in Common Law that judges shall not look into speeches in the legislature is indeed wrong. He says:

> In principle the court should be free to inform itself concerning the social context of the problems involved from all reliable sources. Such sources could be of various kinds; but whatever the limits of the range, it is difficult to see in principle why British courts should exclude rigidly and at wholesale all references whatsoever to the legislative *travaux preparatoires*. Moreover, this is the last thing to be expected from a theory of interpretations which claims to be centred on the intention of the legislator. Yet we are confronted by the rigid British canon (not followed in the United States or on the continent) that *travaux preparatoires,* however clear and decisive on the point at issue, are never to be consulted in aid of interpretation… On what basis is it explicable that lawyers can regard with equanimity cases in which judges may pronounce ex cathedra that so-and-so clearly could not have been in the legislators' minds, when the Parliamentary debates ready to hand (but judicially unopened) …. (See Stone, *Legal System and Lawyers' Reasoning*, p. 351.)

Assembly debates, the various amendments moved in the course of making the Draft Articles 8 and 304 (that became Articles 13 and 368 of the Constitution) to hold that there is no evidence in all those to hold that the Fundamental Rights were *un*amendable.

Justice Reddy dismissed contentions that constitutional amendments that dealt with economic, social, and political implications were best left to the legislature to decide and that the judiciary shall stay away from the thicket. He said:

> 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.[79]

Having thus held that there was nothing in the Constitution that barred amendments to provisions in Part III of the Constitution and that any such amendment under Article 368 of the Constitution was subject to judicial review, Justice Reddy went on to hold the Constitution (Twenty-fourth Amendment) Act, 1971, valid. In his own words,

> The amending power is a facet of the constituent power, but not the whole of it. The power under Article 368, after the amendment, is still described as amending power. The Twenty-fourth Amendment makes this explicit because it did not want a doubt to linger that because the same body, namely, Parliament makes both the ordinary law in terms of the grant in Articles 245 to 248 and an amendment in terms of Article 368, it should not be considered that both these are legislative laws within the meaning of Article 13 (2) which was what the majority in Golaknath's case had held.[80]

This, however, according to the judge was not to say that there were no restrictions at all on the amending powers of

[79] AIR-1973-SC-1461, paragraph 1116.

[80] Ibid., paragraph 1133. (This incidentally was the aim and objective as stated by the government in the Bill.)

the Parliament. "What has to be considered," he wondered, "is whether the word 'amendment' is wide enough to confer a plenitude of power including the power to repeal or abrogate?"[81] Referring to the arguments by the Government in this regard—though the powers under Article 368 are similar to the powers of the Constituent Assembly, 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—Justice Reddy held:

> 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?[82]

Justice Reddy's answer to this was that amendment, under Article 368, was only making changes to the provisions, and in no way could it be construed as repealing the whole of the Constitution and replacing that with another. He held that the

[81] Ibid., paragraph 1152.
[82] Ibid., paragraph 1154.

amplitude of the power of amendment in Article 368 cannot be enlarged by amending the amending power under proviso (e) to Article 368. He then went about identifying the basis for restricting the scope of amendment and dwelt at length on decisions in Common Law and the various judgments by the Supreme Court to arrive at the conclusion that the Preamble will furnish a guide to the construction of the statute as well as identify the basic structure of the Constitution.

> 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 which the Hon'ble Chief Justice has done in great detail after which he has instanced the features which constitute the basic structure. I do not intend to cover the same field once again. There is nothing vague or unascertainable in the preamble… 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.[83]

Justice Reddy then listed out what he considered as part of the basic structure of the Constitution. They were:

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," Justice Reddy held, "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…."[84]

[83] Ibid., paragraph 1171.

[84] Ibid. Justice Reddy went on to illustrate what he meant as basic structure as follows:

> 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

Applying this principle, Justice Reddy held the Constitution (Twenty-fourth Amendment) Act, 1971, valid. He added that the amendment did nothing to abrogate anything in Part III of the Constitution. In the same breath, Justice Reddy upheld Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, too valid. His line was that both *amount* and *public purpose* remained justiciable even after the amendment and that nothing changed in the substantial sense. As for Section 3 of the amendment Bill and the consequent insertion of Article 31-C, Justice Reddy sought severing some parts of Article 31-C for him to hold it valid, and in that way disagreed with those in the bench who struck down Article 31-C; Justice Reddy's premise in doing so was different.

> The sweep of Article 31-C is far wider than Article 31-A, and Article 14 is excluded in respect of matters where the protection was most needed for the effectuation of a genuine and bona fide desire of the State contained in the directives of Article 39 (b) and (c).

He substantiated his point by way of an illustration as follows:

> For instance, persons equally situated may be unequally treated by depriving some in that class while leaving others to retain their

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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 view 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 is not enumerated is no ground for denying that these exist.

property or in respect of the property allowed to be retained or in distributing the material resources thereby acquired unequally, showing favour to some and discriminating against others. To amplify this aspect more fully, it may be stated that in order to further the directives, persons may be grouped in relation to the property they own or hold, or the economic power they possess or in payment of compensation at different rates to different classes of persons depending on the extent or the value of the property they own or possess, or in respect of classes of persons to whom the material resources of the country are distributed. The object of clauses (b) and (c) of Article 39 is the breaking up of concentration of wealth or the distribution of material resources. If full compensation is paid for the property taken in furtherance of the objectives under Article 39 (b) and (c), the very objective sought to be implemented would fail, as there would in fact be no breaking up of concentration of wealth or distribution of material resources. It is, therefore, clear that the very nature of the objectives is such that Article 14 is inapplicable, firstly, because in respect of compensation there cannot be a question of equality, and, secondly, the exclusion thereof is not necessary because any law that makes a reasonable classification to further the objectives of Article 39 (b) and (c) would undoubtedly fulfil the requirements of Article 14. The availability of Article 14 will not really assist an expropriated owner or holder because the objectives of Art. 39 (b) and (c) would be frustrated if he is paid full compensation. *On the other hand, he has no manner of interest in respect of equality in the distribution of the property taken from him, because he would have no further rights in the property taken from him. The only purpose which the exclusion of Article 14 will serve would be to facilitate arbitrariness, inequality in distribution or to enable the conferment of patronage etc.* This right under Article 14 will only be available to the person or class of persons who would be entitled to receive the benefits of distribution under the law. *In fact the availability of Article 14 in respect of laws under Article 31-C would ensure 'distributive justice', or 'economic justice', which without it would be thwarted* … There is another reason why there can be no comparison between Article 31-A and Article 31-C because in Article 31-A the exclusion of Article 14 was confined only to the acquisition etc., of the property and not to the distribution aspect which is not the subject-matter of that Article, whereas, as pointed out already, the exclusion of Article 14 affects distribution which is the subject-matter of Article 39 (b) and (c).[85] (Ananth, emphasis added)

[85] Ibid., paragraph 1203.

In the same way, Justice Reddy found protection under Article 19, too, as necessary for the implementation of the provisions under Articles 39 (b) and (c). He said:

> …I cannot understand by what logic the freedom to assemble peaceably and without arms, or for a citizen to move freely throughout India or to reside and settle in any part of the territory of India, has anything to do with the right to acquire and dispose of property or to practice any profession or to carry on any occupation, trade or business…. If they (persons whose property is taken away) are prohibited from exercising these basic rights, they will be reduced to mere serfs for having owned property which the State in furtherance of its policy expropriates…. Are those to whom property is distributed in furtherance of the directive principles, ought not to be secured against infringement of those rights in property so distributed by laws made under Article 31-C? It would seem that those for whose benefit the legislation deprives others in whom wealth is concentrated themselves may not be protected by Article 19 and Article 14, if Article 31-C can take away or destroy those rights.... Nor am I able to understand why where an industry or undertaking is taken over, is it necessary to take away the right of the workers in that industry or undertaking to form associations or unions. The industry taken away from the owners has nothing to do with the workers working therein, and merely because they work there they will also be deprived of their rights. I have mentioned a few aspects of the unrelated rights which are abridged by Article 31-C. No doubt, the recognition of the freedom of Press in the guarantee of freedom of speech and expression under Article 19 (1) (a) was highlighted by the learned Advocate-General of Maharashtra. Does this mean that if a monopoly of the press is prohibited or where it is sought to be broken up under Article 39 (b) and (c) and the Printing Presses and undertakings of such a Press are acquired under a law, should the citizens be deprived of their right to start another Press, and exercise their freedom of speech and expression?...[86]

It may be noted here that this line of reasoning was taken by Supreme Court judges more than three decades after Justice Reddy espoused it. Between March and July 2011, the Supreme Court set aside land acquisition proceedings in Uttar Pradesh, invoking a line of reason similar to that

[86] Ibid., paragraph 1212.

espoused by Justice Reddy in 1973. We shall discuss this in detail later on (in Chapter 8) in this book.

Justice Reddy's thrust was that:

> the individual rights which ensure political rights of the citizens in a democracy may have to be subordinated to some extent to the Directive Principles for achieving social objectives but they are not to be enslaved and driven out of existence. Such could not have been contemplated as being within the scope of the amending power.[87]

In this way, Justice Reddy, in his judgment, reworked on Article 31-C, severing some parts of it, and held it as valid in that sense alone.

He said:

> In the view I have entertained, the words "*inconsistent with, or takes away or*" and the words "*Article 14*" as also the portion "*and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy*" being severable, be deleted from Article 31-C. In the result, on the construction of Article 31-C after severing the portions indicated above, I hold Section 3 of the Twenty Fifth Amendment valid.[88]

Justice Reddy, however, was in a minority of one in the 13-member bench to pursue this line of reasoning. It may be noted, however, that Justice H. R. Khanna too adopted the doctrine of severability and that made the outcome of the reference what it was in this case.

[87] Ibid., paragraph 1213.

[88] Ibid., paragraph 1220. In the way Justice Reddy suggested, Article 31-C was to read as:

> Saving of laws giving effect to certain directive principles. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it abridges any of the rights conferred by Article19 or Article 31.
>
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Justice Khanna's judgment, in many ways, is considered the most decisive in determining the larger aspects of the case, whether it be the basic structure doctrine (where he agreed with Justices Sikri, Shelat, Grover, Hegde, Mukherjea, and Reddy) or in the case of the validity of the first leg of Article 31-C (which was upheld as it was by Justices Ray, Palekar, Mathew, Dwivedi, and Chandrachud). As for the Constitution (Twenty-fourth Amendment) Act, 1971, the entire bench had upheld it as valid. Justice Khanna, according to all commentaries on our constitutional history, tilted the balance in favor of the basic dtructure doctrine as well as on the question of the first part of Article 31-C.

Justice Khanna began with a forceful assertion that there was nothing in Article 368 that forbade amendments; whether it was to take away the fundamental rights or abridging them. He said:

> No words are to be found in Article 368 as may indicate that a limitation was intended on the power of making amendment of Part III with a view to take away or abridge fundamental rights. On the contrary, the words used in Article 368 are that if the procedure prescribed by that Article is complied with, the Constitution shall stand amended. The words 'the Constitution shall stand amended' plainly cover the various articles of the Constitution, and I find it difficult in the face of those clear and unambiguous words to exclude from their operation the articles relating to fundamental rights in Part III of the Constitution.[89]

Declaring that it was proper to cull out from the debates in the Constituent Assembly, Justice Khanna dwelt at length on the context in which an amendment to Article 304 of the Draft Constitution (that became Article 368) by P. S. Deshmukh was withdrawn after some discussion.[90] This, according to Justice

[89] Ibid., paragraph 1369.

[90] P. S. Deshmukh moved an amendment for insertion of Article 304-A after Article 304, and the new Article was to read as follows:

> Notwithstanding anything contained in the Constitution to the contrary, no amendment which is calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a

Khanna, was evidence that the makers of the Constitution did not intend Part III of the Constitution to be rendered immune from the scope of Article 368. Justice Khanna, similarly, referred to the Constitution (First Amendment) Act, 1951, passed by the provisional parliament which had also acted as the Constituent Assembly for the drafting of the Constitution. "By the First Amendment, certain fundamental rights contained in Article 19 were abridged and amended," he pointed out, and added that "speeches in support of the First Amendment were made by Pandit Nehru and Dr. Ambedkar." These according to him were evidence that "Parliament had by adhering to the procedure prescribed in Article 368 the right to amend the Constitution, including Part III relating to fundamental rights."[91] Justice Khanna buttressed his position

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person or persons with respect to property or otherwise, shall be permissible under this Constitution and any amendment which is or is likely to have such an effect shall be void and ultra vires of any Legislature.

This was withdrawn after some discussion in the Assembly. (Amendment No. 212 moved on September 17, 1949. See CAD, Vol. X, pp. 1667–1651.)

[91] AIR-1973-SC-1461, paragraph 1375.

Justice Khanna also pointed out: "Dr. Shyama Prasad Mukherjee who opposed the First Amendment expressly conceded that Parliament had the power to make the aforesaid amendment." The judge also cited Jawaharlal Nehru's speech in the provisional parliament during the debate on the Constitution First Amendment Bill where he said:

> It is of the utmost importance that people should realise that this great Constitution of ours, over which we laboured for so long, is not a final and rigid thing which must either be accepted or broken. 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. Otherwise, if you make them feel that it is unchangeable and cannot be touched, the only thing to be done by those who wish to change it is to try to break it. That is a dangerous thing and a bad thing. Therefore, it is a desirable and a good thing for people to realise that this very fine Constitution that we have fashioned after years of labour is good in so far as it goes but as

by holding: "The contemporaneous practical exposition furnishes considerable aid in resolving the said doubt and construing the provisions of the article."[92]

In pursuance of this line, Justice Khanna went on to cite a note circulated by B. Narsing Rau, in his capacity as Secretary, before the Constituent Assembly wherein he suggested a proviso that Article 8 (of the draft that became Article 13 of the Constitution) will not apply to Article 304 (of the draft that became Article 368 of the Constitution).[93] Justice Khanna also held that if it was contended that Article 368 imposes such limitations on amendments, it could pave the way for a violent revolution and that the courts cannot sanction that! Thereafter, Justice Khanna identified the root cause of the dispute before the bench as one that sought the immutability of the Right to Property. He said:

> … Part III deals with a number of fundamental rights. Assuming that one relating to property, out of the many fundamental rights, is found to be an obstacle in pushing forward certain ameliorative measures and it is proposed to abridge that fundamental right and it is also decided not to abridge or take away any other fundamental right, the present position, according to the stand taken on behalf

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> society changes, as conditions change we amend it in the proper way. It is not like the unalterable law of the Medes and the Persians that it cannot be changed, although the world around may change.

[92] Ibid., paragraph 1376.

[93] Ibid., paragraph 1393. B. N. Rau's note read as follows:

> Clause (2) of Article 8 does not override the provisions of Article 304 of the Constitution. The expression 'Law' used in the said clause is intended to mean 'ordinary legislation.' However, to remove any possible doubt, the following amendment may be made in Article 8:
>
> In the proviso to clause (2) of Article 8, after the words 'nothing in this clause shall' the words 'affect the provisions of Article 304 of this Constitution or' be inserted." It is also a fact that the Drafting Committee's report, in October 1948, says that the amendment was approved by it and that it shall sponsor it before the assembly. See Rao, *The Framing of India's Constitution, Select Documents* (Vol. 4), p. 26.

> of the petitioners, is that there is no power under Article 368 to abridge the obstructive fundamental right. *The result is that even though reference is made on behalf of the petitioners to those fundamental rights as enshrined within themselves the valued concept of liberty of person and freedom of expression, the protection which is, in fact, sought is for the fundamental right to property which causes obstruction to pushing forward ameliorative measures for national wealth.* It is not, in my opinion, a correct approach to assume that if Parliament is held entitled to amend Part III of the Constitution so as to take away or abridge fundamental rights, it would automatically or necessarily result in the abrogation of all fundamental rights. *I may mention in this context that for seventeen years, from 1950 till 1967 when Golak Nath case was decided, the accepted position was that the Parliament had the power to amend Part III of the Constitution so as to take away or abridge fundamental rights. Despite the possession of that power by the Parliament, no attempt was made by it to take away or abridge fundamental rights relating to cherished values like liberty of person and freedom of expression. If it was not done in the past, why should we assume that the majority of members of the Parliament in future would acquire sudden aversion and dislike for these values and show an anxiety to remove them from the Constitution*….[94] (Ananth, emphasis added)

Having made this point, Justice Khanna went on to clarify that he did not see the Constitution providing for its own destruction or for it being abrogated by such seamless powers to amend. "As a result of the amendment," he held:

> the old constitution cannot be destroyed and done away with; it is retained though in the amended form… 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… 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.[95]

Citing from Jawaharlal Nehru's speech in the course of discussion on the Constitution First Amendment Bill in the

[94] Ibid., paragraph 1432.
[95] Ibid., paragraph 1437.

provisional parliament, Justice Khanna said: "It is, therefore, plain that what Pt. 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."[96]

Having said that, Justice Khanna brought out the substantial link between the Preamble and Article 38 of the Constitution. "It would be seen," he held:

> that the first of the objectives mentioned in the Preamble is to secure to all citizens of India justice, social, economic and political. Article 38 in Part IV relating to the Directive Principles of State Policy recites that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life.[97]

Justice Khanna then held, without mincing words, that the Preamble, said nothing in defense of private property. In his own words:

> I find that although it gives a prominent place to securing the objective of social, economic and political justice to the citizens, there is nothing in it which gives primacy to claims of individual right to property over the claims of social, economic and political justice. *There is, as a matter of fact, no clause or indication in the Preamble which stands in the way of abridgment of right to property for securing social, economic and political justice. Indeed, the dignity of the individual upon which also the Preamble has laid stress, can only be assured by securing the objective of social, economic and political justice.*[98] (Ananth, emphasis added)

The judge then went on to cite from the INC's resolutions at Lahore and Karachi[99] and the Objectives Resolution passed

[96] Ibid., paragraph 1439. Nehru, in that context, said: "[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."

[97] Ibid., paragraph 1486–1487.

[98] Ibid., paragraph 1492.

[99] This has been dealt with in detail in Chapter 1 of this book.

by the Constituent Assembly[100] to drive hard this point and held:

> It cannot therefore, be said that the stress in the impugned amendments to the Constitution upon changing the economic structure by narrowing the gap between the rich and the poor is a recent phenomenon. On the contrary, this has been the objective of the national leaders since before the dawn of independence, and was one of the underlying reasons for the First and Fourth Amendments of the Constitution. The material further indicates that the approach adopted was that there should be no reluctance to abridge or regulate the fundamental right to property if it was felt necessary to do so for changing the economic structure and to attain the objective contained in the Directive Principles.[101]

And with this Justice Khanna spelt out, what can be held, the most significant contribution in the history of our constitutional law. Unlike the others in the bench who stopped with illustrating what could be considered as constituting the basic structure of the Constitution, Justice Khanna went on to hold that the Right to Property did not constitute the basic structure. This indeed set the basis for the higher judiciary in instances where it was brought to decide on constitutional amendments as well as ordinary laws.[102] In the words of Justice Khanna:

> So far as the question is concerned as to whether the right to property can be said to pertain to basic structure or framework of the Constitution, the answer, in my opinion, should plainly be in the negative. Basic structure or framework indicates the broad outlines of the Constitution, while the right to property is a matter of detail. It is apparent from what has been discussed above that the approach of the framers of the Constitution was to subordinate the individual right to property to the social good. Property right has also been changing from time to time. As observed by Harold Laski in Grammar of Politics, the historical argument is fallacious if it regards the regime of private property as a simple and unchanging thing.

[100] This has been discussed in detail in Chapter 3 of this book.

[101] AIR-1973-SC-1461, paragraph 1495.

[102] The Supreme Court found this as a basis to decide upon the Constitution (Forty-second Amendment) Act, 1976, and the Constitution (Forty-fourth Amendment) Act, 1978, in the Minerva Mills Case and the Waman Rao Case; these will be discussed in the Chapter 7.

> The history of private property is, above all, the record of the most varied limitations upon the use of the powers it implies. Property in slaves was valid in Greece and Rome, it is no longer valid today….[103]

On these grounds, Justice Khanna upheld the Constitution (Twenty-fourth Amendment) Act, 1971, as well as Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, which replaced *compensation*, as there in Article 31(2), with *amount*. As for Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, Justice Khanna was closer to Justice Reddy, and differed with all others in the bench. He found the first leg of Article 31-C (saving of laws giving effect to certain Directive Principles, notwithstanding anything contained in Article 13, no law giving effect to the policy of the State toward securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article19, or Article 31) to be in order and valid; but held that the second leg of the Article (and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy) as void.[104]

[103] AIR-1973-SC-1461, paragraph 1496. Justice Khanna quoted Harold Laski's citation of John Stuart Mill in this regard:

> The idea of property is not some one thing identical throughout history and incapable of alteration .... at any given time it is a brief expression denoting the rights over things conferred by the law or custom of some given society at that time, but neither on this point, nor on any other, has the law and custom of a given time and place, a claim to be stereotyped forever. A proposed reform in laws or customs is not necessarily objectionable because its adoption would imply, not the adaptation of all human affairs to the existing idea of property, to the growth and improvement of human affairs.

[104] It is important to note here that this position turned out to be the majority opinion of the bench. Justice Khanna, in that sense, differed with five brother judges in the bench who struck down Article 31-C in its entirety; he also differed with six others who upheld it in its entirety. His view, thus, prevailed upon the bench, while drawing the conclusions by way of assimilating what was common from the six judges who upheld the article in its entirety.

He held out reasons for this: The fact that the Fundamental Rights in Part III are justiciable, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened. "Judicial review," the judge said, "has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of provisions of statutes…." He then referred to Article 31-B of the Constitution to clarify that the significant point to be noted in this connection, being that the power under Article 31-B of exclusion of judicial review which might be undertaken for the purpose of finding whether there has been contravention of any provision of Part III, is exercised not by the legislature enacting the impugned law but by the authority which makes the constitutional amendment under Article 368, namely, the prescribed majority in each House of the Parliament. Such a power is exercised in respect of an existing statute whose provisions can be scrutinized before it is placed in the Ninth Schedule. He then added:

> As against that, the position under Article 31-C is that though judicial review has been excluded by the authority making the constitutional amendment, the law in respect of which the judicial review has been excluded is one yet to be passed by the legislatures. Although the object for which such a law can be enacted has been specified in Article 31-C, the power to decide as to whether the law enacted is for the attainment of that object has been vested not in the courts but in the very legislature which passes the law. The vice of Article 31-C is that even if the law enacted is not for the object mentioned in Article 31-C the declaration made by the legislature precludes a party from showing that the law is not for that object and prevents a Court from going into the question as to whether the law enacted is really for that object. The kind of limited judicial review which is permissible under Article 31-A for the purpose of finding as to whether the law enacted is for the purpose mentioned in Article 31-A has also been done away with under Article 31-C. The effect of the declaration mentioned in Article 31-C is to grant protection to the law enacted by a legislature from being challenged on grounds of contravention of Articles 14, 19 and 31 even though such a law can be shown in the Court to have not been

> enacted for the objects mentioned in Article 31-C. Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness. *The vesting of power of exclusion of judicial review in a legislature, including State Legislature, contemplated by Article 31-C, in my opinion, strikes at the basic structure of the Constitution.* The second part of Article 31-C thus goes beyond the permissible limit of what constitutes amendment under Article 368.[105] (Ananth, emphasis added)

And in the end, Justice Khanna held the "the pelt of the Preamble" as constituting the basic structure or framework of the Constitution. And the most important part of his judgment was the conclusive statement that the "Right to property does not pertain to basic structure or framework of the Constitution."

Justice A. N. Ray, meanwhile, was among those in the bench who disagreed with the basic structure doctrine. Rejecting the view that the courts shall determine the validity of an amendment, Justice Ray held: "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."[106]

His contention was that Article 368 provides in clear and unambiguous terms that an amendment Bill after compliance with the procedure stated therein and upon the President giving assent to such Bill, the Constitution shall stand amended in accordance with the terms of the Bill. "This constitutional mandate," Justice Ray held, "does not admit or provide any scope for any conflict with any other Article of the Constitution."[107] Referring to the amendment proposed by K. Santhanam in the Constituent Assembly to Article 9(2) of the Draft Constitution, Justice Ray held that all the issues here arose because there was no explanation recorded as to why the amendment suggested was not carried out in the

[105] Ibid., paragraph 1541.
[106] Ibid., paragraph 762.
[107] Ibid., paragraph 786.

draft as presented to the Assembly.[108] Justice Ray also referred to the amendment proposed (and withdrawn subsequently) by P. S. Deshmukh in the Constituent Assembly[109] to substantiate his view that Article 368 provided seamless powers to Parliament. Justice Ray then went on to reject the framework of taking the Preamble as a guide to locate the scope for restriction on amending powers. In his words:

> Where the people express themselves in careful and measured terms in framing the Constitution and they leave as little as possible to implications, amendments or changes in the existing order or conditions cannot be left to inserting implications by reference to the Preamble which is an expression of the intention at the time of the framing of the Constitution. Therefore, the power to amend the Constitution is not restricted and controlled by the Preamble.[110]

As Justice Khanna did, Justice Ray too narrated the fact that between the time when the court decided in the Shankari Prasad Deo Case holding the Parliament's power to abridge or even abrogate rights conferred in Part III of the Constitution and the decision in the Golaknath Case, there was no instance where the various Fundamental Rights, barring the Right to Property was affected by the Parliament. He, thus, rejected the argument that seamless powers to amend could result in

[108] Ibid., paragraph 845. K. Santhanam's amendment sought revision of Aritcle 9 (2) of the draft as follows:

> Nothing in this Constitution shall be taken to empower the State to make any law which curtails or takes away any of the rights conferred by Chapter II of this Part except by way of amendment of this Constitution under S. 232 and any law made in contravention of this sub-section shall, to the extent of the contravention, be void (Article 9(2) of the Draft became Article 13 and Chapter II of the draft became Part III of the Constitution).

It may be noted that the text of the report of the Constituent Assembly debates shows the wordings as different, but conveys the same sense as indicated by Justice Ray. (See CAD, Vol. III, pp. 415–416).

[109] This has been referred to earlier in the course of discussion of Justice Khanna's judgment in this chapter.

[110] AIR-1973-SC-1461, paragraph 912.

unwarranted curtailment of the Fundamental Rights.[111] He then went on to explain that in order to ensure that the Fundamental Rights are enjoyed by everyone, it was necessary to reorder the social and the economic structure; the dispute, according to him, was over whether the power to amend the Constitution for this were to be restricted. Justice Ray said:

> Every citizen asserts enjoyment of fundamental rights under the Constitution. It becomes the corresponding duty of every citizen to give effect to fundamental rights of all citizens, dignity of all citizens, by allowing the State to achieve the Directive Principles. The duty of the State is not limited to the protection of individual interest but extends to acts for the achievement of the general welfare in all cases where it can safely act and the only limitations on the Governmental actions are dictated by the experience of the needs of time. A fundamental right may be regarded as fundamental by one generation. It may be considered to be inconvenient limitation upon legislative power by another generation. Popular sovereignty means that the interest which prevails must be the interest of the mass of men. If rights are built upon property those who have no property will have no rights. That is why the State has to balance interest of the individual with the interest of the society.[112]

For these reasons, Justice Ray, in his judgment, upheld the Constitution (Twenty-fourth Amendment) Act, 1971, Section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, and went on to differ with the seven others in the bench to hold Article 31-C valid in its entirety. It is, however, important to note here that Justice Ray's decision, holding Article 31-C valid,

[111] It may be pertinent here to note that Justice Khanna and Justice Ray differed when the government held that the right to the writ of habeas corpus, considered the most important defense against an autocratic state and provided for under Articles 32 and 226 of the Constitution, stood suspended during the Emergency. Justice Ray, who had become Chief Justice at that time, along with Justices M. H. Beg, Y. V. Chandrachud, and P. N. Bhagawati upheld the government's contention in that case (*ADM Jabalpur v. S. K. Shukla*), while Justice Khanna dissented even if he was in a minority of one against four. Interestingly, Justices Ray, Beg, and Chandrachud were among those who rejected the basic structure doctrine in the Keshavananda Case.

[112] AIR-1973-SC-1461, paragraph 1031.

was on the ground that notwithstanding the bar imposed by the new Article on the judiciary from putting legislations which carried a declaration that it was intended to give effect to Articles 39(b) and (c) of the Constitution (which was held void by Justice Khanna), there was no bar on the judiciary, probing as to whether the intentions were really there in such legislations. In his own words:

> In order to decide whether a statute is within Article 31-C the Court may examine the nature and the character of legislation and the matter dealt with as to whether there is any nexus of the law to the principles mentioned in Article 39 (b) and (c). If it appears that there is no nexus between the legislation and the objectives and principles mentioned in Article 39 (b) and (c) the legislation will not be within the protective umbrella. The Court can tear the veil to decide the real nature of the statute if the facts and circumstances warrant such a course.[113]

Justice Ray stressed that while Article 31-C was meant to operate in the field of reforms in the industrial sector as did Article 31-A in the field of agrarian reforms, the necessity for it arose because the Directive Principles of State Policy warranted changes in the industrial sector as well, and was not restricted to agrarian issues alone. On these lines, Justice Ray rested his decision on the premise that:

> Article 14 has the flexibility of classification. Article 19 has the flexibility of reasonable restrictions. Social justice will determine the nature of the individual right and also the restriction on such right. Social justice will require modification or restriction of rights under Part III. The scheme of the Constitution generally discloses that the principles of social justice are placed above individual rights and whenever or wherever it is considered necessary individual rights have been subordinated or cut down to give effect to the principles of social justice. Social justice means various concepts which are evolved in the Directive Principles of the State.[114]

Justice D. C. Palekar, also among those who rejected the basic structure doctrine, however, held that if there was an

[113] Ibid., paragraph 1050.
[114] Ibid., paragraph 1066.

essential feature of the Constitution, it was to be found in Articles 39(b) and (c).

He said:

> Whatever one may say about the legitimacy of describing all the rights conferred in Part III as essential features, one thing is clear. So far as the right to property is concerned, the Constitution, while assuring that nobody shall be deprived of property except under the authority of law and that there shall be a fair return in case of compulsory acquisition [Article 31 (1) & (2)], expressly declared its determination, in the interest of the common good, to break up concentration of wealth and means of production in every form and to arrange for redistribution of ownership and control of the material resources of the community. See: Article 39 (b) & (c). If anything in the Constitution deserves to be called an essential feature, this determination is one. That is the central issue in the case before us, however dexterously it may have been played down in the course of an argument which painted the gloom resulting by the denial of the fundamental rights under Articles 14, 19 and 31 in the implementation of that determination.[115]

Justice Palekar, like Justice Khanna and Justice Ray, stressed upon the logic that freedom, in the sense that the Constitution ordains, cannot be seen as merely in the political sense but in the sense of social and economic justice. In this context, the judge rejected the argument based on the premise that the Fundamental Rights were natural rights, and hence inalienable. He said:

> The so-called natural rights which were discovered by philosophers centuries ago as safeguards against contemporary political and social oppression have in course of time, like the principle of laissez faire in the economic sphere, lost their utility as such in the fast changing world and are recognized in modern political Constitutions only to the extent that organized society is able to respect them. That is why the Constitution has specifically said that the rights are conferred by the people on themselves and are thus, a gift of the Constitution… To claim that there is equal opportunity in a society which encourages or permits great disparities in wealth and other means of social and political advancement is to run in the face of facts of life. Freedoms are not intended only for the fortunate few.

[115] Ibid., paragraph 1297.

> They should become a reality for those whose entire time is now consumed in finding means to keep alive. The core philosophy of the Constitution lies in social, economic and political justice - one of the principal objectives of our Constitution as stated in the Preamble and Article 38, and any move on the part of the society or its Government made in the direction of such justice would inevitably impinge upon the "sanctity" attached to private property and the fundamental right to hold it.[116]

Justice Palekar too agreed with Justice Ray in upholding Article 31-C and for the same reasons that the existence of a nexus between the law and Article 39 (b) and (c) of the Constitution can still be brought up for judicial decision. He held:

> When such a challenge is made, it will be the obvious duty of the court to ascertain on an objective consideration of the law whether it falls within the description. What the court will have to consider is whether it is a law which can reasonably be described as a law giving effect to the policy of the State towards securing the aims of Article 39 (b) or (c). That is an issue which is distinct from the other issue, whether the law does not give effect to the policy of the State towards securing the said aims. A law reasonably calculated to serve a particular aim or purpose may not actually serve that aim or purpose; and it is this latter issue which is excluded from judicial review.[117]

Justice K. K. Mathew, who too rejected the basic structure doctrine to hold that Article 368 provided seamless powers to the Parliament to amend all aspects of the Constitution, was candid enough that interpretation of statutes are determined by the mindset of the judge. He said: "I should think that in such matters everything turns upon the spirit in which a Judge approaches the question before him. The words he must construe are, generally speaking, mere vessels in which he can pour nearly anything he will."[118]

[116] Ibid., paragraph 1288.

[117] Ibid., paragraph 1338.

[118] Ibid., paragraph 1575. Justice Mathew quoted Learned Hand, an authority on legal process toward this end:

> Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more

"A judge confronted with the question whether a particular law abridges a Fundamental Right," according to Justice Mathew:

> must, in the exercise of his judicial function, advert to the moral right embodied in the Fundamental Right and then come to the conclusion whether the law would abridge that right. In this process, the Court will have to look to the Directive Principles in Part IV to see what exactly is the content of the Fundamental Right and whether the law alleged to be in detraction or abridgment of the right is really so. The Court would generally be more astute to protect personal rights than property rights.

Justice Mathew then went on to clarify:

> In other words, Fundamental Rights relating to personal liberty or freedom would receive greater protection from the hands of the Court than property rights; as those rights come with a momentum lacking in the case of shifting economic arrangements. To put it differently, the type of restriction which would constitute abridgment might be different for personal rights and property rights as illustrated by the doctrine of preferred freedoms....[119]

Describing the quest to identify the basic features or the core of the Fundamental Rights as an exercise in futility, Justice Mathew held:

> But the question will still remain, even when the core or the essence of a Fundamental Right is found, whether the amending body has the power to amend it in such a way as to destroy or damage the core. I have already said that considerations of justice, of the common good, or "the general welfare in a democratic society" might require abridging or taking away of the Fundamental Rights.[120]

> than final solutions cast in generalizations in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.

The judge then rested upon President Roosevelt's observation that "the judges of the Supreme Court must be not only great justices, but they must be great constructive statesmen."

[119] Ibid., paragraph 1614.

[120] Ibid., paragraph 1712.

Of the view that the main task of freedom in India for the large part of the people is at the economic level, Justice Mathew maintained that "if Parliament in its capacity as the amending body, decides to amend the Constitution in such a way as to take away or abridge a Fundamental Right to give priority value to the moral claims embodied in Part IV of the Constitution, the court cannot adjudge the constitutional amendment as bad for the reason that what was intended to be subsidiary by the Constitution makers has been made dominant. Judicial review of a constitutional amendment for the reason that it gives priority value to the moral claims embodied in Part IV over the Fundamental Rights embodied in Part III is impermissible.[121]

He then went on to say:

> The framers of our Constitution made the right to acquire, hold and dispose of property a Fundamental Right thinking that every citizen in this country would have an opportunity to come by a modicum of that right. Therefore…any defence of the right to own and hold property must essentially be the defence of a well distributed property and not an abstract right that can, in practice, be exercised only by the few.[122]

And on this basis, he held Article 31-C valid in its entirety. Justice Mathew too added that Article 31-C did not bar judicial scrutiny of the nexus between a legislation sought to be protected under this Article and Articles 39 (b) and (c) and where there was none, the courts shall strike down such legislations.

Justice M. H. Beg, who too was among those who disagreed with the basic structure doctrine, to hold the amendments in question valid in their entirety, held that the direction set by the Constitution makers was to ensure State action against feudalism and that it was distinctly socialist. He held:

> Thus, the direction towards which the nation was to proceed was indicated but the precise methods by which the goals were to be attained, through socialism or state action, were left to be determined by the State organs of the future. *In laying down the principles, by means of which the poverty-stricken, exploited,*

[121] Ibid., paragraph 1728.
[122] Ibid., paragraph 1745.

> *down-trodden, ignorant, religious and superstition ridden masses of India, composed of diverse elements, were to be transformed into a strong united, prosperous, modern nation, it was assumed and said repeatedly that India's economy must change its feudal character.* Its social patterns, modes of thought and feeling, were to be changed and guided by scientific thinking and- endeavour so as to lead its people on towards higher and higher ranges of achievement in every direction.[123] (Ananth, emphasis added)

Justice Beg went on to appreciate the arguments by the Attorney General, Niren De, and H. M. Seervai, the Advocates General of Maharashtra, "that the proper function of Article 368, in a Constitution is to act as a safety valve against violent revolution" and added that:

> it can, only so operate as a safety valve if we do not construe the powers of amendment contained in it so narrowly as to import, contrary to the clear meaning of its explicit language, any bar against the alteration or change of any feature of our Constitution which may be characterised as basic.[124]

He thus held that it was proper, by way of amendments, to abrogate "some fundamental rights, to achieve economic emancipation of the masses without which they are unable to enjoy any fundamental rights in any real sense."[125]

In saying so, Justice Beg expressed his complete agreement with Justice S. N. Dwivedi, another of those judges who held the amendments valid in their entirety.

Justice Dwivedi's judgment held that the petitions arose out of a commitment to the idea of the past that held political rights as cardinal without caring for economic equality. He illustrated, by way of comparing the ideas of the Stuart period with that of Nani Palkhiwala's arguments to establish his point and said:

> Constitutions which grew up in the 17th, 18th and 19th centuries reflected the hopes and aspirations of men of those times;

[123] Ibid., paragraph 1832.
[124] Ibid., paragraph 1838.
[125] Ibid., paragraph 1836.

> the Constitution of India reflects the hopes and aspirations of the people of India emerging from colonial economy in the second half of the 20th century. Constitutions framed in the past for organising political democracy cannot serve as a safe guide in construing the Constitution of India framed for ushering in social and economic democracy.[126]

Justice Dwivedi held that the makers of the Constitution being those who led the struggle for independence, they had internalized the vision of egalitarianism and liberty together in their approach. This, according to him, was also relevant while interpreting the Constitution. On the need to ensure that the Fundamental Rights were not reduced to be a preserve of the minority, it was necessary to give effect to the Directive Principles of State Policy. He held: "And indeed so they are, for when translated into life they will multiply the number of owners of fundamental rights and transform liberty and equality from a privilege into a universal human right."[127]

He also referred to Justice Hidayatullah's observation, in the Golaknath Case, that it was an error to have placed the Right to Property among the Fundamental Rights[128] and to say that Article 368 was only to be amended in the way it has been done to empower the Parliament to set right the error. Justice Dwivedi too held Article 31-C valid in its entirety for the same reasons as did Justices Ray, Palekar, and Beg: That it is possible for the courts to pierce the veil to find if there was

[126] Ibid., paragraph 1874. The judge cited excerpts from Jawaharlal Nehru's speech in the Constituent Assembly while moving amendments to Article 24 of the Draft Constitution (which became Article 31 of the Constitution) that enlarged the scope for acquisition of property for public purposes. On September 10, 1949, Nehru said: "We are passing through the great age of transition .... when we are passing through the great age of transition the various systems of law - have to undergo changes. Conceptions which had appeared to us basic, undergo changes." (See CAD, Volume IX, p. 1196.) This has been discussed in detail in Chapter 2 of this book. The text of the speech is provided as Appendix 5 in this book.

[127] Ibid., paragraph 1880.

[128] This has been discussed in the previous chapter. Also see AIR-1967-SC-1643, paragraph 175.

a nexus between such legislations that declare realization of the provisions in Articles 39 (b) and (c) of the Constitution and their actual provisions.

Justice Y. V. Chandrachud, also among those who upheld all the amendments in their entirety, was of the view that the judges, while interpreting the Constitution and the power of amendment of the Constitution shall leave the final word to the Parliament. He stressed that the Parliament and not the judges were accountable to the people, and hence understood their aspirations better. For this, he relied upon the judgments in a catena of cases to suggest that the judges shall be guided by the present, rather than being held by the past.[129] He went on to discuss the distinction between a flexible and a rigid constitution, and held that it was best to leave the Parliament with seamless powers insofar as rigid constitutions were concerned.

He held that the rigid procedure for amendment was indeed a guarantee against whimsical amendments that would abrogate the Fundamental Rights. Justice Chandrachud's premise, in this regard was that:

> … they cannot be tinkered with and the Constitution has taken care to ensure that they do not become a mere 'plaything' of a special majority. Members of the Lok Sabha are elected on adult universal suffrage by people of the States. Whereas, ordinary laws can be passed by a bare majority of those present, constitutional amendments are required to be passed under Article 368 by a majority of the total membership of each House and by a majority of not less than two-thirds of the members of each House separately, present and voting. In matters falling within the proviso, amendments are also required to be ratified by the Legislatures of not less than half of the States. Rajya Sabha, unlike the Lok Sabha, is a perpetual body, which changes one-third of its membership every two years. Members of the Rajya Sabha are elected by Legislative Assemblies of the States, that is, by those who are directly elected by the people themselves. *The mode of election to Rajya Sabha constitutes to some extent an insurance against gusts and waves of public opinion.*[130] (Ananth, emphasis added)

[129] AIR-1973-SC-1461, paragraph 2027.

[130] Ibid., paragraph 2090. It may be noted here that such hopes did not match the reality. And Justice Chandrachud himself found this to be

Such divergence of opinion rendered it difficult for the bench to leave things to the normal procedure insofar as deciding the *ratio decidendi* was concerned. There was no time for the judges to circulate their individual views and then decide in a conference, which is an established practice in judicial proceedings, because Chief Justice Sikri was to retire on April 26, 1973.[131] And hence, the bench decided to put out a summary, and this they did on April 24, 1973. The decision to put out a summary was inevitable as all the 13 members agreed insofar as holding the Constitution (Twenty-fourth Amendment) Act, 1971, valid. There was also such unanimity insofar as the changes brought about by the Constitution (Twenty-fifth Amendment) Act, 1971, to Article 31 (2) of the Constitution. The agreements rested there.

On the insertion of Article 31-C, by Section 3 of the Constitution (Twenty-fifth Amendment Act, 1971, Chief Justice Sikri along with Justices Shelat, Grover, Hegde, and Mukherjea were in a minority to strike it down. On the other hand, Justices Ray, Palekar, Mathew, Beg, Dwivedi, and Chandrachud were also in a minority to uphold the Article in its entirety. Justice Khanna's position, in the meanwhile, was closest to the minority that upheld the Article as valid; it may be added here that Justice Reddy too took a similar position but his was not as close as was Justice Khanna's position vis-à-vis that of Justices Ray and others in that regard. It was, thus, that it was decided to declare Article 31-C, after severing some portions, be held valid. This was the common minimum to the

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the case when he, as Chief Justice, presided over a five-member bench to decide the validity of the Constitution (Forty-second Amendment) Act, 1976, in the Minerva Mills Case. Interestingly, Justice Chandrachud then had use for the basic structure doctrine and the power of judicial review while deciding in that case and holding some aspects of the amendment invalid. We shall discuss that later on in this chapter.

[131] It may be noted here that Justice Chandrachud recorded his protest over this right at the start of his judgment. It is also pertinent to note that he signed the summary despite that. Those who did not sign the summary, it might be stressed, did not protest as well.

judgments by Justice Ray and others on the one hand, and Justice Khanna on the other. And insofar as the basic structure doctrine, the views of Jutsices Khanna and Reddy were closer to that of Justices Sikri, Shelat, Grover, Hegde, and Mukherjea. This, notwithstanding the disagreement between them on the issue of Article 31-C, came to distinguish the majority view on this.[132]

Meanwhile, nine out of the 13 judges held that the decision in the Golaknath Case was wrong. Justice Sikri, who was in the bench that decided Golaknath, did not express any opinion on that while Justice Shelat (who too was in the Golaknath bench) described that as academic now. Justice Grover, for whom Justice Shelat spoke in this case, may be counted to have agreed with that view. Justice Reddy held that the decision in Golaknath was irrelevant insofar as the dispute here was concerned.

The summary, which constituted the *ratio decidendi*, however, was resented by the government. The immediate fallout of this resentment was found when the government decided to appoint Justice A. N. Ray as Chief Justice after Justice Sikri's retirement on April 26, 1973. Justices Shelat, Grover, and Hegde were overlooked in that instance. All three of them resigned in protest.[133] And after assuring themselves that the composition of the bench in the apex court had changed, the forces in the government who were uncomfortable with the basic structure concept made an attempt to secure reconsideration of the decision in the Keshavananda Case. Interestingly, this was done in the midst of the Emergency. On September 1, 1975, just over a couple of months after the Emergency was imposed (on June 25, 1975), the Attorney General, Niren De, moved an application to have a number of cases listed for urgent hearing. The apex court slated all those cases for November 10, 1975, and Chief Justice Ray

[132] See Appendix 7 for a tabular format presenting the relevant portions from the 11 judgments on these.

[133] Justice Hegde, subsequently, joined the Janata Party to contest the general elections in March 1977 and was elected to the Lok Sabha, and even held the post of Lok Sabha Speaker in the Sixth Lok Sabha.

constituted a 13-member bench for that purpose.[134] The issues before the bench were:

1. Whether the power of amendment of the Constitution was restricted by the theory of basic structure and framework as propounded in Keshavananda's Case, and
2. Whether the Bank Nationalisation Case was correctly decided.[135]

At the outset, when the hearing began on November 10, 1975, Justice Khanna posed a pointed question to Attorney General Niren De: "Has this theory of basic structure impeded or come in the way of legislating any socio-economic measure?" The Attorney General's reply was: "No, that is not the only question. You don't require the power for amending non essential parts of the Constitution."[136] In response to a similar question then by Justice Chandrachud, the Attorney General replied: "Socio-economic measures are not the only thing, important as they are; at the same time, the very structure of Government is the object of the amending power."[137]

The arguments were heard for two days. According to Justice Khanna, the Advocates General for Tamil Nadu, Govind Swaminathan, (Chief Justice Ray had held that he too had sought reopening the case) distanced himself from the plea to reconsider the decision in the Keshavananda Case at the

[134] Apart from Chief Justice A. N. Ray, others in the bench were: Justices H. R. Khanna, K. K. Mathew, M. H. Beg, Y. V. Chandrachud, P. N. Bhagwati, V. R. Krishna Iyer, P. K. Goswami, R. S. Sarkaria, A. C. Gupta, N. L. Untwalia, M. Fazal Ali, and P. M. Singhal.

[135] There is no report of the court's records in the form of an official publication in this regard. However, H. M. Seervai deals with this in detail. [See Seervai, *Constitutional Law of India* (4th Ed.), Vol. 3, pp. 3128–3129]. Justice Khanna recalls this in some detail in his autobiography. (See Khanna, *Neither Roses nor Thorns*, pp. 76–78). T. R. Andhyarujina, who was one of the counsels appearing in the Keshavananda Case, recalls this as well. [See T.R. Andhyarujina, (2009) 9-SCC, pp. J33–J44].

[136] Seervai, *Constitutional Law of India*, p. 3129.

[137] Ibid.

outset and so did D. D. Thakur, who appeared for the state of Jammu and Kashmir then.[138] On September 12, 1975, Chief Justice Ray announced that the bench had been dissolved.[139] To set this part of the narrative in perspective, the immediate provocation for the move to reconsider Keshavananda was the decision, by a majority, in the Indira Gandhi election case.[140] The case went before a constitution bench because of the Constitution (Thirty-ninth Amendment) Act, 1975, was passed between the time that the Supreme Court admitted the Special Leave Petition by Indira Gandhi (on June 23, 1975, before the vacation judge, Justice V. R. Krishna Iyer) challenging the Allahabad High Court judgment, and the day when the appeal was to be heard by the larger bench (on August 11, 1975), the Parliament passed and obtained assent for the Constitution (Thirty-ninth Amendment) Act, 1975.[141] In that case, the five-member constitution bench[142] by majority held Article 329-A, inserted by the Constitution

[138] Khanna, *Neither roses nor thorns*, pp. 77–78. It may be noted here that Tamil Nadu as well as Jammu and Kashmir were ruled by non-Congress parties at that time.

[139] See Seervai, *Constitutional law of India;* Khanna, *Neither roses nor thorns;* and T.R. Andhyarujina, (2009) 9-SCC, pp. J33–J44.

[140] *Indira Nehru Gandhi v. Raj Narain* (AIR-1975-SC-2299).

[141] According to Article 329-A (4), election disputes involving the Prime Minister and the Speaker, were outside the scope of the courts to decide. This was clearly intended to save Indira Gandhi, whose election from Rae Bareili was held null and void by the Allahabad High Court. The Constitution (Thirty-ninth Amendment) Act, 1975, was managed in a hurry to alter the course of the appeal before the apex court. Moved on August 6, 1975, the Bill was considered and voted in the Lok Sabha on August 7, 1975, in the Rajya Sabha on August 8, 1975, and endorsed by state assemblies in special sessions convened on August 9, 1975, despite it being a Saturday and was brought into effect on August 10, 1975, after obtaining assent the same day. (I have dealt with this in detail in Ananth, *India since independence making sense of Indian politics*, pp. 158–160.)

[142] The bench consisted of Chief Justice A. N. Ray, along with Justices H. R. Khanna, K. K. Mathew, M. H. Beg, and Y. V. Chandrachud. The majority constituted separate, but concurring, judgments by Justices Ray, Khanna, Mathew, and Chandrachud.

(Thirty-ninth Amendment) Act, 1975, as unconstitutional.[143] The decision was determined by the basic structure doctrine as settled in the Keshavananda Case. It may be noted that Justices Ray, Mathew, and Chandrachud had dissented on that issue in the Keshavananda Case, but upheld the same in the Indira Gandhi Election Case.

In conclusion, the basic structure doctrine, holding the Parliament's power to amend the Constitution was held as wide enough to amend all parts of the Constitution including the Fundamental Rights, and Article 368 itself also imposed a restriction that it was not as wide to destroy or abrogate the Constitution itself. The Keshavananda judgment held that there were limits to which the Parliament could amend the Constitution and that such limits were determined by the basic structure of the Constitution. The various judges who held out this doctrine illustrated what could constitute the basic structure, but refused to spell them out in an exhaustive manner. In doing so, the Supreme Court held to itself the right to review amendments to the Constitution, and thus reiterated the power of judicial review as part of the basic structure.

The government's response to the decision in the Keshavananda Case was further amendments to the Constitution. Of this, the Constitution (Forty-second Amendment) Act, 1976, was the most extensive one in the history of independent India. We shall discuss these and the Supreme Court's response in Chapter 7.

[143] *Indira Nehru Gandhi v. Raj Narain* (AIR-1975-SC-2299). The Supreme Court decided this case on November 7, 1975.

7

Integrating the Directive Principles into the Fundamental Rights

The Emergency, imposed late in the night on June 25, 1975, rendered a new dimension to the discourse involving the judiciary and the legislature. The larger context of the Emergency is not central to the concerns of this book.[1] However, the passage of the Constitution (Thirty-ninth Amendment) Act, 1975, and the Constitution (Forty-second Amendment) Act, 1976, when the Emergency was in vogue, and the Supreme Court's decision striking down some aspects of those two amendments are relevant insofar as the concerns of this book are concerned. In both these instances, the Supreme Court invoked the basic structure doctrine, espoused in the Keshavananda Case to strike down sections from the two amendment Bills.

On August 6, 1975, Law Minister H. R. Gokhale moved the Constitution (Thirty-ninth Amendment) Act, 1975. Introduced in the Lok Sabha on August 7, 1975, the Bill was discussed

[1] This has been dealt with in a number of published works; some of the specific aspects relevant to the concerns of this book have been dealt with in Austin, *Working a democratic constitution: A history of the Indian experience*. I have dealt with these elsewhere; see Ananth, *India since independence: Making sense of Indian politics*, pp. 143–180.

and passed by the House the same day; the Rajya Sabha did so the day after (August 8, 1975), and after endorsed by the adequate number of state legislatures, the Bill obtained Presidential assent on August 10, 1975, and came into force the same day. The Constitution amendment had five sections: of them, Section 2 pertained to substantive alterations to Article 71 of the Constitution by which the Parliament was empowered to decide on issues pertaining to the election of the President and the Vice President, and such decisions were beyond challenge in the courts. Sections 3 and 4 of the amendment Act pertained to changes in Article 329 of the Constitution that dealt with disputes over election (and electoral malpractices) before the higher judiciary. Section 5 of the amendment Bill added 38 ordinary laws to the Ninth Schedule of the Constitution.[2]

It is pertinent to note here that the Constitution (Thirty-ninth Amendment) Act, 1975, was passed by the Parliament in the midst of the Supreme Court hearing the appeal against the Allahabad High Court order, declaring Indira Gandhi's election to the Lok Sabha as null and void.[3] In the event, the apex court adjourned hearing on the appeal to be heard on

[2] The first entry in this list happened to be a cluster of three Acts: The Representation of the People Act, 1951; the Representation of the People (Amendment) Act, 1974; and the Election Laws (Amendment) Act, 1975. These Acts pertained to electoral conduct and malpractices, and by placing them in the Ninth Schedule the amendment carried out in 1975 which altered the law pertaining to the date of retirement as the date specified in the Gazette Notification (and not the date of the notification) so that the involvement of Yashpal Kapoor as Indira Gandhi's Election Agent from Rae Bareili and that being held, according to the law as it prevailed then, as corrupt electoral practices by the Allahabad High Court, as legitimate and legal.

[3] The Constitution (Thirty-ninth Amendment) Act, 1975, was, in fact, passed in such a hurry in order to save her election and status as a Member of Parliament before the five-member bench consisting of Chief Justice Ray and Justices H. R. Khanna, M. H. Beg, K. K. Mathew, and Y. V. Chandrachud, who had posted the case for final hearing on August 11, 1975. It may be noted that the constitution amendment Act obtained assent on August 10, 1975.

August 25, 1971, and to decide, in the meanwhile, the validity of the Constitution (Thirty-ninth Amendment) Act, 1975.[4] The challenge was about whether the Parliament had powers to amend the Constitution to (1) include amendments to the elections laws in the Ninth Schedule and (2) the insertion of Article 329-A to the Constitution. Both these, the petitioners argued, violated the basic structure of the Constitution, and were hence liable to be struck down. According to the new Article 329-A, no election to either House of the Parliament of a person who holds the office of Prime Minister at the time of such election, or is appointed as Prime Minister after such election, or the office of the Speaker (or is chosen as the Speaker) shall be called in question in any of the courts.[5]

[4] This had become necessary because the validity of the amendment determined Indira Gandhi's chances of continuing as an MP. In other words, the changes to the Representation of the People Act, 1951, brought about by deleting Section 123 (7) of the Act (by which employment of government servants by candidates as election agents, which was one of the grounds for setting aside Indira Gandhi's election to the Lok Sabha by the Allahabad High Court), would not apply when the Supreme Court took up the appeal. And by including that amendment Act in the Ninth Schedule, the establishment had sought to ensure the dismissal of the High Court order by the Supreme Court. In that context, the petitioner in the case, Raj Narain, sought amendment of the petition and included the validity of the Constitution (Thirty-ninth Amendment) Act, 1975, in his petition. The basis for the challenge was that it violated the basic structure doctrine.

[5] Clause 4 of Article 368-A read as:

> (4) 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 as is referred to in clause (1) to either House 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 has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any

Intended, as it was, to save Indira Gandhi's election to the Lok Sabha as against the decision by the Allahabad High Court, Article 329-A, if found valid, would have rendered the appeal before the Supreme Court infructuous. This was the case with the amendments to the election laws, which were included in the Ninth Schedule of the Constitution. The Bench, by majority judgment, struck down Clause 4 of Article 329-A. It is important, from the concerns of this book, to cite the grounds on which the majority in the bench arrived at this decision; and in the words of the judges:

> … [S]trike down clause (4) of Article 329A on the ground that *it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic structure of the Constitution* inasmuch as (1) it abolishes the forum without providing for another forum for going into the dispute relating to the validity of the election of the appellant and further prescribes that the said dispute shall not be governed by any election law and that the validity of the said election shall be absolute and not consequently be liable to be assailed, and (2) it extinguishes both the right and the remedy to challenge the validity of the aforesaid election.[6] (Ananth, emphasis added)

It may be stressed here that at least three out of the four judges who constituted the majority in this case did not agree with the majority in the Kesavananda Case insofar as the basic structure doctrine was concerned.[7] However, they endorsed the doctrine in this case. Another important aspect

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

For a full text of the Article, see Kashyap, *Constitution making since 1950: An Overview* (Vol. 6), pp. 109–110.

[6] *Indira Gandhi v. Raj Narain* (AIR-1975-SC-2299), paragraph 11 of the Headnotes.

[7] Chief Justice A. N. Ray, Justices K. K. Mathew, and Y. V. Chandrachud agreed with Justice H. R. Khanna in this case to strike down Clause 4 of the new Article 329-A on the basis of the basic structure doctrine. It may be noted that the judges added "Free and Fair elections" to the illustrative list of basic features.

of the decision in the election case from the point of this book was a clarification by Justice Khanna on whether the Fundamental Rights as a whole constituted the basic structure or not. Justice Khanna held:

> The limitation inherent in the word 'mendment' according to which it is not permissible by amendment of the Constitution to change the basic structure of the Constitution was to operate equally on articles pertaining to fundamental rights as on other articles not pertaining to those rights.[8]

This decision on November 7, 1975, did not please the government. It may be noted that the attempt to review the Kesavananda decision had begun (in September 1975) even while the Election Case was being heard and the basic structure doctrine was invoked in that context. And the 13-judge bench, for that purpose, was constituted on November 10, 1975. We have discussed this earlier in Chapter 6 and that the bench was dissolved on November 12, 1975. This, however, did not mean that the government accepted the position as such.

In this chapter, we shall discuss the Constitution (Forty-second Amendment) Act, 1976, described by most commentators of constitutional history as not just an amendment, but replacement of the Constitution with another and the Constitution (Forty-fourth Amendment) Act, 1978, and the Supreme Court decisions in the Minerva Mills Case and in the Waman Rao Case. The decisions in these two cases, apart from upholding the basic structure doctrine, also paved the path for a new approach where provisions in the Directive Principles of State Policy would be integrated into the Fundamental Rights, and thus rendered enforceable. In this new approach, radical as it was, the apex court showed the way to harmonize the two Parts of the Constitution, rather than posing one as inimical to the other. This was also a stage when the judiciary seemed to lean toward the principle of due-process-of-law in place of the principle of procedure-established-by-law, which guided its decisions when the Republic came into being.

[8] AIR-1975-SC-2299, paragraph 251.

The Constitution Forty-second Amendment

On August 28, 1976, H. R. Gokhale, Minister for Law, Justice and Company Affairs moved a Bill to amend the Constitution.[9] Introduced in the Lok Sabha on September 1, 1976, it was considered by the House and discussed for eight days between October 25, 1976, and November 2, 1976. After passage in the Lower House, the Bill was discussed in the Rajya Sabha for six days from November 4, 1976, and passed on November 11, 1976. It was endorsed by the various state assemblies and obtained the Presidential assent on December 12, 1976. Most parts of the amendment came into force on February 1, 1977, while one of the provisions came into force on April 1, 1977.

The Act, indeed, contained the most number of Clauses (insofar as Constitution Amendments were concerned) hitherto.[10] Of relevance to the concerns of this book are the changes in the Preamble, amendment to Article 31-C, and Article 368 of the Constitution.

By Section 2 of the amendment Act, the Preamble to the Constitution was altered to read as "Sovereign Socialist Secular Democratic Republic" instead of "Sovereign Democratic Republic"; and the words "unity of the nation" were altered to read as "unity and integrity of the nation."[11]

By Section 4 of the Amendment Act, Article 31-C was amended to read as follows:

> 31-C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing *all or any of the principles laid down in Part IV* shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; *and no*

[9] At the time of moving, it was the Constitution (Forty-fourth Amendment) Bill, 1976 (see Pylee, *Constitutional amendments in India*, p. 202).

[10] By this, the Preamble was amended (inserting "socialism," "secularism," and "integrity"); Parts IVA and XIVA were added; Articles 39-A, 43-A, 48-A, 131-A, 139-A, 144-A, 226-A, 228-A, and 257-A were added; and as many as 50 Articles in the Constitution were amended. See Pylee, *Constitutional amendments in India*, pp. 180–201.

[11] See Pylee, *Constitutional amendments in India* (3rd Ed.), p. 180.

> *law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:*
>
> Provided that where such law is made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.[12] (Ananth, emphasis added)

By Section 55 of the Amendment Act, Article 368 was amended and two more Clauses—4 and 5—were added to it. The new clauses read as follows:

> (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under the Article [whether before or after the commencement of S. 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.[13]

These provisions in the Constitution (Forty-second Amendment) Act, 1976, clearly rendered the majority decision in the Keshavananda case a nullity. In that context, the Constitution (Forty-second Amendment), Act, 1976, was clearly the one that destroyed a number of aspects of the Constitution.

[12] Article 31-C, held valid by the majority in the Keshavananda Case, accorded protection to laws that were enacted to give effect to provisions in Articles 39 (b) and (c). The amendment now accorded the same to laws intended to give effect to all the provisions of Part IV. Apart from that, the second leg barred the judiciary from piercing the veil and examining as to the nexus between the law and the provisions in Part IV. This, incidentally, was struck down by the majority in the Keshavananda Case as violating the basic structure of the Constitution. It may be noted, at this stage, that the majority in the Minerva Mills Case held this part of the amendment as void; Chief Justice Y. V. Chandrachud, who had disagreed with the basic structure doctrine and also held Article 31-C valid in its entirety in the Keshavananda Case, wrote the majority judgment in this case to strike down the provision this time. We will discuss this decision later on in this chapter.

[13] Pylee, *Constitutional amendments in India*, p. 198.

The roots of this amendment could be traced to the political crisis in the nation, beginning with the struggle within the Congress party at one level and the decisions by the Supreme Court in the Golaknath Case, the Bank Nationalization Case, and the Privy Purses Case on the other. The Constitution amendments in 1971 and 1972 (after Indira Gandhi returned to power with a comfortable majority) and the majority decision in the Keshavananda Case seemed to resolve the debate. But the Congress leadership under Indira Gandhi held another view on it. For instance, on October 13, 1976, Indira Gandhi told the Parliament: "We do not accept the dogma of the basic structure."[14] It may be recalled that the attempt to reconsider the decision in the Keshavananda Case and the 13-member bench taking it up on November 10 and 11, 1976, followed this categorical declaration by the Prime Minister.

And within a few months, an anonymous paper, titled "A Fresh Look at the Constitution" surfaced in the public domain; the paper talked about a number of issues, including the need for a committed judiciary. It argued against the judiciary reviewing amendments to the Constitution. This was when the Supreme Court took up cases from the various High Courts across the country, seeking a writ of habeas corpus. The Jabalpur Bench of the Madhya Pradesh High Court had even issued a writ of habeas corpus in an application from S. K. Shukla, held without charges.[15] The penal transfer of as many as 16 High Court judges took place in this context. It may be recalled that Justice A. N. Ray was made the Chief Justice of India, superseding three others who were senior to him in the bench, the day after the Keshavananda was decided. In this large context, the government appointed the Swaran Singh Committee, with almost all members being known Indira loyalists, to recommend changes to the Constitution. The Constitution (Forty-second Amendment)

[14] See Indira Gandhi: Selected Speeches and Writings (1984, Vol. 3, p. 288).

[15] The case *ADM Jabalpur v. Shiv Kant Shukla* (AIR-1976-SC-1207) was decided by a 4:1 majority, denying the application of the writ of habeas corpus during the Emergency. Justice H. R. Khanna was the lone dissenting judge in this case.

Act, 1976, indeed was the culmination of this long process, and it incorporated some of the recommendations from the Swaran Singh Committee.[16]

In the words of Granville Austin:

> The important Constitutional development of the Emergency, other than its very imposition, was the enactment of the Forty Second Amendment. Coming in November 1976, the amendment demonstrates the progression of the Prime Minister and her government from having near-absolute power without a coherent programme—other than the protection of her prime ministry—to power expressed through fundamental constitutional change.[17]

And this indeed was the context in which the Supreme Court decided on the Minerva Mills Case on May 9, 1980. The decision by the majority in that case was based on the basic structure doctrine.

Minerva Mills Case: The Basic Structure Doctrine Confirmed

The Emergency being in force at the time of these amendments, there was no scope for any legal challenge.[18] Hence, there was no challenge mounted against the Constitution

[16] These have been discussed in extensive detail in several published works. See Ananth, *Constitutional amendments in India, pp. 164–68* for a detailed narrative of these points and the recommendations of the Swaran Singh Committee. The fact is that the discourse had, by this time, shifted from an argument over the status of the Fundamental Rights vis-à-vis the Directive Principles of State Policy and the Constitution. Instead, the issues raised had emanated from a position that sought seamless powers to the political leadership of the country and a judiciary that was committed to the executive rather than the Constitution.

[17] Austin, *Working a democratic constitution: A history of the Indian experience*, p. 348.

[18] Article 359, dealing with the suspension of the enforcement of Fundamental Rights conferred by Part III during emergencies, as it stood after the Constitution (Forty-second Amendment) Act, 1976, read as follows:

> (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the

(42nd Amendment), Act, 1976, or any such laws that drew protection on the basis of Article 31-B and amended Article 31-C. One such issue was an order by the Union Government dated October 19, 1971, under Section 18A of the Industries

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enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(1A) While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

Provided that where a Proclamation of Emergency is in operation only in any part of the territory of India, any such law may be made, or any such executive action may be taken, under this article in relation to or in any State or Union territory in which or in any part of which the Proclamation of Emergency is not in operation, if and in so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India:
Provided that where a Proclamation of Emergency is in operation only in a part of the territory of India, any such order shall not extend to any other part of the territory of India unless the President, being satisfied that the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation, considers such extension to be necessary.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament: (See Constitution of India). It may be added here that this was further amended by the Constitution (Forty Fourth Amendment) Act, 1978, to save application of Articles 20 and 21, even during emergencies.

(Development and Regulations) Act, 1951, authorizing the National Textiles Corporation to take over the management of the Minerva Mills Ltd. (a textile mill) in Karnataka, on the ground that its affairs were being managed in a manner highly detrimental to public interest. The decision was based on a report by a committee set up to study the financial and managerial health of the company and its report submitted in January 1971. The Government Order on October 19, 1971, drew its authority from the provisions of Sick Textile Undertakings (Nationalization) Act, 1974.[19] In the given situation, when the Minerva Mills was nationalized, there was no scope for challenging the acquisition on any ground.[20]

The Limited Company as well as some of its shareholders, then, waited until the Emergency ended[21] and raised a petition under Article 32 of the Constitution. In that petition, they challenged the validity of the Constitution (Thirty-ninth Amendment) Act, 1975 (which placed the Nationalization Act in the Ninth Schedule), and also the validity of some of the provisions of the Constitution (Forty-second Amendment) Act, 1976, such as the amended Article 31-C and the additions to Article 368 of the Constitution. In other words, the bench restricted the challenge to the constitutionality of Sections 4 and 55 of the Constitution (Forty-second Amendment) Act, 1976.[22] The five-member bench in this case delivered a split

[19] This Act was among those included in the Ninth Schedule of the Constitution by way of the Constitution (Thirty-ninth Amendment) Act, 1975 (see Entry 105 of the Ninth Schedule, Constitution of India).

[20] It may be noted here that while Article 31-B prohibited challenge on the validity of the acquisition order because it was based on a law that was already placed in the Ninth Schedule. There was still some scope for challenge (in the law as it stood post Keshavananda) that the Nationalization Act violated the basic structure, and in that event the apex court could have decided either way. This possibility, however, did not exist in the context of the Emergency and in accordance with Article 359, even in the pre-Forty second amendment stage.

[21] The Emergency was lifted on March 21, 1977, the day after Indira Gandhi and her Congress party lost the general elections. The decision to lift the Emergency, incidentally, was the last one by the Cabinet.

[22] AIR-1980-SC-1789, paragraph 10.

verdict and it will be relevant, from the scope of this book, to deal with the judgment in some detail.[23]

At the outset, the bench took up to decide on the validity of the amendments to Article 368 by way of Section 55 of the Constitution (Forty-second Amendment) Act, 1976. In doing so, the bench relied on the majority decision in the Keshavananda Case. "Its avowed purpose," said Justice Chandrachud, "is the *removal of doubts* but after the decision of this Court in Kesavananda Bharati there could be no doubt as regards the existence of limitations on the Parliament's power to amend the Constitution."[24] Justice Chandrachud, speaking for the majority, held that in the context of the constitutional history of Article 368, the true object of the declaration contained in Article 368 is the removal of those limitations. He added: "Clause (5) confers upon the Parliament a vast and undefined power to amend the Constitution, even so as to distort it out of recognition."[25]

The judge then went on to hold that the theme song of the majority decision in Keshavananda Bharati as:

> Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity.[26]

His point was that the majority, in the Keshavananda Case, conceded to the Parliament the right to make alterations in the Constitution so long as they are within its basic framework. Dismissing apprehensions raised by the government, Justice Chandrachud wondered as to what fears can that

[23] Apart from the Chief Justice of India, Y. V. Chandrachud, the bench consisted of Justices P. N. Bhagwati, A. C. Gupta, N. L. Untwalia, and P. S. Kailasam. The majority verdict was delivered by Justice Chandrachud (speaking for Justices Gupta, Untwalia, and Kailasam), while Justice Bhagwati delivered the dissenting judgment.

[24] Ibid., paragraph 21.

[25] Ibid.

[26] Ibid.

judgment raise or misgivings generated if it only meant this and no more. "Democracy," he said:

> is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of Fraternity assuring the dignity of the individual and the unity of the Nation.

From this premise, Justice Chandrachud, speaking for the majority, said:

> *The newly introduced clause (5) of Article 368 demolishes the very pillars on which the Preamble rests by empowering the Parliament to exercise its constituent power without any* 'limitation whatever'. No constituent power can conceivably go higher than the sky-high power conferred by Clause (5), for it even empowers the Parliament to 'repeal the provisions of this Constitution', that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. *The power to destroy is not a power to amend*.[27] (Ananth, emphasis added)

Thus, the majority struck down Article 368 (4), inserted by the Constitution (Forty-second Amendment) Act, 1976, on the ground that it violated the basic structure of the Constitution. The bench also struck down Article 368 (5) of the Constitution.[28] However, the bench held as valid those

[27] Ibid.

[28] It may be noted here that Justice P. N. Bhagwati, who chose to deliver a separate judgment, too had agreed with the majority in striking down Articles 368 (4) and (5) and he did so for similar reasons: that they violated the Basic Structure of the Constitution. (See ibid., paragraph 123).

insertions to the Preamble that were made by Constitution (Forty-second Amendment) Act, 1976. It was held that:

> The very 42nd Amendment which introduced clauses (4) and (5) in Article 368 made amendments to the Preamble to which no exception can be taken. *Those amendments are not only within the framework of the Constitution but they give vitality to its philosophy; they afford strength and succor to its foundations.* By the aforesaid amendments, what was originally described as a 'Sovereign Democratic Republic' became a 'Sovereign Socialist Secular Democratic Republic' and the resolution to promote the 'unity of the Nation' was elevated into a promise to promote the 'unity and integrity of the Nation'. *These amendments furnish the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution. They offer promise of more, they do not scuttle a precious heritage.*[29] (Ananth, emphasis added)

The simple point is that the bench (including Justice Bhagwati, who gave a dissenting judgment in this case) did not bow down and endorsed the basic structure doctrine put forth as law by the majority in the Keshavananda Case. It may be added here that Justice Chandrachud dissented on that issue in the Keshavananda Case and was part of the minority in that instance.

Thereafter, Justice Chandrachud, speaking for the majority, went on to deal with Article 31-C, as amended by the Constitution (Forty-second Amendment) Act, 1976. The judge began this by rejecting the preliminary objections raised by the government in the case. The objection was that the petition was based on apprehensions over the wide scope for amendment and that there was nothing in Articles 31-C and 368, as amended, to confirm the apprehensions that the provisions would lead to a complete abrogation of the rights. The government's contention was that the courts shall not deal with academic and hypothetical issues. He held:

> But, we find it difficult to uphold the preliminary objection because, the question raised by the petitioners as regards the constitutionality of Sections 4 and 55 of the 42nd Amendment is not an academic or

[29] Ibid., paragraph 23.

> a hypothetical question. The 42nd Amendment is there for anyone to see and by its Sections 4 and 55 amendments have been made to Articles 31C and 368 of the Constitution. An order has been passed against the petitioners under Section 18A of the Industries (Development and Regulation) Act, 1951, by which the petitioners are aggrieved.[30]

Justice Chandrachud added that there were two other relevant considerations which must be taken into account while dealing with the preliminary objection. "There is no constitutional or statutory inhibition," he said, "against the decision of questions before they actually arise for consideration." Speaking for the majority, he held that the question had been raised in a large number of petitions and that it is expedient in the interest of justice to settle the true position. Further, he held that the issue before the court was not about an ordinary law, which may or may not be passed, which could be described as a hypothetical question; that a law may be passed in future which will injure the rights of the petitioners.

> We are dealing with a constitutional amendment which has been brought into operation and which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes. We, therefore, overrule the preliminary objection and proceed to determine the point raised by the petitioners.[31]

Justice Chandrachud, thereafter, described the dispute before the court as one that involves the status of the Directive Principles of State Policy vis-à-vis the Fundamental Rights; whether the majority decision in the Keshavananda Case was binding; and whether Parliament had unlimited powers to amend the Constitution as to give a position of precedence to the Directive Principles over the Fundamental Rights. This approach, indeed, helped the judges to steer clear of the political thicket, shrouded by the rhetoric behind the Constitution (Forty-second Amendment) Act, 1976, and yet address the issue forthright. "Article 31C as amended by Section 4 of the 42nd Amendment," said Justice Chandrachud,

[30] Ibid., paragraph 43.
[31] Ibid., paragraph 44.

"provides in terms that a law giving effect to any directive principle cannot be challenged as void on the ground that it violates the rights conferred by Article 14 or Article 19." He then held: "The 42nd Amendment by its Section 4 thus subordinates the fundamental rights conferred by Articles 14 and 19 to the Directive Principles."[32]

From this premise, Justice Chandrachud went on to state that the question to be answered was whether Articles 14 and 19, which must now give way to laws passed in order to effectuate the policy of the State toward securing all or any of the principles of Directive Policy, are essential features of the basic structure of the Constitution. And that it is only if the rights conferred by these two Articles are not a part of the basic structure of the Constitution that they can be allowed to be abrogated by a constitutional amendment. The judge held:

> If they are a part of the basic structure, they cannot be obliterated out of existence in relation to a category of laws described in Article 31C or, for the matter of that, in relation to laws of any description whatsoever, passed in order to achieve any object or policy whatsoever. This will serve to bring out the point that a total emasculation of the essential features of the Constitution is by the ratio of Kesavananda Bharati, not permissible to the Parliament.[33]

Having set the premise thus, Justice Chandrachud went on to stress that notwithstanding the importance that the courts have attached to the preservation of human liberties, the thrust on some of the Directive Principles of State Policy have been equally important. He then said:

> Therefore, the importance of Directive Principles in the scheme of our Constitution cannot ever be over-emphasized. Those principles

[32] Ibid., paragraph 45. It may be noted here that although Article 31-C, as amended in 1976, saved laws from the operation of Article 31 in addition to Articles 19 and 21, the deletion of Article 31 by way of the Constitution (Forty-fourth Amendment) Act, 1978, also brought about such changes in Article 31-C to that effect. In other words, the deletion of Article 31, being the Right to Property as a Fundamental Right, served the purpose and this happened even before the Supreme Court decided the Minerva Mills Case on May 9, 1980.

[33] Ibid., paragraph 46.

> project the high ideal which the Constitution aims to achieve. In fact, Directive principles of State policy are fundamental in the governance of the country and the Attorney General is right that there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realisation of his aspirations. *The promise of a better tomorrow must be fulfilled to-day, day after tomorrow it runs the risk of being conveniently forgotten.* Indeed, so many tomorrows have come and gone without a leaf turning that today there is a lurking danger that people will work out their destiny through the compelled cult of their own "dirty hands." Words bandied about in marbled halls say much but fail to achieve as much.[34] (Ananth, emphasis added)

Citing Austin's conclusion that "the core of the commitment to the Social Revolution lies in Parts III and IV…. These are the conscience of the Constitution"[35] Justice Chandrachud, speaking for the majority, went on to cite a catena of cases from the American courts to establish that it was equally important for the courts, in such cases as the instant one, to uphold personal freedom guaranteed by Articles in Part III of the Constitution. Referring to the various stages of the freedom struggle and the commitments by its leadership to the welfare and the liberty of the people to uphold that, Justice Chandrachud pointed out that "though Parts III and IV appear in the Constitution as two distinct fasciculus of articles, the leaders of our independence movement drew no distinction between the two kinds of State's obligation—negative and positive."[36] The judge then stressed the need to harmonize the provisions in Parts III and IV, rather than posit the two as potential grounds for conflict. Speaking for the majority, Justice Chandrachud said:

> This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice - social, economic and

[34] Ibid., paragraph 47.

[35] Ibid., paragraph 48. Also see Austin, *The Indian Constitution: Cornerstone of a nation*, p. 50.

[36] Ibid., paragraph 58.

> political. We, therefore, put part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV. Therefore, the rights conferred by Part III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal is human freedoms…. *The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III.* It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. *Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.*[37] (Ananth, emphasis added)

This premise was used to examine the validity of Article 31-C, as it stood after the Constitution (Forty-second Amendment) Act, 1976, by Justice Chandrachud and the majority in the bench. "On any reasonable interpretation," said Justice Chandrachud:

> there can be no doubt that by the amendment introduced by Section 4 of the 42nd Amendment, Articles 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31C. The startling consequence which the amendment has produced is that even if a law is in total defiance of the mandate of Article 13 read with Articles 14 and 19, its validity will not be open to question so long as its object is to secure a Directive Principle of State Policy.[38]

The judges then averred to a point argued by the government: that it is possible to conceive of laws which will not attract

[37] Ibid., paragraph 62.
[38] Ibid., paragraph 63.

Article 31-C, since they may not bear direct and reasonable nexus with the provisions of Part IV. The majority in the bench, however, rejected this. Speaking on their behalf, Justice Chandrachud said:

> A large majority of laws, the bulk of them, can at any rate be easily justified as having been passed for the purpose of giving effect to the policy of the State towards securing some principle or the other laid down in Part IV. In respect of all such laws, which will cover an extensive gamut of the relevant legislative activity, the protection of Articles 14 and 19 will stand wholly withdrawn. It is then no answer to say, while determining whether the basic structure of the Constitution is altered, that at least some laws will fall outside the scope of Article 31C.[39]

The majority, apart from making it clear that the basic structure doctrine was valid and binding, also held that the apex court, in reviewing a constitutional amendment, will look to harmonize the Fundamental Rights and the Directive Principles of State Policy rather than place one over the other. In other words, the majority decision in the Keshavananda Case, being the law as it stood, was applied by the majority in deciding the validity of Section 4 (as it was the case with Section 55) of the Constitution (Forty-second Amendment) Act, 1976.

Justice Chandrachud, speaking for the majority in the bench, said this in so many words:

> We have to decide the matter before us not by metaphysical subtlety, nor as a matter of semantics, but by a broad and liberal approach. We must not miss the wood for the trees. A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. An author, who writes exclusively on foreign matters, shall have been totally deprived of the right of free speech and expression if he is prohibited from writing on foreign matters. The fact therefore that some laws may fall outside the scope of Article 31C is no answer to the contention that the withdrawal of protection of Articles 14 and 19 from a large number of laws destroys the basic structure of the Constitution.[40]

[39] Ibid.
[40] Ibid., paragraph 64.

The substantive change introduced by Section 4 of the Constitution (Forty-second Amendment) Act, 1976, was to include all laws made with an express purpose of giving effect to all the provisions in Part IV of the Constitution. This was different from Article 31-C, as upheld in the Keshavananda Case, that laws to give effect to Articles 39 (b) and (c) will remain valid even if they violated Articles 19 and 21 of the Constitution. The government's argument in this regard was that Article 38 of the Constitution is the kingpin of the Directive Principles, and no law passed in order to give effect to the principles contained therein can even damage or destroy the basic structure of the Constitution.[41] Justice Chandrachud, speaking for the majority, responded to this in the following words:

> We are unable to agree that all the Directive Principles of State Policy contained in Part IV eventually verge upon Article 38. Article 38 undoubtedly contains a broad guideline, but the other directive principles are not mere illustrations of the principle contained in Article 38. Secondly, if it be true that no law passed for the purpose of giving effect to the directive principle contained in Article 38 can damage or destroy the basic structure of the Constitution, what was the necessity, and more so the justification, for providing by a constitutional amendment that no law which is passed for giving effect to the policy of the State towards securing any principle laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges the rights conferred by Articles 14 and 19? The object and purpose of the amendment of Article 31-C is really to save laws which cannot be saved under Article 19 (2) to (6). Laws which fall under those provisions are in the nature of reasonable restrictions on the fundamental rights in public interest and therefore they abridge but do not abrogate the fundamental rights. It was in order to deal with laws which do not get the protection of Article 19 (2) to (6) that Article 31C was amended to say that the provisions of Article 19, inter alia, cannot be invoked for voiding the laws of the description mentioned in Article 31C.[42]

[41] Article 38 of the Constitution reads as follows: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." (See Constitution of India)

[42] Ibid., paragraph 65.

Holding that "Articles 14 and 19 do not confer any fanciful rights," Justice Chandrachud stressed that the Universal Declaration of Human Rights consider them as elementary for the proper and effective functioning of a democracy. Articles 14 and 19, in his view and also that of the majority in the bench, were crucial in the operation of the provisions of Article 32 of the Constitution. Section 4 of the Forty-second Amendment, the majority held, was:

> an easy way to circumvent Article 32 (4) by withdrawing totally the protection of Articles 14 and 19 in respect of a large category of laws, so that there will be no violation to complain of in regard to which redress can be sought under Article 32.[43]

The majority, for whom Justice Chandrachud spoke, was categorical that:

> Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. *Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights*, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.[44] (Ananth, emphasis added)

Thus, the majority held that Section 4 of the Constitution (Forty-second Amendment) Act, 1976, was beyond the

[43] Ibid., paragraph 65. It may be noted here that the judges were willing to deal with the context of the times and referred to the crisis in Assam and Punjab at that time. They said: "Then again, regional chauvinism will have a field day if Article 19 (1) (d) is not available to the citizens. Already, there are disturbing trends on a part of the Indian horizon. Those trends will receive strength and encouragement if laws can be passed with immunity, preventing the citizens from exercising their right to move freely throughout the territory of India. The nature and quality of the amendment introduced by Section 4 of the 42nd Amendment is therefore such that it virtually tears away the heart of basic fundamental freedoms." Ibid.

[44] Ibid., paragraph 79.

amending power of the Parliament, and hence void. The judges added that it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State toward securing all or any of the principles laid down in Part IV of the Constitution. Section 55 of the Act was also held to be beyond the amending power of the Parliament and void since it removed all limitations on the power of the Parliament to amend the Constitution, and confers power upon it to amend the Constitution to damage or destroy its basic or essential features or its basic structure.[45]

Incidentally, another bench of the Supreme Court decided in the same way on another case on the same day. On May 9, 1980, a five-member bench, decided in the Waman Rao Case.

Waman Rao Case

The Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, brought into operation on January 26, 1962, had imposed a ceiling on agricultural holdings.[46] The ceiling further lowered by three amendment Acts passed in the

[45] It may be noted here that the judgment in the Minerva Mills Case was delivered on May 9, 1980; however, the judges gave their reasons on July 31, 1980. Similarly, Justice P. N. Bhagwati recorded his dissent on May 9, 1980, and pronounced his judgment along with the reasons on July 31, 1980. It is important to stress here that Justice Bhagwati agreed with the others that amendments to Article 368 of the Constitutions adding Sections 4 and 5 to the Article was void and that it violated the basic structure of the Constitution. Insofar as Article 31-C, as amended, Justice Bhagwati held that the new Article did not prohibit judicial scrutiny of such laws to find out its nexus with provisions in Part IV and where it did not exist, the court could strike down such laws. In other words, the dissent was on a limited point and Justice Bhagwati too had concurred with the majority insofar as the basic structure doctrine was concerned.

[46] Entry 34 of Ninth Schedule of the Constitution.

Maharashtra State Assembly in 1975 and 1976. All these amendments too were included in the Ninth Schedule subsequently.[47] The validity of these Acts was challenged in the Bombay High Court in a batch of 2660 petitions. A Division Bench of the Bombay High Court, sitting at Nagpur, repelled that challenge by a judgment on August 13, 1976.[48] The High Court's decision was based on the position that the laws under challenge were included in the Ninth Schedule of the Constitution, and also that the Emergency being in force barred any challenge on the grounds that the laws violated Articles 19 and 21.[49] The landowners who had, thus, lost the case in the Bombay High Court, preferred an appeal to the Supreme Court soon after. The apex court dismissed the appeal on January 27, 1977.[50]

However, after the Emergency was revoked, a review petition against the judgment was filed before the Supreme Court. The appellants, being those who lost their land after the ceiling was lowered, contended that several grounds, which were otherwise open to them for assailing the constitutional validity of the impugned Acts, could not be raised as long as the Emergency was in force and that they should be permitted to raise those in a fresh petition then that the Emergency was lifted. The Supreme Court allowed fresh writ petitions too in that regard while accepting the review petition. In these petitions, the appellants raised only one important ground

[47] Entries 157, 159, and 160 of Ninth Schedule of the Constitution.

[48] *Vithalrao Udaorao v. State of Maharashtra* (AIR-1977-Bom. 99).

[49] Article 359, as it stood at that time, barred application of the Fundamental Rights.

[50] *Dattatraya Govind v. State of Maharashtra* (AIR-1977-SC-915). It may be noted that the Emergency was still in vogue on that date. The only point urged in those appeals was that the Act, as amended, violated the provisions of 31-A (1), in so far as it created an artificial *family unit* and fixed the ceiling on the agricultural holdings of such family units. The argument was that the violation of the particular proviso deprived the impugned laws of the protection conferred by Article 31-A. The Supreme Court rejected this on the view that the impugned provisions would receive the protection of Article 31-B by reason of the inclusion of the 1961 Act and the subsequent amendments in the Ninth Schedule.

that the impugned laws claimed protection from Articles 31-A, 31-B, and the unamended Article 31-C of the Constitution, while these provisions of the Constitution damaged or destroyed the basic structure of the Constitution as decided by the majority in the Keshavananda Case.

The case came up for hearing before a five-member bench and was decided by a majority judgment (4:1) on May 9, 1980.[51] Justice Chandrachud, speaking for the majority, took up the challenge against the constitutional validity of Article 31-A at the outset and dwelt upon the catena of cases where the Supreme Court had decided on it hitherto. He relied upon the speech by Jawaharlal Nehru in the provisional parliament, in extensive detail, in order to substantiate his decision to uphold the Article, inserted as it was, through the Constitution (First Amendment) Act, 1951.[52] The majority in the bench thus held:

> These statements were made by the Prime Minister on the floor of the House after what is correctly described as the most careful deliberation and a broad-based consultation with diverse interests. They were made in order to resolve doubts and difficulties and not with the intention of creating confrontation with any other arm of the Government or with the people. They stand in a class apart and convey in a language characterised by logic and directness, how the Constitution was failing in its purpose and how essential it was, in order to remove glaring disparities, to pour meaning and content into the framework of the Constitution for the purpose of strengthening its structure. *Looking back over the past thirty years' constitutional history of our country, we, as lawyers and Judges, must endorse the claim made in the speeches above that if Article 31A were not enacted, some of the main purposes of the Constitution would have been delayed and eventually defeated and that by the 1st Amendment, the constitutional edifice was not impaired but strengthened.*[53] (Ananth, emphasis added)

[51] Apart from Chief Justice Y. V. Chandrachud, the other members of the bench were Justices P. N. Bhagwati, V. R. Krishna Iyer, V. D. Tulzapurkar, and A. P. Sen.

[52] See Appendix 8 for the full text of Jawaharlal Nehru's speech in the Provisional Parliament which was constituted by the members of the Constituent Assembly. It may be noted that this was cited as a basis by the judges in the Kesavananda Case too.

[53] *Waman Rao and others v. Union of India and Others* (AIR-1981-SC-271), paragraph 25.

The judges stressed that the Constitution (First Amendment) Act, 1951, was inspired by the "objectives of the Constitution" and that "Article 31-A (1) could easily have appeared in the original Constitution itself as an illustration of its basic philosophy." They described the amendment as a legitimate response by the makers of the Constitution to a situation when those who held property began to *distort the base of the Constitution*. Justice Chandrachud, speaking for the majority, held: "It is that sense and sensitivity which gave birth to the impugned amendment. The progress in the degeneracy of any nation can be rapid, especially in societies given by economic disparities and caste barriers."[54] The judges went on to add:

> *Indeed, if there is one place in an agriculture-dominated society like ours where citizens can hope to have equal justice, it is on the strip of land which they till and love, the land which assures to them the dignity of their person by providing to them a near decent means of livelihood.*[55] (Ananth, emphasis added)

Justice Chandrachud, speaking for Justices Krishna Iyer, Tulzapurkar, and Sen, who constituted the majority in this case, said:

> *The First Amendment has thus made the constitutional ideal of equal justice a living truth. It is like a mirror that reflects the ideals of the Constitution; it is not the destroyer of its basic structure.* The provisions introduced by it and the 4th Amendment for the extinguishment or modification of rights in lands held or

[54] Ibid., paragraph 28.

[55] Ibid. It may be noted here that this sense was evident in the judgments by the Supreme Court almost three decades later while deciding cases involving the acquisition of land in the name of public purpose. Between March and July 2011, the Supreme Court struck down land acquisition orders by the government in Uttar Pradesh. It is necessary to add that while this was an argument in support of the government's right to acquire land in the name of public good, the context in 2011 was to save the farmers and their right to their property. We shall discuss this in detail in Chapter 8. Suffice to say here that there was a pro-people tilt in both these instances.

> let for purposes of agriculture or for purposes ancillary thereto, strengthen rather than weaken the basic structure of the Constitution.[56] (Ananth, emphasis added)

The majority judges then went into the specifics of the amendments to the Land Ceiling Act passed in the Maharashtra State Assembly and included it in the Ninth Schedule; in other words, the immediate provocation behind the dispute before the apex court. The amendments were based on the principle that set the ceiling on the basis of the family as a unit, rather than the individuals in the family. A panel set up by the Planning Commission of India, in May 1959, suggested this principle.[57] The majority held that this basis, flowing as it did from a study by experts, cannot be challenged before the courts in any case and more so, where it served the basis for agrarian reforms legislation.

The majority, for these reasons, held the Constitution (First Amendment) Act, 1951, valid. This, they said, was for reasons other than that the amendment was held valid by the Supreme Court in the Shankari Prasad Deo Case, the Sajjan Singh Case, and the Golaknath Case, wherein the principle of prospective ruling was applied to uphold the laws. The judges, however, indulged in this exercise again because the law, after the Keshavananda Case, was that laws included in the Ninth Schedule after April 24, 1973 (being the day when the Keshavananda Case was decided), were to be tested for validity based on the basic structure doctrine.

But then, Justice Chandrachud, speaking for the majority, did point out to the long list of laws that the Ninth Schedule had come to constitute. The list contained 188 legislations from the various states at that time.[58] This they did to convey

[56] Ibid., paragraph 26.

[57] The principle herein was that a family consisting of the husband, wife, and their three children shall constitute a unit for the purpose of determining the ceiling on land ownership.

[58] See Appendix 4 for a list of laws in the Schedule and the various stages when they were added. The Ninth Schedule contained 284 laws at the time when this book was completed.

a sense of unease. The judges expressed their views on this by way of citing Jawaharlal Nehru:

> The Ninth Schedule is gradually becoming densely populated and it would appear that some planning is imperative. But that is another matter. We may only remind that Jawaharlal Nehru, had assured the Parliament, while speaking on the 1st Amendment that there was no desire to add to the 13 items which were being incorporated in the Ninth Schedule simultaneously with the 1st Amendment and that it was intended that the Schedule should not incorporate laws of any other description than those which fell within items 1 to 13. Even the small list of 13 items was described by the Prime Minister as a long schedule.[59]

The second reason for drawing a line at a convenient and relevant point of time is that the first 66 items in the Ninth Schedule, which were inserted prior to the decision in Keshavananda Bharati, mostly pertained to laws of agrarian reforms. There were a few exceptions amongst those 66 items, such as items 17, 18, and 19 which related to insurance, railways, and industries. But almost all other items would fall within the purview of Article 31-A (1) (a). In fact, items 65 and 66, which were inserted by the Twenty-ninth Amendment, were the Kerala Land Reforms (Amendment) Acts of 1969 and 1971, respectively, which were challenged in the Keshavananda Bharati Case. That challenge was repelled. The majority in the bench, in the Keshavananda Case, then went on to hold Article 31-B read with the Ninth Schedule, valid without any enquiry, insofar as the laws included in the Ninth Schedule prior to April 24, 1973. However, the judges held that laws included in the Ninth Schedule on or after April 24, 1973, will have to be judged, based upon the basic structure doctrine. "There was no justification," they held "for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein."[60] This remains the law to this day.

And in the end, the majority, in this case, took up Article 31-C, as it stood before the Constitution (Forty-second

[59] AIR-1981-SC-271, paragraph 47.
[60] Ibid., paragraph 52.

Amendment) Act, 1972. There was, in fact, no need for the bench, in this case, to pronounce a decision on the validity of the amended Article 31-C; that was taken up by another bench, which too was presided over by Justice Chandrachud, to decide on the Minerva Mills Case. And in that light, the bench, in this instance, dealt with the issue by way of a short observation in the form of a summary. It said:

> The unamended portion of Article 31C is not like an uncharted sea. It gives protection to a defined and limited category of laws which are passed for giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39. These clauses of Article 39 contain directive principles which are vital to the well-being of the country and the welfare of its people…. It is impossible to conceive that any law passed for such a purpose can at all violate Article 14 or Article 19. Article 31 is now out of harm's way. In fact, far from damaging the basic structure of the Constitution, laws passed truly and bona fide for giving effect to directive principles contained in Clauses (b) and (c) of Art. 39 will fortify that structure. *We do hope that the Parliament will utilise to the maximum its potential to pass laws, genuinely and truly related to the principles contained in clauses (b) and (c) of Article 39.* The challenge made to the validity of the first part of the unamended Article 31C therefore fails.[61] (Ananth, emphasis added)

The point is that the Supreme Court, in this case and in the Minerva Mills Case, upheld the basic structure doctrine as enunciated in the Keshavananda Case, and in the seven years that went by between the decision in the Keshavananda Case and May 9, 1980, and the decisions in the Minerva Mills Case and the Waman Rao Case, when two different benches decided on similar issues, the nation had gone through tumultuous times. The defeat of the Congress party in March 1977 and the Janata Party coming to power (during which time the Forty-fourth Amendment was enacted), the fall of the Janata government and the return of Indira Gandhi's Congress party following the general elections, in January 1980, had all passed before the validity of the Constitution (Forty-second Amendment) Act was taken up for judicial review. The period

[61] Ibid., paragraph 55.

also witnessed the rule by Charan Singh, heading a rag-tag coalition. The most relevant development during this period was the Constitution (Forty-fourth Amendment) Act, 1978. The Supreme Court, in the meanwhile, held the basic structure doctrine as relevant and based its decision on the doctrine in the Indira Gandhi Election Case too; the court struck down Article 329-A of the Constitution as void, and displayed courage by doing so in the midst of the Emergency. The Forty-Fourth Amendment, subsequently, restored the Constitution, so to say, to where it stood before 1976. One of its provisions, important from the concerns of this book, caused the deletion of Article 31 (Right to Property as a Fundamental Right) and placed property rights as a mere constitutional right in the form of Article 300-A. This would have sufficed to repel challenges against the acquisition of property in a strictly legal sense.

But then, the judges who decided the Minerva Mills Case and the Waman Rao Case resisted the temptation to tread upon an easy path, and instead went about deciding the law and interpreting the Constitution in a manner where the status of the provisions in the Directive Principles of State Policy were raised to being as important as the Fundamental Rights. The theme song of all these decisions, indeed, was what Justice Chandrachud said, on behalf of the majority in the Minerva Mills Case:

> Just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal is human freedoms.[62]

It is pertinent to note here that the judgments in the Minerva Mills Case and the Waman Rao Case must have irritated the regime at the time they were delivered, for they put the law where it stood after the Keshavananda Case. The Congress, which had frowned at the basic structure doctrine in that

[62] AIR-1980-SC-1789, paragraph 62.

instance and enacted the Constitution (Forty-second Amendment) Act, 1976, did not react the same way in the months after May 1980. It can be said that Indira Gandhi, by this time, did not find much use for the egalitarian goals. It is true that more laws were added to the Ninth Schedule from this time. But then, there were hardly any among them that were in the same league as the laws put in the list in the first couple of decades after the Constitution came into force.[63]

However, it became the turn of the Supreme Court now to ensure that the Directive Principles of State Policy were made into a reality. An instance of this was the decision by the Supreme Court in the Olga Tellis Case, also known as the Pavement Dwellers Case.

Olga Tellis Case

On July 13, 1981, A. R. Antulay, then the chief minister of Maharashtra, announced the government's decision to clean up the city of Bombay and as part of that move, all the pavement dwellers in the city of Bombay were to be evicted forcibly and sent back to places where they came from. The chief minister instructed the police department to provide the necessary support to the Bombay Municipal Corporation while such dwellings were demolished and removing those who lived there. Antulay's rise in the political scene in Maharashtra, considered until then a preserve of the Marathas, had to do with his proximity to Sanjay Gandhi, who too was known for his penchant to keep the cities free of slums, and have the slum dwellers evicted and resettled in faraway places. Sanjay Gandhi had ensured this in Delhi and elsewhere during the Emergency, and his attitude had gained him certain notoriety then. Antulay had become chief minister of Maharashtra in June 1980.[64] That the eviction drive was nothing but a cruel joke

[63] A look at the list in Appendix 4 will establish this.

[64] It may be noted that Antulay was implicated in a series of scandals. The one involving him in the Indira Pratishtan Trust led to his exit as chief minister later. Like many others who rose in the Congress, such as

on the slum dwellers was evident in the manner in which the chief minister justified his decision. Antulay's announcement also contained the justification. It said: "It is a very inhuman existence. These structures are flimsy and open to the elements. During the monsoon there is no way these people can live comfortably."[65]

On orders from the chief minister, the Bombay Municipal Corporation swung into action. The officers, accompanied by a posse of police, began evicting people on July 23, 1981. Among those evicted that way was P. Angamuthu; he was put in a bus, along with his wife and daughters to Salem, a small town then in Tamil Nadu and many hundred miles away from Bombay. But Angamuthu returned to Bombay in a few days, in search of a job and got into a pavement house once again. Angamuthu also filed a writ petition in the Bombay High Court, seeking injunction against eviction from his dwelling. Like him, there were others who were evicted from some other parts of Bombay; and they too filed writ petitions in the Bombay High Court with similar prayers. The Bombay High Court had stayed the demolition of dwellings until October 15, 1981. It was an interim stay as is common with High Courts in writ petitions.

In the meanwhile, the petitioners went to the Supreme Court seeking an order against their eviction and that they are given alternative accommodation in the event of eviction. The petitioners invoked Article 21 of the Constitution in their petition. The petitions were grouped together by the Supreme Court and

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Sanjay Gandhi accolades, Antulay too did not find any use for socialism, even as a rhetoric, and represented the Congress party's shift away from Nehru's ideals. Indira Gandhi, who displayed such enthusiasm to further Nehru's scheme between 1969 and 1977, when she led the charge against the judiciary, had also moved away from there after her return to power in 1980.

[65] This is as cited in the judgment. See *Olga Tellis v. Bombay Municipal Corporation* (AIR-1986-SC-180; paragraph 5). It may be noted here that Sanjay Gandhi had embarked upon a similar project in Delhi's Turkman Gate and the various chief ministers across the country followed the leader in many towns thereafter.

were heard by a five-member bench.[66] In a unanimous judgment delivered on July 10, 1985, the Supreme Court held that the Right to Life guaranteed as a Fundamental Right in the Constitution under Article 21 also includes the Right to Livelihood. Speaking for the bench, Chief Justice Chandrachud held:

> The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. *An equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood.* If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.[67] (Ananth, emphasis added)

The basis for this decision lay in a departure, by the Supreme Court in the Maneka Gandhi Case, from the existing principles of jurisprudence adopted in the A. K. Gopalan Case. Incidentally, the makers of the Constitution preferred the principle of procedure-established-by-law against that of due-process-of-the-law after a long discussion. They made this decision in order to avoid a situation where reforms, legislations invariably will be stuck in courts for an inordinately long period. This, however, was relevant to the context of the times and the shift, beginning with the Maneka Gandhi Case, was as relevant in the times it happened. Justice Chandrachud, speaking for the Constitution bench, went on to explain the departure from that decision as necessary.[68] In his judgment, on behalf of the bench, Justice Chandrachud said:

> Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to

[66] Presided over by Chief Justice Chandrachud, the other members of the bench were Justices Murtaza Fazl Ali, V. D. Tulzapurkar, O. Chinnappa Reddy, and A. Varadarajan.

[67] AIR-1986-SC-180, paragraph 32.

[68] *A. K. Gopalan v. State of Madras* (AIR-1950-SC-0-27). We will discuss the principle as adopted in that case in detail in Chapter 9 of this

> live. *And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life*. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.[69] (Ananth, emphasis added)

The learned judge also went on to explain why slums come up in the cities, as a way to put things in perspective. He said:

> Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood.[70]

Justice Chandrachud, speaking for the bench, relied on decisions by the American Court (in *Munn v. Illinois*) that "Life means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed."[71] The significance of the decision from the perspective of this book is the link that the bench established between Article 21 and Articles 39 (a) and 41 of the Constitution. The bench, in this case, set the stage for a new approach to rights. In doing so,

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book. It may be noted that the Supreme Court, in a sense, had departed from that principle and overruled the position in A. K. Gopalan and the R. C. Cooper Cases in some ways and this has been dealt with briefly in Chapter 5 of this book. The departure and adoption of the due-process-of-law jurisprudence was explicit in the Maneka Gandhi Case, and this was in the domain of political rights as such. The Olga Tellis Case, in a sense, was the first instance when the court applied this to the domain of economic rights.

[69] AIR-1986-SC-180, paragraph 32.

[70] Ibid.

[71] Ibid. The judge also pointed out that this was approved by the Supreme Court in the *Kharak Singh v. State of Uttar Pradesh* (AIR-1963-SC-1295).

Justice Chandrachud and the others in the five-member bench, picked up the framework laid by the Supreme Court to uphold amendments to the Constitution in the past where the operation of some of the Fundamental Rights were restricted in order to give effect to the Directive Principles of State Policy. The bench held:

> Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any Court, are nevertheless fundamental in the governance of the country. *The Principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights*. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, *any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right, to life conferred by Article 21*.[72] (Ananth, emphasis added)

Having said this, the bench went on to probe as to whether the eviction of pavement dwellers led to a loss of their livelihood. In this context, the court held:

> *That the eviction of a person from a pavement or slum will inevitably lead to the deprivation of his means of livelihood, is a proposition which does not have to be established in each individual case*. That is an inference which can be drawn from acceptable data. Issues of general public importance, which affect the lives of large sections of the society, defy a just determination if their consideration is limited to the evidence pertaining to specific individuals. In the resolution of such issues, there are no symbolic samples which can effectively project a true picture of the grim realities of life…

[72] Ibid., paragraph 33.

> In a matter like the one before us, in which the future of half of the city's population is at stake, the Court must consult authentic empirical data compiled by agencies, official and non-official. It is by that process that the core of the problem can be reached and a satisfactory solution found. It would be unrealistic on our part to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements. *Commonsense, which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants*.[73] (Ananth, emphasis added)

The judges then dealt with the larger picture behind the migration of people to the cities in search of livelihood to substantiate their point that the evictions, indeed, will cause a loss of livelihood. In doing so, they brought the considerations of humane thinking too. Speaking for the bench, Justice Chandrachud said:

> The landless labourers, who constitute the bulk of the village population, are deeply imbedded in the mire of poverty. It is due to these economic pressures that the rural population is forced to migrate to urban areas in search of employment. The affluent and the not-so-affluent are alike in search of domestic servants. Industrial and Business Houses pay a fair wage to the skilled workman that a villager becomes in course of time. Having found a job, even if it means washing the pots and pans, the migrant sticks to the big city. If driven out, he returns in quest of another job. The cost of public sector housing is beyond his modest means and the less we refer to the deals of private builders the better for all, excluding none....[74]

The judges also pointed out that it was natural for those evicted to flee to a less conspicuous pavement in the by-lanes and when the officials are gone, they return to their old habitats. "Their main attachment to those places," the judges held, "is the nearness thereof to their place of work."[75] That the bench as a whole perceived the eviction and the way they were carried out as inhuman and insensitive was borne out in the way they recalled the operations in the case of residents of Kamraj Nagar. This was a slum cluster of over 500 hutments,

[73] Ibid., paragraph 35.
[74] Ibid., paragraph 36.
[75] Ibid., paragraph 6.

built in about 1960 by persons who were employed by a construction company, engaged in laying water pipes along the Western Express Highway. After the project was completed, the slums were occupied by municipal employees, factory or hotel workers, construction supervisors and the like. On hearing about the chief minister's announcement, they filed a writ petition in the High Court of Bombay for an order of injunction against its implementation; and the High Court granted an ad interim injunction to be in force until July 21, 1981. On that day, the municipal corporation had given an undertaking that the huts would not be demolished until October 15, 1981. However, on July 23, 1981, the residents of that slum were huddled into state transport buses for being deported out of Bombay. The judges noted: "Two infants were born during the deportation but that was set off by the death of two others."[76]

The importance of this approach by the bench is that it laid the basis for the court to reject an argument by the government that the pavement dwellers, having committed an unlawful act of encroaching on public land, shall not seek protection under the provisions of the Constitution that are meant, in fact, to be applied only where the larger context too is lawful. The government's argument was based on the law, as held by the Supreme Court, in the Sant Ram Case.[77]

[76] Ibid., paragraph 8. It may be noted here that the case for the rights of the Kamaraj Nagar residents was taken up by Praful Chandra Bidwai, a journalist with *The Times of India* newspaper at that time. Bidwai would become a prominent journalist and fighter for causes in the days ahead. Similarly, another batch of petitions before the apex court in that case was filed by Olga Tellis, also a journalist.

[77] In Re. Sant Ram (AIR-1960-SC-932). In that case, the issue involved was as to whether a rule empowering the court to put out the lists of touts and forbid advocates from seeking help from touts for briefs was a violation of the right to life and livelihood under Article 21 of the Constitution. A Constitutional Bench of the Supreme Court held:

> No tout can claim any rights in relation to the business of the Court. This rule which seeks to maintain the purity of the legal profession is no less in the interest of the general public and it is the duty of every Court to see that toutism is completely eliminated.

Rejecting the argument, Justice Chandrachud, speaking for the bench, held:

> This decision is distinguishable because, under the Constitution, no person can claim the right to livelihood by the pursuit of an opprobrious occupation or a nefarious trade or business, like toutism, gambling or living on the gains of prostitution. *The petitioners before us do not claim the right to dwell on pavements or in slums for the purpose of pursuing any activity which is illegal, immoral or contrary to public interest. Many of them pursue occupations which are humble but honourable.*[78] (Ananth, emphasis added)

Thereafter, the bench addressed the validity of Section 314 of the Bombay Municipal Corporation Act, 1888, that vested power in the hands of the commissioner of the corporation to evict dwellings on public land even without notice. In other words, here was a case where the procedure established by law permitted eviction without notice. The petitioners had contended that this colonial law shall not be held valid in a democracy. Holding that it was settled law that the procedure prescribed by law is fair, just, and reasonable,[79] the bench held:

> Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. *It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must conform to the norms of justice and fairplay*. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice

[78] AIR-1986-SC-180, paragraph 34.

[79] Ibid., paragraph. The judges referred to a catena of cases decided by the Supreme Court in this regard: *E. P. Royappa v. State of Tamil Nadu*; *Maneka Gandhi v. Union of India*; *M. H. Hoskot v. State of Maharashtra*; *Sunil Batra v. Delhi Administration*; *Sita Ram v. State of U. P.*; *Hussainara Khatoon I v. Home Secretary, State of Bihar*; *Hussainara Khatoon II v. Home Secretary, State of Bihar*; *Sunil Batra II v. Delhi Administration*; *Jolly George Verghese v. Bank of Cochin*; *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*; and *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*. These are important cases where the shift toward the due-process-of-law was evident.

> of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be within the scope of the authority conferred by law and secondly, it must be reasonable. *If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable*. The substance of the law cannot be divorced, from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it.[80] (Ananth, emphasis added)

Applying this principle, the bench did hold Section 314 of the Bombay Municipal Corporation Act, 1888, as valid. The court, however, interpreted the Section as not a command and that the power to evict without notice as only discretionary. The bench held:

> It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the *audi alteram partem rule* ('hear the other side') could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken…. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.[81]

Reiterating that the pavement dwellers cannot be denied of the right to be heard, simply because they had committed

[80] Ibid., paragraph 40.
[81] Ibid., paragraph 45.

the crime of trespass and encroaching into public space, the bench held:

> There is no doubt that the petitioners are using pavements and other public properties for an unauthorised purpose. But, their intention or object in doing so is not to 'Commit an offence or intimidate, insult or annoy any person', which is the gist of the offence of 'Criminal trespass' under Section 441 of the Penal Code. *They manage to find a habitat in places which are mostly filthy or marshy, out of sheer helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so where.* The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice.[82] (Ananth, emphasis added)

The state government's counsel also raised a point about the lawless behavior of the pavement dwellers and that it was incumbent upon the State, to protect the law and order, to evict them. To this, the judges held:

> The charge of the State Government, besides being contrary to these scientific findings, is born of prejudice against the poor and the destitute. Affluent people living in sky-scrapers also commit crimes varying from living on the gains of prostitution and defrauding the public treasury to smuggling. But, they get away….[83]

The judges, then ordered as follows:

> …pavement dwellers who were censused or who happened to be censused in 1970 should be given, though not as a condition precedent to their removal, alternate pitches at Malavani or, at such other convenient place as the Government considers reasonable but not farther away in terms of distance; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their re-settlement; slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purpose, in which case, alternate

[82] Ibid., paragraph 49.
[83] Ibid., paragraph 50.

> sites or accommodation will be provided to them; … In order to minimise the hardship involved in any eviction, we direct that the slums, wherever situated, will not be removed until one month after the end of the current monsoon season, that is, until October 31, 1985, and, thereafter, only in accordance with this judgment.[84]

The importance of the decision in the Olga Tellis Case is in that the Supreme Court, persisting with the basic structure doctrine, internalized the provisions of Article 41 of the Constitution, being a part of the Directive Principles of State Policy, into Article 21 of the Constitution, and thus made it enforceable. Speaking for the constitutional bench, Justice Chandrachud held:

> *The forcible eviction of squatters, even if they are resettled in other sites, totally disrupts the economic life of the household.* It has been a common experience of the administrators and planners that when resettlement is forcibly done, squatters eventually sell their new plots and return to their original sites near their place of employment. Therefore, what is of crucial importance to the question of thinning out the squatters' colonies in metropolitan cities is to create new opportunities for employment in the rural sector and to spread the existing job opportunities evenly in urban areas. *Apart from the further misery and degradation which it involves, eviction of slum and pavement dwellers is an ineffective remedy for decongesting the cities.*[85] (Ananth, emphasis added)

That the bench rested its position on a larger philosophical premise, rather than restricting its concerns to the letter of the law, was evident when the judges cited an important study of the times and endorsed the argument there. The bench made it a point to cite excerpts from a publication by George, titled *How the Other Half Dies—The Real Reasons for World Hunger*:

> So long as thorough going land reform, regrouping and distribution of resources to the poorest, bottom half of the population does not take place, Third World countries can go on increasing their production until hell freezes and hunger will remain, for the

[84] Ibid., paragraph 57.
[85] Ibid., paragraph 55.

> production will go to those who already have plenty - to the developed world or to the wealthy in the Third World itself. Poverty and hunger walk hand in hand.[86]

And went on to close their judgment with a quotation from the same book:

> Malnourished babies, wasted mothers, emaciated corpses in the streets of Asia have definite and definable reasons for existing. Hunger may have been the human race's constant companion, and 'the poor may always be with us', but in the twentieth century, one cannot take this fatalistic view of the destiny of millions of fellow creatures. Their condition is not inevitable but is caused by identifiable forces within the province of rational, human control.[87]

In the short history of the working of our Constitution, the stage at which the Supreme Court decided the Olga Tellis Case was one where the political leadership that commanded a huge majority in the Lok Sabha did not find much inspiration from its own past where it had displayed a lot of determination to give effect to the provisions in the Directive Principles of State Policy, and had even battled it out with the judiciary. In that context, it turned out to be the Supreme Court's agenda to ensure that the Directive Principles were not mere pious wishes, but were indeed enforceable. The decision in the Keshavananda Case laid the foundations to this shift and the judges responded to the situation in such a manner that democracy, in the economic sense of the term, did not remain an ideal that was merely stated in the Preamble of the Constitution, but were enforced in the manner in which it should be. The basic structure was redefined in that way by the judiciary, and this was done at a time when the political leadership began moving away from this path.

[86] Ibid., paragraph 55.
[87] Ibid., paragraph 56.

8

Socialism and Liberalization

The adoption of the Economic Policy Resolution by the Lok Sabha, on July 21, 1991, marked the Indian state's shift away from the socialist paradigm. It should be considered a marker only in the formal sense of the term. The shift away from socialism was evident even in the decade before the 1990s, and a significant feature of the discourse during the 1980s was the series of interventions by the higher judiciary to enforce egalitarianism, as listed out in the Directive Principles of State Policy in general. It may be noted that Articles 39 (b) and (c) had, by this time, been interpreted as being a substantive means to achieve justice, social, economic, and political as enshrined in the Preamble of the Constitution. It is also significant, from the scope of this book, that the Supreme Court in the Minerva Mills Case upheld the insertion of the word *socialist* (along with *secular*) in the Preamble of the Constitution. The Constitution Bench, in that case held:

> We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice—social, economic, and political. We, therefore, put part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved….[1]

In that case, where the Constitution (Forty-second Amendment) Act, 1976 was reviewed and in which the Supreme

[1] AIR-1980-SC-1789.

Court struck down changes to Article 368 of the Constitution, the Supreme Court also held that the insertions to the Preamble as:

> not only within the framework of the Constitution but they give vitality to its philosophy; they afford strength and succor to its foundations…. These amendments furnish the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution. They offer promise of more, they do not scuttle a precious heritage.[2]

The basis for such interpretations, laid down in the Keshavananda Case, was taken to its logical end in the various decisions by the Supreme Court in the 1980s. Another important dimension is that the 1980s was also marked by the State, as defined in Article 12 of the Constitution, beginning to retreat from the socialist paradigm[3]; this was also a time when the higher judiciary sought to arrest the drift. The theme song of all these decisions was that Article 21 of the Constitution reinforces the Right to Life, a Fundamental Right, which is an inalienable human right declared by the Universal Declaration on Human Rights and the sequential conventions to which India is a signatory, and that these rights are derived from the Directive Principles of State Policy in the Constitution.[4] The

[2] Ibid., paragraph 23.

[3] Article 12 of the Constitution defines the State in the following words:

> In this Part, unless the context otherwise requires, 'the state' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

[4] Some of the important cases of this kind were: In *Bandhua Mukti Morcha v. Union of India* (AIR-1984-SC-802), the Supreme Court held that the right to live with human dignity, enshrined in Article 21, derives its life breath from the Directive Principles of State Policy, and that opportunities and facilities should be provided to the children to develop in a healthy manner and in conditions of freedom and dignity. Adequate facilities, just and human conditions of work, etc., are the

principle laid down in a catena of cases, decided during this period was that the Fundamental Rights can ill-afford to be consigned to the limbo of undefined premises and uncertain application. That will be a mockery of them. It was from this premise that the Supreme Court decided the Samatha Case, in 1997, to hold that the tribals have fundamental right to social and economic empowerment. As a part of right to development to enjoy full freedom, democracy offered to

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minimum requirements which must exist in order to enable a person to live with human dignity, and the State has to take every action. In *Subhash Kumar v. State of Bihar* (AIR-1991-SC-420), the court held that the Right to Life includes the right to enjoyment of pollution-free water and air for full enjoyment of life. In *Olga Tellis v. Bombay Municipal Corporation* (AIR-1986-SC-180), as we discussed in Chapter 7, the court had held that right to livelihood is an important facet of the Right to Life. In *C.E.S.C. Ltd. v. S. C. Bose* (1992-AIR-SC-202), it was held that right to social and economic justice is a Fundamental Right. Right to health of a worker is a Fundamental Right. Therefore, Right to Life enshrined in Article 21 means something more than mere survival of animal existence. The right to live with human dignity with minimum sustenance and shelter, and all those rights and aspects of life which would go to make a man's life complete and worth living, would form part of the right to life. Enjoyment of life and its attainment—social, cultural, and intellectual—without which life cannot be meaningful would embrace the protection and preservation of life guaranteed by Article 21. In *C.E.R.C. v. Union of India* (AIR-1995-SC-2834), the court held the right to health and social justice as a Fundamental Right of workers. Right to economic equality was held to be a Fundamental Right in *Dalmia Cement Bharat Ltd. v. Union of India* (1996-AIR-SCW-3652). Right to shelter was held to be a fundamental human right in *P. G. Gupta v. State of Gujarat* (1995-AIR-SCW-1540) and in such other cases as *M/s. Shantistar Builders v. Narayan Khimlal Totame* (AIR-1990-SC-630), *Chameli Singh v. State of U.P.* (1996-AIR-SCW-542), and *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan* (1996-AIR-SCW-4315). In *Delhi Transport Corporation v. D. T. C. Mazdoor Congress* (AIR-1991-SC-101), the Supreme Court had held that Right to Life would include the right to continue in permanent employment, which is neither a bounty of the employer nor can its survival be at the volition or mercy of the employer. The court had held that income is the foundation to enjoy many Fundamental Rights and when work is the source of income, the right to work would become as much a Fundamental Right.

them through the State's regulated power of good government that the lands in Scheduled Areas are preserved for social economic empowerment of the tribals.[5] In this case, the Supreme Court also discussed the idea of socialism, as enshrined in the Constitution, and hence it is relevant for the scope of this book.

Samatha Case

The case before the Supreme Court, in this instance, arose out of an appeal against a decision by the Andhra Pradesh High Court over mining leases in the tribal areas in the state. The point in issue, in this case, was whether the land in the Scheduled Areas could be transferred to non-tribals. On April 28, 1995, a Division Bench of the Andhra Pradesh High Court decided a case by Samatha, a registered society working among the tribals, challenging the lease of land in the Scheduled Areas to non-tribals. The challenge was based on the provisions of the Andhra Pradesh Scheduled Area Land Transfer Regulation, 1959, as amended by Regulation 2 of 1970. The High Court held that there was no prohibition on the grant of mining leases of government land in the Scheduled Area to the non-tribals.[6]

Section 3 of the Regulation of 1970, amending the Andhra Pradesh Scheduled Area Land Transfer Regulation, 1959,

[5] See Headnotes, Paragraph B of AIR-1997-SC-3297.

[6] There was another appeal, heard alongside, against another decision by the Andhra Pradesh High Court, on the contrary. In that appeal arising from S. L. P. (C) No. 21457 of 1993, filed by Hyderabad Abrasives and Minerals, another Division Bench, earlier had taken dramatically the opposite view and held that mining leases are illegal. In that case, the High Court had held that any lease to the non-tribals, even of government land situated in a Scheduled Area as void. Accordingly, the Division Bench directed the government to prohibit mining operations in the Scheduled Area, and that the mines stacked on the surface were permitted to be removed after proper permits were obtained.

was categorical insofar as prohibiting transfer of land in the Scheduled Areas to non-tribals. The provision read as follows:

> 3. Transfer of immovable property by a member of a Scheduled Tribe-
>
> (1)(a) Notwithstanding anything in any enactment, rule or law in force in the Agency tracts any transfer of immovable property situated in the Agency tracts by a person. Whether or not such person is a member of a Scheduled Tribe, shall be absolutely null and void, unless such transfer is made in favour of person, who is a member of a Scheduled Tribe or a Society, Andhra Pradesh Co-operative Societies Act, 1964 (Act 7 of 1964) which is composed solely of members of the Scheduled Tribes.
> (b) Until the contrary is proved, any immovable property situated in the Agency tracts and in the possession of a person who is not a member of Scheduled Tribe, shall be presumed to have been acquired by person or his predecessor in possession through a transfer, made to him by a member of a Scheduled Tribe.
> (c) Where a person intending to sell his land is not able to effect such sale, by reason of the fact that no member of a Scheduled Tribe is willing to purchase the land or is willing to purchase the land on the terms offered by such person, then such person may apply to the Agent, the Agency Divisional Officer or any other prescribed officer for the acquisition of such land by the State Government, and the Agent. Agency Divisional Officer or the prescribed officer as the case may be may by order, take over such land on payment of compensation in accordance with the principles specified in Section 10 of the Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961 (Act X of 1961) and such land shall thereupon vest in the State Government free from all encumbrances and shall be disposed of in favour of members of the Scheduled Tribes or a society registered or deemed to be registered under the Andhra Pradesh Co-operative Societies Act, 1964 (Act 7 of 1964) composed solely of members or in such other manner and subject to such conditions as may be prescribed.

Notwithstanding this regulation in place, the State Government of Andhra Pradesh granted mining licenses to a host of private players, all of those non-tribals, and the society challenged the grant of such licenses. It is also pertinent to note,

in this context, that the 1959 Act as well as the Regulation of 1970 were in accordance with Article 244 of the Constitution and the Fifth Schedule consequently.[7] Paragraph 5 of the Fifth Schedule, in fact, vests in the governor of a state to regulate the transfer of land in the tribal areas. It reads:

> 5. Law applicable to Scheduled Areas–
>
> (1) Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.
> (2) The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.
>
> In particular and without prejudice to the generality of the foregoing power, such regulations may-
>
> (a) Prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;
> (b) Regulate the allotment of land to members of the Scheduled Tribes in such area;
> (c) Regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.
>
> (3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.
> (4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

[7] Article 244 of the Constitution pertains to the administration of Scheduled Areas and Tribal Areas, and Clause (1) of the Article reads as follows: "The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Tripura and Mizoram" (see Constitution of India).

> (5) No regulation shall be made under this paragraph unless the Governor making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.[8]

The case before the Andhra Pradesh High Court was that the state government was clearly prohibited from granting mining leases to non-tribals in the scheduled area. A Division Bench of the Andhra Pradesh High Court, however, held that the Regulation does not prohibit transfer of government land by way of lease to the non-tribals. In addition, the High Court also held that the word *person*, in Section 3 of the Regulation, was applicable only to natural persons, namely, tribals and non-tribals and that the State did not constitute a *person* in that context. The High Court also held that the Regulation prohibits the transfer of land in Scheduled Area by a tribal to non-tribal natural persons, and hence the leases granted in accordance with the provisions of the Mining Act to non-tribals were valid.[9] On July 11, 1997, the three-member bench of the Supreme Court held by majority that the decision by the High Court was wrong.[10] In doing so, the majority dealt with the principles enunciated in Schedule V of the Constitution in extensive detail as well as the meaning of socialism, as enshrined in the Constitution. The judgment is also relevant for the concerns of this book in the sense that the tribals and their right to the land were discussed by the judges in detail.

In his leading judgment, Justice Ramaswamy cited the decision of the constitutional bench in the Waman Rao[11] Case, where the bench had observed that there was a strong link between the ownership of land and the dignity of the

[8] See Constitution of India.

[9] 1996-AIHC-316 (Andh Pra).

[10] The bench consisted of Justices K. Ramaswamy, S. Saghir Ahmad, and G. B. Pattnaik. The bench delivered a split judgment with Justices Ramaswamy and Sagir Ahmad constituting the majority and Justice Pattnaik dissenting. See *Samatha v. State of Andhra Pradesh and others* (AIR-1997-SC-3297).

[11] This has been dealt with in detail in the previous chapter of this book.

person to uphold land reforms legislation in Maharashtra to stress the point that "agricultural land is the foundation for a sense of security and freedom from fear. Assured possession is a lasting source for peace and prosperity."[12] Justice Ramaswamy then went on to specifically deal with the relevance of this to the tribal people. He said:

> Agriculture is the only source of livelihood for Scheduled Tribes, apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of their abode and work and living. It is a security and source for economic empowerment. Therefore, the tribes too have great emotional attachment to their lands. *The land on which they live and till, assures them equality of status and dignity of person and means to economic and social justice and potent weapon of economic empowerment in social democracy.*[13] (Ananth, emphasis added)

The judge then went on to cite the studies by scholars on the state of the tribals and their economy to buttress his point that the Constitution mandated measures to protect the rights of the tribals, and more specifically their right to carry on with agriculture in the forest lands. "Ninety per cent of the Scheduled Tribes," the judge said, "predominantly live in forest areas and intractable terrains." He then added:

> 95 per cent of them are below poverty line and totally depend upon agriculture or agriculture based activities and some of them turn out as migrant construction labour due to their displacement from hearth and home for the so-called exploitation of minerals and construction of projects.[14]

Dwelling at length on the legislative history involving the rights of the tribals, Justice Ramaswamy stressed the need for laws as well as the will to implement those, being a constitutional

[12] AIR-1997-SC-3297, paragraph 9.
[13] Ibid., paragraph 10.
[14] Ibid., paragraph 11.

mandate. "The magnitude of the problem," he said, "is of national importance which needs to be tackled and solved by Parliamentary law and effective enforcement."[15] He said:

> From the beginning of the British rule in India, the Legislature has adopted the policy to exclude some areas totally and some partially from the governance through the Executive Council and given power to the Governor of the Province and the Governor General/ Viceroy to administer them with their special responsibilities. The partially excluded areas had the dual control by the Executive with primacy given to the Governor of the Province to apply or to exclude the application of the laws made by the Legislature or the Executive Council to the partially excluded scheduled areas. *In either event the object was to prevent the tribals to get the wiles of the money-lenders and preservation of their property and customs and to allow the tribals autonomy of their living in accordance with their customs and culture.* Until the Simon Commission, the legislative protection was not available in that behalf. The Simon Commission found it necessary to bring the tribals to the main-stream of national life. In consequence, tribal area[s] was to be brought under the direct administration of the elected Governments by encouraging education, self-reliance and the provincial Government[s] were to devote special attention for their upliftment. But the scheme was not given effect to in the Constitution of India Act, 1935. As is seen, Sections 91 and 92 of the Government of India Act and the Cabinet Mission Statement of May 16, 1946, emphasised the special attention on the tribal areas.[16] (Ananth, emphasis added)

Justice Ramaswamy then discussed the different stages of the debate in the Constituent Assembly, before Article 244 and the Fifth Schedule was made part of the Constitution. It may be noted here that the report presented by the Subcommittee on the Rights of Citizens, Minorities and Tribal, and Excluded Areas, headed by Vallabhbhai Patel, on August 25, 1947, had recommended precautions, while the allotment of the lands to the non-tribals.[17] In its report, prepared after extensive consultations and debates, the subcommittee had said:

[15] Ibid., paragraph 31.

[16] Ibid., paragraph 32.

[17] The Committee was set up in accordance with the statement, on May 16, 1946, that the tribal areas and excluded areas required the special attention of the Constituent Assembly.

> The importance of protection for the land of the tribals has been emphasized earlier. All tenancy legislation which has been passed hitherto with a view to protect the aboriginal has tended to prohibit alienation of the tribal's land to non-tribals. Alienation of any kind, even to other tribals, may have to be prohibited or severely restricted according to the different stages of advancement. We find however that Provincial governments are generally alive to this question and that protective laws exist. We assume that these will continue to apply and as we have made special provision to see that land laws are not altered to the disadvantage of the tribal in future, we do not consider additional restrictions necessary. As regards the allotment of new land for cultivation or residence, however, we are of the view that the interest of the tribal needs to be safeguarded in view of the increasing pressure on lands everywhere. *We have proceeded accordingly that the allotment of vacant land belonging to the State in scheduled area should not be made except in accordance with special regulation made by the Government on the advice of the Tribal Advisory Council*.[18] (Ananth, emphasis added)

As in the case of several other provisions, the Drafting Committee was authorized by the Constituent Assembly to make changes subsequently, keeping in view the larger concerns.[19] Thus, when B. R. Ambedkar introduced the Draft Constitution, the Fifth Schedule (consequent to Article 215-A that became Article 244), as introduced on September 5, 1949,

[18] Rao (Ed.), Reports on Tribal and Excluded Areas in B. Shiva Rao, *Framing of India's Constitution, Select Documents*, Vol. 3, pp. 755–756.

[19] A meeting of the Advisory Committee, presided over by Vallabhbhai Patel, on December 7, 1947, resolved to authorize the Drafting Committee to make the necessary changes in this regard. See ibid., pp. 779–780. It may be noted that the Fifth Schedule in the Draft Constitution of 1948, Clause (6) as originally proposed reads as under:

> (i) alienation of allotment of land to non-tribals in Scheduled Areas, it shall not be lawful for a member of Scheduled Tribes to transfer any land in person who is not a member of the Scheduled Tribes;
> (ii) *no land in scheduled area vested in the State within such area shall be allotted to person who is not a member of the Scheduled Tribes except in accordance with the rules made in that behalf by the Governor in consultation with the Tribal Advisory Council for the State.* (Ananth, emphasis added)
>
> See ibid., p. 652.

contained a set of changes as presented before the Assembly earlier. The changes, relevant to the concerns of this book, in paragraph 5 of the Fifth Schedule, specifically contained a ban on thetransfer of government land in tribal areas to non-tribals. The transfer was passed by the Assembly without any member opposing the amendment on the same day, that is, September 5, 1949.[20] Citing all these, Justice Ramaswamy held:

> It would, therefore, be seen that before the Draft Constitution became paramount law and the Fifth Schedule as its integral part, the members of the Constituent Assembly deliberated to protect land, the precious asset to the tribals, for their economic empowerment, economic justice, social status and dignity of their person by retention of the land with the tribals not only belonging to them but also allotment of the Government land. *The proposal for allotment of the Government land to the non-tribals though was initially proposed but was ultimately dropped*. After restructuring Fifth Schedule, as presently found, the specific provision in the draft report to allot land to non-tribals was omitted which was accepted by the members of the Constituent Assembly without any demur or discussion.[21] (Ananth, emphasis added)

Justice Ramaswamy pointed out that the debate and the fact that the Fifth Schedule went through such important changes between the first draft and what was finally adopted:

> [W]ould manifest the animation of the founding fathers that land in the scheduled area covered by the Fifth Schedule requires to be preserved by prohibiting transfers between tribals and non-tribals and providing for allotment of land to the members of the Scheduled Tribes in such area and regulating the carrying on of the business by money-lenders in such area.[22]

The judge then held that Section 3 of the Regulation prohibiting transfer of land from a member of the Scheduled Tribes to a non-Scheduled Tribe as flowing out of the Fifth Schedule of the Constitution, and hence any transfer of land situated

[20] See CAD, Vol. IX for a full text of the proceedings in the Constituent Assembly, pp. 967–1001.

[21] AIR-1997-SC-3297, paragraph 34

[22] Ibid., paragraph 36.

in the Scheduled Areas by a person, whether or not such person is a member of a Scheduled Tribe, shall be absolutely null and void, unless such transfer is made in favor of a Scheduled Tribe, or a society registered or deemed to be registered under the Andhra Pradesh Co-operative Societies Act, 1964 and composed solely of members of the Scheduled Tribes.[23]

In doing so, Justice Ramaswamy relied on an earlier judgment by the Supreme Court, holding Section 3 of the Regulation as constitutional. In the Rami Reddy Case,[24] where the constitutional validity of the Regulation was questioned, the Supreme Court had said:

> As a matter of fact it would be unreasonable and unfair to hold that the impugned provisions are unreasonable.... Surely it is not unreasonable to restore unto the 'tribals' what originally belonged to them but of which they were deprived as a result of exploitative invasion on the part of 'non-tribals.' In the first place should lessons not be drawn from past experience to plug the loopholes and prevent future recourse to devices to flout the law. The community cannot shut its eyes to the fact that the competition between the 'tribals' and the 'non-tribals' partakes of the character of a race between a handicapped one legged person and an able-bodied two legged person. True, transfer by 'non-tribals' to 'non-tribals' would not diminish the pool. It would maintain status quo. *But is it sufficient or fair enough to freeze the exploitative deprivation of the 'tribals' and thereby legalize and perpetuate the past-wrong instead of effacing the same. As a matter of fact it would be unjust, unfair and highly unreasonable merely to freeze the situation instead of reversing the injustice and restoring the status quo ante.* The provisions merely command that if a land holder voluntarily and on his own volition is desirous of alienating the land, he may do so only in a favour of a 'tribal'. It would be adding insult to injury to impose such a disability only on the tribals (the victims of oppression and exploitation themselves) and discriminate against them in this regard whilst leaving the 'non-tribals' to thrive on the fruits of their exploitation at the cost of 'tribals'. The 'non-tribal' economic exploiters cannot be installed on the pedestal of immunity and accorded a privileged treatment

[23] Ibid., paragraph 41.

[24] *P. Rami Reddy and Others v. State of A.P. and another* (AIR-1988-SC-1626).

> by permitting them to transfer the lands and structures, if any, raised on such lands by 'non-tribals' and make profits at the cost of the tribals. It would not only be tantamount to perpetuating the exploitation and injustice, it would tantamount to placing [a] premium on the exploitation and injustice perpetrated by the non-tribals… *It must also be emphasized that to freeze the pool of lands available to the 'tribals' at the present level is virtually to diminish the pool…* No unreasonableness therefore is involved in making the prohibition against transfer to 'non-tribals' applicable to both the 'tribal' as also to the 'non-tribal' owners in the scheduled area. As a matter of fact it would have been unreasonable to do otherwise. In the absence of protection, the economically stronger 'non-tribals' would in course of time devour all the available lands and wipe out the very identity of the tribals who cannot survive in the absence of the only source of livelihood they presently have. It is precisely for this reason that the architects of the Constitution have with farsight and foresight provided in paragraph 5(2) of Fifth Schedule… More so, if the factor that the original acquisition by the 'non-tribals' 'from 'tribals' was polluted by the sins of exploitation committed by the 'non-tribals' is not ignored.[25] (Ananth, emphasis added)

It may be noted here that the Division Bench of the Andhra Pradesh High Court must have followed this judgment rather than dismissing the petition by Samatha, a society that filed the case against leasing out the land in the Scheduled Areas to non-tribal mining companies. But then, the High Court interpreted the provisions in a manner that Section 3 of the Regulation applied only to *natural persons* and that the state government did not constitute *person* as laid out in the law. Justice Ramaswamy negated this decision of the High Court, and citing a catena of case laws in that regard, the judge held:

> It would, therefore, be settled law that the question whether or not the word 'person' used in a statute would include the State has to be determined with reference to the provisions of the Act, the aim and its object and the purpose the Act seeks to subserve. There is no reason to consider the word 'person' in a narrow

[25] Ibid., paragraph 19. The judgment was delivered by Justice M. P.Thakkar to which Justice B. C. Ray agreed. The case was decided on July 14, 1988.

> sense. It must be construed in a broader perspective, unless the statute, either expressly or by necessary implication, exempts the State from the operation of the Act as against the State or would include 'State Government.'[26]

The judge thereafter went on to chart a distinct course in order to establish his point. And in doing so, Justice Ramaswamy took the law, as laid down in the Rami Reddy Case, to a further distance on the same track. The agenda of egalitarianism, in his view, was fundamental to interpreting the Regulation of 1970. He said:

> Justice is an attribute of human conduct. Law, as a social engineering, is to remedy existing imbalances, as a vehicle to establish an egalitarian social order in a Socialist Secular Bharat Republic… Welfare State is a rubicon between unbridled individualism and communism. All human rights are derived from the dignity of the person and his inherent worth. Fundamental Rights and Directive Principles of the Constitution have fused in them as fundamental human rights as indivisible and inter-dependent. The Constitution has charged the State to provide facilities and opportunities among the people and groups of people to remove social and economic inequality and to improve equality of status. Article 39(b) enjoins the State to direct its policy towards securing distribution of the ownership and control of the material resources of the community as best to subserve the common good. The founding fathers with hind sight, engrafted with prognosis, not only inalienable human rights as part of the Constitution but also charged the State as its policy to remove obstacles, disabilities and inequalities for human development and positive actions to provide opportunities and facilities to develop human dignity and equality of status and of opportunity for social and economic democracy. Economic and social equality is a facet of liberty without which meaningful life would be hollow and [be a] mirage.[27]

Justice Ramaswami then dwelt at length on the United Nations Convention on the Right to Development to drive home the point that the Regulation of 1970, in general, and Section 3 of that, impugned in the case herein, was indeed a necessary condition. The judge then went on to deal with the judgments

[26] AIR-1997-SC-3297, paragraph 62.
[27] Ibid., paragraph 73.

in a catena of cases that widened the scope of Article 21 and the Right to Life as a Fundamental Right. This, he held, was as much relevant in the context of socialism as enshrined in the Preamble of the Constitution. Justice Ramaswami said:

> It is necessary to consider at this juncture the meaning of the word 'socialism' envisaged in the Preamble of the Constitution. *Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution*. The Fundamental Rights and the Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism. The word "socialist" used in the Preamble must be read from the goals Articles 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate Articles seek to establish, i.e., to reduce inequalities in income and status and to provide equality of opportunity and facilities. Social justice enjoins the Court to uphold Government's endeavour to remove economic inequalities, to provide a decent standard of living to the poor and to protect the interest of the weaker sections of the society so as to assimilate all the sections of the society in a secular integrated socialist Bharat with dignity of person and equality of status to all.[28] (Ananth, emphasis added)

Relying upon the decision by the Constitution Bench of the Supreme Court in the Minerva Mills Case that the edifice of our Constitution is built upon the concept crystallized in the Preamble, Justice Ramaswamy stressed that the resolution to constitute ourselves into a socialist State carries with it the obligation to secure to the people, justice, social, economic, and political. Justice Ramaswami also referred to the decision in the *D. S. Nakara v. Union of India* Case where socialism as enshrined in the Preamble was defined by a Constitution bench.[29] Defining socialism in his own way, Justice Ramaswamy held:

> A socialistic society involves a planned economy which takes note of time and space considerations in the distribution and pricing of output. It would be necessary for both the efficient working of

[28] Ibid., paragraph 80.

[29] AIR-1983-SC-130. In that case, the bench had held:

> The preamble to the Constitution envisages the establishment of a socialist republic. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. Article 41 enjoins the State

socialist enterprises and the prevention of unplanned and anarchical expansion of private enterprises. *The Indian conception of socialism with democracy with human dignity is by creation of opportunities for the development of each individual and not the destruction of the individual. It is not for the merging of the individual in the society.* The Indian socialist society wants the development of each individual but requires this development to be such that it leads to the upliftment of the society as a whole. Fundamental duties in Chapter VI-A of the Constitution to bear meaningful content, facilities and opportunity on equal footing is the fundamental condition of a socialist society. The more the talent from Backward Classes and areas get recognition and support, the more socialist will be the society. Public Sector and Private Sector should harmoniously work. *The Indian approach to socialism would be derived from Indian spiritual traditions. Buddhism, Jainism, Vedantic and Bhakti Hinduism, Sikhism, Islam and Christianity have all contributed to this heritage rooted to respect for human dignity and human equality.* While imposing restrictions on the right to private property even to the extent of abolishing it where necessary in the social and public interest, it permits private enterprise in economic activity and makes for a mixed economy rather than a completely socialised economy. It abhors violence and class war and hierarchical class structure and pins its faith on non-violence, sacrifice, and dedication to the service of the poor and as a natural consequence, its implementation is envisaged through Parliamentary democracy planned economy and the rule of law rather than through a violent revolution or a dictatorship in any form. Indian socialism, therefore, is different from Marxist or scientific socialism.[30] (Ananth, emphasis added)

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to secure public assistance in old age, sickness and disablement. Every state action whenever taken must be directed and must be so interpreted as to take society one step towards the goal of establishing a socialist welfare society. While examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble provides a reliable yardstick to hold one way or the other.

The Constitution bench, in that case, was constituted by Chief Justice Y. V. Chandrachud, along with Justices V. D. Tulzapurkar, D. A. Desai, O. Chinnappa Reddy, and Baharul Islam. The subject matter of the case involved the pension scheme for government servants, and the bench ruled that pension was not a bounty but a right. Justice Desai spoke for the bench as a whole in that case. (See Headnotes, paragraph C iv)

[30] AIR-1997-SC-3297, paragraph 103.

Justice Ramaswamy went on to cite the decision by the Constitution Bench of the Supreme Court in the *State of Karnataka v. Ranganatha Reddy* Case[31] as well as the decision in the *Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Ltd.*,[32] in which another constitution bench reiterated the same view.

It may be pointed out here that the Constitution Bench in the Sanjeev Coke Manufacturing Company Case had held that though the word *socialist* was introduced in the Preamble

[31] AIR-1978-SC-215. In that case, a nine-judge bench of the Supreme Court upheld the nationalization of contract carriages. In doing so, the bench referred to Article 39 (b) of the Constitution and said:

> [I]t was held that one of the principal aims of socialism is the distribution of the material resources of the community in such a way as to subserve the common good. This principle is embodied under Article 39(b) of the Constitution as one of the essential directive principles of State polity. The key word is distribution and the genus of the Article, if we may say so, cannot but be given full play as it fulfils the basic purpose of restructuring the economic order. Each word in this Article has a strategic role and the whole Article is a social mission. It embraces the entire material resources of the community. Its task is to distribute such resources, its goal is to undertake distribution as best to subserve the common good. It reorganises by such distribution the ownership and control.

[32] AIR-1983-SC-239. In that case, the Supreme Court held:

> While considering Article 39(b) of the Constitution, that the broad egalitarian principle of economic justice was implicit in every directive principle and, therefore, a law designed to promote a directive principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would most certainly advance the broader egalitarian principle and desirable constitutional goal of social and economic justice for all. If the law was aimed at the broader egalitarianism of the Directive Principles, Article 31C protected the law from needless, unending and rancorous debate on the question whether the law contravened Article 14's concept of the equality before the law. The law seeking the immunity afforded by Article 31C must be a law directing the policy of the State towards securing a Directive Principle and the connection with the Directive Principle must not be some remote or tenuous connection. The object of the nationalisation of the coal mine is to distribute [a] nation['s] resources (see paragraph 16).

by a later amendment of the Constitution, that socialism has always been the goal is evident from the Directive Principles of the State Policy. The amendment was only to emphasize the urgency. Ownership, control, and distribution of national productive wealth for the benefit and use of the community, and the rejection of a system of misuse of its resources for selfish ends is what socialism is about, and the words and thought of Article 39(b) echo the familiar language and philosophy of socialism as expounded generally by all socialist writers. Socialism is, first of all, a protest against the material and cultural poverty inflicted by capitalism on the mass of the people. Nationalization of coal mines for distribution was upheld as a step towards socialism.[33] Justice Ramaswamy, thereafter, went on to say:

> It is an established rule of interpretation that to establish Socialist Secular Democratic Republic, the basic structure under the rule of law, pragmatic broad and wide interpretation of the Constitution makes social and economic democracy with liberty, equality of opportunity, equality of status and fraternity a reality to 'we, the people of India', who would include the Schedule[d] Tribes. All State actions should be to reach the above goal with this march under rule of law. *The interpretation of the words 'person' 'regulation' and 'distribution' require to be broached broadly to elongate socio-economic justice to the tribals.* The word 'regulates' in para 5(2)(b) of the Fifth Schedule to the Constitution and the title of the Regulation would not only control allotment of land to the Tribes in Scheduled area but also prohibits tra[n]sfer of private or Government's land in such areas to the non-tribals. While later clause (a) achieves the object of prohibiting transfers inter vivos by tribals to the prohibiting or non-tribals inter se, the first clause includes the State Government or being an juristic person integral scheme of para 5(2) of Schedule. *The Regulation seeks to further achieve the object of declaring with a presumptive evidence that the land in the Scheduled Areas belongs to the Scheduled Tribes and any transfer made to a non-tribal shall always be deemed to have been made by a tribal unless the transferee establish the contra.* It also prohibits transfer of the land in any form known to law and declared such transfer as void except by way of testamentary disposition by a tribal to his kith and kin/tribal or by partition among them… If a tribal is unwilling to purchase land from

[33]Ibid.

> a non-tribal, the State Government is enjoined to purchase the land from a non-tribal as per the principles set down in the regulations and to distribute the same to a tribal or a co-operative society composed solely of tribals.[34] (Ananth, emphasis added)

With this, he upheld the appeal by Samatha, the registered society that challenged the transfer of land in the Scheduled Areas to mining companies owned by non-tribals and set aside the judgment, on the contrary, by the Andhra Pradesh High Court. Justice Saghir Ahmad, in a separate but identical judgment, concurred with Justice Ramaswamy to constitute the majority in this case.[35] The significance of the majority decision in this case lay in the fact that the Supreme Court elongated the constitutional commitment to redistributive justice for the tribals. In doing so, the court made a specific reference to Article 39 (b) and applied that to the Fifth Schedule of the Constitution. The context in which this was made—after Articles 31 and 19 (1) (f) were deleted from the Constitution—clearly paved the path to some significant judgments in the future. In the instant case, for instance, it laid down the rights of the tribal people, whose livelihood depended on the land which they tilled, against alienation of property. This certainly was evidence of the possibility to interpret the Constitution in general and the Fundamental Rights in particular, in a manner that subserved the right to property of the poor and the marginalized in society. The Supreme Court, in this case, furthered the spirit in which the constitution bench decided in the Keshavananda Case, and as the law evolved thereafter in the Minerva Mills Case and in the Waman Rao Case. The aid to this interpretation also came from the decision in the Maneka Gandhi Case,[36] where the principle of due-process-of-law overwhelmed that

[34] AIR-1997-SC-3297, paragraph 108.

[35] Justice Pattnaik's dissenting judgment in this case was based on an interpretation that the government did not constitute a *person*, and hence Section 3 of the Regulation of 1970 did not apply to this case.

[36] *Maneka Gandhi v. Union of India* (AIR-1978-SC-597). In that case, Justice Bhagwati, speaking for the majority, had observed as follows:

> The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to

of procedure-established-by-law. The majority in this case held that where two competing public purposes claim preferential policy decision, option to the State should normally be to elongate and achieve the constitutional goal; and that the court too shall adopt this principle in the course of interpretation of statutes.

While these were foregrounded in large measure when the Supreme Court set aside land acquisition proceedings (beginning March 2011), there was indeed an interregnum, so to say, in this phase. That was pronounced in the Bharat Aluminium Company Limited (BALCO) Case, decided on December 10, 2001, when an appeal against privatization of a state-owned industrial corporation was dismissed by a three-member bench of the apex court.

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make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation.' Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that 'natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances'. The Audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.

The BALCO Case

The BALCO was incorporated in 1965 as a public sector corporation under the Government of India. Those were times when the dominant policy was to vest manufacturing activities in the public sector. BALCO had set up two plants: one at Korba (was part of Madhya Pradesh at that time, and now part of Chhattisgarh since the new state came into existence in 2000) and another at Bidhanbag in West Bengal. The two integrated aluminium manufacturing plants were engaged in the manufacture and sale of aluminium metal, including wire rods and semi-fabricated products. By the turn of the century, the company had a paid-up share capital of ₹488.85 crores, which was owned and controlled by the Government of India. The land on which the Korba Plant stood was let on a 99-years lease to the company by the then Government of Madhya Pradesh.

Since 1991, consequent to a substantive change in the economic policy of the Union Government,[37] the Union Government set up a commission to study and recommend for the disinvestment of the government's share in the various Central Public Sector Undertakings (PSUs). This commission, known as the Disinvestment Commission, in its second report submitted in April, 1997, recommended that BALCO be privatized. The recommendation which it made was that the government may immediately disinvest its holding in the company by offering a significant share of 40 percent of the equity to a strategic partner. The report further advised that there should be an agreement with the selected strategic partner specifying that the government would, within two years, make a public offer in the domestic market for further sale or shares to institutions, small investors, and employees, thereby bringing down its holding to 26 percent. The Commission also recommended

[37] This change was spelt out categorically in a resolution moved by Manmohan Singh, then the Union Finance Minister, in the Parliament. The resolution was discussed and approved by a large majority in the House. The ruling Congress as well as the BJP, which constituted the main opposition party in the House, supported the resolution.

that there should be an ongoing review of the situation and the government may disinvest its balance equity of 26 percent in full, in favor of investors in the domestic market at the appropriate time. The Commission had recommended the appointment of a financial advisor to undertake a proper valuation of the company and to conduct the sale process.

Subsequently, in June 1998, the Disinvestment Commission recommended that as much as 51 percent of BALCO's shares be offered to a single entity and that the management of the company be transferred to a private investor forthwith. Meanwhile, on March 3, 2000, the Union Cabinet approved a proposal from the Ministry of Mines to reduce the share capital of BALCO from ₹488.8 crores to ₹244.4 crores.[38] Around the same time, Jardine Fleming, a global consultant was employed to execute the disinvestment. Bids were invited and as on June 30, 2000, eight companies had submitted bids to buy the company.[39] In the end, on February 21, 2001, the bid by Sterlite Industries at ₹551.5 crores was accepted, and the government communicated its decision to the company on the same day. Petitions challenging the decision were filed in the various High Courts soon after, and these were transferred to the Supreme Court. Among those were petitions by

[38] By this time, the government policy was to ensure cash flow into its coffers by way of selling its stakes to the PSUs. The decision, in the instant case, ensured a cash flow of ₹244.4 crores to the Union Government in the financial year 1999–2000.

[39] The companies that submitted bids were: (1) Sterlite Industries India. Ltd., (2) HINDALCO Industries Ltd., (3) Tranex Holding Inc., (4) Indian Minerals Corporation Plc., (5) VAW Aluminium AG, Germany, (6) ALCOA, USA, (7) Sibirsky, Russia, and (8) MALCO. M/S Jardine Fleming, a global advisor, made an analysis of the various bids on the basis of the financial and technical capability, familiarity with India, and overall credibility, and in the course, rejected two of the bidders: Indian Minerals Corporation Plc. and Tranex Holding Inc. The inter-ministerial group, set up by the Union of India, accepted the expression of interest of six out of eight parties, and it also decided that the bids of Sterlite and MALCO be treated as one. Two of these five bidders, VAW Aluminium AG, Germany and Sibirsky, Russia dropped out, leaving the field to ALCOA, USA, HINDALCO, and Sterlite. They inspected BALCO between September 2000 to December 2000.

the State Government of Chhattisgarh (on the ground that the transfer of the shares amounted to transfer of the lease of the land from the government to the private bidder), and another one by the BALCO employees' union (that the disinvestment would affect their terms of employment adversely).

A three-judge bench of the Supreme Court,[40] deciding the case on December 10, 2001, dismissed the petitions and upheld the disinvestment proposal by which BALCO, hitherto a Central PSU, was to be transferred to Sterlite, a private player. The transfer, no doubt, entailed the private sector player paying for the assets and the company a sum, as determined by the bid and that money being put into the consolidated funds of the Government of India. A calling attention motion against the scheme was defeated in both the Houses of Parliament and the entire scheme, as it was, was deemed to have the approval of the Parliament.[41] In doing so, the Supreme Court relied upon the R. C. Cooper Case.[42] It may be noted that in the R. C. Cooper Case, the court had decided against the nationalization of private sector banks and in the instant case, the dispute involved a measure in the opposite

[40] AIR-2002-SC-350. The three-judge bench, in this case, consisted of Justices B. N. Kirpal, V. Shivraj Patil, and P. Venkatarama Reddy. The unanimous judgment, dismissing the petitions, was delivered by Justice Kirpal.

[41] It may be noted here that there was no such approval necessary in any case, and the discussion in the Parliament was a move by the parties in the opposition at that time.

[42] AIR-1970-SC-564. It may be noted that the Supreme Court, in that case, had said:

> It is again not for this Court to consider the relative merits of the different political theories or economic policies. ... This Court has the power to strike down a law on the ground of, want of authority, but the court will not sit in appeal over the policy of the Parliament in enacting a law....

It may also be stressed here that the apex court, in the end, struck down the nationalization of private sector banks. The R. C. Cooper judgment, incidentally, was overwhelmed by the Constitution (Twenty-fifth Amendment) Act, 1971, and upheld in the Keshavananda Case.

direction. Justice Kirpal, speaking for the two others, held: "Applying the analogy, just as the court does not sit over the policy of the Parliament in enacting the law, similarly, it is not for this Court to examine whether the policy of this disinvestment is desirable or not."[43]

Justice Kirpal went on to cite the Supreme Court's judgment in the Narmada Bachao Andolan Case to hold his point.[44] He held:

> … it is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because, it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.[45]

Having said that, Justice Kirpal went on to discuss the disinvestment policy and its contours in such an extensive manner to hold that the apprehensions raised by the Union about the terms of employment of the workers being adversely impacted in the event of privatization were outside the court's purview. He said:

> Process of disinvestment is a policy decision involving complex economic factors… In matters relating to economic issues, the

[43] Ibid., paragraph 34.

[44] In the *Narmada Bachao Andolan v. Union of India and Others* [(2000) 10 SCC 664], in which the validity of the establishment of a large dam was raised, the Supreme Court had held as follows:

> It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon, except to the extent permissible under the Constitution.... (see paragraph 229)

[45] AIR-2002-SC-350, paragraph 46.

> government has, while taking a decision, right to 'trial and error' as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the company is conducting its business, inasmuch as its policy decision may have an impact on the workers' rights, nevertheless, *it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law*. Even a government servant, having the protection of not only Articles 14 and 16 of the Constitution but also of Article 311, has no absolute right to remain in service. For example, apart from cases of disciplinary action, the services of government servants can be terminated if posts are abolished. If such employee cannot make a grievance based on Part III of the Constitution or Article 311 then, it cannot stand to reason that like the petitioners, non-government employees working in a company which by reason of judicial pronouncement may be regarded as a state for the purpose of Part III of the Constitution, can claim a superior or a better right than a government servant and impugn it[]change of status. *In taking of a policy decision in economic matters at length, the principles of natural justice have no role to play.* While it is expected of a responsible employer to take all aspects into consideration including welfare of the labourer before taking any policy decision that, by itself, will not entitle the employees to demand a right of hearing or consultation prior to the taking of the decision.[46] (Ananth, emphasis added)

And contrary to the *principle* enunciated in the earlier part of the judgment that the judiciary shall not hold a view on the correctness or otherwise of a policy, Justice Kirpal, speaking for the bench, held:

> The policies of the government ought not to remain static. With the change in economic climate, the wisdom and the manner for the government to run commercial ventures may require reconsideration. What may have been in the public interest at a point of time, may no longer be so. The government has taken a policy decision that it is in public interest to disinvest in BALCO. An elaborate process has been undergone and majority shares sold. It cannot be said that public funds have been frittered away. In this

[46] Ibid., paragraph 47.

> process, the change in the character of the company cannot be validly impugned. While it was a policy decision to start BALCO as a company owned by the government, it is as a change of policy that disinvestment has now taken place. If the initial decision could not be validly challenged on the same parity of reasoning, the decision to disinvest also cannot be impugned without showing that it is against any law or mala fide.[47]

It is pertinent to note here that such a position, in fact, was a deviation from the law, as established by the Constitution Bench in the Minerva Mills Case in which the nationalization of a private textile mill was upheld; and the decision in that case was based on an interpretation of the Constitution as such and with the aid of the Preamble at one level and Article 39 (b) at another level. In other words, the three-member bench, in this instance, seemed to have thought in a manner contrary to that in which the constitution bench had thought in the Minerva Mills Case.

In a reference to the Samatha Case, Justice Kirpal expressed his own reservation that any interpretation of a constitutional provision, such as the Fifth Schedule, was best left to a constitution bench and that the Samatha Case was decided by a 2:1 majority.[48] Justice Kirpal, however, had another reason to dismiss the petition. The provisions of the Madhya Pradesh Land Revenue Code, 1959 and section 165, in particular, did not correspond to Section 3 of the Andhra Pradesh Regulation of 1970. Section 165 (6) of the code, as amended in 1976, read as follows:

> Notwithstanding anything contained in 502 sub-section 1, the right of Bhumiswami belonging to a tribe which has been declared to be an aboriginal tribe by the state government, by a notification in that behalf for the whole or part of the area to which the Code applies shall - i. in such areas as are predominantly inhabited by aboriginal tribes and from such date as the state government may, by notification specify, not be transferred nor it shall be transferable either by

[47] Ibid., paragraph 51.

[48] Ibid., paragraph 71. It may be noted, in this context, that in the instant case, too, the bench consisted of only three judges and was not a constitution bench.

> way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe in the area specified in the notification; ii. in areas other than those specified in the notification under clause i., not be transferred or be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe *without the permission of a revenue officer not below the rank of collector, given for reasons to be recorded in writing*.[49] (Ananth, emphasis added)

The bench could have referred the instant case to a constitution bench; the judges could have asked the petitioners to amend the prayer in the case and challenge the Madhya Pradesh Land Revenue Code, 1959, on the ground that it did not conform to the provisions in the Fifth Schedule of the Constitution. Neither of the two was done, and instead the bench simply dismissed the petition, by the State Government of Chhattisgarh, for the following reason:

> In the instant case, either the land was acquired and then given on lease by the state government to BALCO or permission was given by the district collector for transfer of private land in favour of BALCO. This was clearly permissible under the provisions of section 1656. as it then stood and it is too late in the day, 25 years after the last permission was granted, to hold that because of this disinvestment, it must be presumed that there is a transfer of land to the non-tribal in the year 2001 even though the land continues to remain with BALCO to whom it was originally transferred. The giving of land to BALCO on lease was in compliance with the provisions of section 1656 of the Revenue Code. Moreover, change of management or in the shareholding does not imply that there has now been any transfer of land from one company to another. If the original grant of lease of land and permission to transfer in favour of BALCO between the years 1968 and 1972 was valid, then, it cannot now be contended that there has been another transfer of land with the government having been reduced its stake to 49%. Even

[49] It may be noted that this was on the lines of the Fifth Schedule, as it was before the amendment introduced at the drafting stage (as discussed in the previous section of this chapter), and thus allowed transfer of tribal land to non-tribals. The section also carried an explanation that read as: For the purposes of this sub section, the expression *otherwise* shall not include lease.

> if BALCO had been a non-public sector undertaking, the transfer of land to it was not in violation of the M.P. Land Revenue Code.[50]

Justice Kirpal did not stop there. Speaking for the bench, the judge also went on to restrict the scope of public interest litigations. For among the petitions in this case, was one by B. L. Wadhera, a public spirited litigant who had filed similar cases earlier too. Citing a catena of cases where the Supreme Court, in recent times, had dismissed such cases, Justice Kirpal held:

> It will be seen that whenever the Court has interfered and given directions while entertaining PIL, it has mainly been where there has been an element of violation of Article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage. In those cases also, it is the legal rights which are secured by the courts. We may, however, add that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the government in exercise of their administrative power. No doubt, a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in a court of law, but, a public interest litigation at the behest of a stranger ought not to be entertained. Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless the Court is satisfied that there has been violation of Article 21, and the persons adversely affected, are unable to approach the Court.[51]

"In a democracy," he held:

> it is the prerogative of each elected government to follow it[s] own policy. Often a change in government may result in the shift in focus or change in economic policies. Any such change may result

[50] AIR-2002-SC-350, paragraph 75.

[51] Ibid., paragraph 88. The bench then held that:

> the decision to disinvest and the implementation thereof is purely an administrative decision relating to the economic policy of the state and challenge to the same at the instance of a busybody cannot fall within the parameters of public interest litigation. On this ground alone, we decline to entertain the writ petition filed by Shri B. L. Wadhera. (see paragraph 89)

> in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court.[52]

The decision in the BALCO Case, as it came in the context of similar judgments in the Narmada Bachao Andolan Case, was indeed an instance where the pendulum swung away from the spirit and the content in the Samatha Case. It appeared that the judiciary, as it did when the Supreme Court decided in the Golaknath Case, the Bank Nationalization Case, and in the Privy Purses Case, had moved away from the constitutional commitment to socialism. The political establishment's shift in a similar direction made it appear that the idea of socialism, as enshrined in the Preamble and structured around Article 38 and 39 (b) and (c) of the Constitution, brought to the fore since Keshavananda and elongated in the Olga Tellis Case were on a course of retreat. This however changed with the Supreme Court decisions beginning March 2011, setting aside land acquisition proceedings under the provisions of the Land Acquisition Act, 1894.

The Dev Sharan Case

Acquisition of private property, or nationalization, ceased to be the government's policy even in the 1980s. A case in point was that of the cotton textile mills in Bombay. A number of them, in the private sector, found their markets shrinking. Apart from the obsolete technology, their market share began to decline significantly due to the advent of polyester fiber. In another time, such mills were nationalized and brought under the National Textile Corporation. The 1980s witnessed a crisis in the case of the NTC itself, and the government at that time was not really concerned about protecting employment in the sector. The private

[52] Ibid., paragraph 91.

mills in Bombay, faced with a serious crisis, were waiting for an opportunity to close down. A strike, called for by an independent labor union leader, Datta Samant, was used as an opportunity by the mill owners. The government let the mills close down and several thousand workers were simply left in the lurch. Rather than nationalization, the thinking began to veer around privatization. The July 1991 economic policy resolution formalized this thinking. An official paper, in fact, recommended the closure of as many as 244 Central public sector enterprises, and more than half of those happened to be units that were nationalized after they were rendered unworthy by private entrepreneurs. All this could be the subject matter of another study.

As for the concerns of this book, the decades after 1991, acquisition of private land had turned in into an issue and apart from resistance to such moves on the ground, challenges against such acquisitions in the courts and the response of the Supreme Court have assumed a lot of importance. One aspect of that was seen in the Samatha Case and that involved land in the Scheduled Areas. Another dimension of this is the acquisition of agricultural land, in regions close to the metropolitan towns, becoming commonplace. And in most of these, if not all, the various state governments invoked provisions of the Land Acquisition Act, 1894 to take away land from the farmers and hand them over to corporates for industrial development or to private builders for housing projects. Some of these moves by the State were discussed in the Supreme Court, and the Dev Sharan Case was among the first of these moves in which the Supreme Court struck down such acquisitions. It may be noted here that the Supreme Court, in this case as well as a couple of others, struck down the acquisition on procedural grounds involving a specific provision of the Land Acquisition Law, 1894, and also raised larger constitutional questions involving the Fundamental Rights and the Directive Principles of State Policy while doing so. On March 7, 2011, a Supreme Court bench consisting of Justices G. S. Singhvi and Asok Kumar Ganguly struck down acquisition of agricultural land in the Saharanpur District,

Uttar Pradesh; the land was acquired for the construction of a district jail and was part of a scheme for building modern jails in several parts of Uttar Pradesh.[53]

The facts of the case, in this instance, are as follows: Appellants Dev Sharan and others were aggrieved by the acquisition of their fertile agricultural land by the Uttar Pradesh government for construction of a modern jail in Shahjahanpur by invoking the emergency provisions of the Land Acquisition Act, 1894, and without conducting an enquiry where the land owners could have raised their objections. The Allahabad High Court upheld the acquisition, and the Special Leave Petition was directed against this judgment of the Allahabad High Court.

It will be pertinent, at this stage, to state the relevant provisions of the Land Acquisition Act, 1894, such as Sections 4 (1), 5A, and 6 that specify the requirement in case private land was to be acquired for a *public purpose*. Section 4 (1) of the Act provides for the publication of the notification.[54] The next stage in the acquisition procedure is provided by Section 5 A of the Act, and it gives an opportunity to the owner of the land, notified for acquisition, placing his objections.[55] Section 6, thereafter, lays down that on receipt of a report from the authority (the

[53] *Dev Sharan and Others v. State of Uttar Pradesh and Others* [(2011) 4 SCC 769].

[54] Section 4 (1) reads as:

> Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company a notification to that effect shall be published in the official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality[, including] the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of the notification.

[55] Section 5 A reads:

> (1) Any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to

District Collector) after the 5A enquiry, the Government may notify the acquisition of the said property. The Act also lays down that the time taken between the date of the notification under Section 4 (1) of the Act and Section 6 shall be less than one year. However, Section 17 of the Act provides for dispensing with the enquiry under Section 5 A; in other words, acquisition is possible without hearing the potential loser.[56]

In his petition before the Allahabad High Court, Dev Sharan, one of those whose lands were sought to be acquired, challenged the acquisition on two grounds; one that there were barren lands elsewhere that could be acquired for the purpose of building a jail; and two, that there was no emergency as such, and hence invoking Section 17 of the 1894 Act and the consequent waiver of the enquiry under Section 5 A of the Act was unwarranted and that it denied him the right to

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be needed for a public purpose or for a company may, within thirty days from the date of the publication of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under subsection (1) shall be made to the Collector in writing and the Collector shall give the objector, an opportunity to be heard in person or by any person authorised by him in this behalf or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has been notified under Section 4, subsection (1), or make different reports in respect of different parcels of such land, to the appropriate Government containing his recommendations on the objections, together with the record of the proceedings held by him for the decision of that Government. The decision of the Appropriate Government on the objections shall be final.

(3) For the purposes of this section, a person shall be deemed to be in load who would be entitled to claim an interest in compensation if the land were acquired under this Act.

[56] Section 17 of the Act provides for emergency acquisitions that can be effected after a mere 15 days after the notification and without an enquiry. The emergency can be both on the basis of a natural calamity/cause (such as a river changing course) as well as a public purpose that may be deemed emergent by the authority.

record his objection as provided for in the law. The Allahabad High Court, on November 25, 2009, rejected the contentions and held that it was beyond the scope of the court to interrogate as to whether the emergency existed or not. An appeal was raised against this before the Supreme Court.

The contentions before the Supreme Court were on two points: (1) Whether the state government was justified in acquiring the said pieces of fertile agricultural land, when there were alternative sites of unfertile *banjar* (waste/ barren land) land available; and (2) whether the state government was justified in dispensing with the inquiry which is mandated to be conducted under Section 5 A of the Act, especially when one year elapsed between the notifications under Section 4 and the one under Section 6. In fact, the Supreme Court was to decide as to whether the Allahabad High Court had erred insofar as it upheld the factum of urgency in the absence of a categorical finding, an enquiry under Section 5 A would have been detrimental to public interest. The case rested on the point that the scheme to build a new prison was under consideration of the state government for several years and that there was no material fact to justify the abridgement of the appellants' right of raising an objection to acquisition and of a hearing under Section 5 A of the Land Acquisition Act, 1894.

Finding that there was force in the argument, Justice Ganguly, speaking for Justice Singhvi as well, held as follows:

> In connection with land acquisition proceeding whenever the provision of Section 17 and its various subsections including Section 17(4) is used in the name of taking urgent or emergent action and the right of hearing of the land holder under Section 5A is dispensed with, the Court is called upon to consider a few fundamentals in the exercise of such powers.[57]

Stressing the fact that the Land Acquisition Act, 1894 was "a pre-Constitutional legislation of colonial vintage," Justice Ganguly added that it "is a drastic law, being expropriatory

[57] (2011) 4-SCC-769, paragraph 14.

in nature as it confers on the State a power which affects person's property right." The judge went on to hold that:

> Even though right to property is no longer fundamental and was never a natural right, and is acquired on a concession by the State, it has to be accepted that without the right to some property, other rights become illusory. *This Court is considering these questions, especially, in the context of some recent trends in land acquisition. This Court is of the opinion that the concept of public purpose in land acquisition has to be viewed from an angle which is consistent with the concept of a welfare State.*[58] (Ananth, emphasis added)

It may be noted here, in this context, that the Supreme Court, had clarified as to what constitutes public purpose in its judgment in the Kameshwar Singh Case. Justice S. R. Das had stated so categorically that acquisition to serve the ends of Article 39 (b) of the Constitution as such will constitute a public purpose. This position was upheld on many occasions thereafter by the Supreme Court. The most decisive judgment, in this regard, happened to be the majority decision in the Keshavananda Case by which Article 31-C was held valid.[59] In the instant case, Justice Ganguly, speaking for Justice Singhvi, went on to stress that Section 3(f) of the Land Acquisition Act, 1894,[60] had to be interpreted on the same lines. The court held:

> The concept of public purpose cannot remain static for all time to come. The concept, even though sought to be defined under Section 3(f) of the Act, is not capable of any precise definition.

[58] Ibid., paragraph 15.

[59] These aspects have been dealt with in detail in Chapters 4 and 6 of this book.

[60] Section 3 (f): The expression *public purpose* includes:

(i) The provision of village-sites, or the extension, planned development or improvement of existing village-sites;
(ii) The provision of land for town or rural planning;
(iii) The provision of land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned;

> The said definition, having suffered several amendments, has assumed the character of an inclusive one. *It must be accepted that in construing public purpose, a broad and overall view has to be taken and the focus must be on ensuring maximum benefit to the largest number of people.* Any attempt by the State to acquire land by promoting a public purpose to benefit a particular group of people or to serve any particular interest at the cost of the interest of a large section of people especially of the common people defeats the very concept of public purpose. *Even though the concept of public purpose was introduced by pre-Constitutional legislation, its application must be consistent with the constitutional ethos and especially the chapter under Fundamental Rights and also the Directive Principles.*[61] (Ananth, emphasis added)

Justice Ganguly, then, went into the scope for judicial intervention in cases of land acquisition in accordance with the larger constitutional scheme and stressed the importance of Article 13 of the Constitution in this regard. He also held that the Fundamental Rights have not been allowed to remain as

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(iv) The provision of land for a corporation owned or controlled by the State;

(v) The provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State;

(vi) The provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government, or by any authority established by Government for carrying out any such scheme, or, with the prior approval of the appropriate Government, by local authority, or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a State, or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State;

(vii) The provision of land for any other scheme of development sponsored by Government or, with the prior approval of the appropriate Government, by a local authority;

(viii) The provision of any premises or building for locating a public office, but does not include acquisition of land for companies.

[61] (2011) 4-SCC-769, paragraph 16.

they were insofar as their scope was concerned, and have to be seen as in the manner in which they have been interpreted time and again by the Supreme Court. He held:

> In construing the concept of public purpose, the mandate of Article 13 of the Constitution that any pre-constitutional law cannot in any way take away or abridge rights conferred under Part III, must be kept in mind. By judicial interpretation the contents of these Part III rights are constantly expanded. The meaning of public purpose in acquisition of land must be judged on the touchstone of this expanded view of Part-III rights. *The open-ended nature of our Constitution needs a harmonious reconciliation between various competing principles and the overhanging shadows of socio-economic reality in this country*.[62] (Ananth, emphasis added)

The bench, then, came to the specifics of the instant case to hold that:

> Therefore, the concept of public purpose on this broad horizon must also be read into the provisions of emergency power under Section 17 with the consequential dispensation of right of hearing under Section 5A of the said Act. *The Courts must examine these questions very carefully when little Indians lose their small property in the name of mindless acquisition at the instance of the State*.[63] (Ananth, emphasis added)

In doing so, the two-member bench relied upon an earlier decision by the Supreme Court where the role of the judges of the higher judiciary, while deciding issues of importance to the society, was outlined; that they shall not act as mere umpires but adopt a goal oriented approach.[64] Justice Ganguly, speaking for Justice Singhvi, relied on the principle enunciated

[62] Ibid., paragraph 17.

[63] Ibid.

[64] The reference here was to the decision in the *Authorised Officer Thanjavur and another v. Naganatha Iyer* (AIR-1979-SC-1487). This was an appeal, involving as to whether land in excess of the ceiling, imposed by the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 even if such lands were transferred to different owners after the law was enacted and before it was given effect. Section 22 of the Act had, in fact, laid down that such transfers in the interim period would be voidable.

in the Naganatha Iyer Case. The principle laid down by the court, in that case, was:

> *While dealing with welfare legislation of so fundamental a character as agrarian reform, the Court must constantly remember that the statutory pilgrimage to 'destination social justice' should be helped, and not hampered, by judicial interpretation*. For, the story of agrarian redistribution in Tamil Nadu, as elsewhere, has been tardy and zigzag, what with legislative delays, judicial stays and invalidations, followed by fresh constitutional amendments and new constitutional challenges and statutory constructions, holding up, for decades, urgent measures of rural economic justice which was part of the pledges of the freedom struggle. It is true that judges are constitutional invigilators and statutory interpreters; *but they are also responsive and responsible to Part IV of the Constitution being one of the trinity of the nation's appointed instrumentalities in the transformation of the socio-economic order*. The Judiciary in its sphere, shares the revolutionary purpose of the Constitutional order, and when called upon to *decode social legislation must be animated by a goal oriented approach*. This is part of the dynamics of statutory interpretation in the developing countries so that *Courts are not converted into rescue shelters for those who seek to defeat agrarian justice by cute transactions* of many manifestations now so familiar in the country and illustrated by the several cases under appeal. *This caveat has become necessary because the judiciary is not a mere umpire, as some assume but an activist catalyst in the constitutional scheme*.[65] (Ananth, emphasis added)

And in accordance with this, some such transfers were declared void and those lands were to be appropriated in accordance with the law. Those land holders approached the Madras High Court with a plea that Section 22 was unconstitutional. The Madras High Court, even while upholding the decision to appropriate such lands parceled out during the period between the enactment and the law being brought into force, refrained from speaking on the larger question of its constitutional validity. The appeal before the Supreme Court was preferred by the state seeking that the law be laid down in this regard. A two-member bench of the Supreme Court bench, consisting of Justices V. R. Krishna Iyer and A. P. Sen, held Section 22 as valid and also laid down the principle of interpretation insofar as such legislations are concerned.

[65] See AIR-1979-SC-1487, paragraph 1. In this case, Justice Krishna Iyer spoke for Justice Sen as well. Also see (2011) 4-SCC-769, paragraph 18 where Justice Ganguly quotes this part of the judgment as mentioned.

"In other words," held Justice Ganguly, "the words public purpose must be viewed through the prism of Constitutional values as stated above and that this principle in our jurisprudence forces the Court to construe any expropriatory legislation like the Land Acquisition Act very strictly."[66] The stress clearly was that the higher judiciary, in such instances, shall pierce the veil insofar as the *public purpose* is concerned, rather than relying upon the statement by the acquisitioning authority as conclusive.

Justice Ganguly, speaking for Justice Singhvi as well, then cited a catena of cases, decided even after the Constitution (Forty-fourth Amendment) Act, 1978 deleted Article 19 (1) (f) and Article 31 of the Constitution, where the Supreme Court had held that though Right to Property ceased to be a Fundamental Right, it would however be given an express recognition as a legal right and also as a human right. The basis for this was reliance upon the various international covenants, namely, the Declaration of Human and Civic Rights.[67]

Justice Ganguly's order in the instant case thereafter dealt with the relevance and the history of Section 5 A of the Land Acquisition Act, 1894. It was an insertion, almost 30 years after the 1894 Act came into vogue. The *Calcutta High Court in J. E. D. Ezra v. the Secretary of State for India and others*, where the properties of one Ezra were sought to be acquired under the 1894 Act for expansion of the offices of the Bank of Bengal, rejected the argument that there must have been a chance for the person whose property was going to be taken away to object to such an acquisition, based on the principles of natural justice. However, the judges held out that they had rejected the plea only because there was no such provision in the Act. It was in order to remedy this shortcoming in the

[66] (2011) 4-SCC-769, paragraphs 19–20.

[67] An important case in this regard and cited as such in the instant judgment was the decision in the *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke and Chemicals Ltd. and Others* [(2007) 8-SCC-705]. In that case, the Supreme Court upheld a decision by the Indore Bench of the Madhya Pradesh High Court, quashing acquisition of land for expansion of the city. [see (2011) 4-SCC-769, paragraphs 22–24].

1894 Act that an amendment by way of inserting Section 5 A was introduced on July 11, 1923.[68]

Citing the decision by a three-judge bench of the Supreme Court where the relevance of Section 5 A of the Land Acquisition Law, 1894 where the court underscored that "the right to file objection under Section 5-A is a substantial right when a person's property is being threatened with acquisition and we cannot accept that right can be taken away as if by a side-wind."[69] Justice Ganguly, speaking for Justice Singhvi went on to cite a catena of similar cases since then where the Supreme Court had dealt with Section 5 A in relation to Section 17 of the Land Acquisition Act, 1894 and held that the provision to dispense with an enquiry before acquisition, as such, could be sanctioned only after probing as to whether an emergency existed at all.[70]

[68] The context and the imperative of this insertion were explained in the Statement of Objects and Reasons to the Amendment Act. It read as follows:

> The Land Acquisition Act I of 1894 does not provide that persons having an interest in land which it is proposed to acquire, shall have the right of objecting to such acquisition; nor is Government bound to enquire into and consider any objections that may reach them. The object of this Bill is to provide that a Local Government shall not declare, under section 6 of the Act, that any land is needed for a public purpose unless time has been allowed after the notification under section 4 for persons interested in the land to put in objections and for such objections to be considered by the Local Government. [see (2011) 4-SCC-769, paragraph 29]

[69] *Nandeshwar Prasad and Others v. Government of Uttar Pradesh and Others* (AIR-1964-SC-1217). In that case, a three-judge bench, consisting of Justices P. B. Gajendragadkar, K. N. Wanchoo, and K. C. Das Gupta, had declared that enquiry under Section 5 A of the Land Acquisition Act, 1894 was a necessary condition for compulsory acquisition of land. Speaking for the bench, Justice Wanchoo stressed that under the Land Acquisition Act, an order under Section17 (1) or Section 17 (4) can only be passed with respect to waste or arable land and it cannot be passed with respect to land which is not waste or arable and on which buildings stand (see paragraph 11 of the judgment).

[70] The bench, in the instant case, relied upon the following judgments of the Supreme Court: *Hindustan Petroleum Corporation Limited v.*

Central to the decision in the instant case was a judgment by the Supreme Court in the *Union of India v. Mukesh Hans* Case,[71] in which the three-member bench of the Supreme Court, in a unanimous judgment, had held as follows:

> The mere existence of an urgency under Section 17 (1) or unforeseen emergency under Section 17(2) would not by themselves be sufficient for dispensing with 5A inquiry. If that was not the

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Darius Shahpur Chennai and Others [(2005) 7-SCC-627], in which the court held that the right conferred under Section 5 A had to be read, considering the provisions of Article 300-A of the Constitution and, so construed, the right under Section 5 A should be interpreted as being akin to a Fundamental Right. The Supreme Court had then held that the same being the legal position, the procedures which have been laid down for depriving a person of the said right must be strictly complied with. In the *Essco Fabs Private Limited and Others v. State of Haryana and Others* [(2009) 2-SCC-377], the Supreme Court had held that whereas Subsection (1) of Section 17 deals with cases of *urgency*, Subsection (2) of the said section covers cases of "sudden change in the channel of any navigable river or other unforeseen emergency" and that even in such cases, that is, cases of *urgency* or *unforeseen emergency*, enquiry contemplated by Section 5 A cannot ipso facto be dispensed with which is clear from Subsection (4) of Section 17 of the Act.

[71] (2004) 8-SCC-14. The bench consisted of Justices N. Santosh Hegde, Ashok Bhan, and, A. K. Mathur. In that case, Justice Hegde spoke for the others. The case involved acquisition of land by the Delhi administration in 1988 to provide the space for the annual festival called *Phool Walon Ki Sair* in Mehrauli village, Delhi. Based on the instructions issued by the Lt. Governor, proceedings were initiated to acquire the earmarked land for the purpose A notification acquiring 72 *bighas* of land was mooted under the stated public purpose of planned development of Delhi. During the process of preparing the acquisition notification, the recommending authorities felt that provisions of Section 17 (1) of the Act should be utilized to facilitate urgent acquisition of the required land. Hence, notices were put up at different levels that the draft notification may indicate the need for urgency in invoking Section 17 (1) of the Act. As the usual bureaucratic procedure was not proceeding at the required pace, the Delhi administration wrote a letter to the deputy commissioner, calling upon the said officer to ensure that the concerned draft notification in regard to the said acquisition should be sent to that office without further delay. A notification dated

> intention of the Legislature then the latter part of subsection (4) of Section 17 would not have been necessary and the Legislature in Section 17(1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically 5A inquiry will be dispensed with. But then that is not the language of the Section which in our opinion requires the appropriate Government to further consider the need for dispensing with 5A inquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with 5A inquiry does not mean that in and every case when there is an urgency contemplated under Section 17(1) and unforeseen emergency contemplated under Section 17(2) exists that by itself would not contain the need for dispensing with 5A inquiry. It is possible in a given case the urgency noticed by the appropriate Government under Section 17(1) or the unforeseen emergency under Section 17(2) itself may be of such degree that it could require the appropriate Government on that very basis to dispense with the inquiry under Section 5A but then there is a need for application of mind by the appropriate Government that such an urgency for dispensation of the 5A inquiry is inherent in the two types of urgencies contemplated under Section 17(1) arid (2) of the Act.[72]

Applying this principle, which clearly was the *ratio decidendi* in the Mukesh Hans Case, Justice Ganguly, speaking for Justice Singhvi held:

> … [T]he time which elapsed between publication of Section 4(1) and Section 17 notifications, and Section 6 declaration, in the local newspapers is of 11 months and 23 days, i.e. almost one year. This slow pace at which the government machinery had functioned

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30-6-1988 under Section 4 (1) of the Act came to be published, and it stated the public purpose to be *planned development of Delhi*. This notification specifically stated that the Lt. Governor was of the opinion that provision of Subsection (1) of Section 17 of the Act was applicable to that acquisition and that he was pleased to note under Subsection (4) that the provisions of Section 5 A of the Act do not apply. Simultaneously, a declaration under Section 6 of the Act as well as the notice under Section 7 of the Act was also published.

[72] Ibid., paragraph 32.

> in processing the acquisition, clearly evinces that there was no urgency for acquiring the land so as to warrant invoking Section 17 (4) of the Act.[73]

Although the bench found the construction of jails to be a public purpose and upheld the government's powers to acquire private land for that purpose, it quashed the acquisition proceedings in the instant case and held:

> For the reasons aforesaid, we hold that the State Government was not justified, in the facts of this case, to invoke the emergency provision of Section 17(4) of the Act. *The valuable right of the appellants under Section 5A of the Act cannot flattened and steamrolled on the 'ipsi dixit' of the executive authority.* The impugned notifications under Sections 4 and 6 of the Act in so far as they relate to the appellants' land are quashed. The possession of the appellants in respect of their land cannot be interfered with except in accordance with law.[74] (Ananth, emphasis added)

The judgment is significant for more than one reason. The Supreme Court Bench, in this case, decided in the way it did, relying upon a catena of cases decided at an earlier point of time. The trend had been to treat the right to be heard, under Section 5 A of the Land Acquisition Act, 1894 as a necessary condition for the acquisition of land. This had been the case in the several decisions of the apex court since the cases of Nandeshwar Prasad and until Mukesh Hans. In that context, the decision of the Allahabad High Court to dismiss the writ petition in the instant case was certainly a case of judicial indiscipline. The Supreme Court, in this instance, has set this right. The second important aspect of the judgment in the instant case was that the Supreme Court described the Land Acquisition Act, 1894 as an *appropriatory legislation* and went on to hold that the courts examine the procedure as well as the purpose "very carefully when little Indians lose

[73] 2011-4 (SCC) 769, paragraph 38. (Notification under Section 4(1) was issued on June 4, 2008 and the Declaration under Section 6 was issued on August 10, 2009).

[74] Ibid., paragraph 41.

their small property in the name of mindless acquisition at the instance of the State." The judgment also laid down that:

> *If public purpose can be satisfied by not rendering common man homeless and by exploring other avenues of acquisition*, the Courts, before sanctioning an acquisition, must in exercise of its power of judicial review, focus its attention on the concept of social and economic justice.[75] (Ananth, emphasis added)

Although the judges, in the instant case, held that the state government, in this case, may pursue with the acquisition of land, including that of the appellant in the case, after providing an opportunity to object under Section 5 A, the implication of the decision was that where the enquiry was mandated, it was possible for the owner of the land to be acquired to establish that such acquisition would deprive him of his livelihood, and thus save the land from being acquired. This certainly was a radical departure from the prevailing trend where it seemed that the judiciary simply endorsed the retreat of the State from the socialist principles, as enshrined in the Preamble of the Constitution and elaborated in Article 39 (b) of the Constitution. The same bench, in a couple of other judgments, elongated these principles further.

Greater NOIDA Industrial Development Authority Case[76]

A notification under Section 4 (1), read with Sections 17 (1) and (4) of the Land Acquisition Act, 1894 for acquisition of 205.0288 hectares land of village Makora, Pargana Dankaur, Tehsil in the Gautam Budh Nagar (adjacent to Delhi) was issued by the Uttar Pradesh State Government. This notification, issued on March 12, 2008 was also of the same nature as in the case discussed earlier in this chapter, and thus the land owners whose lands were to be acquired for a *public purpose*

[75] Ibid., paragraph 18.
[76] *Radhey Shyam v. State of Uttar Pradesh* [(2011) 5-SCC-553].

were denied an opportunity to raise objections under Section 5A in an enquiry. The *public purpose* as stated in the notification was "planned industrial development in District Gautam Budh Nagar through Greater Noida Industrial Development Authority." The state government was of the view that the said land was urgently required for the planned industrial development in the district and that it was as well necessary to eliminate the delay likely to be caused by an enquiry under Section 5 A of the 1894 Act, and hence justified to invoke Section 17 (4) of the Act to ensure that the provisions of Section 5 A of the said Act should not apply.

A section of those whose land was sought to be acquired in this case then made a representation to the Chairman-cum-Chief Executive Officer of the Development Authority. They sent copies of that representation to the Chief Minister, the Principal Secretary, Housing and Urban Development, Government of Uttar Pradesh, the District Magistrate and the Special Officer, Land Acquisition, Gautam Buddh Nagar with the request that their land may not be acquired because they had raised construction on those lands as early as some 30–35 years ago and were using the property for *abadi* (habitation). No one heeded the representation and the state government issued the notification under Section 6 that is to be read with Section 9 of the Land Acquisition Act on November 19, 2008. In other words, the time taken between the notification under Section 4(1) and Section 6 of the 1894 Act was eight months and seven days.

The persons whose land was to be, thus, acquired then raised a writ petition before the Allahabad High Court seeking that the acquisition proceedings be quashed on the following grounds:

1. That the land cannot be used for industrial purposes because in the draft Master Plan of Greater NOIDA (2021), the same is shown as part of residential zone.
2. That they had already constructed dwelling houses and as per the policy of the State Government, the residential structures are exempted from acquisition.

3. That the State Government arbitrarily invoked Section 17(1) read with Section 17(4) of the Act and deprived them of their valuable right to raise objections under Section 5-A.
4. The acquisition of land is vitiated by arbitrariness, mala fides and violation of Article 14 of the Constitution inasmuch as lands of the Member of Legislative Assembly and other influential persons were left out from acquisition despite the fact that they were not in *abadi*, but they were not given similar treatment despite the fact that their land was part of *abadi* and they had constructed dwelling units.[77]

In a substantial sense, such facts raised as grounds in the writ petition could have been valid grounds of objection during an enquiry under Section 5 A of the Land Acquisition Act, 1894; and if they were raised in that forum, the District Magistrate was bound by the provisions of the Act to either hold them as reasonable and stop the proceedings or where he found these facts to be unfounded, record such findings and go ahead with the acquisition after fixing the compensation. In other words, an enquiry under Section 5 A of the Act was the forum where such issues of fact could have been raised and settled. It may be added that the law, as laid down by the Supreme Court in a catena of cases (discussed previously in this chapter) had laid down the conditions for invoking Section 17 (4), and thus dispensing with the enquiry under Section 5 A in strict terms. The law clearly said that dispensing with the statutory enquiry could be resorted to only in the rarest cases.

The High Court, however, dismissed the writ petitions on December 15, 2008. The High Court order, it may be noted, was prompt. It was dismissed at the threshold level itself and without even seeking a response, by way of a counter affidavit, from the state government. The High Court, while dismissing the petition, held that the petitioners had not let in any material evidence in their representation to the Development

[77] See ibid., paragraph 5.

Authority to establish that the decision to dispense with an enquiry under Section 5 A by invoking Section 17 (4) was arbitrary, and hence the Authority was within power limits to let the representation go unheeded. The High Court then held as follows:

> We, therefore, do not find any occasion even to call upon the respondents to file a counter affidavit placing on record, the material if any for exercising power under Section 17(1) and (4) of the Act in the absence of any relevant pleading or material and the question of requiring the respondents to produce the original record in this regard also does not arise.[78]

It further held that "the decision of the Government to invoke Section 17(1) cannot be subjected to judicial review."[79]

Dealing with the appeal, the two-member bench of the Supreme Court, consisting of Justices Singhvi and Ganguly, held at the outset that there was force in the grounds raised by the petitioners. Justice Singhvi, speaking for Justice Ganguly as well in this case, held:

> It is relevant to mention here that excluding the enquiry under Section 5-A can only be an exception where the urgency cannot brook any delay. *The enquiry provides an opportunity to the owner of land to convince the authorities concerned that the land in question is not suitable for purpose for which it is sought to be acquired or the same sought to be acquired for the collateral purposes.* It is pertinent to mention here that the respondents No. 1 and 2 without the application of mind dispensed with the enquiry on the ground of urgency invoking the power conferred by Section 17 (1) or (2) of the Act. Further, the respondent No. 1 and 2 without application of mind did not consider the survey report of the *abadi* of the village Makaura where the entire land is being used for the purpose of residence and grazing of cattle[]s in Khasra No. 394. Further, the petitioners were surprised to find that their land have not been included in the *abadi* irrespective of the same is in use for habitation and keeping the cattle and other uses. The petitioners have constructed their houses and using the same for their residence and keep their cattle[s] and agricultural produce.

[78] See ibid., paragraph 7.
[79] See ibid., paragraph 8.

> The survey report clearly shows that the impugned Khasra No. 394 is in use for residence.[80] (Ananth, emphasis added)

Unlike the Allahabad High Court, the Supreme Court in this case ordered the different respondents to file their response by way of an affidavit. In his counter affidavit, the Land Acquisition Officer stated that the urgency clause was invoked, in this case, for a variety of grounds and among them were the following:

1. That the land in the adjoining villages were already acquired by the Greater Noida Industrial Development Authority. Thus, the acquired land was urgently required for continuity of infrastructure services and planned Industrial Development of the Area. *If, the proposed land was not acquired immediately and delay in this regard would lead to encroachments and would adversely affect the Planned Industrial Development of the Area.*
2. That the acquired land consists of 246 plots numbers with 392 recorded tenure holders. *If objections are to be invited and hearing be given to such large number of tenure holders, it would take long time to dispose of the objections thereof and would hamper the planned development of the area.*
3. *That reputed industrial houses who are interested in investing in the State and in case the land is not readily available, they might move to other states* and such a move would adversely affect the employment opportunities in the State.[81] (Ananth, emphasis added)

A number of documents too were let in, as evidence, by the Government to establish its point that there was a sense of urgency and hence Section 17(4) had to be invoked. Justice Singhvi, in his order, where he spoke for Justice Ganguly, objected to the manner in which the Allahabad High Court had dealt with the writ petition. The bench held:

> At the outset, we record our disapproval of the casual manner in which the High Court disposed of the writ petition without even calling upon the respondents to file counter affidavit and produce the relevant records. A reading of the averments contained in paragraphs 11 and 16 and grounds A and F of the writ petition, which have been extracted hereinabove coupled with the appellants' assertion that the acquisition of their land was vitiated due to

[80] Ibid., paragraph 6.
[81] See ibid., paragraph 9.

> discrimination inasmuch as land belonging to influential persons had been left out from acquisition, but their land was acquired in total disregard of the policy of the State Government to leave out land on which dwelling units had already been constructed, show that they had succeeded in making out a strong case for deeper examination of the issues raised in the writ petition and the High Court committed serious error by summarily non-suiting them.[82]

Justice Singhvi then dwelt at length on the long history of the Land Acquisition Act, 1894, and the context in which Section 5 A came to be inserted into the Act and placed the whole provision in its context. He said:

> The Act, which was enacted more than 116 years ago for facilitating the acquisition of land and other immovable properties for construction of roads, canals, railways etc., has been frequently used in the post independence era for different public purposes like laying of roads, construction of bridges, dams and buildings of various public establishments/institutions, planned development of urban areas, providing of houses to different sections of the society and for developing residential colonies/sectors. *However, in the recent years, the country has witnessed a new phenomena. Large tracts of land have been acquired in rural parts of the country in the name of development and transferred to private entrepreneurs, who have utilized the same for construction of multi-storied complexes, commercial centers and for setting up industrial units.* Similarly, large scale acquisitions have been made on behalf of the companies by invoking the provisions contained in Part VII of the Act.[83] (Ananth, emphasis added)

[82] Ibid., paragraph 15.

[83] Ibid., paragraph 17. It may be noted that Part VII of the Land Acquisition Act, 1894 (consisting of Sections 38 to 44 B) deals with land acquisition for the purpose of being handed over to private companies. The law distinguishes acquisition for such purposes from the *public purposes* as it is otherwise, and the distinction is merely on the question of who pays the compensation. Part VII lays down that the compensation amount as well as the other costs for acquisitions for the purpose of transfer to private companies shall be paid by the recipient of the land, and the government's responsibility rests with identification of the land to be acquired, notifying the acquisition as per the provisions of the Act and facilitating the disbursal of compensation. Some instances of such acquisitions are those in Singur in West Bengal, Kalinganagar in Orissa, etc. (For a detailed exposition of the law in this regard, see Ghosh, *The Land Acquisition Act, 1894,* pp. 982–1008.)

Justice Singhvi, thereafter, went on to speak about the implication of this trend in a forthright manner. "The resultant effect of these acquisitions," he said, "is that the land owners, who were doing agricultural operations and other ancillary activities in rural areas, have been deprived of the only source of their livelihood."[84] This indeed was a significant statement by the judges, and they also emphasized that in such situations and the larger context where most of those whose lands were taken away were innocent of their constitutional and legal rights were forced to "reconcile with deprivation of land by accepting the amount of compensation offered by the Government and by thinking that it is their fate and destiny determined by God." The judges clearly displayed their empathy to the cause of the farmers deprived of their livelihood this way, when they said:

> Even those who get semblance of education are neither conversant with the functioning of the State apparatus nor they can access the records prepared by the concerned authorities as a prelude to the acquisition of land by invoking Section 4 with or without the aid of Section 17(1) and/or 17(4).[85]

And in what can certainly be seen as a comment on the Allahabad High Court's order, the judges held:

> Therefore, while examining the land owner's challenge to the acquisition of land in a petition filed under Article 226 of the Constitution, *the High Court should not adopt a pedantic approach, as has been done in the present case, and decide the matter keeping in view the constitutional goals of social and economic justice and the fact that even though the right to property is no longer a fundamental right, the same continues to be an important constitutional right and in terms of Article 300-A, no person can be deprived of his property except by authority of law.*[86] (Ananth, emphasis added)

The judgment, significant in many ways, also laid down that:

> in cases where the acquisition is made by invoking Section 4 read with Section 17(1) and/or 17(4), the High Court should insist upon

[84] Ibid., paragraph 18.
[85] Ibid.
[86] Ibid.

> filing of reply affidavit by the respondents and production of the relevant records, and carefully scrutinize the same before pronouncing upon legality of the impugned notification oraction because a negative result without examining the relevant records to find out whether the competent authority had formed a bonafide opinion on the issue of invoking the urgency provision and *excluding the application of Section 5-A is likely to make the land owner a landless poor and force him to migrate to the nearby city only to live in a slum*.[87] (Ananth, emphasis added)

These, after all, were the laws as laid down by the Supreme Court and in unambiguous terms in the Mukesh Hans Case by a three-judge bench of the Supreme Court in 2004. Justice Singhvi, speaking for Justice Ganguly, in this instant case, went a step further and added:

> If the acquisition is intended to benefit private person(s) and the provisions contained in Section 17(1) and/or 17(4) are invoked, then scrutiny of the justification put forward by the State should be more rigorous in cases involving the challenge to the acquisition of land, the pleadings should be liberally construed and relief should not be denied to the petitioner by applying the technical rules of procedure embodied in the Code of Civil Procedure and other procedural laws.[88]

The judges then stressed that the approach, in such cases, must be *goal oriented*,' rather than being that of an umpire as held by the bench in the Naganatha Ayyar Case. The bench, in the instant case, also stressed that the burden of proving that an emergency existed and that invoking the provisions of Section 17 (4), and thus dispensing with the enquiry under Section 5 A of the Act rested with the State. The court held:

> … [A]n assertion by the appellants that there was no urgency in the acquisition of land; that the concerned authorities did not apply mind to the relevant factors and records and arbitrarily invoked the urgency provisions and thereby denied him the minimum opportunity of hearing in terms of Section 5-A(1) and (2), should be treated as sufficient for calling upon the respondents to file their

[87] Ibid.
[88] Ibid.

> response and produce the relevant records to justify the invoking of urgency provisions.[89]

After this long but clear narrative of the law, as laid down by the Supreme Court hitherto and illustrating how the High Court decision was untenable, Justice Singhvi, speaking for Justice Ganguly as well, went on to cite from a Common Law judgment and extracted a principle enunciated to buttress their decision:

> Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says God, "where art thou? hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat."

to underscore the need for an enquiry before executing the acquisition in this context.[90] The bench, in the instant case, thus went on to foreground the principle of natural justice

[89] Ibid., paragraph 19. The bench relied on an earlier judgment by a three-member bench of the apex court for this. In that case (*Narayan Govind Gavate v. State of Maharashtra*), the Supreme Court had examined the correctness of the judgment of the Bombay High Court, whereby the acquisition of land by the State Government by issuing notification under Section 4 read with Section 17 (1) and 17 (4) for development and utilization as residential and industrial area was quashed. The High Court held that the purpose of acquisition was a genuine public purpose, but quashed the notifications by observing that the burden of proving the existence of circumstances which could justify invoking of urgency clause was on the State, which it had failed to discharge. The Supreme Court upheld the High Court judgment in that case.

[90] Ibid., paragraph 24. The case law, *Cooper v. Wandsworth Board of Works*, involved an Act by the District Board that had brought down Cooper's house because he had failed to comply with the Metropolis Local Management Act. The Act required the plaintiff to notify the board seven days before starting to build the house. Cooper argued that even though the board had the legal authority to tear his house down, no person should be deprived of their property without notice. Despite the lack of express words in the statute, the court recognized the right of hearing before the plaintiff's house built without permission was demolished in the exercise of statutory powers. The Lords, in that case, held that Cooper was entitled for a hearing.

and its cardinal maxim *audi alteram partem* (that none shall be punished without being heard). Justice Singhvi relied on a judgment by the Supreme Court, as early as in 1973, to drive home this point. A three-judge bench, in the Sayeedur Rahman vs State of Bihar[91] had held as follows: In that case, the bench had stressed the importance of the right to be heard and held as follows:

> … This unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of the rival contestants. This right has its roots in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision, for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties.[92]

The bench, in the instant case also cited the judgment in the M. S. Gill versus Chief Election Commissioner, where a Constitution bench of the Supreme Court had underscored the right to be heard in as many words.[93] Justice Singhvi also cited

[91] (1973) 3-SCC-373.

[92] Ibid., paragraph 11.

[93] (1978) 1-SCC-405. In that case, Justice V. R. Krishna Iyer, speaking for two others in the bench had held as follows:

> Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes it, applies when people are affected by acts of authority. It is the hone of healthy government, recognised from earliest times and not a mystic testament of Judge-made law. Indeed, from the legendary days of Adam—and of Kautilya's Arthasastra—the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not newfangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.

the decision in the Maneka Gandhi Case[94] to buttress the view of the bench in the instant case. The bench then went on to list out a set of nine principles based on the various decisions arrived at by the Supreme Court over the years. They were:[95]

1. Eminent domain is a right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently, the sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good….
2. The legislations which provide for compulsory acquisition of private property by the State fall in the category of expropriatory legislation and such legislation must be construed strictly.

Once we understand the soul of the rule as fair play in action—and it is so—we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation: nothing more—but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alteram partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation. (see paragraphs 43 and 48)

[94] AIR-1978-SC-597. It may be noted that the Maneka Gandhi case was the first instance where the principle of due- process-of-law was explicit in our judicial history.

[95] (2011) 5-SCC-553, paragraph 53.

3. Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. *If the property belongs to the economically disadvantaged segment of the society or people suffering from other handicaps, then the Court is not only entitled but is duty bound to scrutinize the action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the land owner is likely to become landless and deprived of the only source of his livelihood and/or shelter*.
4. The property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4, 5-A and 6 of the Act. A public purpose, however laudable it may be, does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, the State can invoke the urgency provisions and dispense with the requirement of hearing the land owner or other interested persons.
5. Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. *These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even few weeks or months.* Therefore, before excluding the application of Section 5-A, the concerned authority must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.
6. The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and *the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is*

not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the concerned authorities did not apply mind to the relevant factors and the records.

7. The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word 'may' in sub- section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5-A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power under Section 17(1).
8. The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Section 17(1) and/or 17(4). The Court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of audi alteram partem embodied in Section 5-A (1) and (2) is not at all warranted in such matters.
9. *If land is acquired for the benefit of private persons, the Court should view the invoking of Section 17(1) and/or 17(4) with suspicion and carefully scrutinize the relevant record before adjudicating upon the legality of such acquisition.* (Ananth, emphasis added)

Applying these principles to the instant case, Justice Singhvi, speaking for Justice Ganguly as well, held that there was nothing sustainable in the affidavit and the explanations by

the Government to justify invoking the urgency clause. The judges held:

> Even if planned industrial development of the district is treated as public purpose within the meaning of Section 4, there was no urgency which could justify the exercise of power by the State Government under Section 17(1) and 17(4). *The objective of industrial development of an area cannot be achieved by pressing some buttons on computer screen. It needs lot of deliberations and planning keeping in view various scientific and technical parameters and environmental concerns.* The private entrepreneurs, who are desirous of making investment in the State, take their own time in setting up the industrial units. Usually, the State Government and its agencies/instrumentalities would give them two to three years' to put up their factories, establishments etc. *Therefore, time required for ensuring compliance of the provisions contained in Section 5-A cannot, by any stretch of imagination, be portrayed as delay which will frustrate the purpose of acquisition.*[96] (Ananth, emphasis added)

The judges then pointed out that the notice period, under Section 5 A of the Land Acquisition Act, 1894 was a mere 30 days from the date of notification under Section 4(1) of the Act, and this certainly cannot lead to frustration of the plans. For all these reasons, the Supreme Court set aside the order of the Allahabad High Court and ordered that the land, thus, acquired be returned to its owners. The Supreme Court also ordered that the State Government of Uttar Pradesh pay a sum of ₹5 lakhs to the appellant as costs for forcing unwarranted litigation on them.

The importance of the judgment, in this case, is in the fact that it reversed a trend, in recent years, where the State's powers to acquire private property for a public purpose be used for causes contrary to the intentions of the law makers. The more important point is that the court, in the instant case, sought to place the law on its legs, and this was achieved by relying upon a catena of its own case laws. The most salient feature of this judgment was in the fact that the two-judge bench enlisted the principles upon which the

[96] Ibid., paragraph 55.

various High Courts shall decide challenges to acquisition of land under the Land Acquisition Act, 1894. Justices Singhvi and Ganguly, in doing so, had in fact placed the 1894 Act in a position where it shall subserve the constitutional scheme in general and Article 39 (b) in particular.

The same bench decided on another case on similar lines on July 6, 2011. This case too involved acquisition of land in the Gautham Buddha Nagar in Uttar Pradesh and more specifically in villages adjoining Delhi. Apart from the issue of invoking Section 17 (4), and thus dispensing with the enquiry under Section 5A of the Land Acquisition Act, 1894, the challenge in this case was also against the conversion of land, thus, acquired in the name of planned industrial development being put to use for construction of multistoreyed housing apartments by private builders. It was evident that the conversion—from industrial purposes to housing projects promoted by private builders—was approved by the concerned authority, in this case, even before the notification under Section 6 of the 1894 Act was issued.

A section of those who lost their land in this process preferred a writ petition, and the Allahabad High Court had ordered status quo (at the stage of admission) and later on held the writ petitions as valid, and thus quashed the acquisition on grounds that invoking Section 17 (4) was unjustified and more importantly that the act of converting the land acquired from industrial purpose to housing for projects floated by private builders was clearly a colourable exercise of power as defined in the 1894 Act. The Greater Noida Development Authority, who had acquired the land and also sanctioned the conversion appealed against the Allahabad High Court judgment before the Supreme Court; and a batch of cases, pending disposal before the High Court at that time, were transferred to the Supreme Court in this instance. The private builders who had received the land and embarked upon construction work too impleaded themselves in the Supreme Court.

Justices Singhvi and Ganguly, on July 6, 2011, upheld the Allahabad High Court order confirming that invoking Section 17 (4) in the process was unjustified and also that the

conversion of the land was mala fide, particularly where the said land was handed over to private builders, and hence cannot be seen as serving any public purpose. In doing so, Justice Singhvi, speaking for Justice Ganguly, made the following observation:

> The facts brought on record unmistakably show that the whole exercise of acquisition was designed to serve the interest of the builders and the veil of public purpose was used to mislead the people in believing that land was being acquired for a public purpose i.e. planned industrial development. This is the reason why even before the issue of notification under Section 6(1), the process for change of land use was initiated and completed with unusual haste and without waiting for the Government's approval to the modification of the Development Plan, the Authority offered and allotted the acquired land to the builders for construction of multi-storeyed complexes. This was nothing but a colourable exercise of power by the State Government under the 1894 Act and in our considered view, the High Court did not commit any error by recording a conclusion to that effect.[97]

The judges then went on to speak out their mind before dismissing the appeals. They said:

> Before concluding, we consider it necessary to reiterate that the acquisition of land is a serious matter and before initiating the proceedings under the 1894 Act and other similar legislations, the concerned Government must seriously ponder over the consequences of depriving the tenure holder of his property. *It must be remembered that the land is just like [a]mother, of[for] the people living in the rural areas of the country. It is the only source of sustenance and livelihood for the landowner and his family. If the land is acquired, not only the present but the future generations of the landowner are deprived of their livelihood and the only social security. They are made landless and are forced to live in slums in the urban areas because there is no mechanism for ensuring alternative source of livelihood to them. Mindless acquisition of fertile and cultivable land may also lead to serious food crisis in the country.* In the result, the special leave petitions are dismissed.[98] (Ananth, emphasis added)

[97] *Greater Noida Industrial Development Authority v. Devendrakumar and Others* (2011) 12-SCC-375.

[98] Ibid.

This concluding portion, indeed, is significant. It may appear that the judges went beyond the law. However, on close scrutiny, they simply adopted a goal-oriented approach, rather than behaving as mere umpires. The goals that they adopted were not mere subjective wishes of their own minds, but the imperatives set by the Preamble of the Constitution, the Fundamental Rights, and the Directive Principles of State Policy. In many ways than one, the decisions in the three cases where land acquisition proceedings were quashed, Justices Singhvi and Ganguly clearly identified the goals as stated in the Constitution. And in a very specific sense, they brought Article 39 (b) to the foreground by speaking against depriving the rights of the farmer in all those instances. The higher judiciary had identified this constitutional scheme in its decision upholding the Constitution (First Amendment) Act, 1951, and thus cleared the path of hurdles in giving effect to land reforms across the nation. By restricting the State's right to compulsorily acquire the small pieces of land, held by farmers who were not the same as the landlords in pre-independent India who held large tracts as their own, the two-judge bench had only followed the larger mandate. The judgment in the three cases will remain the law until a larger bench decides another way.

9

Conclusion

The Constituent Assembly, though not a body elected directly for the purpose by the people of India, was certainly a body that represented the different sections of the Indian people in the social, economic, and political sense of the term. Although the Indian National Congress (INC) dominated the Assembly in the numerical sense, and hence its ideals determined the course of the making of the Constitution; representatives of many platforms too were present in the Assembly. The Constituent Assembly, hence, was crucible where representatives of different interest groups that constituted the polity at the time of independence articulated the concerns of the various groups. The Constitution, as adopted on November 26, 1949, after at least three years of debate among the members to remain the fundamental law of the land with overwhelming authority over all the existing laws as well as future legislations was, thus, an expression of the consensus that had emerged at the time of independence.

This was in line with what John Rawls would outline in his *Theory of Justice*, a long time after our own Constitution was adopted. Rawls' seminal work, published in 1971, was based on Kantian principles and rests upon the concept of the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions. In this framework of justice as fairness, the premise is that of a contract between parties that are rational and mutually disinterested. This arises in a condition where the

parties are not driven by benevolent impulses all the time, and hence the imperative for an institutional arrangement to ensure the idea of justice as distinct from one derived out of a primitive condition of culture. The necessary condition to approach justice as fairness is a decision to look for a conception of justice that negates and denies any place for the accidents of natural endowment and the contingencies of social circumstance as counters in the quest for political and economic advantage. This perception of justice presupposes a jettisoning of the social world that seem arbitrary to the present and the perceived future from a moral point of view.[1]

This *original position* that is fundamental to Rawls' framework presupposes a mandate to represent equality between human beings as moral persons, as creatures having a conception of their good, and capable of a sense of justice. This, indeed, is a departure from utilitarianism and the distinction is substantive too. It can be argued that the Rawlsian framework is indeed useful and appropriate to this book. It is, however, important to add that there is ample scope, insofar as the theory of law is concerned, to go beyond John Rawls; it is inevitable too. Amartya Sen's *Idea of Justice* is one such trajectory. In Sen's framework, poverty, hunger and unequal access to education, and such other means to equality are injustices, and thus presuppose a consensus against these from an ethical premise, rather than resting on the ground that the system is supported by institutional mechanisms to ensure justice. In other words, Sen's idea of justice presupposes a war of position, as distinct from the war of maneuver, as an essential component in the quest for justice.

The Constituent Assembly debates these points to the extent to which the Assembly was a crucible for positions on either ends of the spectrum on a variety of issues, such as secularism, socialism, and federalism, as well as on the crucial question of the different perspectives of democracy. Insofar as the idea of socialism was concerned, which has been the subject matter of discussion in the eight chapters here, the range of opinion in the Assembly reflected the entire spectrum.

[1] See Rawls, *A Theory of Justice*.

Dr. B. R. Ambedkar, for instance, presented a draft proposal which entailed all the wealth in general, and agricultural land in particular to be made into national property and a Constitution where such property was then vested in the hands of the tiller. Ambedkar's proposal, before the Fundamental Rights Subcommittee, was one that sought to acknowledge the right to the land for the tiller, and in that sense far more radical than whatever the INC had taken up as its position in the four decades before independence. So did K. T. Shah, the communist leaning socialist, when he presented a draft before the same subcommittee at the outset. There was no place, whatsoever for Article 24 of the Draft Constitution, in this framework.

Article 24, however, seemed to represent the dominant view as it prevailed in the Assembly—was part of the Draft that the Fundamental Rights Subcommittee decided to present before the Constituent Assembly. It was, as it read at that stage, a provision that placed the Right to Property as a Fundamental Right, and in that sense, an injunction against acquisition of property by the independent Indian State. This did not appeal to the dominant section in the Assembly, and the House then decided to amend it. The dissent, indeed, emerged from a perception that the draft did not reflect the thinking of the times and seemed loaded in favor of preserving the agrarian structure that had been sustained by the colonial regime. Even while the idea of agrarian reforms, as espoused by Ambedkar and Shah, failed to gather support from among a majority in the Assembly, the INC had committed itself, even before the Assembly came into existence, to abolish the system of landlordism. Article 24, as it was, did not reflect this. It was, hence, decided to postpone discussion on the provision to a later day.

And when the Article, subjected to substantial amendments, was moved in the Assembly, it reflected the INC's agrarian reforms program in all its dimensions. This, notwithstanding the fact that it fell way short of what Ambedkar and Shah advocated, provoked a strong opposition from the representatives of the land-owning classes in the Assembly. The Raja of Darbhanga, Kameshwar Singh, was among those

who registered his opposition to Article 26 as it was moved in September 1949, only a few months before the Constitution was approved. Jawaharlal Nehru, who moved the amended Article for consideration was forthright with his attack on zamindari and that the INC was committed to its abolition in the fullest sense of the term. There were apprehensions even among the socialists. Damodar Swaroop Seth, a Congress Socialist then, had even called this Article turning into the Magna Carta in the hands of the capitalists in India. And Nazimuddin Ahmed, among the few Muslim League representatives in the Assembly, described this provision as nothing but a manifestation of a *cheap nationalism* and a hindrance to all possible foreign investments in India.

Jawaharlal Nehru, in his response, declared that the Article on property in the Constitution will be used against the concentration of land and wealth in a few hands, and the Constitution will be amended if it was found hindering such a policy.

To put it in the framework of the Rawlsian Theory of Justice, where the Constitution happened to be the contract, the *original position* was to ensure the individual's right in the political sense as much as in the social and economic sense. In other words, the Right to Equality as guaranteed by Article 14 of the Constitution or the Right to Life as guaranteed by Article 21 was a mandate upon the State. Article 31, by which the Right to Property was accorded the status of a Fundamental Right as such, however, was to be seen in conjunction with Articles 39 (b) and (c) of the Constitution. The political regime, under Jawaharlal Nehru, was certainly committed to this *original position,* and the Constitution (First Amendment) Act, 1951 brought this to the fore. Nehru himself stated this before the Constituent Assembly in response to apprehensions raised by sections in the Assembly, when he moved the amended Article 26 (which came to be Article 31 of the Constitution) during the discussion on September 10, 1949 that the Constitution will be amended accordingly to ensure this as and when it was felt necessary.

This was done by the Provisional Parliament after the Patna High Court held the Bihar Act unconstitutional. Articles

31-A and 31-B were, thus, in line with that commitment. The Supreme Court too held the amendment valid in the Shankari Prasad Deo Case. It may be stressed here that the contours of that *original position* did not appreciate or internalize the idea of land to the tiller. The rejection of Ambedkar's argument against the Bihar Act in the Kameshwar Prasad Case in 1955, where he argued against the land reforms law on grounds that it contained nothing to ensure redistribution of the land to the tiller, and hence would create another set of landlords, which violated the constitutional scheme, was evidence that the agrarian agenda was only restricted to the rights of the tenants to property and not concerned with the aspirations of the tiller, who in the social sense of the term belonged to the Scheduled Castes. The consensus was that the Fundamental Rights were not mere abstractions and that the Directive Principles of State Policy set the premise, in a concrete sense. It was also laid down that the amendments to the Constitution, even if they meant restricting the scope of the Fundamental Rights, were constitutional. An explicit statement of this came in the Supreme Court's judgment in the case involving the Kerala Education Bill, wherein it was held that the courts may not ignore the Directive Principles of State Policy as laid down in Part IV while determining the scope and ambit of the Fundamental Rights. The apex court, in that case, stressed the importance of the principle of harmonious construction.

This, indeed, was also an instance where the apex court had set out to read the consequence of legislation, rather than merely reading through the procedure adopted. In other words, this was an instance where the due-process-of-law was preferred to the procedure-established-by-law framework. This notwithstanding the law laid down in the A. K. Gopalan Case, as early as in 1950, where a constitution bench of the Supreme Court held preventive detention laws valid even if they violated the Right to Liberty as laid down under Article 21 of the Constitution. The instant case involved a challenge to the preventive detention law, enacted from within the scope of Article 19 (5) of the Constitution, as violating the freedom guaranteed under Article 21 which had to

be quashed. This was the first time when the apex court left to read into the various provisions of the Constitution and harmonize those provisions. The decision then was that Article 19(5) had to be read independent of the other provisions in Part III of the Constitution. In doing so, the apex court stuck to the procedure-established-by-law framework.

This line was declared incorrect, in so many words, 19 years later in the R. C. Cooper Case where the bench struck down the Bank Nationalization Act, 1969, on grounds that even while the law was enacted according to the procedure established by law and that the provisions under Article 31 of the Constitution were not violated, the nationalization of 14 private sector banks amounted to an attack on the rights conferred upon the citizens under Article 19 (g) of the Constitution, and hence was unconstitutional. In doing so, the majority of judges in the bench also declared the law, as held in the A. K. Gopalan Case, as incorrect. This was possible because the bench shifted to the due-process-of-law framework in this case. In other words, they read into Article 19 (g) of the Constitution to point out that the act of acquisition of the property, even if it was consistent with Article 31 of the Constitution, did in effect, infringe upon the rights guaranteed by Article 19 (g). It is important to note here that the apex court had done this, even while it did not expressly declare the A. K. Gopalan decision as incorrect, in the Kerala Education Bill Case, in 1958, itself. In that case, the apex court had invoked the provisions as guaranteed in Articles 26 and 29 of the Constitution to declare the Kerala Education Bill unconstitutional. The doctrine of harmonious construction, indeed, was a necessary condition, if the *original position* had to be considered legitimate.

A look into the sequence of amendments to the Constitution in 1951, 1955, and 1965 by which the Nehruvian regime changed the face of Article 31 in general, and the expansion of the scope for the State to compulsorily acquire private property by way of inserting Articles 31-A and 31-B (as well as the Ninth Schedule) and the explicit proviso restricting the higher judiciary from deciding upon the adequacy of compensation were all meant to serve the *original position*.

That all these were in response to hurdles placed by the higher judiciary in that path have been elaborated upon in Chapter 4 of this book. The larger point here is that the Supreme Court, in all this while, had left the last word on the issue to the Parliament. In both the Shankari Prasad Deo Case and the Sajjan Singh Case, as we have seen, the court had laid down that all aspects of the Constitution were subject to amendment by the Parliament and that even such amendments that were expressly intended to upturn decisions by the higher judiciary were valid as long as the procedures as laid down under Article 368 of the Constitution were followed.

The Constitution (First Amendment) Act, 1951, after all, was intended to nullify the apex court's decision in the *State of Madras v. Champakam Dorairajan* Case (involving reservation of seats in higher education institutions for the Scheduled Castes) and the Patna High Court's decision of striking down the Zamindari Abolition Act passed in Bihar. In upholding the amendment as valid, the Supreme Court, in the Shankari Prasad Case, had also spelt it out that the Directive Principles of State Policy were not mere pious wishes and that the Fundamental Rights were subordinate to those principles. This remained the ruling principle in the Sajjan Singh Case too. The Parliament's power to amend the Constitution was held to be supreme and the limitation imposed on such powers under Article 13 (2) of the Constitution, according to this line, did not apply to constitutional amendments. The discussion on the various case laws in this phase between 1951 and 1965, in Chapter 4 of this book brings out that the concerns raised in Articles 39 (b) and (c) of the Constitution which were considered as central to this idea. The ruling principle, indeed, was the idea of socialism as laid out in this provision of the Directive Principles of State Policy and a consensus that socialism as outlined there constituted the *original position*.

The earliest deviation from this was seen in the majority decision in the Golaknath Case. The 11-member bench, the largest until then, overruled the law as decided in the Shankari Prasad Deo Case and reiterated in the Sajjan Singh Case, when it was held that the Fundamental Rights were not to be abridged, even in order to give effect to the Directive Principles

of State Policy. The principle of harmonious construction, established as the law till then, was set aside and the majority, led by Chief Justice K. Subba Rao, held Fundamental Rights as supreme and absolute. The bench interpreted the Constitution in a manner where the scope of Article 13 (2) was elongated in order to apply to constitutional amendments too. It is significant that by this interpretation, the bench, restored Article 31 of the Constitution to its pristine status of being an injunction against compulsory acquisition of private property, except in specific contexts; it was clearly a decision that put the clock back to the position where the concept of *eminent domain* stood as in the Government of India Act, 1935. In other words, Section 299 of the 1935 Act, delegitimized by the Constitution and confined to the past by the various amendments to the Constitution between 1951 and 1965, was restored. The Golaknath judgment, thus, put the clock back insofar as the *original position* was concerned when the Parliament's powers to restrict the scope of the Fundamental Rights was curtailed. It is important to note here that even while the majority that decided the Golaknath Case had seemed to uphold all the Fundamental Rights guaranteed in Part III of the Constitution and in that sense a progressive decision, the fact is that the concerns therein were restricted to the right to private property.

Justice M. Hidayatullah's observation in this context was significant. The learned judge, even while concurring with the majority to overrule the law, as established in the Shankari Prasad Deo Case and the Sajjan Singh Case to restrict the amending powers of the Parliament, did strike a different note when he held that the Right to Property must not have been accorded the status of a Fundamental Right in the first instance. Justice Hidayatullah, in a sense, suggested that he found the right to private property inimical to the *original position*, and yet agreed with the others who held against the land reforms laws and the State's right to compulsory acquisition of private property as violating the Constitution only because he was stuck to the principle of the-procedure-established-by-law. From this position, the judge could not have found merit in the need to harmonious construction of the provisions in Part III and Part IV of the Constitution. The

plain fact is that the majority decision in the Golaknath Case that the Fundamental Rights were neither alienable nor even abridgable was arrived at on a consideration of the right to private property. The concerns for the rest of the rights guaranteed in Part III of the Constitution were only incidental.

The learned judges refrained from seeing the Fundamental Rights as one whole lot and interdependent of one another in many instances. That Article 31 of the Constitution, when seen as a blanket injunction against the State's right to acquire private property for a public good, which it was without applying Article 31-A and 31-B, would render the Right to Equality guaranteed by Article 14 or the Right to Freedom of Profession guaranteed under Article 19 (g) of the Constitution, and the Right to Life as guaranteed by Article 21 of the Constitution as empty words was not factored in by the learned judges who constituted the majority in this case. Nor did they see the legitimate grounds on which the amendments to the Constitution were upheld by the Supreme Court in the decade and half before they decided the Golaknath Case. And in doing so, the majority in the Golaknath Case simply held that the provisions in Part IV of the Constitution, in general, and Articles 39 (b) and (c) were mere pious wishes. Apprehensions of this nature in the Constituent Assembly that appeared unfounded during the Nehruvian regime were, for once, rendered valid in the immediate wake of Golaknath. The *original position* seemed a pious wish.

An apt comment on the Golaknath judgment by Justice O. Chinnappa Reddy (Supreme Court Judge between 1978 and 1987), known as a humanist and activist judge in the highest and noblest sense of the terms, described it in all its dimensions: "Golaknath was a tragedy," he said. Allowing Fundamental Rights to dominate the Directive Principles of State Policy, in his view, is tantamount to treating the individual as superior to the individual in society. Justice Reddy elaborated his criticism of the Golaknath judgment by charging the majority in the bench of having held a lopsided view of rights. In his own words:

> They (the judges who constituted the majority in Golaknath) were highly conscious that it was a Constitution that they were

> expounding but appeared to be unconscious that simultaneously it was the right to property in an economy of scarcity that they were expounding. It was as if the right to property was the centre of the Constitutional universe around which the other Fundamental Rights including the right to equality revolved. The effect of Golaknath was to stop constitutional progress and to fossilize the Constitution.[2]

The effect of Golaknath was prominently pronounced in the majority decision in the R. C. Cooper Case. At least four out of the majority of ten judges who decided against the Bank Nationalization Act—Justices J. C. Shah, S. M. Sikri, J. A. Shelat, and C. A. Vaidyalingam—were with the majority in the Golaknath Case too. Justice Shah wrote the majority judgment in that case. Justices V. Bharghava and G. K. Mitter, who were with the dissenting minority in the Golaknath Case, went along with the majority in this case. The lone dissenter in the R. C. Cooper Case was Justice A. N. Ray. In another decision of the times and one that belongs to the same league—the Privy Purses Case—Chief Justice Hidayatullah, as he then was, spoke for the majority in the 11-member constitution bench to strike down an order to abolish privy purses to the descendants of those who ruled the Indian states by remaining loyal to the British regime.

It is not mere coincidence that Justice Subba Rao, who led the majority in the Golaknath Case, ended up being the candidate for the presidential election in May 1967 as the combined opposition's nominee against Zakir Hussain, fielded by the Congress. It is also relevant to note here that the Swatantra Party that led the opposition at that time was explicit in its opposition to the socialism as represented by the INC at that time. Justice Subba Rao retired as judge on April 11, 1967 and signed his nominations papers within days for the presidential elections on May 6, 1967. Similarly, Justice J. C. Shah, who led the majority in the R. C. Cooper Case, after his retirement on January 22, 1971 (he had been the Chief Justice for a couple of months from December 18, 1970), was discovered

[2] Reddy, *The Court and the Constitution of India: Summits and Shallows*, p. 48.

by the Janata Party regime to head a Commission of Enquiry to probe into the Emergency regime. It may be added that Justice Shah was vocal against the Emergency even while it was on. It is relevant again to note that Justice Hidayatullah was chosen as the Vice President in August 1979; the regime at that time was controlled by the Janata Party.

While the fact that these were not mere coincidence will not do to establish that the decisions in the Golaknath Case, the R. C. Cooper and the Privy Purses Cases were guided by an ideological project against socialism as envisaged, there is no denial that the three judgments came at a time when the dissent against such socialism was pronounced within the INC as well as outside in the parliamentary political discourse. While the dissidence within was represented by what came to be described as the Syndicate within the Congress, the campaign against such socialism outside was led by the Swatantra Party that had emerged into the strongest block in the Lok Sabha, with 44 MPs, after the general elections in 1967. This larger context is certainly significant, and it is proper to hold that the shift away from the *original position* was not an autonomous development. It was, on the contrary, intimately linked with the attempt in the political domain to renege on the commitment to socialism in a generalized sense and from the form enshrined in Articles 39 (b) and (c) of the Constitution.

It is also significant and not another coincidence that the INC, now under Indira Gandhi, began asserting its commitment to socialism. The decision to nationalize 14 private banks as well as to abolish the privy purses were part of the calculations in the realm of partisan politics. The nationalization of private sector banks, for instance, was essentially a part of Indira Gandhi's strategy against her detractors in the party. This is revealed from the sequence of events involving the All India Congress Committee (AICC) session at Bangalore, in July 1969, where Morarji Desai, her Deputy Prime Minister handling the finance portfolio, had emerged stronger with the support from such leaders as K. Kamaraj, S. Nijalingappa, Atulya Ghosh, and S. K. Patil throwing themselves behind him. Indira Gandhi returned from the session, recommended an ordinance and provoked Desai to resign

from the Cabinet. The ordinance was soon replaced with an Act of Parliament. The story behind the presidential order abolishing privy purses, even after a constitution amendment toward this failed in the Rajya Sabha for want of just one vote, was intended to push the opposition into taking an unpopular position; and this was achieved.

Intentional or otherwise, the discourse once again shifted toward socialism. The Constitution (Twenty-fourth Amendment) Act, 1971 was also a message, loud and clear, that Parliament and not the Judiciary, shall decide the economic policy. The statement of aims and objects to the Constitution Amendment Bill also made the purpose behind the amendment clear: To give effect to Article 39 (b) and (c) of the Constitution. The discussion in Chapter 6 of this book where the Keshavananda Case is dealt with in elaborate detail conveys the story of how the *original position* was restored. All the 13 judges in the bench held that the decision in the Golaknath Case was incorrect. It is also significant that Justices Sikri and Shelat were part of the majority that decided Golaknath. It was, hence, natural for them to circumvent their disapproval of Golaknath in a tactful manner, rather than rejecting it forthright. Justice Sikri, for instance, held that amendments, as long as the basic features were not distorted, were possible insofar as all the Articles of the Constitution; Justice Shelat held that Golaknath was now only of academic interest and need not be held the law for all times to come.

The Keshavananda Case was significant for other reasons too. For instance, the bench in this case also decided on the Constitution (Twenty-fifth Amendment) Act, 1971. It was there that the Parliament stated its intention to restore the *original position* in the most forthright fashion. Section 3 of the Amendment Act, by which Article 31-C was added to the Constitution, was, indeed, an explicit statement foregrounding Articles 39 (b) and (c), and that legislations to give effect to its objects were immune from challenges even if they abridged or violated the rights guaranteed under Articles 14, 19, and 31 of the Constitution. The Article, as passed by the Parliament, also contained a proviso that debarred the judiciary from even entertaining petitions challenging such legislations as long as those were

passed with a stated purpose of giving effect to Articles 39 (b) and (c). The importance of the Keshavananda decision, as we have seen in Chapter 6, lay in that the majority held the first part as valid even while striking down the latter part.

The most important contribution to our Constitutional law came by way of the basic structure doctrine as espoused by all those who constituted the majority in the 13-member bench. Six out of the 13 judges—Justices A. N. Ray, D. G. Palekar, K. K. Mathew, M. H. Beg, N. Dwivedi, and Y. V. Chandrachud—did not subscribe to this doctrine and were of the view that the Parliament's power to amend the Constitution was seamless. They had all leaned upon the procedure-established-by-law framework and read into Article 368 of the Constitution to decide that as long as the procedure established in that Article was followed in the making of constitutional amendments, such amendments were valid. The other judges too agreed with them insofar as declaring the Constitution (Twenty-fourth Amendment) Act, 1971 as valid. But they all disagreed with the six judges to hold the second leg of the Constitution (Twenty-fifth Amendment) Act, 1971 as void. The majority of seven judges, thus, declared that judicial scrutiny of constitutional amendments as such cannot be barred and that the higher judiciary shall test the amendments for consistency with the basic structure of the Constitution. It is important that they read into the text of the debates in the Constituent Assembly and the context in which the Fundamental Rights were included in the Constituent Assembly while doing so.

The majority in the Keshavananda bench, in fact, made a clear departure from the prevalent rules of interpretation of statutes to invoke the texts of the Constituent Assembly debates to underscore the point that judicial review was indeed a part of the basic structure of the Constitution. A reading into the texts of the 11 different judgments in the case, as done and cited in Chapter 6 of this book, makes it abundantly clear that the judges also dwelt at length on the concerns expressed in the Assembly against letting the Parliament be the ultimate authority insofar as the business of law making was concerned. The judges, one after another, recalled the substantial change in juridical thought in the

aftermath of the rise and fall of fascism in Germany and the faults as they existed in the Weimar Constitution. The important point in that sense was the earnest attempt by the judges to internalize the Universal Declaration of Human Rights, 1948 and the fact that the Charter had gone into the need to harmonize the social, economic, and political rights rather than subordinating one to another. The theme song in Keshavananda, thus, was a constant reference to the Preamble of the Constitution and the idea of justice—social, economic, and political.

This, indeed, went into the decision by the majority in the bench to uphold one part of the Constitution (Twenty-fifth Amendment) Act, 1971, which laid down the scope for judicial review to the extent that legislations seeking to give effect to Articles 39 (b) and (c), that reflected the socialistic intent insofar as the ownership of property was concerned, which would be immune from being tested against the rights guaranteed by Articles 14 and 19 of the Constitution. The long and short of this move was that while the courts shall not order the State to enforce the redistribution of wealth and means of production, there was no way that the State can be prevented from enforcing those even if some of the Fundamental Rights were infringed upon by such Acts. By retaining the power to scrutinize as to whether a certain legislation would, as a matter of fact, help in giving effect to the socialist policy, the higher judiciary set the framework to ensure that the *original position* worked. In other words, with Keshavananda, the status of Articles 39 (b) and (c) was restored to where it stood before Golaknath, being on a pedestal higher than the Fundamental Rights. The majority in the bench could arrive at this decision because they sought to go beyond the framework of the-procedure-established-by-law and to the framework of the due-process-of-the-law; in other words, the consequences were seen by them as important to decide as to whether a particular legislation was constitutional or not. The majority judgment, in fact, made sure that the Constitution was not fossilized.

It is not mere coincidence that the learned judges resorted to the basic structure doctrine in this case, decided on April 24, 1973; and the fact that John Rawls' work where

the same concept was discussed and even formed the most important premise for his *Theory of Justice* was published first in 1971. It is another matter that none of the seven judges who espoused the basic structure doctrine or the six others who did not do so had referred to Rawls and his seminal work of the times. Rawls had been lecturing in the American universities during the 1960s, and his book arrived in 1971. However, Rawls had not referred to the Constitutional Law of India in any of those lectures; nor is there any reference to our own Constitution in his book. We are, in any case, not concerned with the impact of Rawls on our constitutional process in this book. However, John Rawls' study and his *Theory of Justice* are indeed useful tools to study and comment upon the process through which our Constitution came into being and its working in the 60-plus years of its existence. The basic structure doctrine, in that sense, was an important tool in the development of our constitutional history, for it helped reiterate the constitutional scheme as the *original principle*.

The judgments in the Keshavananda Case were not written from within the four corners of the Constitution. The learned judges, instead, strayed out into philosophical debates and concepts from political theory. As for instance, they repulsed the arguments that relied upon the premise that the Right to Property, being a part of the Fundamental Rights, was transcendental. It was also argued that this was a natural right, and hence accorded the status of a Fundamental Right. Justice K. K. Mathew dismissed this statement as one that smacks of sentimentalism and as one that is calculated to cloud the mind with an outmoded political philosophy. "This idea of natural law in defence of causes both paltry and iniquitous has caused many to reject it with impatience."[3] This, also, was a clear statement that the instant case involved giving effect to Articles 39 (b) and (c) of the Constitution, and that equity rather than inequity was an integral part of the *original position* and that any interpretation of the Constitution had to be done, necessarily, from this larger framework.

[3] *Keshavananda v. State of Kerala* (AIR-1973-SC-1461), paragraph 1691.

Yet another important aspect of the Keshavananda Case, as we have seen in Chapter 6, was the elaborate reasoning by Justice H. R. Khanna in order to establish that the Right to Property, even while it was listed as a Fundamental Right in the Constitution, did not constitute the basic structure. The long passages from the judgment, cited in this book, where the judges who upheld the Constitution (Twenty-fourth Amendment) Act, 1971 and also a part of the Constitution (Twenty-fifth Amendment) Act, 1971, established that in all the instances where violation of the Fundamental Rights were cited as grounds against the various legislations including the instant case, were legislations that attacked the right to private property and that the specter of denial of political rights was raised only in order to defend the individual's right to property. This led the judges to dismiss the apprehensions that unlimited powers to the Parliament would lead to an end to political democracy as merely imaginary and a gloss to defend political democracy.

Justice Khanna, for instance, reasoned out such apprehensions by way of pointing out that political liberty, as guaranteed by the Fundamental Rights of the Constitution, could be curtailed even without a constitutional amendment. Citing Articles 358 and 359, that the operation of the Fundamental Rights may be suspended by way of a presidential order during an Emergency, Justice Khanna went on to hold that even while the Constitution provided for annulling the Fundamental Rights, it will not happen. In Justice Khanna's words, "It is, in my opinion, inconceivable that a party would dare to so abuse the powers granted by the emergency provisions."[4] Justice Khanna's confidence, indeed, was misplaced. The experience during the Emergency did show that the INC, the party in power then, did what the learned Judge thought was inconceivable. But then, Justice Khanna also said, in the same context, that the effective check against such unabashed abuse of power was the sense of political responsibility and the fear of public rebellion.

[4] Ibid., paragraph 1435.

That was established in March 1977 when the Congress was defeated and the regime that came amended the Constitution in many ways. By the Constitution (Forty-fourth Amendment) Act, 1979, the rights guaranteed under Articles 20 and 21 were rendered immutable even during an Emergency. Justice Khanna, in his own way, made this point when he dissented against the majority in the infamous Habeas Corpus Case, even during the Emergency. This, however, is outside the scope of this book. But then, it is pertinent to hold that the experience during the Emergency seemed to lead the judiciary, in general, and even those who disagreed with the basic structure doctrine and the position that the Parliament's powers to amend the Constitution was subject to judicial scrutiny to accept it subsequently.

The earliest instance of this was evident when the Indira Gandhi Election Case came up before the constitution bench of the Supreme Court. Article 329-A, inserted by the Constitution (Thirty-ninth Amendment) Act, 1975, was declared unconstitutional by the bench in that case. Justice Khanna clarified his position, as he had espoused in the Keshavananda Case, that even while he maintained that the Right to Property did not constitute the basic structure, some other Articles in Part III of the Constitution were indeed a part of the basic structure. In addition, the majority out of the five-member bench went into the implications of the amendment to conclude that even while the Parliament's authority to amend was beyond doubt and the passage of the amendment in the absence of a number of its members who were detained in the various jails at the time of its passage, the procedure-established-by-law was followed, and assailing the amendment on this ground was not possible. Even then, the bench found the implications of the amendment as violating the guarantees under Article 14 of the Constitution, and hence found Article 329-A invalid. This was yet another instance of the Supreme Court applying the due-process-of-law framework while interpreting a constitution amendment Act. This principle was further reiterated in the Maneka Gandhi Case, which fell in the realm of political justice and had little to do with the idea of justice in the social and economic sense of the term.

The basic structure doctrine, as espoused in the Keshavananda Case, was applied in the realm of economic justice, in the Minerva Mills Case, as well as in the Waman Rao Case. The Constitution (Forty-second Amendment) Act, 1976, by which a whole lot of constitutional provisions were amended and a number of new provisions were added, was indeed a move that was seen as one that turned the Constitution upside down. Apart from rendering the judiciary into an institution subordinate to the Parliament, the amendment was also one that had the potential to usher into an authoritarian regime. The context in which the amendment was enacted—at a time when the Emergency was in force—foreclosed the application of the writ Jurisdiction and a challenge to that had to wait indefinitely until the Emergency was withdrawn. Hence, the challenge was mounted only after March 21, 1977, and thus got clubbed with the Minerva Mills Case. We have dealt with this aspect in Chapter 7 of this book. The change of government, in the meanwhile, and the Constitution (Forty-third Amendment) Act, 1977 and the Constitution (Forty-fourth Amendment) Act, 1979 restored the Constitution to where it stood before the Emergency was imposed. The changes brought about were extensive and most pronounced in the redefinition of conditions that warranted imposition of an Emergency; the phrase *internal disturbance* was replaced with *armed rebellion*, and a Cabinet resolution in written form was made a necessary condition for the President to issue a proclamation. The scope of judicial review was restored by this amendment; and Article 31-D, providing powers to the Parliament to enact any legislation to preserve national security, was deleted. In that way, the various changes brought about by the Constitution (Forty-second Amendment) Act, 1976 were reversed by the Parliament itself. The most important aspect of the Forty-fourth Amendment, from the concerns of this book, was the deletion of Article 31 from Part III of the Constitution and reducing the Right to Property to being a mere legal right.

However, Article 31-C, as it was consequent to the Constitution (Forty-second Amendment) Act, 1976, remained as it was. The Supreme Court, in the Keshavananda Case,

had held that parts where legislations gave effect to Articles 39 (b) and (c) were to be held valid even if they abridge the rights guaranteed under Articles 14 and 19 of the Constitution. Among the various changes brought about by the Constitution (Forty-second Amendment) Act, 1976 was a further amendment to Article 31-C. As a result, it was laid down that legislations seeking to give effect to all or any of the provisions in Part IV of the Constitution were to be treated as valid, even if they violated the guarantees under Articles 14 and 19 of the Constitution. It may be noted that after the deletion of Article 31 (as a result of the Constitution Forty-fourth Amendment Act, 1979), it was naturally deleted from Article 31-C too. That the Janata Party, which ensured the restoration of the Constitution to its pre-Forty-second amendment status did not reverse the amendments to Article 31-C, is a question that was neither raised nor explained.

The issue, however, was raised in the Minerva Mills Case and the five-member Constitution bench led by the Chief Justice Y. V. Chandrachud (as he then was), declared the amended Article 31-C as unconstitutional. In doing so, the importance of Articles 39 (b) and (c) to the scheme of the Constitution and achieving the goals set in the Preamble—justice, social, economic, and political—as underscored by the majority in the Keshavananda Case was further reiterated by the bench in the instant case. Justice Chandrachud, who had dissented against the basic structure doctrine in the Keshavananda Case, went on to stress its relevance in the Minerva Mills Case. The significance of the judgment in the Minerva Mills Case (as also in the Waman Rao Case decided at about the same time and by another bench, which was also headed by Justice Chandrachud) is that Article 31-C, as amended, that treated all the provisions in Part IV on the same pedestal, was struck down. And by upholding the unamended Article 31-C (as was done by the majority in the Keshavananda Case), the bench in the Minerva Mills Case sent out a message, loud and clear, that Articles 39 (b) and (c) were on a higher pedestal than the other provisions in Part IV of the Constitution.

An interpretation of the judgment in the Minerva Mills Case is not the fallout of any stretch of imagination. The proof

of this is found in the judgment itself. Justice Chandrachud, speaking for the majority, also dealt with that aspect of the Constitution (Forty-second Amendment) Act, 1976 by which the Preamble to the Constitution was amended to be read as *Sovereign Socialist Secular Democratic Republic*, and the fact that the words *socialist* and *secular* were added to the Preamble by that amendment. The learned judge held that these were not mere exercise in semantics, and held that aspect of the amendment to be an instance of adding vitality to the constitutional philosophy. In his own words, "they afford strength and succour to its foundation. These amendments," he added, "furnish the most eloquent example of how the amending power can be exercised consistently with the creed of the Constitution."[5]

The long and the short of this is that the idea of socialism had been integral to the constitutional scheme, and the core of this scheme lay in giving effect to the provisions in Articles 39 (b) and (c) of the Constitution. The various case laws, beginning with Shankari Prasad Deo and culminating in the Minerva Mills judgment, reiterated this principle. It is then legitimate to argue that this process by which the *original position* was confirmed then was interrupted by the case laws that emerged during this period, and were based on an incorrect reading of the constitutional scheme. These include the decision in the Bela Banerjee Case, the Metal Corporation Case, the Golaknath Case, the R. C. Cooper Case, and the Privy Purses Case. The decisive impact, in this whole course, indeed, was made by the majority decision in the Keshavananda Case. And the basic structure doctrine, which by all means was consistent with John Rawls' Theory of Justice, helped in the most decisive manner to arrive at a Theory of Justice on the basis of the *original position* in the way John Rawls espoused in his seminal work published in 1971. In other words, the Rawlsian approach seemed to form the basis for the majority judgment in the Keshavananda Case; and this is a fact notwithstanding that the learned judges arrived at the position without referring to Rawls. There were, however, references in the different judgments in

[5] *Minerva Mills v. Union of India* (AIR-1980-SC-1789), paragraph 23.

the Keshavananda Case to Immanual Kant's philosophy on which Rawls too leant so heavily.

It may be noted here that Article 31-B and the Ninth Schedule of the Constitution, laying down that legislations included in the Schedule by way of constitutional amendments were the causes of the challenges, beginning from Shankari Prasad Deo and until Keshavananda. The majority in the Keshavananda Case held that while legislations already in the Ninth Schedule as on April 24, 1973 were beyond the scope of judicial scrutiny, and that all such inclusions post the judgment will be subject to the basic structure doctrine and left to the higher judiciary's scrutiny. In other words, entries 65 and 66 of the Ninth Schedule, which too were subjects of the dispute in the Keshavananda Case were found to be consistent with the basic structure; and it is significant that all the judges in the 13-member bench held this view when they upheld the Constitution (Twenty-ninth Amendment) Act, 1972. The fact is that both these entries pertained to land reforms laws enacted by the Kerala State Assembly. Twenty more state legislations were added to the Schedule by the Constitution (Thirty-fourth Amendment) Act, 1974 and 38 more were added to the Schedule by the Constitution (Thirty-ninth Amendment) Act, 1975. A look into the two such sets added to the Schedule reveal a subtle change in the nature of the legislations. While the first of the two sets consisted of agrarian reforms legislations alone, and in that sense consistent with the aims as declared behind the First Amendment that brought Article 31-B of the Constitution—to protect agrarian reforms legislations—the laws added to the Schedule by the Thirty-ninth Amendment was an eclectic mix.

Entry 87, by which changes to the election laws, enacted as they were to ensure that the Allahabad High Court's decision, setting aside Indira Gandhi's election to the Lok Sabha, was dismissed by the Supreme Court (and that was achieved), was in no way relevant to Article 31-B. This entry was omitted by the Constitution (Forty-fourth Amendment). Similarly, of the 20 legislations added to the Schedule by the Constitution (Thirty-ninth Amendment) Act, 1975, most did not concern

land reforms. It may be added that barring entry 87, the rest were predominantly socialistic in that they pertained to nationalization of industrial undertakings. In other words, they too were laws aimed at giving effect to Articles 39 (b) and (c) of the Constitution. The Supreme Court sat on judgment in this regard in the Minerva Mills Case (directly pertaining to entry 105 of the Ninth Schedule) and in the Waman Rao Case (pertaining to entry 114 of the Ninth Schedule), and in both instances the amendments were held constitutional. The learned judges, thus, established the nexus between these laws and Articles 39 (b) and (c) of the Constitution.

In what was clearly an elaborate interpretation of the basic structure doctrine enunciated in the Keshavananda Case, and thus laid down as the law, the learned judges in the Minerva Mills Case as well as in the Waman Rao Case, pointed to the centrality of Articles 39 (b) and (c) in the scheme. Justice Chandrachud went into the trend in this regard and the inclusion of even legislations that were not concerned with land reforms and property acquisition for a public purpose, that began with the Constitution (Thirty-ninth Amendment) Act, 1976 and accentuated in the subsequent amendments in this line to express disapproval. In doing so, the judges had leaned upon the Keshavananda decision, involving the Twenty-ninth Amendment to hold that laws included in the Ninth Schedule after April 24, 1973, would be tested against the basic structure doctrine and more specifically in the backdrop of Articles 39 (b) and (c) for their validity. This, hence, is ample evidence to the fact that socialism was not an abstraction; that it was a definite economic policy involving distribution of property and the means of production for the larger public good, and against concentration of such resources in a few hands.

The nature of the laws included in the Ninth Schedule subsequently and the lack of challenge in the higher judiciary for their Constitutional validity should lead to a conclusion that in this phase—post 1976—the law was settled in favor of reforms, and hence the idea of socialism was accepted in the discourse as such. This, however, is not to say that land reforms had been achieved by this time in the fullest sense

of the term. But then, the failure or the shortcomings were in the realm of implementation of the law, and hence an administrative failure than one that was due to deficiency of legislations. In any case, with the deletion of Article 31 from the Constitution and rendering the Right to Property as a mere legal right, Article 31-B and the Ninth Schedule became less of a necessary condition to elongate the socialistic principles in the Constitution. And Article 31-C, as upheld by the Supreme Court in the Keshavananda Case, was enough to take care of political decisions in the realm of nationalization of private property whether it was land, industrial, or financial resources. The *original position*, thus, stood fortified in the legal sense and entrenched in the higher judiciary's scheme.

The decision in the Olga Tellis Case, involving the eviction of slum dwellers in Bombay, was the first ever instance where the Supreme Court elongated the scope of the Fundamental Rights from this premise. This, the apex court did by interpreting the scope of the Right to Life guaranteed by Article 21 of the Constitution as necessarily a guarantee to the Right to Livelihood. Even while this case law did not relate to property rights and, in that sense, did not belong to the same league as the case laws discussed hitherto in this book, its prominent place in the development of socialistic jurisprudence is, indeed, significant. The foregrounding of Article 21 of the Constitution and the elongation of its scope in the various judgments beginning Olga Tellis and until the Supreme Court decision in the J. P. Unnikrishnan case leading to the insertion of Article 21-A of the Constitution, enshrining the Right to Primary Education as Fundamental Right, marked a phase where the *original position* was restated in the administrative law as much as constitutional. In all these, the definition of swaraj in the Karachi Resolution was sought to be enforced by the judiciary. While it is beyond the scope of this book to deal with this trend in elaborate detail, we saw the law as settled in the Olga Tellis Case forming the basis for judicial decisions in the neo-liberal era, beginning 1991.

The distinction between the earlier phase, when the discourse was essentially driving an attempt to restrict the scope of Article 31 of the Constitution in a manner that it

empowered the State to compulsorily acquire private property, in the years after 1980, the judiciary was engaged in expanding the scope of Article 21 of the Constitution. The path to this was laid by the majority judgment in the Keshavananda Case. The basic structure doctrine enunciated in that case laid down judicial review and the idea of socialism as integral to the constitutional scheme. The higher judiciary assumed to itself the right as well as a duty to ensure that the goals set in the Preamble to the Constitution—justice, social, economic, and political—and, thus, foregrounded the *original position* are expressed in a forthright manner. The significance of this move must be found in the changing context since July 1991, when the political establishment began to retreat from its commitment to the idea of socialism. In the new context, compulsory acquisition of property meant just the opposite of what it was meant to be. The concept of public purpose, which in the early stages of the Republic meant dispossessing the zamindars and such others of their large tracts of land to distribute that among the tenant farmers, underwent a change in the years after 1991.

The Land Acquisition Act, 1894 was invoked even earlier. Those were, however, in a context when industrial activity was predominantly in the manufacturing sector and even where it was in the area of commercial goods, the nature of the industries being ones that employed a large workforce meant employment opportunities for a cross section of the people, and not merely the white collar jobs. The service sector, so to say, was restricted to the financial institutions. The shift in 1991 also meant the preference for the private against the public sector that determined economic policy in the earlier phase. We have seen, in this book, the discourse being dominated by the State acquiring private property and the evolution of constitutional law in that direction. The direction, thus, was nationalization of industrial and financial institutions. This was reversed in the post-1991 phase in the sense that the State had begun to retreat from the socialistic commitment. The role of the higher judiciary in this phase was one of enforcing those principles, and this indeed was testimony of the relevance of the *original position*. In other

words, the principle of judicial review, enunciated in the Keshavananda Case and the basic structure doctrine, helped this process.

In the three judgments, delivered since early 2011, the Supreme Court put the State in the dock for the abuse of the notion of public purpose in acquiring land and for using emergency provisions in the law to deny farmers their right to object to acquisition. Quashing land acquisition proceedings in these cases, the apex court raised fundamental issues relating to the Right to Life, as guaranteed under Article 21. In all the three cases, as we have seen in Chapter 8 of this book, the apex court came down heavily on the state government's decision to invoke Section 17 (1) of the Land Acquisition Act, 1894, and thus dispense with an enquiry as required under Section 5 A of the same Act. The 1894 Act, which the judges rightly condemned of belonging to the colonial era and serving as the basis for acquisition of private land by the government in the name of *public purpose* provides for such acquisition in an *emergency* and to deprive the landowner of the right to register his objections as otherwise laid out under Section 5 A. In the instant cases, the Uttar Pradesh Government had used the emergency provision and defended the decision on the ground that it was necessary to overcome delays in acquisition. This abuse, indeed, is not restricted to these three instances and to Uttar Pradesh alone; it is now a rule than an exception across the country.

As it was in the instant cases, the land thus acquired is promptly handed over to a host of private developers and builders. The judges, in these three instances, dealt with the nexus between using the excuse of an emergency to acquire land and the vested interests behind acquisition. The apex court's decision in the three cases which was arrived at after the judges decided to peep into the reasons, as stated, behind the acquisition and the subsequent changes in the land use patterns was, indeed, a significant shift from the position in the past where the courts desisted from such an exercise. The law, as it stood, was to leave the specifics of the public purpose to the Executive's decision and judgment. An observation by Justice G. S. Singhvi, who spoke for Justice Ganguly

as well in one of these cases is indeed relevant in this context. The judge held:

> Before concluding, we consider it necessary to reiterate that the acquisition of land is a serious matter and before initiating the proceedings under the 1894 Act and other similar legislations, the concerned Government must seriously ponder over the consequences of depriving the tenure holder of his property. It must be remembered that the land is just like mother of the people living in the rural areas of the country. It is the only source of sustenance and livelihood for the landowner and his family. If the land is acquired, not only the present but the future generations of the landowner are deprived of their livelihood and the only social security. They are made landless and are forced to live in slums in the urban areas because there is no mechanism for ensuring alternative source of livelihood to them. Mindless acquisition of fertile and cultivable land may also lead to serious food crisis in the country. In the result, the special leave petitions are dismissed.[6]

The tussle during the 1950s between the judiciary, the executive, and the Parliament over land acquisition that took place in the context of the State's attempts to abolish zamindari and implement land reform. That tussle was settled in favor of the Parliament with land ceiling laws being placed outside judicial review. The insertion of Articles 31-A and 31-B that barred the judiciary from intervening into measures to acquire land for public purposes were meant to remove the hurdles in the path of land acquisition for agrarian reforms, and the objective was the very opposite of depriving the small farmer of his land. The debates in the Constituent Assembly on zamindari abolition and the various judgments by the apex court upholding different legislations for compulsory acquisition of land and other property do point to a clear sense of purpose: to ensure that the ownership and control of the material resources of the community are so distributed as best to serve the common good. If the constitutional amendments of the time and the legislation enacted between the 1950s and 1970s were about facilitating and protecting the

[6] *Greater Noida Industrial Development Authority v. Devendrakumar and Others* (2011) 12-SCC-375.

transfer of resources from the rich to the poor, the State and Central Governments began invoking those to transfer land from the poor to the rich!

In as much as the earlier position of the courts was justified in the context of the land acquisition law being put to use to abolish landlordism, the current process of judicial intervention is very much welcome. In fact, the courts should have taken notice earlier of the manner in which agricultural land was being acquired by the various state governments and the resistance to such measures by farmers, especially when there is a threat to their livelihood. In now doing so, the apex court has only picked up the thread from the trend set by the higher judiciary, in the earlier phase, when the scope of some of the provisions listed in the Constitution as Fundamental Rights were expanded to include some of the ideals proclaimed in the Directive Principles of State Policy. Like it did in the Olga Tellis Case, the Supreme Court rightly read into the recent development in land acquisition a threat to the livelihood of the farming community and has asserted the right of the judiciary to intervene and ensure that the Right to Life, guaranteed by Article 21 of the Constitution, is not denied to the small, middle, and marginal farmers in the name of public good.

The *original position*, in the Rawlsian sense of the term, is what made all these possible. However, it is also pertinent, in this context, to recall instances where the institutions failed. Bela Banerjee, Vajravelu Mudaliar and Metal Corporation, discussed in Chapter 4 were instances where the judiciary's decisions were in the nature of departing from the socialistic principles. This was pushed further in the Golaknath Case and pronounced in the R. C. Cooper Case, and the Privy Purses Case, as discussed in Chapter 5 of this book. The political establishment, however, changed the course in all those instances and the *original position* was put back on the rails. Keshavananda seemed to confirm the o*riginal position* and the basic structure doctrine was certainly a reiteration of that principle. But then, we did notice another reversal of that decision in the BALCO Case, discussed in Chapter 8 of this book. An important distinction in this case was that it involved the

political establishment as well as the higher judiciary reneging from the socialistic principles at the same time. This was unlike in the past where one of the two institutions stood firm insofar as ensuring that socialism remained the state policy.

In John Rawl's *Theory of Justice*, the total reliance is on the *original position*, and it assumes that justice will be ensured with the institutions—legislative and judicial—in place. It has indeed worked in the 60-plus years of our constitutional history. There were aberrations in this course. And a way out of such aberrations could be found in Amartya Sen's *Idea of Justice*, which warrants a determination to go beyond Rawls. The *idea of justice*, as enunciated by Sen, warrants a *war of positions*, in the Gramscian sense of the term, wherein hunger, poverty, and unequal access to education and health care is considered injustice. In other words, even while the *original position* is acknowledged and the institutional arrangement to ensure justice is relevant and inevitable, the need to go beyond those is inevitable. In that sense, socialism will have to be perceived not merely in the sense as it was defined or perceived by the makers of the Constitution. It can and will have to be taken beyond mere positions, involving the ownership of the means of production and the concept of *eminent domain*. The elongated definition of the Right to Life, as pursued by the higher judiciary, in the various instances hitherto could well serve the basis for this process. This, however, cannot mean that equitable distribution of wealth and the means of production is negotiable. That, after all, is an integral part of the *original position* and will have to remain that way.

Appendices

Appendix 1

A Comparative Chart of the Fundamental Rights Resolution of the Karachi Session of the Indian National Congress and the Constitution as Adopted on November 26, 1949

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
1. i) Every citizen of India has the right of free expression of opinion, the right of free association and combination, and the right to assemble peacefully and without arms, for purposes not opposed to law or morality. xiv) Every citizen is free to move throughout India and to stay and settle in any part thereof, to acquire property and to follow any trade or calling, and to be treated equally with regard to legal prosecution or protection in all parts of India.	19 (1) All citizens shall have the right a) to freedom of speech and expression; b) to assemble peaceably and without arms; c) to form associations or unions; d) to move freely throughout the territory of India; e) to reside and settle in any part of the territory of India; f) to acquire, hold and dispose of property; and g) to practise any profession, or to carry on any occupation, trade or business. (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or

(Appendix 1 Continued)

(Appendix 1 Continued)

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
	prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. (3) Nothing in sub-clause (b) of the said clause shall effect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause. (4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause. (5) Nothing in sub-clauses (d), (e), and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the

(Appendix 1 Continued)

(Appendix 1 Continued)

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
	exercise of the right conferred by the said sub-clause, and in particular nothing in the said sub-clause shall affect the operation of any existing law so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing, or empowering any authority to prescribe, the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, or trade or business.
ii) Every citizen shall enjoy freedom of conscience and the right freely to profess and practise his religion, subject to public order and morality.	25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practise; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. Explanation II: In sub-clause (b) of clause (2), the reference to Hindus shall be constructed as including a reference

(Appendix 1 Continued)

(Appendix 1 Continued)

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
	to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.
	26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right
	(a) to establish and maintain institutions for religious and charitable purposes;
	(b) to manage its own affairs in matters of religion;
	(c) to own and acquire movable and immovable property; and
	(d) to administer such property in accordance with law.
iii) The culture, language and script of the minorities and of the different linguistic areas shall be protected.	29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
	(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.
iv) All citizens are equal before the law, irrespective of religion, caste, creed, or sex.	14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
v) No disability attaches to any citizen, by reason of his or her religion, caste, creed, or sex, in regard to public	15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(Appendix 1 Continued)

(Appendix 1 Continued)

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
employment office of power or honour, and in the exercise of any trade or calling.	(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth, or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. (3) Nothing in this article shall prevent the State from making any special provision for women and children. 16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State. (3) Nothing in this article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or appointment to an office under any State specified in the first Schedule or any local or other authority within its territory, any requirement as to

(Appendix 1 Continued)

(Appendix 1 Continued)

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
	residence within the State prior to such employment or appointment. (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to particular denomination.
vi) All citizens have equal rights and duties in regard to wells, tanks, roads, schools and places of public resort, maintained out of State or local funds, or dedicated by private persons for the use of the general public.	17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.
viii) No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered, or confiscated, save in accordance with law.	21. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced

(Appendix 1 Continued)

(Appendix 1 Continued)

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
	before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate. (3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention. (4) No law for providing for preventive detention shall authorize the detention of a person for a longer period than three months later- (a) any Advisory Board consisting of persons who are or have been or are qualified to be appointed as judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention; or (b) such person is detained in accordance with the provisions of any law made by Parliament under clause (7) (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as possible, communicate to such person the

(Appendix 1 Continued)

(Appendix 1 Continued)

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
	grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. (6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose. (7) Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention, and also the maximum period for which any person may be detained under such law, and Parliament may further prescribe by law the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).
ix) The State shall observe neutrality in regard to all religions.	25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practise;

(Appendix 1 Continued)

(Appendix 1 Continued)

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
	(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Explanation I: The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. Explanation II: In sub-clause (b) of clause (2), the reference to Hindus shall be constructed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.
xi) The State shall provide for free and compulsory primary education.	45. The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years. (This was a Directive Principle of State Policy and became a Fundamental Right—Article 21 A—several years after the Republican Constitution was adopted)
5) Children of school-going age shall not be employed in mines and factories.	24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Source: * Sitaramayya, Why vote Congress? (Vol.1), pp. 463–465.

** Rao (Ed.) (Reprint), *The Framing of India's Constitution: Select Documents* (Vol. 4), pp. 753–764.

Appendix 2

Report of the Subcommittee on Land Policy, Agricultural Labour, and Insurance of the National Planning Committee*

Shri K. T. Shah, Chairman of the Subcommittee on Land Policy & Insurance, presented a further note on September 3, in addition to the Interim Report submitted during the Fourth Session of the National Planning Committee. After full discussion, and certain amendments, this note was approved of. The amended note then read as follows:

> In pursuance of the general policy already laid down by the National Planning Committee (vide Handbook No. 3, p. 33) in regard to the ownership and working of land, the following amplification is recommended:
>
> Cultivation of land should be organised in complete collectives, wherever feasible, e.g. on culturable waste-lands, and other lands acquired by the State. Other forms of co-operative farming should be encouraged elsewhere. This co-operative farming should include cultivation of land and all other branches of agricultural work. In such co-operatives, private ownership of land will continue; but working of such land shall be in common; and the distribution of the produce will be regulated in accordance with the duly weighed contribution made by each member in respect of land, labor and tools, implements, and cattle required for cultivation.
>
> During the transition, the co-operative organisation of farming may also take the form of restricted co-operation for specific functions, e.g. credit, marketing, purchase of seeds, etc.
>
> It may also be on land acquired on lease by the co-operators from a private landowner, whose only interest thereafter would be confined to receiving the stipulated leasehold fee. The activities of such a co-operative organisation may be unrestricted in respect of all operations connected with agriculture. The only difference between this form and the proceeding will be: that whereas in the preceding form the land will be brought into the common pool which belongs to the members of the co-opeartive

* Shah (Ed.), *Report of the National Planning Committee*, pp. 222–225.

themselves, in the other form the land would be leased from a private owner.

The State should also maintain special farms under its control and management for experimental, educational, or demonstration purposes.

The collective farm—as distinguished from the co-operative or the State farm mentioned above—may be operated in such a manner that, after paying from the produce all expenses of cultivation, including the wages of workers, the surplus, if any, after paying the State dues, will be available for the benefit of the collective colony and the common services or amenities required by it, so as to raise their standard of living, as well as to make provision by way of reserve against future contingencies.

It has been decided that no intermediaries between the State and the cultivators should be recognised; and that all their rights and titles should be acquired by the State paying such compensation as may be considered necessary and desirable. Where such lands are acquired, it would be feasible to have collective and co-opeartive organisations as indicated above.

While these steps are being taken in the direction of collectivisation, there will continue to be large parts of the country under the regime of peasant proprietors or individual cultivators. Individuals enterprise will thus continue; but it must be subordinated t the needs of the community. Wherever possible, the co-operative principle should be introduced even in this sector of the national economy to whatever extent feasible. This will also enable the State to judge from experience and comparison how far this organisation is beneficial in particular areas and can be harmonised with the Plan. It is difficult to make more specific recommendations in regard to this sector applicable to all India, as conditions vary considerably in the different parts of the country. Far-reaching changes have been made in recent years in regard to land revenue, agricultural debts and organisation of farming; and many proposals dealing with these and cognate matters have also been put forward, and are before the public. There is still room for considerable improvement in this regard; but specific recommendations will necessarily relate to each province separately. It should be borne in mind, however, that whatever changes are proposed or made, should be in keeping with the general policy and objectives in regard to land laid down above.

While the present land revenue system lasts, the basis of taxation must be changed so that the higher incomes from land should be taxed progressively on the model of the Income Tax. Wherever possible and advisable relief in land revenue burdens should be

afforded to actual petty cultivators on whom that burden falls disproportionately heavily today.

(Note: Mr. G. M. Sayed was of opinion that compulsory collectives should be the only ieal laid down.)

Mr. Ambalal Sarabhai was in favour of the deletion of the latest three lines of paragraph 2 and to state instead that the distribution of the produce should be on an equitable basis.

Mr. Ambalal Sarabhai wished to add that he approved that the proposals contained in the Note should be given effect to as experiments. He fully accepted the last paragraph of the Note regarding the basis of taxation.

Appendix 3

A Comparative Chart of the Fundamental Rights as Enlisted in the Resolution of the Karachi Session of the Indian National Congress but made into Directive Principles of State Policy in the Constitution as Adopted on November 26, 1949

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
xi) The State shall provide for free and compulsory primary education.	45. The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.
1. a) The organisation of economic life must conform to the principle of justice, to the end that it may secure a decent standard of living.	38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice—social, economic and political—shall inform all the institutions of the national life.

(Appendix 3 Continued)

(Appendix 3 Continued)

*As in the Karachi Resolution**	*As in the Constitution Adopted on November 26, 1949***
b) The State shall safeguard the interests of industrial workers and shall secure for them, by suitable legislation and in other ways, a living wage, healthy conditions of work, limited hours of labour, suitable machinery for the settlement of disputes between employers and workmen, and protection against the economic consequences of old age, sickness and unemployment.	43. The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.
2. Labour to be freed from serfdom and conditions bordering on serfdom.	39 (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
3. Protection of women workers, and specially, adequate provision for leave during maternity period.	42. The State shall make provision for securing just and humane conditions of work and for maternity relief.
4. The State shall own or control key industries and services, mineral resources, railways, waterways, shipping and other means of public transport.	39 (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

Sources: * Sitaramayya, *The history of the Indian National Congress* (Vol. 1), pp. 463–465.

** Rao (Ed.), *The framing of India's Constitution: Select documents* (Vol. 4), pp. 753–764.

Appendix 4

Ninth Schedule (Article 31-B)

The First Amendment—1951

1. The Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).

2 The Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LXVII of 1948).

3. The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act LXI of 1949).

4. The Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949).

5. The Panch Mahals, Mehwassi Tenure Abolition Act, 1949 (Bombay Act LXIII of 1949).

6. The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950).

7. The Bombay Paragana and ulkarni Watan Abolition Act, 1950 (Bombay Act LX of 1950).

8. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act 1 of 1951).

9. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).

10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act 1 of 1950).

11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act 1 of 1951).

12. The Hyderabad (Abolition of Jagirs) Regulation, 1358F (No. LXIX of 1358, Fasli).

13. The Hyderabad Jagirs (Commutation) Regulation, 1359F (No. XXV of 1359, Fasli).

The Fourth Amendment—1955

14. The Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act XXXVIII of 1950).

15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U.P. Act XXVI of 1948).

16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act LX of 1948).

17. Sections 52A to 52G of the Insurance Act, 1938 (Act IV of 1938), as inserted by section 42 of the Insurance (Amendment) Act, 1950 (Act XLVII of 1950).

18. The Railway Companies (Emergency Provisions) Act, 1951 (Act LI of 1951).

19. Chapter 111-A of the Industries (Development and Regulation) Act, 1951 (Act LXV of 1951), as inserted by section 13 of the Industries (Development and Regulation) Amendment Act, 1953 (Act XXVI of 1953).

20. The West Bengal Land Development and Planning Act, 1948 (West Bengal Act XXI of 1948), as amended by West Bengal Act XXIX of 1951.

The Seventeenth Amendment—1964

21. The Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961 (Andhra Pradesh Act X of 1961).

22. The Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands (Validation) Act, 1961 (Andhra Pradesh Act XXI of 1961).

23. The Andhra Pradesh (Telangana Area) Ijara and owli Land Cancellation of Irregular Pattas and Abolition of Concessional Assessment Act, 1961 (Andhra Pradesh Act XXXVI of 1961).

24. The Assam State Acquisition of Lands belonging to Religious or Charitable Institution of Public Nature Act, 1959 (Assam Act IX of 1961).

25. The Bihar Land Reforms (Amendment) Act, 1953 (Bihar Act XX of 1954).

26. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), (except section 28 of this Act).

27. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1954 (Bombay Act 1 of 1955).

28. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1957 (Bombay Act XVIII of 1958).

29. The Bombay Inams (utch Area) Abolition Act, 1958 (Bombay Act XCVIII of 1958).

30. The Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960 (Gujarat Act XVI of 1960).

31. The Gujarat Agricultural Lands Ceiling Act, 1960 (Gujarat Act XXVI of 1961).

32. The Sagbara and Mehwassi Estates (Proprietary Rights Abolition, etc.) Regulation, 1962 (Gujarat Regulation 1 of 1962).

33. The Gujarat Surviving Alienations Abolition Act, 1963 (Gujarat Act XXXIII of 1963), except in so far as this Act relates to an alienation referred to in sub-clause (d) of clause (3) of sec. 2 thereof.

34. The Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (Maharashtra Act XXVII of 1961).

35. The Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and Further Amendment) Act, 1961 (Maharashtra Act XLV of 1961).

36. The Hyderabad Tenancy and Agricultural Lands Act, 1950 (Hyderabad Act XXI of 1950).

37. The Jenmikaram Payment (Abolition) Act, 1960 (Kerala Act III of 1961).

38. The Kerala Land Tax Act, 1961 (Kerala Act XIII of 1961).

39. The Kerala Land Reforms Act, 1963 (Kerala Act 1 of 1964).

40. The Madhya Pradesh Land Revenue Code, 1959 (Madhya Pradesh Act XX of 1959).

41. The Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 (Madhya Pradesh Act XX of 1960).

42. The Madras Cultivating Tenants Protection Act, 1955 (Madras Act XXV of 1955).

43. The Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956 (Madras Act XXIV of 1956).

44. The Madras Occupants of *k*udiyiruppu (Protection from Eviction) Act, 1961 (Madras Act XXXVIII of 1961).

45. The Madras Public Trust (Regulation of Administration of Agricultural Lands) Act, 1961 (Madras Act LVII of 1961).

46. The Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Madras Act LVIII of 1961).

47. The Mysore Tenancy Act, 1952 (Mysore Act XIII of 1952).

48. The Coorg Tenants Act, 1957 (Mysore Act XIV of 1957).

49. The Mysore Village Offices Abolition Act, 1961 (Mysore Act XIV of 1961).

50. The Hyderabad Tenancy and Agricultural Lands (Validation) Act, 1961 (Mysore Act XXXVI of 1961).

51. The Mysore Land Reforms Act, 1961 (Mysore Act X of 1962).

52. The Orissa Land Reforms Act, 1960 (Orissa Act XVI of 1960).

53. The Orissa Merged Territories (Village Offices Abolition) Act, 1963 (Orissa Act X of 1963).

54. The Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953).

55. The Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955).

56. The Rajasthan Zamindari and Biswedari Abolition Act, 1959 (Rajasthan Act VIII of 1959).

57. The Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 (Uttar Pradesh Act XVII of 1960).

58. The Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (Uttar Pradesh Act 1 of 1961).

59. The West Bengal Estates Acquisition Act, 1953 (West Bengal Act 1 of 1954).

60. The West Bengal Land Reforms Act, 1955 (West Bengal Act X of 1956).

61. The Delhi Land Reforms Act, 1954 (Delhi Act VIII of 1954).

62. The Delhi Land Holdings (Ceiling) Act, 1960 (Central Act 24 of 1960).

63. The Manipur Land Revenue and Land Reforms Act, 1960 (Central Act 33 of 1960).

64. The Tripura Land Revenue and Land Reforms Act, 1960 (Central Act 43 of 1960).

The Twenty-ninth Amendment—1972

65. The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969).

66. The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971).

The Thirty-fourth Amendment—1974

67. The Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 (Andhra Pradesh Act 1 of 1973).

68. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1972 (Bihar Act 1 of 1973).

69. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1973 (Bihar Act IX of 1973).

70. The Bihar Land Reforms (Amendment) Act, 1972 (Bihar Act V of 1972).

71. The Gujarat Agricultural Lands Ceiling (Amendment) Act, 1972 (Gujarat Act 2 of 1974).

72. The Haryana Ceiling on Land Holdings Act, 1972 (Haryana Act 26 of 1972).

73. The Himachal Pradesh Ceiling on Land Holdings Act, 1972 (Himachal Pradesh Act 19 of 1973).

74. The Kerala Land Reforms (Amendment) Act, 1972 (*K*erala Act 17 of 1972).

75. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1972 (Madhya Pradesh Act 12 of 1974).

76. The Madhya Pradesh Ceiling on Agricultural Holdings (Second Amendment) Act, 1972 (Madhya Pradesh Act 13 of 1974).

77. The Mysore Land Reforms (Amendment) Act, 1973 (Karnataka Act 1 of 1974).

78. The Punjab Land Reforms Act, 1972 (Punjab Act 10 of 1973).

79. The Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973 (Rajasthan Act II of 1973).

80. The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 (Tamil Nadu Act 24 of 1969).

81. The West Bengal Land Reforms (Amendment) Act, 1972 (West Bengal Act XII of 1972).

82. The West Bengal Estates Acquisition (Amendment) Act, 1964 (West Bengal Act XXII of 1964).

83. The West Bengal Estates Acquisition (Second Amendment) Act, 1973 (West Bengal Act XXXIII of 1973).

84. The Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1972 (Gujarat Act 5 of 1973).

85. The Orissa Land Reforms (Amendment) Act, 1974 (Orissa Act 9 of 1974).

86. The Tripura Land Revenue and Land Reforms (Second Amendment) Act, 1974 (Tripura Act 7 of 1974).

The Thirty-ninth Amendment—1975

87 **Omitted by 44th Amendment.*

88. The Industries (Development and Regulation) Act,1951 (Central Act 65 of 1951).

89. The Requisitioning and Acquisition of Immovable Property Act, 1952 (Central Act 30 of 1952).

90. The Mines and Minerals (Regulation and Development) Act, 1957 (Central Act 67 of 1957).

91. The Monopolies and Restrictive Trade Practices Act, 1969 (Central Act 54 of 1969).

92. **Omitted by 44th Amendment.*

93. The Coking Coal Mines (Emergency Provisions) Act, 1971 (Central Act 64 of 1971).

94. The Coking Coal Mines (Nationalisation) Act, 1972 (Central Act 36 of 1972).

95. The General Insurance Business (Nationalisation) Act, 1972 (Central Act 57 of 1972).

96. The Indian Copper Corporation (Acquisition of Undertaking) Act, 1972 (Central Act 58 of 1972).

97. The Sick Textile Undertakings (Taking Over of Management) Act, 1972 (Central Act 72 of 1972).

98. The Coal Mines (Taking Over of Management) Act, 1973 (Central Act 15 of 1973).

99. The Coal Mines (Nationalisation) Act, 1973 (Central Act 26 of 1973).

100. The Foreign Exchange Regulation Act, 1973 (Central Act 46 of 1973).

101. The Alcock Ashdown Company Limited (Acquisition of Undertakings) Act, 1973 (Central Act 56 of 1973).

102 The Coal Mines (Conservation and Development) Act, 1974 (Central Act 28 of1974).

103 The Additional Emoluments (Compulsory Deposit) Act, 1974 (Central Act 37 of 1974).

104. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974).

105. The Sick Textile Undertakings (Nationalisation) Act, 1974 (Central Act 57 of 1974).

106. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1964 (Maharashtra Act XVI of 1965).

107. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1965 (Maharashtra Act XXXII of 1965).

108. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1968 (Maharashtra Act XVI of 1968).

109. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Second Amendment) Act, 1968 (Maharashtra Act XXXIII of 1968).

110. The Maharashtra Agricultural Lands (Ceiling on Holdings) Amendment) Act, 1969 (Maharashtra Act XXXVII of 1969).

111. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Second Amendment) Act, 1969 (Maharashtra Act XXXVIII of 1969).

112. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1970 (Maharashtra Act XXVII of 1970).

113. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1972 (Maharashtra Act XIII of 1972).

114. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1973 (Maharashtra Act L of 1973).

115. The Orissa Land Reforms (Amendment) Act, 1965 (Orissa Act 13 of 1965).

116. The Orissa Land Reforms (Amendment) Act, 1966 (Orissa Act 8 of 1967).

117. The Orissa Land Reforms (Amendment) Act, 1967 (Orissa Act 13 of 1967).

118. The Orissa Land Reforms (Amendment) Act, 1969 (Orissa Act 13 of 1969).

119. The Orissa Land Reforms (Amendment) Act, 1970 (Orissa Act 18 of 1970).

120. The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (Uttar Pradesh Act 18 of 1973).

121. The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1974 (Uttar Pradesh Act 2 of 1975).

122. The Tripura Land Revenue and Land Reforms (Third Amendment) Act, 1975(Tripura Act 3 of 1975).

123. The Dadra and Nagar Haveli Land Reforms Regulation, 1971 (3 of 1971).

124. The Dadra and Nagar Haveli Land Reforms (Amendment) Regulation, 1973 (5 of 1973).

The Fortieth Amendment—1976

125. Section 66A and Chapter IVA of the Motor Vehicles Act, 1939 (Central Act 4 of 1939)

126. The Essential Commodities Act, 1955 (Central Act 10 of 1955).

127. The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (Central Act 13 of 1976).

128. The Bonded Labour System (Abolition) Act, 1976 (Central Act 19 of 1976).

129. The Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1976 (Central Act 20 of 1976).

130. **Omitted by 44th Amendment.*

131. The Levy Sugar Price Equalisation Fund Act, 1976 (Central Act 31 of 1976).

132. The Urban Land (Ceiling and Regulation) Act, 1976 (Central Act 33 of 1976).

133. The Departmentalisation of Union Accounts (Transfer of Personnel) Act, 1976 (Central Act 59 of 1976).

134. The Assam Fixation of Ceiling on Land Holdings Act, 1956 (Assam Act 1 of 1957).

135. The Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (Bombay Act XCIX of 1958).

136. The Gujarat Private Forests (Acquisition) Act, 1972 (Gujarat Act 14 of 1973).

137. The Haryana Ceiling on Land Holdings (Amendment) Act, 1976 (Haryana Act 17 of 1976).

138. The Himachal Pradesh Tenancy and Land Reforms Act, 1972 (Himachal Pradesh Act 8 of 1974).

139. The Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 (Himachal Pradesh Act 18 of 1974).

140. The Karnataka Land Reforms (Second Amendment and Miscellaneous Provisions) Act, 1974 (Karnataka Act 31 of 1974).

141. The Karnataka Land Reforms (Second Amendment) Act, 1976 (Karnataka Act 27 of 1976).

142. The Kerala Prevention of Eviction Act, 1966 (Kerala Act 12 of 1966).

143. The Thiruppuvaram Payment (Abolition) Act, 1969 (Kerala Act 19 of 1969).

144. The Sreepadam Lands Enfranchisement Act, 1969 (Kerala Act 20 of 1969).

145. The Sree Pandaravaka Lands (Vesting and Enfranchisement) Act, 1971 (Kerala Act 20 of 1971).

146. The Kerala Private Forests (Vesting and Assignment) Act, 1971 (Kerala Act 26 of 1971).

147. The Kerala Agricultural Workers Act, 1974 (Kerala Act 18 of 1974).

148. The Kerala Cashew Factories (Acquisition) Act, 1974 (Kerala Act 29 of 1974).

149. The Kerala Chitties Act, 1975 (Kerala Act 23 of 1975).

150. The Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act, 1975 (Kerala Act 31 of 1975).

151. The Kerala Land Reforms (Amendment) Act, 1976 (Kerala Act 15 of 1976).

152. The Kanam Tenancy Abolition Act, 1976 (Kerala Act 16 of 1976).

153. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1974 (Madhya Pradesh Act 20 of 1974).

154. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1975 (Madhya Pradesh Act 2 of 1976).

155. The West handesh Mehwassi Estates (Proprietary Rights Abolition, etc.) Regulation, 1961 (Maharashtra Regulation 1 of 1962).

156. The Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 (Maharashtra Act XIV of 1975).

157. The Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act, 1972 (Maharashtra Act XXI of 1975).

158. The Maharashtra Private Forests (Acquisition) Act, 1975 (Maharashtra Act XXIX of 1975).

159. The Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Amendment Act, 1975 (Maharashtra Act XLVII of 1975).

160. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1975 (Maharashtra Act 11 of 1976).

161. The Orissa Estates Abolition Act, 1951 (Orissa Act 1 of 1952).

162. The Rajasthan Colonisation Act, 1954 (Rajasthan Act XXVII of 1954).

163. The Rajasthan Land Reforms and Acquisition of Landowners' Estates Act, 1963 (Rajasthan Act 11 of 1964).

164. The Rajasthan Imposition of Ceiling on Agricultural Holdings (Amendment) Act, 1976 (Rajasthan Act 8 of 1976).

165. The Rajasthan Tenancy (Amendment) Act, 1976 (Rajasthan Act 12 of 1976).

166. The Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act, 1970 (Tamil Nadu Act 17 of 1970).

167. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1971 (Tamil Nadu Act 41 of 1971).

168. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1972 (Tamil Nadu Act 10 of 1972).

169. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1972 (Tamil Nadu Act 20 of 1972).

170. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Third Amendment Act, 1972 (Tamil Nadu Act 37 of 1972).

171. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Fourth Amendment Act, 1972 (Tamil Nadu Act 39 of 1972).

172. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Sixth Amendment Act, 1972, (Tamil Nadu Act 7 of 1974).

173. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Fifth Amendment Act, 1972 (Tamil Nadu Act 10 of 1974).

174. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1974 (Tamil Nadu Act 15 of 1974).

175. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Third Amendment Act, 1974 (Tamil Nadu Act 30 of 1974).

176. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1974 (Tamil Nadu Act 32 of 1974).

177. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1975 (Tamil Nadu Act 11 of 1975).

178. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1975 (Tamil Nadu Act 21 of 1975).

179. Amendments made to the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act 1 of 1951) by the Uttar Pradesh Land Laws (Amendment) Act, 1971 (Uttar Pradesh Act, 21 of 1971) and the Uttar Pradesh Land Laws (Amendment) Act, 1974 (Uttar Pradesh Act 34 of 1974).

180, The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1976 (Uttar Pradesh Act 20 of 1976).

181. The West Bengal Land Reforms (Second Amendment) Act, 1972 (West Bengal Act XXVIII of 1972).

182. The West Bengal Restoration of Alienated Land Act, 1973 (West Bengal Act XXIII of 1973).

183. The West Bengal Land Reforms (Amendment) Act, 1974 (West Bengal Act XXXIII of 1974).

184. The West Bengal Land Reforms (Amendment) Act, 1975 (West Bengal Act XXIII of 1975).

185. The West Bengal Land Reforms (Amendment) Act, 1976 (West Bengal Act XII of 1976).

186. The Delhi Land Holdings (Ceiling) Amendment Act, 1976 (Central Act 15 of1976).

187. The Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (Goa, Daman and Diu Act 1 of 1976).

188. The Pondicherry Land Reforms (Fixation of Ceiling on Land) Act, 1973 (Pondicherry Act 9 of 1974).

The Forty-seventh Amendment—1984

189. The Assam (Temporarily Settled Areas) Tenancy Act, 1971 (Assam Act XXIII of 1971).

190. The Assam (Temporarily Settled Areas) Tenancy (Amendment) Act, 1974 (Assam Act XVIII of 1974).

191. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Amending Act, 1974 (Bihar Act 13 of 1975).

192. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1976 (Bihar Act 22 of 1976).

193. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1978 (Bihar Act VII of 1978).

194. The Land Acquisition (Bihar Amendment) Act, 1979 (Bihar Act 2 of 1980).

195. The Haryana Ceiling on Land Holdings (Amendment) Act, 1977 (Haryana Act 14 of 1977).

196. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1978 (Tamil Nadu Act 25 of 1978).

197. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1979 (Tamil Nadu Act 11 of 1979).

198. The Uttar Pradesh Zamindari Abolition Laws (Amendment) Act, 1978 (Uttar Pradesh Act 15 of 1978).

199. The West Bengal Restoration of Alienated Land (Amendment) Act, 1978 (West Bengal Act XXIV of 1978).

200. The West Bengal Restoration of Alienated Land (Amendment) Act, 1980 (West Bengal Act LVI of 1980).

201. The Goa, Daman and Diu Agricultural Tenancy Act, 1964 (Goa, Daman and Diu Act 7 of 1964).

202. The Goa, Daman and Diu Agricultural Tenancy (Fifth Amendment) Act, 1976 (Goa, Daman and Diu Act 17 of 1976).

The Sixty-sixth Amendment—1990

203. The Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959 (Andhra Pradesh Regulation 1 of 1959).

204. The Andhra Pradesh Scheduled Areas Laws (Extension and Amendment) Regulation, 1963 (Andhra Pradesh Regulation 2 of 1963).

205. The Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation, 1970 (Andhra Pradesh Regulation 1 of 1970).

206. The Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation, 1971 (Andhra Pradesh Regulation 1 of 1971).

207. The Andhra Pradesh Scheduled Areas Land Transfer (Amendment) Regulation, 1978 (Andhra Pradesh Regulation 1 of 1978).

208. The Bihar Tenancy Act, 1885 (Bihar Act 8 of 1885).

209. The Chota Nagpur Tenancy Act, 1908 (Bengal Act 6 of 1908) (Chapter VIII-sections 46, 47, 48, 48A and 49; Chapter X sections 71, 71A and 71B; and Chapter XVIII-sections 240, 241 and 242).

210. The Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 (Bihar Act 14 of 1949) except section 53.

211. The Bihar Scheduled Areas Regulation, 1969 (Bihar Regulation 1 of 1969).

212. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1982 (Bihar Act 55 of 1982).

213. The Gujarat Devasthan Inams Abolition Act, 1969 (Gujarat Act 16 of 1969).

214. The Gujarat Tenancy Laws (Amendment) Act, 1976 (Gujarat Act 37 of 1976).

215. The Gujarat Agricultural Lands Ceiling (Amendment) Act, 1976 (President's Act 43 of 1976).

216. The Gujarat Devasthan Inams Abolition (Amendment) Act, 1977 (Gujarat Act 27 of 1977).

217. The Gujarat Tenancy Laws (Amendment) Act, 1977 (Gujarat Act 30 of 1977).

218. The Bombay Land Revenue (Gujarat Second Amendment) Act, 1980 (Gujarat Act 37 of 1980).

219. The Bombay Land Revenue Code and Land Tenure Abolition Laws (Gujarat Amendment) Act, 1982 (Gujarat Act 8 of 1982).

220. The Himachal Pradesh Transfer of Land (Regulation) Act, 1968 (Himachal Pradesh Act 15 of 1969).

221. The Himachal Pradesh Transfer of Land (Regulation) (Amendment) Act, 1986 (Himachal Pradesh Act 16 of 1986).

222. The Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of certain Lands) Act, 1978 (Karnataka Act 2 of 1979).

223. The Kerala Land Reforms (Amendment) Act, 1978 (Kerala Act 13 of 1978).

224. The Kerala Land Reforms (Amendment) Act, 1981 (Kerala Act 19 of 1981).

225. The Madhya Pradesh Land Revenue Code (Third Amendment) Act, 1976 (Madhya Pradesh Act 61 of 1976).

226. The Madhya Pradesh Land Revenue Code (Amendment) Act, 1980 (Madhya Pradesh Act 15 of 1980).

227. The Madhya Pradesh Akrishik Jot Uchchatam Seema Adhiniyam, 1981 (Madhya Pradesh Act 11 of 1981).

228. The Madhya Pradesh Ceiling on Agricultural Holdings (Second Amendment) Act, 1976 (Madhya Pradesh Act 1 of 1984).

229. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1984 (Madhya Pradesh Act 14 of 1984).

230. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1989 (Madhya Pradesh Act 8 of 1989).

231. The Maharashtra Land Revenue Code, 1966 (Maharashtra Act 41 of 1966), sections 36, 36A and 36B.

232. The Maharashtra Land Revenue Code and the Maharashtra Restoration of Lands to Scheduled Tribes (Second Amendment) Act, 1976 (Maharashtra Act 30 of 1977).

233. The Maharashtra Abolition of Subsisting Proprietary Rights to Mines and Minerals in certain Lands Act, 1985 (Maharashtra Act 16 of 1985).

234. The Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956 (Orissa Regulation 2 of 1956).

235. The Orissa Land Reforms (Second Amendment) Act, 1975 (Orissa Act 29 of 1976).

236. The Orissa Land Reforms (Amendment) Act. 1976 (Orissa Act 30 of 1976).

237. The Orissa Land Reforms (Second Amendment) Act, 1976 (Orissa Act 44 of 1976).

238. The Rajasthan Colonisation (Amendment) Act, 1984 (Rajasthan Act 12 of 1984). 239. The Rajasthan Tenancy (Amendment) Act, 1984 (Rajasthan Act 13 of 1984).

240. The Rajasthan Tenancy (Amendment) Act, 1987 (Rajasthan Act 21 of 1987).

241. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1979 (Tamil Nadu Act 8 of 1980).

242. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1980 (Tamil Nadu Act 21 of 1980).

243. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1981 (Tamil Nadu Act 59 of 1981).

244. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1983 (Tamil Nadu Act 2 of 1984).

245. The Uttar Pradesh Land Laws (Amendment) Act, 1982 (Uttar Pradesh Act 20 of 1982).

246. The West Bengal Land Reforms (Amendment) Act, 1965 (West Bengal Act 18 of 1965).

247. The West Bengal Land Reforms (Amendment) Act, 1966 (West Bengal Act 11 of 1966).

248. The West Bengal Land Reforms (Second Amendment) Act, 1969 (West Bengal Act 23 of 1969).

249. The West Bengal Estate Acquisition (Amendment) Act, 1977 (West Bengal Act 36 of 1977).

250. The West Bengal Land Holding Revenue Act, 1979 (West Bengal Act 44 of 1979).

251. The West Bengal Land Reforms (Amendment) Act, 1980 (West Bengal Act 41 of 1980).

252. The West Bengal Land Holding Revenue (Amendment) Act, 1981 (West Bengal Act 33 of 1981).

253. The Calcutta Thikka Tenancy (Acquisition and Regulation) Act, 1981 (West Bengal Act 37 of 1981).

254. The West Bengal Land Holding Revenue (Amendment) Act, 1982 (West Bengal Act 23 of 1982).

255. The Calcutta Thikka Tenancy (Acquisition and Regulation) (Amendment) Act, 1984 (West Bengal Act 41 of 1984).

256. The Mahe Land Reforms Act, 1968 (Pondicherry Act 1 of 1968).

257. The Mahe Land Reforms (Amendment) Act, 1980 (Pondicherry Act 1 of 1981).

The Seventy-eighth Amendment—1995

258. The Bihar Privileged Persons Homestead Tenancy Act, 1947 (Bihar Act 4 of 1948).

259. The Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (Bihar Act 22 of 1956).

260. The Bihar Consolidation of Holdings and Prevention of Fragmentation (Amendment) Act, 1970 (Bihar Act 7 of 1970).

261. The Bihar Privileged Persons Homestead Tenancy (Amendment) Act, 1970 (Bihar Act 9 of 1970).

262. The Bihar Consolidation of Holdings and Prevention of Fragmentation (Amendment) Act, 1973 (Bihar Act 27 of 1975).

263. The Bihar Consolidation of Holdings and Prevention of Fragmentation (Amendment) Act, 1981 (Bihar Act 35 of 1982)

264. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1987 (Bihar Act 21 of 1987).

265. The Bihar Privileged Persons Homestead Tenancy (Amendment) Act, 1989 (Bihar Act 11 of 1989).

266. The Bihar Land Reforms (Amendment) Act, 1989 (Bihar Act 11 of 1990).

267. The Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) (Amendment) Act, 1984 (Karnataka Act 3 of 1984).

268. The Kerala Land Reforms (Amendment) Act, 1989 (Kerala Act 16 of 1989).

269. The Kerala Land Reforms (Second Amendment) Act, 1989 (Kerala Act 2 of 1990).

270. The Orissa Land Reforms (Amendment) Act, 1989 (Orissa Act 9 of 1990).

271. The Rajasthan Tenancy (Amendment) Act, 1979 (Rajasthan Act 16 of 1979).

272. The Rajasthan Colonisation (Amendment) Act, 1987 (Rajasthan Act 2 of 1987).

273. The Rajasthan Colonisation (Amendment) Act, 1989 (Rajasthan Act 12 of 1989).

274. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1983 (Tamil Nadu Act 3 of 1984).

275. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1986 (Tamil Nadu Act 57 of 1986).

276. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1987 (Tamil Nadu Act 4 of 1988).

277. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land (Amendment) Act, 1989 (Tamil Nadu Act 30 of 1989).

278. The West Bengal Land Reforms (Amendment) Act, 1981 (West Bengal Act 50 of 1981).

279. The West Bengal Land Reforms (Amendment) Act, 1986 (West Bengal Act 5 of 1986).

280. The West Bengal Land Reforms (Second Amendment) Act, 1986 (West Bengal Act 19 of 1986).

281. The West Bengal Land Reforms (Third Amendment) Act, 1986 (West Bengal Act 35 of 1986).

282. The West Bengal Land Reforms (Amendment) Act, 1989 (West Bengal Act 23 of 1989).

283. The West Bengal Land Reforms (Amendment) Act, 1990 (West Bengal Act 24 of 1990).

284. The West Bengal Land Reforms Tribunal Act, 1991 (West Bengal Act 12 of 1991).

Appendix 5

Text of Speech by Jawaharlal Nehru in the Constituent Assembly Introducing Article 24 (which became Article 31) of the Draft Constitution on September 10, 1949*

The Honourable Shri Jawaharlal Nehru: Sir, I was saying that in spite of the great argument that has taken place, not in this House but outside among Members over this article, the questions involved

* CAD, Lok Sabha Secretariat, Volume IX, Book 4, pp. 1194–1198.

are relatively simple. It is true that there are two approaches to those questions, the two approaches being the individual right to property and the community's interest in that property or the community's right. There is no conflict necessarily between those two: sometimes the two may overlap and sometimes there might be, if you like, some petty conflict. This amendment that I have moved tries to remove or to avoid that conflict and also tries to take into consideration fully both these rights-the right of the individual and the right of the community.

First of all let us be quite clear that there is no question of any expropriation without compensation so far as this Constitution is concerned. If property is required for public use it is a well established law that it should be acquired by the State, by compulsion if necessary and compensation is paid and the law has laid down methods of judging that compensation. Now, normally speaking in regard to such acquisition-what might be called petition or acquisition of small bits of property or even relatively large bits, if you like, for the improvement of a town, etc., the law has been clearly laid down. But more and more today the community has to deal with large schemes of social reform, social engineering, etc., which can hardly be considered from the point of view of that individual acquisition of a small bit of land or structure. Difficulties arise-apart from every other difficulty, the question of time. Here is a piece of legislation that the community, as presented in its chosen representatives, considers quite essential for the progress and the safety of the State and it is a piece of legislation which affects millions of people. Obviously you cannot leave that piece of legislation too long, widespread and continuous litigation in the courts of law. Otherwise the future of millions of people may be affected; otherwise the whole structures of the State may be shaken to its foundations: so that we have to keep these things in view. If we have to take the property, if the State so wills, we have to see that fair and equitable compensation is given, because we proceed on the basis of fair and equitable compensation. But when we consider the equity of it we have always to remember that the equity does not apply only to the individual but to the community. No individual can override ultimately the rights of the community at large. No community should injure and invade the rights of the individual unless it be, for the most urgent and important reasons.

How is it going to balance all this? You may balance it to some extent by legal means, but ultimately the balancing authority can only be the sovereign legislature of the country which can keep before it all the various factors-all the public, political and it, leads you by a chain of thought and refers to these various factors and

I think refers to them in an equitable manner. It is true that some honourable Members may criticise this article because of a certain perhaps overlapping, because of a certain perhaps-what they might consider-lack of clarity in a word here or there or a phase. That to some extent is inevitable when you try to bring together a large number of ideas and approaches and factors and put them in one or a number of phrases.

This draft article which I have the honour to propose is the result of a great deal of consultation, is the result in fact of the attempt to bring together and compromise various approaches to this question. I feel that that attempt has to a very large measure succeeded. I may not meet the wishes of every individual who may like to emphasize one part of it more than the other. But I think it is a just compromise and it does justice and equity not only to the individual but to the community.

The first clause in this article lays down the basic principle that no Person shall be deprived of his property save by authority of law. The next clause says that the law should provide for the compensation for the property and should either fix the amount of compensation or specify the principles under which or the manner in which the compensation is to be determined. The law should do it. Parliament should do it. There is no reference in this to any judiciary coming into the picture. Much thought has been given to it and there has been much debate as to where the judiciary comes in. Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in. Parliament fixes either the compensation itself or the principles governing that compensation and they should not be challenged except for one reason, where it is thought that there has been a fraud on the Constitution. Naturally the judiciary comes in to see if there has been a fraud on the Constitution or not. But normally speaking one presumes that any Parliament representing the entire community and will be very much concerned with doing justice to the individual as well as the community.

In regard to the other clauses I need say very little except that clause (4) relates to Bills now pending before the Legislature of a State. The House will know that there are such bills pending. In order to avoid any doubt with regard to those measures, it says that soon as the President has assented to that law no question should be raised in a court of law in regard to the provisions of that enactment. Previous to this it has already been said that the matter has to go to the President. That is, if you like, a kind of a check to see that in a hurry the Legislature has not done something which it should not have done. If so, the President no doubt will draw their

attention to it and suggest such changes as he may consider fit and proper for Parliament's consideration.

Finally, there are certain other saving clauses about which I need not say much. Clause (6) again refers to any law which has been passed within the last year before the commencement of the Constitution. It says that, if the President certifies that, no other obstruction should be raised. Reading this article, it seems to me surprising that we have had this tremendous debate on it-not here but elsewhere. That debate was due perhaps not to this article but to rather other conflicts of opinion which are in the minds of Members and, I believe, many outside.

We are passing through a tremendous age of transition. That of course is a platitude. Nevertheless platitudes have to be repeated and to be remembered lest in forgetting them we land ourselves in great difficulties and in crisis. When we pass through great ages of transition, the various systems—even systems of law—have to undergo changes. Conceptions which had appeared to us basic undergo changes. And I draw the attention of the House to the very conception of property which may seem to us an unchanging conception but which has changed throughout the times, and changed very greatly, and which is today undergoing a very rapid change. There was a period when there was property in human beings. The king owned everything-the land, the cattle, the human beings. Property used to be measured in terms of the cows and bullocks you possessed in old days. Property in land then became more important. Gradually the property in human beings ceased to exist. If you go back to the period when there were debates on slavery you will see how very much the same arguments were advanced in regard to the other property. Well, slavery ceased to exist.

Gradually the idea of property underwent changes not so much by law, but by the development of human society. Land today, as it has been yesterday, is likely to be a very important kind of property. One cannot overlook it. Nevertheless, other kinds of property today are very important in industrially developed countries. Ultimately you arrive at an idea of property which consists chiefly in a millionaire having a bundle of paper in his hands which represents millions, securities, promissory notes, etc. That is the conception of property today; that is the real conception of the millionaire. It is rather an odd conception to have to protect carefully that property which, in the larger concept of vastly greater properties, is paper. In other words, property becomes today more and more a question of credit. It becomes more and more immaterial and more and more a shadow. A man with credit has more property and can raise property and can do wonders with that credit. But a man with no credit

can do nothing at all. I am merely mentioning this to the House to show how this idea of property has been a changing one where society has been changing rapidly owing to the various revolutions.

Again, another change takes place. Property remains of course property, but the ownership of property begins to spread out. The individual, instead of owning a very small share, more or less begins to own a very large share partly and thereafter becomes the co-sharer, of a very large property and gets the benefit of that, although he is not complete master of it. So co-operative undertakings, so in a sense the joint stock system, etc., began. So in a sense also spread the idea of an individual becoming a part owner as a member of a group of properties on a big scale which no single individual can ever hold except very rarely. In recent years the tendency has been for monopoly of wealth and property in a limited number of hands. This does not apply to India so much, because we have not grown so much in that direction. But where industrially countries have grown fast there has been monopoly of capital with the result that even the old idea of property and free enterprise is not easily applicable, because in the ultimate analysis the few persons who possess a large monopoly of capital really dominate the scene. They can crush out the little shopkeeper by their methods of business and by the fact that they have large sums of money at their command. Without giving the slightest compensation they can crush him out of existence. The small man is crushed out of existence by the modern tendency to have money power concentrated in some hands. Thus the old conception of the individual owner of property suffers not only from social developments, as we see them taking place and from new conceptions of co-operative ownership of property, but from the development on the old lines when a rich man with capital can buy out the small one for a song.

How are you going to protect the individual? I began by saying that there are two approaches-the approach of the individual and the approach of the community. But how are we to protect the individual today except the few who are strong enough to protect themselves? They have become fewer and fewer. In such a state of affairs, the State has to protect the individual right to property. He may possess property, but it may mean nothing to him, because some monopoly comes in the way and prevents him from the enjoyment of his property. The subject therefore is not a simple one when you say you are protecting the individual's rights, because the individual may lose that right completely by the functioning of various forces today both in the capitalist direction and in the socialist direction.

Well, this is a large question and one can consider the various aspects of it at length. I wish to place before the House just a hint of these broader issues, because I am a little afraid that this House may be moved by legal arguments of extreme subtlety and extreme cleverness, ignoring the human aspect of the problem and the other aspects which are really changing the world today.

The House has to keep in mind the transitional and the revolutionary aspects of the problem, because, when you think of the land question in India today, you are thinking of something which is dynamic, moving, changing and revolutionary. These may well change the face of India either way; whether you deal with it or do not deal with it, it is not a static thing. It is something which is not entirely, absolutely within the control of law and Parliaments. That is to say, if law and Parliaments do not fit themselves into the changing picture, they cannot control the situation completely. This is a big fact. Therefore it is in this context of the fast-changing situation in India that we have to view this question and it is with this context in the wide world and in Asia we are concerned.

It must be said that we have to consider these problems not in the narrow, legalistic and juristic sense. There are some honourable Members here who, at the very outset, were owners of land, owners of zamindaries. Naturally they feel that their interests might be affected by this land legislation. But I think that the way this land legislation is being dealt with today-and I am acquainted a little more intimately with the land legislation in the United Provinces than elsewhere-the way this question is being dealt with may appear to them not completely right so far as they are concerned; but it is better way and a juster way, from their point view, than any other way that is going to come later. That way may not be by any process of legislation. The land question may be settled differently. If you look at the situation all the world over and all over Asia, nothing is more important and vital than a gradual reform of the big estates.

It has been not today's policy, but the old policy of the National Congress laid down years ago that the zamindari institution in India, that is the big estate system must be abolished. So far as we are concerned, we, who are connected with the Congress, shall give effect to that pledge naturally completely, one hundred percent and no legal [subtlety] and no change is going to come in our way. That is quite clear. We will honour our pledges. Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in Judgement over the sovereign will of Parliament representing the will of the entire community.

If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament. But we must respect the judiciary, the Supreme Court and the other High Courts in the land. As wise people, their duty it is to see that in a moment of passion, in a moment of excitement, even the representatives of the people do not go wrong; they might. In the detached atmosphere of the courts, they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against the community in the larger sense of the term. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of correction. So, it is important that with this limitation the judiciary should function.

You have decided, the House has decided, rather most of the Provincial Governments have decided to have a second Chamber. Why has it been so decided? The Second Chamber also is an elected Chamber mostly. Presumably, they have so decided because we want some check somewhere to any rapid decision of the First Chamber, which that Chamber itself may later regret and may wish to go back on. So, from that point of view, it is desirable to have people whose duty is, not in any small matters but with regard to the basic principles that you lay down, to see that you do not go wrong, as sometimes even the Legislature may go wrong, but ultimately the fact remains that the legislature must be supreme and must not be interfered with by the courts of law in such measures of social reform. Otherwise, you will have strange procedures adopted. Of course, one is the method of changing the Constitution. The other is that which we have seen in great countries across the seas that the executive, which is the appointing authority of the judiciary, begins to appoint judges of its own liking for getting decisions in its own favour, but that is not a very good method.

I submit, therefore, that in this Resolution the approach made protects both individual and the community. It gives the final authority to Parliament, subject only to the scrutiny of the superior courts in case of some grave error, in case of contravention of the Constitution or the like, not otherwise. And finally in regard to certain pending measures or measures that have been passed, it makes it clear beyond any doubt that there should be no interference. I beg to place this amendment before the House.

Appendix 6

Text of Speech by Vallabhai Patel in the Constituent Assembly in Defence of Article 291 (provision for Privy Purses) of the Constitution on October 12, 1949*

The Honourable Sardar Vallabhai J. Patel: Sir, it has been my endeavour to keep the House fully informed of our policy and the developments in respect of the States. Apart from the statements I have made on the floor of the House from time to time, I laid before the House in July last year a White Paper on States in which was set out in detail not only the policy pursued by the Government of India towards the States but also the various agreements and Covenants entered into with the Rulers were reproduced. In March last I placed before the House another detailed report on the policy and the working of the Ministry of States. Now that the process of integration of the States has been completed I propose to place before the House next month another State Paper which will contain a comprehensive review of all the developments which have taken place in respect of the Indian States since this Government was called upon to face the problem of States.

The amendments which are now being proposed concerning the provisions of the Constitution applicable to the States, embody the results of the bloodless revolution which within a remarkably short period, has transformed the internal and external set up of the States. The fact that the new Constitution specifies only nine States in Part III of Schedule I is an index to the phenomenal progress made by the policy of integration pursued by the Government of India. By integrating 500 and odd States into sizeable units and by the complete elimination of centuries—old autocracies, the Indian democracy has won a great victory of which the Princes and the people of India alike should be proud. This is an achievement which should rebound to the credit of any nation or people at any phase of history.

As the House is aware, when the States entered the Constituent Assembly, of India, it was thought that the Constitution of the States would not form part of the Constitution of India. It was also understood that unlike the Provinces the accession of the States to the Indian Union would not be automatic but would be by means

* CAD, Volume X, Book 5, pp. 161–168.

of some process of ratification of the Constitution. In the context of those commitments and the conditions then obtaining certain provisions were incorporated in the Draft Constitution, which placed the States in certain important respects on a footing different from that of the Provinces.

As a result of the policy of integration and democratization of States pursued by the Government of India since December 1947 the process of what might be described as "unionisation" of States has been greatly accelerated. Two important developments in this direction have been the extension of the legislative authority of the Dominion over the States and the federal financial integration of the States. The States had originally acceded in respect of the Unions of States to all matters specified in the Federal and Concurrent Lists except those relating to taxation. The content of the accession of the state of Mysore was also likewise extended.

The gap in the financial field as now been filled by the arrangements which have been negotiated, with the States on the basis of the recommendations made by the Indian States Finances Enquiry Committee. The fundamental basis of this scheme is the federal financial integration of the States as a necessary consequence of the basic conception underlying the new Constitution of the Union of India–that of Provinces and States as equal partners. The scheme, therefore, is based upon complete equality between the Provinces and States in the following respects:-

1. The Central Government should perform the same functions and exercise the same powers in States as in Provinces;
2. The Central Government should function through its own executive organizations in States as in Provinces;
3. There should be uniformity and equality in the basis of contributions to Central resources from Provinces and States;
4. There should be equality of treatment as between Provinces and States in the matters of common services rendered by the Central Government and as regards the sharing of divisible federal taxes, grants-in-aid, 'subsidies', and all other forms of financial and technical assistance.

The fact that these far-reaching changes in our fiscal structure are being introduced with the full concurrence of the States is in itself a great tribute to the excellent work done by the Indian States Finances Enquiry Committee under the chairmanship of Sir V. T. Krishnamachari, who brought to bear on this important problem his vast experience in Indian States.

These important developments enabled us to review the position of the States under the new Constitution and to remove from it all

vestiges of anomalies and disparities which found their way into the new Constitution as a legacy from the past.

When the Covenants establishing the various Unions of States were entered into, it was contemplated that the Constitutions of the various Unions would be formed by their respective Constituent Assemblies within the framework of the covenants and the Constitution of India. These provisions were made in the covenants at a time when we were still working under the shadow of the theory, that the assumption, by the Constituent Assembly of India, of the constitution-making authority in respect of the States would constitute an infringement of the autonomy of the States. As however, the States closer, to the Centre, it was realized that the idea of separate Constitutions being framed for the different Constituent units of the Indian Union was a legacy from the "Rulers" polity and that in a people's polity there was no scope for variegated constitutional patterns. We, therefore, discussed this matter with the Premiers of the various Unions and decided, with their concurrence, that the Constitution of the States should also form an integral part of the Constitution of India. The readiness with which the legislatures of the three States in which such bodies are functioning at present, namely, Mysore, Travancore and Cochin Union and Saurashtra, have accepted this procedure, bears testimony to the wish of the people of the States to eschew the separatist trends of the past.

In view of these important developments it became necessary to recast a number of the provisions of the Constitution in so far as they related to the States. The amendments we are proposing have been examined by the Constitution-making bodies of Mysore, Saurashtra and Travancore and Cochin Union. Some of the modifications proposed by these bodies have been incorporated in the amendments tabled before the House. Others have been dropped as a result of the discussions I have had with the representatives of these Constituent Assemblies.

It is a matter of deep regret for me that it has not been possible for us to adopt a similar procedure for ascertaining the wishes of the people of the other States and Unions of States through their elected representatives. Unfortunately we have no properly constituted legislatures in the rest of the States; nor will it be possible to have legislatures constituted in them before the Constitution of India emerges in its final form. We have, therefore, no option but to make the Constitution operative in these states on the basis of its acceptance by the Ruler of the Rajpramukh, as the case may be, who will no doubt consult their Councils of Ministers. I am sure neither the honourable Members representing those States in this House nor the people of the States generally, would wish that the

enforcement of the Constitution in these States should be held over until legislatures or constitution-making bodies are constituted in them. The legislatures of these States, when, constituted under the new Constitution, may propose amendments to the Constitution. I wish to assure the people of these States that any recommendations made by their first legislatures would receive our earnest consideration. In the meantime I have no doubt, that the Constitution framed by this House, where all the States except one are duly represented, will be acceptable to them.

In view of the special problems with which the Government of Jammu and Kashmir is faced, we have made a special provision for the continuance of the constitutional relationship of the State with the Union on the existing basis. In the case of Hyderabad State the acceptance of the Constitution will be subject to ratification by the people of the State.

As the House will see, in several respects the Constitution as it now emerges, is different from the original draft. We have deleted such provisions, as articles 224 and 225, which imposed limitations on the Union's legislative and executive authority in relation to States in the federal sphere. The entries in the legislative List, which differentiated between the States and Provinces have likewise been dropped. The legislative and executive authority of the Union in respect of the States will, therefore, be co-extensive with its similar authority in and over the Provinces. Subject to certain adjustments during the transitional period, the fiscal relationship of the States with the Centre will also be the same as that between the Provinces and the Centre. The jurisdiction of the Supreme Court will now extend to the States to the same extent as in the case of the Provinces. The High Courts of the States are to be constituted and will function in the same manner as the Provincial High Courts. All the citizens of India, whether residing in States or Provinces, will enjoy the same fundamental rights and the same legal remedies to enforce them. In the matter of their constitutional relationship with the Centre and in their internal set-up the States will be on a par with the Provinces.

I am sure the House will note with gratification the important fact that unlike the scheme of 1935, our new constitution is not an alliance between democracies and dynasties, but a really union of the Indian people built on the basic concept of the sovereignty of the people. It removes all barriers between the people of the States and the people of Provinces and, achieves for the first time the objective of a strong democratic [India] built on the true foundation of a co-operative enterprise on the part of the people of the Provinces and States alike.

As the House is acquainted with trends of developments affecting the States it is not necessary for me to explain to the House the various amendments which have been tabled. There are two or three matters, however, about which I should like to make a few observations.

One of these is the proposed article 306-B. As the House is aware, the States, as we inherited them, Were in varying stages of development, In 'most cases the advance had to be made from the starting point of pure,' autocracy. Having regard to the magnitude of the task, which confronted the Governments of the Unions in the transitional period, and to the fact that neither the Services inherited by them nor the political organisations, as they existed there, were in a position to assume, unaided, full responsibilities of the administration, we made a provision in some of the Covenants that till the new Constitution came into operation in these. Unions, the Rajpramukh and the Council of Ministers shall, in the exercise of their functions, be under the general control of the Government of India and comply with the instructions issued by that Government from time to time. The stress of the transitional phase is likely to continue for some years. We are ourselves most anxious that the people of these States should shoulder their full responsibilities; however, we cannot ignore the fact that while the administrative organisation and political institutions are to be found in most of the States in a relatively less developed state, the problems relating to the integration of the States and the change-over from an autocratic to a democratic order are such, as to test the mettle of long established administrations and experienced leaders of people. We have therefore, found it necessary that in the interest of the growth of democratic institutions in these States, no less than the requirements of administrative efficiency, the Government of India should exercise general supervision over the Governments of the States till such time as it may be necessary.

It is natural that a provision of this nature which treats States in Part III differently, from Part I States should cause some misgivings. I wish to assure the honourable Members representing these States, and through them the people of these States that the provision involves no censure of any Government. It merely provides for contingencies which, in view of the present conditions, are more likely to arise in Part III States than in the States of other categories. We do not wish to interfere with the day-to-day administration of any of the State. We are ourselves most anxious that the people of the States should learn by experience. This article is essentially in the nature of a safety-value to obviate recourse to drastic remedies such as the provisions for the breakdown of the constitutional

machinery. It is quite obvious that in this matter the States, e.g., Mysore and Travancore and Cochin Union where democratic institutions have been functioning for a long time and where Governments responsible to legislatures are in office, have to be treated differently from the States not conforming to these standards. In all these cases our control will be exercised in varying degrees according to the requirements of each case. The proviso to the article gives us the necessary discretion to deal with each case on its merits.

I hope this statement which embodies our considered policy will allay any apprehension which the Governments of any of these States may have concerning this article.

Another matter about which I would like to remove misgivings is the proposed amendment to article 3. This amendment places the States in Part III on the same footing as the States in Part I in respect of territorial readjustments. The Constituent Assembly of Mysore recommended to us that the article as already adopted by this House, which provides for prior consent of Part III States before any proposals affecting their territories are placed before the House, should remain unaltered. We have not found it possible to agree to the suggestion for the simple reason that in such matters there should be no differentiation between Part I and Part III States. I, however take this opportunity of assuring the representatives of Mysore State that whether the article provides for consultation or consent of the legislature of the affected State, the wishes of the people cannot be ignored either by the Central Government or legislature. After all, we are a democracy; the main sanction behind us in the will of the people and we cannot act in disregard of public opinion.

I now come to the proposed article 267-A in respect of which some explanation is necessary. The Government of India have guaranteed to the Rulers of merged and integrated States payment of privy purses as fixed under the terms of the various Convenants and Agreements of Merger. Article 267-A give constitutional recognition to these guarantees and provides for this expenditure being charged on the Central Revenues subject to such recoveries as may be made from time to time from the Provinces and States in respect of these payments.

I shall first deal with the financial aspect of these arrangements. In the past, in most of the States there was no distinction between the expenditure on the administration and the Ruler's privy purse. Even where the Ruler's privy purse had been fixed no effective steps were taken to, ensure that the expenditure expected to be covered by the privy purse was not, directly or indirectly, charged on the revenues of the State. Large amounts, therefore, were spent on the

Rulers and on the members of the ruling families. This expenditure has been estimated to exceed twenty crores of rupees per year.

All the agreements of merger and Covenants now provide for the fixation of the Ruler's privy purse which is intended to cover all the expenses of the Rulers and their families including the expenses of their residences, marriages and other ceremonies, etc. The privy purse guaranteed under these agreements is less than the percentage for the Deccan States under the award given by Dr. Rajendra Prasad, Shri Shankerrao Deo and Dr. Pattabbi Sitaramayya. It is calculated on the basis of 15 percent, on the first lakh of average annual revenue of the State concerned 10 per cent, on the next four lakhs and seven and a half percent, and above five lakhs, subject to a maximum of ten lakhs. The maximum figure of 10 lakhs has been exceeded only in the case of some of the major States, which had been recognized as viable and the amounts fixed in such cases are payable during their life-time only. The total annual Privy Purse commitments so far made amount to about four and a half cores. When the amounts guaranteed to certain Rulers during their life-time are subsequently refixed the total annual expenditure in respect of privy purses will amount to less than ₹4 crores.

Under the terms of the Covenants and the agreements entered into by the Rules privy purses are payable to the Rulers, out of the revenues of the States concerned and payments have so far been made accordingly. During the discussions with the Indian States Finances Enquiry Committee, it was urged by most of the States that the liability for paying privy purses of Rulers should be taken over by the Centre on the ground that:

1. privy purses have been fixed by the Centre;
2. privy purses are political in nature; and
3. similar payments are not made by the Provinces.

Apart from these considerations, the position has definitely changed since the execution of the Covenants. In the first place, so far as the merged States are concerned, with their total extinction under the new Constitution of India, as separate entities, the basis of liability for privy purse payments guaranteed to the Rulers of the States will undergo a change, in that the States, from the revenues of which privy purses are payable, would cease to exist. Secondly, the term "revenues of the State" has now to be viewed in the context of the federal financial integration of States. This integration involves a two-fold process; one, of "functional" partition of the present composite State Governments, and the other of "merger" of the partitioned "federal" portions of the State Governments with the present Central Government. It follows,

therefore, that when the federal financial integration becomes effective, the liability in respect of privy purse payments should strictly speaking be shared on an equitable basis by the functional successors to the Governments of merged and integrated States, that is, the Central Government, on the one hand, and the Governments of Provinces and States on the other. Having regard to all these factors, we have decided that the best course would be that these payments should constitute a charge on the Central revenues, but that, at the same time, provision should be made for the recovery of such contributions from the Governments of the State, during such transitional period and in such amounts as may be considered appropriate. These recoveries are to be made in accordance with the scheme for financial integration of the States.

I have already stated that the privy purse settlements made by us will reduce the burden of the expenditure on the Rulers to at least one-fourth of the previous figure. Besides, the States have benefited very considerably from the process of integration in the form of cash balances inherited by them from the Rulers. Thus, for instance, the Rajpramukh of Madhya Bharat alone has made over to the Union large sums of money yielding interest sufficient to cover a major portion of the total privy purses of the Rulers, who have joined this Union. So far as the assumption of the part of the burden by the Centre is concerned, we must remember that this arrangement flows as a consequence of the financial integration of the States, which will have an effect of lasting character on the economy of this country. The fiscal unification of India will patch up the disruptive rents in the economy of India which rendered effective implementation of economic policies in the Provinces impossible. Thus, for instance, in the matter of income-tax evasion alone, which has been a serious matter in recent years the gains from federal financial integration will prove very substantial. From the financial point of view, therefore, the arrangements we have made are going to benefit very materially the economy of this country.

I shall now come to the political and moral aspect of these settlements in order to view the payments guaranteed by us in their correct perspective, we have to remember that they are linked with the momentous developments affecting the most vital interests of this country. These guarantees form part of the historic settlements which enshrine in them the consummation of the great ideal of geographical, political and economic unification of India, an ideal which for centuries remained a distant dream and which appeared as remote and as difficult of attainment as ever even after the advent of Indian independence.

Human memory is proverbially short. Meeting in October, 1949, we are apt to forget the magnitude of the problem which confronted us in August, 1947. As the honourable Members are aware, the so-called lapse of paramountcy was a part of the Plan announced on June 3, 1947, which was accepted by the Congress. We agreed to this arrangement in the same manner as we agreed to the partition of India. We accepted it because we had no option to act otherwise. While there was recognition in the various announcements of the British Government of the fundamental fact that each State should link up its future with the Dominion with which it was geographically contiguous, the Indian Independence Act released the States from all their obligations to the British Crown. In their various authoritative pronouncements, the British spokesmen recognized that with the lapse of paramountcy, technically and legally the States would become independent. They even conceded that theoretically the States were free to link their future with whichever Dominion they liked although, in saying so, they referred to certain geographical compulsions, which could not be evaded. The situation was indeed fraught with immeasurable potentialities of disruption, for some of the Rulers did wish to exercise their technical right to declare independence and others to join the neighbouring Dominion. If the Rulers had exercised their right in such an unpatriotic manner, they would have found considerable support from influential elements hostile to the interests of this country.

It was against this unpropitious background that the Government of India invited the Rulers of the States to accede on three subjects of Defence, External Affairs and Communications. At the time the proposal was put forward to the Rulers, an assurance was given to them that they would retain the status quo except for accession on these subjects. It had been made clear to them that this accession did not also imply any financial liability on the part of the States-and that there was no intention either to encroach on the internal autonomy or the sovereignty of the States or to fetter their discretion in respect of their acceptance of the new Constitution of India. These commitments had to be borne in mind when the States Ministry approached the Rulers for the integration of their States. There was nothing to compel or induce the Rulers to merge the identity of their States. Any use of force would have not only been against our professed principles but would have also caused serious repercussions. If the Rulers had elected to stay [out], they would have continued to draw the heavy civil lists which they were drawing before and in large number of cases they could have continued to enjoy unrestricted use of the State revenues. The minimum which we could offer to them as quid pro quo for parting with

their ruling powers was to guarantee to them privy purses and certain privileges on a reasonable and defined basis. The privy purse settlements are therefore in the nature of consideration for the surrender by the Rulers of all their ruling powers and also for the dissolution of the States, as separate units. We would do well to remember that the British Government spent enormous in respect of the Mahratta settlements alone. We are ourselves honouring the commitments of the British Government in respect of the pensions of those Rulers who helped them in consolidating their Empire. Need we cavil then at the small-purposely use the, word-small-price we have paid for the bloodless revolution which has affected the destinies of millions of our people.

The capacity for mischief and trouble on the part of the Rulers if the settlement with them would not have been reached on a negotiated basis was far greater than could be imagine at this stage. Let us do justice to them; let us place ourselves in their position and then assess the value of their sacrifice. The Rulers have now discharged their part of the obligations by transferring all ruling powers and by agreeing, to the integration of their States. The main part of our obligation under these agreements, is to ensure that the guarantees given by us in respect of privy purse are fully implemented. Our failure to do so would be a breach of faith and seriously prejudice the stabilization of the new order.

In commending the various provisions concerning the States to the House I would ask the Honourable Members to view them as a coordinated over-all settlement of a gigantic problem. A particular provision isolated from its context may give a wholly erroneous impression. Some of us might find fault with what might appear a relic of the previous autocratic set up. I wish to assure Honourable Members that autocracy in the States has gone, and has gone for good. Let us not get impatient with any particular term which might remind us of the past. The form in which the Rulers find recognition in the new Constitution of India, in no way impairs the democratic set up of the States. The Rulers have made an honourable exit;- it now remains for the people to fill the breach and to derive full benefit from the new order.

I take the liberty to remind the House that at the Haripura Session the Congress in 1938 defined its objective in respect of the States as follows:-

"The Congress stands for the same political, social and economic freedom in the, States as in the rest of India and considers the States as integral parts of India which cannot be separated. The Purna Swaraj or complete Independence, which is the objective of the Congress, is for the whole of India, inclusive of the States, for

the integrity and unity of India must be maintained in freedom as it has been maintained in subjection. The only kind of federation that can be to the Congress is one of which the States participate as free units, enjoying the same measure of democratic freedom as the rest of India."

I am sure the House will agree with me when I say that the provision which we are now placing before the House embody in them full achievement of that objective (Cheers).

Appendix 7

Excerpts detailing the position of the various judges in the Kesavananda Case.

	Issue 1	*Issue 2*	*Issue 3*	*Issue 4*	*Issue 5*
Name of the Judge	*Status of Golaknath decision*	*Scope of Article 368*	*Validity of Const: 24th Amendment*	*Validity of Const: 25th Amendment*	*Validity of Const: 29th Amendment*
S. M. Sikri	A Constitutional amendment would be bad if it infringed Article 13 (2 Golak Nath's case did not decide whether Article 13 (2) can be amended under Article 368.	Parliament cannot abrogate or take away fundamental rights or completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits, Parliament can amend every article	Valid	Section 2 is valid Section 3 is void	The Constitution Bench will decide whether the impugned Acts take away fundamental rights or only abridge them.
J. M. Shelat & A. N. Grover	The decision in Golak Nath has become academic.	h. No power to abrogate or take away the fundamental freedom.	Valid	Section 2 is valid. Section 3 is void	Valid as long as the basic elements of the Constitution are not affected.

(Appendix 7 Continued)

(Appendix 7 Continued)

Name of the Judge	*Issue 1* *Status of Golaknath decision*	*Issue 2* *Scope of Article 368*	*Issue 3* *Validity of Const: 24th Amendment*	*Issue 4* *Validity of Const: 25th Amendment*	*Issue 5* *Validity of Const: 29th Amendment*
K. S. Hegde and A. K. Mukherjea		Amend the Constitution under Article 368 without emasculating the basic elements or fundamental features of the Constitution.	Valid	Section 2 is valid. Section 3 is void	valid. However, abrogation of any of the basic elements or essential features of the Constitution will have to be examined.
A. N. Ray	The Constitution is the supreme law. An amendment of the Constitution is an exercise of the constituent power. The majority view in Golak Nath case with respect is wrong.	Parliament in exercise of constituent power can amend any provision of this Constitution. Under Article 368 the power to amend can also be increased.	Valid	Valid	Valid
P. Jagmohan Reddy	Golaknath's case is irrelevant.	The power of amendment is to be found in Article 368 itself. Parliament could amend Art. 368 and Art. 13, and all the fundamental rights. However,	Valid	Section 2 is valid. Section 3 is void.	Valid, as long as it abrogate, emasculate, damage or destroy any of the fundamental rights in Part III or

		it should not abrogate or emasculate or damage any of the fundamental rights or the essential elements in the basic structure of the Constitution.			the basic elements or essential features of the Constitution.
H. R. Khanna		The power of amendment under Art. 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. The power of amendment would include within itself the power to add, alter or repeal the various articles. viii) Right to property does not pertain to basic structure or framework of the Constitution.	Valid	The first part of Art. 31-C Constitution (Twenty fifth Amendment) Act is valid. The second part of Art. 31-C can be severed from the remaining part of Article 31-C.	Valid since does not suffer from an infirmity.
D. G. Palekar	Golak Nath v. State of Punjab is, with respect, not correct	There were no implied or inherent limitations on the amending power under the unamended Article 368 in its operation over the fundamental rights. There can be none after its amendment.	Valid	Section 2 and 3 are valid.	Valid

(Appendix 7 Continued)

(Appendix 7 Continued)

	Issue 1	*Issue 2*	*Issue 3*	*Issue 4*	*Issue 5*
Name of the Judge	*Status of Golaknath decision*	*Scope of Article 368*	*Validity of Const: 24th Amendment*	*Validity of Const: 25th Amendment*	*Validity of Const: 29th Amendment*
K. K. Mathew	Upheld the Golaknath Case. The Parliament had no power to amend Fundamental Rights in such a way as to take away or abridge them.	The only limitation is that the Constitution cannot be repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organized. There were or are implied or inherent limitations upon the power of amendment under the article	Valid	The 25th Amendment, including Article 31-C, is valid.	Valid
M. H. Beg	The majority view in Golak Nath's case (supra), holding that Article 13 operated as a limitation upon the powers of constitutional amendment found in Article 368, was erroneous. (Golaknath wrong)		Valid	(3) The 25th Amendment, including addition of Article 31C, is valid.	Valid

S. N. Dwivedi	The majority decision in Golaknath is not correct and should be overruled.	The word "amendment" in Article 368 is broad enough to authorise the varying, repealing or abrogating of each and every provision in the Constitution including Part III. There are no limitations on the amending power in Art. 368	Valid	Valid	Valid
Y. V. Chandrachud	The decision of the leading majority in the Golak Nath case is not correct. The decision of the leading majority and of Hidayatullah, J. that there is no distinction between an ordinary law and a law amending the Constitution is incorrect.	There are no inherent limitations on the amending power in the sense that the Amending Body lacks the power to make amendments so as to damage or destroy the essential features or the fundamental principles of the Constitution.	Valid	Section 2 (a) and Section 2 (b) are valid. Section 3 of the 25th Amendment which introduced Art. 31-C into the Constitution is valid.	Valid

Source: Collated from the judgment (AIR-1973-SC-1461).

Appendix 8

Text of Jawaharlal Nehru's Speech in the Provisional Parliament while Moving the Constitution (First Amendment) Act, 1951

This Bill is not a very complicated one: nor is it a big one. Nevertheless, I need hardly point out that it is of intrinsic and great importance. Anything dealing with the Constitution and change of it is of important. Anything dealing with Fundamental Rights incorporated in the Constitution is of even greater importance. Therefore, in bringing this Bill forward, I do so and the Government does so in no spirit of lightheartedness, in no haste, but after the most careful thought and scrutiny given to this problem.

I might inform the House that we have been thinking about this matter for several months, consulting people, State Governments, Ministers of Provincial Governments, consulting when occasion offered itself, a number of Members of this House, referring it to various Committees and the like and taking such advice from competent legal quarters as we could obtain, so that we have proceeded with as great care as we could possibly give to it. We have brought it forward now after that care, in the best form that we could give it, because we thought that the amendments mentioned in this Bill are not only necessary, but desirable, and because we thought that if these changes are not made, perhaps not only would great difficulties arise, as they have arisen in the past few months, *but perhaps some of the main purposes of the very Constitution may be defeated or delayed* (Ananth, emphasis added).

The real difficulty which has come up before us is this. The Constitution lays down certain Directive Principles of State Policy and after long discussion we agreed to them and they point out the way we have got to travel. The Constitution also lays down certain Fundamental Rights. Both are important. The Directive Principles of State Policy represent a dynamic move towards a certain objective. The Fundamental Rights represent something static, to preserve certain rights which exist. Both again are right. But somehow and sometime, it might so happen that that dynamic movement and that static standstill do not quite fit into each other.

A dynamic movement towards a certain objective necessarily means certain changes taking place that is the essence of movement.

Now I shall proceed with the other article, the important one, namely Article 31. When I think of this article the whole gamut of

pictures comes up before my mind, because this article deals with the abolition of the zamindari system, with land laws and agrarian reform. I am not a zamindar, nor I am a tenant. I am an outsider. But the whole length of my public life has been intimately connected, or was intimately connected with agrarian agitation in my Province. And so these matters came up before me repeatedly and I became intimately associated with them. Therefore, I have a certain emotional reaction to them and awareness of them which is much more than merely an intellectual appreciation. If there is one thing to which we as a party have been committed in the past generation or so it is the agrarian reform and the abolition of the zamindari system.

Now apart from our commitment, a survey of the world today, a survey of Asia today will lead any intelligent person to see that the basic and the primary problem is the land problem today in Asia, as in India. And every day of delay adds to the difficulties and dangers, apart from being an injustice in itself.

It is patent that when you are out to remedy inequalities, you do not remedy inequalities by producing further inequalities. We do not want anyone to suffer. But, inevitably, in big social changes some people have to suffer.

How are we to meet this challenge of the times? How are we to answer the question: For the last ten or 20 years you have said, we will do it. Why have you not done it? It is not good for us to say: We are helpless before fate and the situation which we are to face at present. Therefore, we have to think in terms of these big changes, and changes and the like and therefore we thought of amending Article 31. Ultimately we thought it best to propose additional Articles 31A and 31B and in addition to that there is a Schedule attached, of a number of Acts passed by State Legislatures, some of which have been challenged or might be challenged and we thought it best to save them from long delays and these difficulties, so that this process of change which has been initiated by the State should go ahead.

The other day I was reading an article about India by a very eminent American and in that article which contained many correct statements and some incorrect statements, the author finished up by saying that India has very difficult problems to face but the most acute of them he said can be put in five words and those five words were: land, water, babies, cows and capital. I think that there is a great deal of truth in this concise analysis of the Indian situation.

Now I come to Articles 31, 31A and 31B. May I remind the House or such Members of the House as were also Members of the Constituent Assembly, of the long debates that we had on this issue. Now the whole object of these articles in the Constitution was to

take away and I say so deliberately to take away the question of zamindari and land reform from the purview of the courts. That is the whole object of the Constitution and we put in some proviso etc., in regard to Article 31.

What are we to do about it? What is the Government to do? *If a Government has not even the power to legislate to bring about gradually that equality, the Government fails to do what it has been commanded to do by this Constitution*. That is why I said that the amendments I have placed before the House are meant to give effect to this Constitution. *I am not changing the Constitution by an iota; I am merely making it stronger. I am merely giving effect to the real intentions of the framers of the Constitution, and to the wording of the Constitution, unless it is interpreted in a very narrow and legalistic way.* Here is a definite intention in the Constitution. This question of land reform is under Article 31 (2), this clause tries to take it away from the purview of the courts, and somehow Article 14 is brought in. That kind of thing is not surely the intention of the framers of the Constitution. Here again I may say that the Bihar High Court held that view but the Allahabad and Nagpur High Courts held a contrary view. That is true. There is confusion and doubt. Are we to wait for this confusion and doubt gradually to resolve itself, while powerful agrarian movements grow up? May I remind the House that this question of land reform is most intimately connected with food production. We talk about food production and grow-more-food and if there is agrarian trouble and insecurity of land tenure nobody knows what is to happen. Neither the zamindar nor the tenant can devote his energies to food production because there is instability. Therefore, these loud arguments and these repeated appeals in courts are dangerous to the State, from the security point of view, from the food production point of view and from the individual point of view, whether it is that of the zamindar or the tenant or any intermediary (Ananth, emphasis added).

Source: Parliamentary Debates Part II, Volumes XII and XIII, May 15–June 9, 1951.

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[1] Bold numbers signify the Article numbers of the Constitution of India.

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