Rights as a site of struggle

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The Context

In its competitive elections, coalition politics, free press, and independent judiciary, India's democracy may be considered exemplary by most institutional standards. And yet as anyone who has ever encountered the Indian state in its hospitals, schools, police stations, local courts, electricity and water supply offices, or fair price shops would vouch, *something* in the way institutional ideals translate into practice makes the mechanics and the everyday experience of the state in India far from exemplary. There is a disconnect between the formalist view of democracy and the substantive view. It is often understood that sufficient conditions of a democratic society is not met in the Indian case. Social movements are born out of such perceptions, which challenge the state's claim to represent the "people". While the state tries to integrate everyone into a Citizen (by elections) and a consumer (by market), the new social movements seek new social and governance space. Such movements have two markers, first, the focus of the movement is not to capture state power; and second, it dispels the myth of the "vanguard" and is expressed in multiple sites, such as gender, ethnicity, caste, identity etc. The location of this struggle gives rise to the limits of the discourse, that is, what can be stated and by whom. This paper is an attempt at mapping the struggle between the legislature (the representatives of the People) and the Judiciary (the protectors of the people against a tyrannous state) during one of the most interesting phases of Indian nation. The bone of contention being the fundamental rights of the citizen as enshrined in the constitution.

While setting up the National Commission to Review the Working of the Constitution (the Commission), the National Democratic Alliance government (formed by a coalition of 24 national and regional level parties) stated that the basic structure of the Constitution would not be tampered with. Justice M.N. Venkatachalaiah, Chairman of the Commission, emphasised on several occasions that an inquiry into the basic structure of the Constitution lay beyond the scope of the Commission's work. Several political parties -- notably the Congress and the two Communist parties which were in the opposition -- made it clear that the review exercise was the government's ploy to seek legitimacy for its design to adopt radical constitutional reforms thus destroying the basic structure of the document. What is the basic structure and how has the concept been a tool with political parties who tried to destroy it when it suited them.

According to the Constitution, Parliament and the state legislatures in India have the power to make laws within their respective jurisdictions. This power is not absolute in nature. The Constitution vests in the judiciary, the power to adjudicate upon the constitutional validity of all laws. If a law made by Parliament or the state legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such a law invalid or *ultra vire*s. This check notwithstanding, the framers wanted the Constitution to be an adaptable document rather than a rigid framework for governance. Hence Parliament was invested with the power to amend the Constitution. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers, the apex court has pronounced that Parliament could not distort, damage or alter the *basic features* of the Constitution under the pretext of amending it. The phrase 'basic structure' itself cannot be found in the Constitution. The Supreme Court recognised this concept for the first time in the *Kesavananda Bharati* case in 1973. Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by Parliament.

The pre-*Kesavananda* position

The Indian Parliament's authority to amend the Constitution, particularly the chapter on the fundamental rights of citizens, was challenged as early as in 1951. After Independence, several laws were enacted in the states with the aim of reforming land ownership and tenancy structures. They were:

(1) Abolition of Intermediaries

(2) Ceiling was fixed on land holdings

(3) The cultivating tenant within the ceiling secured permanent rights

(4) In some states, the share of the landlord was regulated by the law

(5) In one state, the tiller of the soil secured cultivating rights against the absentee landlord, and in some states, the rural economy was re-adjusted in such a way, that the scattered bits of land of each tenant were consolidated in one place by a process of statutory exchange.

This was in keeping with the ruling Congress party's electoral promise of implementing the socialistic goals of the Constitution [contained in Article 39 (b) and (c) of the Directive Principles of State Policy] that required equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few. Property owners -- adversely affected by these laws -- petitioned the courts. The courts struck down the land reforms laws saying that they transgressed the fundamental right to property guaranteed by the Constitution. Piqued by the unfavourable judgements, Parliament placed these laws in the Ninth Schedule of the Constitution through the First and Fourth amendments (in 1951 and 1952 respectively), thereby effectively removing them from the scope of judicial review.

The innovation and addition of the Ninth Schedule to the Constitution through the very first amendment in 1951 was a means of immunising certain laws against judicial review. Under the provisions of Article 31, which themselves were amended several times later, laws placed in the Ninth Schedule – pertaining to acquisition of private property and compensation payable for such acquisition – could not be challenged in a court of law on the ground that they violated the fundamental rights of citizens. This protective umbrella covered more than 250 laws passed by state legislatures with the aim of regulating the size of land holdings and abolishing various tenancy systems. The Ninth Schedule was

created with the primary objective of preventing the judiciary - which upheld the citizens' right to property on several occasions - from derailing the Congress party led government's agenda for a social revolution.[1]

Property owners again challenged the constitutional amendments which placed land reforms laws in the Ninth Schedule[2] before the Supreme Court, saying that they violated Article 13 (2) of the Constitution. Article 13 (2) provides for the protection of the fundamental rights of the citizen. Parliament and the state legislatures are clearly prohibited from making laws that may take away or abridge the fundamental rights guaranteed to the citizen[3]. They argued that any amendment to the Constitution had the status of a law as understood by Article 13 (2). In 1952 *(Sankari Prasad Singh Deo v. Union of India*[4]) and 1955 *(Sajjan Singh v. Rajasthan*[5]), the Supreme Court rejected both arguments and upheld the power of Parliament to amend any part of the Constitution including that which affected the fundamental rights of citizens. Significantly though, two dissenting judges in *Sajjan Singh v. Rajasthan* case raised doubts whether the fundamental rights of citizens could become a plaything of the majority party in Parliament.

The Golaknath verdict

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[1] Originally, the Constitution guaranteed a citizen, the fundamental right to acquire, hold and dispose of property under Article 19(1)f. Under Article 31 s/he could not be deprived of her property unless it was acquired by the State, under a law that determined the amount of compensation she ought to receive against such an acquisition. Property owned by an individual or a firm could be acquired by the State only for public purposes and upon payment of compensation determined by the law. Article 31 has been modified six times -- beginning with the First amendment in 1951 -- progressively curtailing this fundamental right. Finally in 1978, Article 19f was omitted and Article 31 was repealed by the Forty-fourth amendment. Instead Article 300A was introduced in Part XII making the right to property only a legal right. This provision implies that the executive arm of the government (civil servants and the police) could not interfere with the citizen's right to property. However, Parliament and state legislatures had the power to make laws affecting the citizens' right to property.

[2] Later on, laws relating to the nationalisation of certain sick industrial undertakings, the regulation of monopolies and restrictive trade practices, transactions in foreign exchange, abolition of bonded labour, ceiling on urban land holdings, the supply and distribution of essential commodities and reservation benefits provided for Scheduled Castes and Tribes in Tamil Nadu were added to the Ninth Schedule through various constitutional amendments.

[3] Article 13 (2) states- "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." The term Part refers to Part III of the Constitution which lists the fundamental rights of the citizen.

[4] *Sankari Prasad Singh Deo v. Union of Indi*a, AIR 1951 SC 458.

[5] *Sajjan Singh v. State of Rajasth*an, AIR 1965 SC 845.

In 1967 an eleven-judge bench of the Supreme Court reversed its position. Delivering its 6:5 majority judgement in the *Golaknath v. State of Punjab*[6] case, Chief Justice Subba Rao put forth the interesting position that Article 368, that contained provisions relating to the amendment of the Constitution, merely laid down the amending procedure. Article 368 did not confer upon Parliament the power to amend the Constitution. The amending power (constituent power) of Parliament arose from other provisions contained in the Constitution (Articles 245, 246, 248) which gave it the power to make laws (plenary legislative power)[7]. Thus, the apex court held that the amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13 (2)[8]. The majority judgement invoked the concept of 'implied limitations on Parliament's power to amend the Constitution'. This view held that the Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to themselves, the people had reserved the fundamental rights for themselves. Article 13, according to the majority view, expressed this limitation on the powers of Parliament. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under it. The judges stated that the fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament[9]. They observed that a Constituent Assembly might be summoned by Parliament for the purpose of amending the fundamental rights if necessary. In other words, the apex court held that some features of the Constitution lay at its core and required much more than the usual procedures to change them.

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[6] *I.C. Golaknath v. State of Punja*b, AIR 1967 SC 1643.

[7] By virtue of the powers conferred upon it in Articles 245 and 246, Parliament can make laws relating to any of the 97 subjects mentioned in the Union List and 47 subjects mentioned in the Concurrent List, contained in the Seventh Schedule of the Constitution. Upon the recommendation of the Rajya Sabha (Council of States) Parliament can also make laws in the national interest, relating to any of the 66 subjects contained in the State List.

[8] See fn3 supra.

[9] Certain constitutional amendments must be ratified by at least half of the State legislatures before they can come into force. Matters such as the election of the President of the republic, the executive and legislative powers of the Union and the States, the High Courts in the States and Union Territories, representation of States in Parliament and the Constitution amending provisions themselves, contained in Article 368, must be amended by following this procedure.

The phrase 'basic structure' was introduced for the first time by M.K. Nambiar, while arguing for the petitioners in the *Golaknath* case, but it was only in 1973 that the concept surfaced in the text of the apex court's verdict.

Nationalisation of Banks and Abolition of Privy Purses

Within a few weeks of the *Golaknath* verdict the Congress party suffered heavy losses in the parliamentary elections and lost power in several states. Though a private member's bill - tabled by Barrister Nath Pai - seeking to restore the supremacy of Parliament's power to amend the Constitution was introduced and debated both on the floor of the house and in the Select Committee, it could not be passed due to political compulsions of the time. But the opportunity to test parliamentary supremacy presented itself once again when Parliament introduced laws to provide greater access to bank credit for the agricultural sector and ensure equitable distribution of wealth and resources of production by: a) nationalising banks,[10] and, b) derecognising erstwhile princes' privy purses, which were promised in perpetuity - as a sop to accede to the Union - at the time of Independence. Parliament reasoned that it was implementing the Directive Principles of State Policy, but the Supreme Court struck down both moves. By now, it was clear that the Supreme Court and Parliament were at loggerheads over the relative position of the fundamental rights vis-à-vis the Directive Principles of State Policy. At one level, the battle was about the supremacy of Parliament vis-à-vis the power of the courts to interpret and uphold the Constitution. At another level the contention was over the sanctity of property as a fundamental right jealously guarded by an affluent class numerically much smaller than the large impoverished masses for whose benefit the Congress government claimed to implement its socialistic development programme.

Less than two weeks after the Supreme Court struck down the President's order derecognising the privy purses, in a quick move to secure the mandate of the people and to bolster her own stature[11], Prime Minister Indira Gandhi dissolved the Lok Sabha and

[10] On 19 July 1969, 14 major private banks were nationalised in India. The need for the nationalisation was felt mainly because private commercial banks were not fulfilling the social and developmental goals of banking and had largely excluded rural areas and small scale borrowers.

[11] Indira Gandhi took over as Prime Minister from Gulzarilal Nanda, who officiated as a stop gap arrangement after Lal Bahadur Shastry's death. At that time she was the Information Minister and a member of the Rajya Sabha. She was

called for a snap poll. For the first time, the Constitution itself became an electoral issue in India. Eight of the ten manifestos in the 1971 elections called for changes in the Constitution in order to restore the supremacy of Parliament. A.K. Gopalan of the Communist Party of India (Marxist) went to the extent of saying that the Constitution be done away with lock stock and barrel and be replaced with one that enshrined the real sovereignty of the people. The Congress party returned to power with a two-thirds majority. The electorate had endorsed the Congress party's socialist agenda, which among other things spoke of making basic changes to the Constitution in order to restore the supremacy of the Parliament. Through a spate of amendments made between July 1971 and June 1972 Parliament sought to regain its lost ground.

The Twenty-fourth Amendment Act, 1971

In order to remove difficulties created by the decision of Supreme Court in Golaknath's case, the Parliament enacted the 24th Amendment Act. The amendment brought about the following changes:

(1) It added a new clause (4) to Article 13, which provided that "nothing in this Article shall apply to any amendment of this Constitution made under Article 368."

(2) It substituted a new marginal heading to Article 368 in place of the old heading "Procedure for amendment of the Constitution." The new heading read "Power of Parliament to amend the Constitution and Procedure therefore."

(3) It inserted a new sub-section (1) in Article 368 which provided that "notwithstanding anything in this Constitution, Parliament may, in exercise of its constituent power amend by way of addition, variation, or repeal any provision of this Constitution in accordance with the procedure laid down in this Article."

(4) It substituted the words, "it shall be presented to the President who shall give his assent to the Bill and thereupon" for the words "it shall be presented to the President for his assent and upon".

It restored for itself the absolute power to amend any part of the Constitution including Part III, dealing with the fundamental rights. Even the President was made duty bound to give his assent to any amendment bill passed by both houses of Parliament. Several curbs

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widely perceived to be the "Gungi Gudiya" susceptible to manipulation by the Congress Big Bosses. The turn of events also presented her with an opportunity to prove her mettle.

on the right to property were passed into law. The right to equality before the law and equal protection of the laws (Article 14) and the fundamental freedoms guaranteed under Article 19[12] were made subordinate to Article 39 (b) & (c) in the Directive Principles of State Policy. Privy purses of erstwhile princes were abolished[13] and an entire category of legislation dealing with land reforms was placed in the Ninth Schedule beyond the scope of judicial review.

The Twenty-fifth Amendment Act, 1971

The Twenty-fifth Amendment contained three significant provisions:

First, it amended Article 31(2) and provided that anyone's property may be acquired on payment of an "amount" instead of "compensation". The intention was that the citizen's right to property should be transformed into the state's right to confiscation and the state should be able to deprive anyone of any property in return for any amount payable at any time on any terms; and the executive action, however arbitrary or irrational, should not be subjected to the Court's scrutiny. Such state action may have a direct impact on any of the other fundamental rights, the exercise of which would be impeded or negated by the deprivation of property without compensation, the only exception being the case of educational institutions dealt with in the proviso to Article 31(2). Publishers may be deprived of their printing presses and buildings, trade unions of their properties, professional men of their professional assets, all without compensation, and thus the fundamental rights to freedom of speech, to form unions, and to practice any profession, guaranteed by Article 19(1)(a), (c) and (g)—could be eroded or extinguished. The amended Article 31 had nothing to do with concentration of wealth, and permitted any common citizen's property, however small in value, to be acquired by the state without the payment of what would be compensation in the eye of the law.

[12] Freedom of speech and expression, the right to assemble peacefully, the right to form unions and associations, the right to move freely and reside in any part of India and the right to practise any profession or trade are the six fundamental freedoms guaranteed under Article 19. The right to property was also guaranteed in this section until 1978 when it was omitted by the Forty-fourth amendment during the Janata party regime.

[13] The 26th amendment Act, 1971, sought to terminate the privy purses and special privileges of the erstwhile Princes since they were found to be "unrelated to any current functions and social purposes, and were incompatible with an egalitarian social order".

Second, the Supreme Court had held in the Bank Nationalisation case that the power of acquisition or requisition envisaged by Article 31(2) was subject to the citizen's right to acquire, hold and dispose of property under Article 19(1)(f) which, in turn, was subject under Article 19(5) to reasonable restrictions in the interests of the general public. The Twenty-fifth Amendment enacted that Article 19(1)(f) would be inapplicable to acquisition or requisition laws. Since all reasonable restrictions in the public interest are already permitted under Article 19(5), the only object of making Article 19(1)(f) inapplicable would be to enable acquisition and requisition laws to contain restrictions and procedural provisions which are unreasonable or not in the public interest. It is impossible to perceive the social content of a law, which is not reasonable, or not in the public interest or could not be argued to that effect. After the Twenty-fifth Amendment, any law for requisitioning or acquiring property could be passed with an express provision, which violated the rules of natural justice.

Third, the Twenty-fifth Amendment inserted Article 31C which provided that "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." The Directive principles of state policy set out in Article 39(b) and (c) deal with the entire economic system, and therefore, countless categories of law can claim the protection of Article 31C since most laws can be related to the economic system in one way or another. Article 31C had damaged the very heart of the Constitution.

Emergence of the Basic Structure Concept- the Kesavananda milestone

Inevitably, the constitutional validity of these amendments was challenged before a full bench of the Supreme Court (thirteen judges). Their verdict can be found in eleven separate judgements. Nine judges signed a summary statement which records the most important conclusions reached by them in this case. Granville Austin notes that there are

several discrepancies between the points contained in the summary signed by the judges and the opinions expressed by them in their separate judgements[14]. Nevertheless, the concept of 'basic structure' of the Constitution gained recognition in the majority verdict. All judges upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution[15]. All signatories to the summary held that the *Golaknath* case had been decided wrongly and that Article 368 contained both the power and the procedure for amending the Constitution. However, they were clear that an amendment to the Constitution was not the same as a law as understood by Article 13 (2). It is necessary to point out the subtle difference that exists between two kinds of functions performed by the Indian Parliament:

a) it can make laws for the country by exercising its legislative power, and

b) it can amend the Constitution by exercising its constituent power.

Constituent power is superior to ordinary legislative power

Unlike the British Parliament which is a sovereign body (in the absence of a written constitution), the powers and functions of the Indian Parliament and State legislatures are subject to limitations laid down in the Constitution. The constitution does not contain all the laws that govern the country. The Parliament and the state legislatures make laws from time to time on various subjects, within their respective jurisdictions[16]. The general framework for making these laws is provided by the Constitution. Parliament alone is given the power to make changes to this framework under Article 368.

Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament. Another illustration is useful to demonstrate the difference between

[14] Quoted in Granville Austin, *Working a Democratic Constitution, The Indian Experience*, Oxford University Press, New Delhi, 1999, p. 235.

[15] The Constitution (Twenty-fourth amendment) Act 1971.

[16] By virtue of the powers conferred upon it in Articles 245 and 246, Parliament can make laws relating to any of the 97 subjects mentioned in the Union List and 47 subjects mentioned in the Concurrent List, contained in the Seventh Schedule of the Constitution. Upon the recommendation of the Rajya Sabha. Parliament can also make laws in the national interest relating to any of the 66 subjects contained in the State List. However certain constitutional amendments must be ratified by at least half of the State legislatures before they can come into force. Matters such as the election of the President of the republic, the executive and legislative powers of the Union and the States, the High Courts in the States and Union Territories, representation of States in Parliament and the Constitution amending provisions themselves, contained in Article 368, must be amended by following this procedure.

Parliament's constituent power and law making powers. According to Article 21 of the Constitution, no person in the country may be deprived of his/her life or personal liberty except according to procedure established by law. The Constitution does not lay down the details of the procedure as that responsibility is vested with the legislatures and the executive. Parliament and the state legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The executive lays down the procedure of implementing these laws and the accused person is tried in a court of law. Changes to these laws may be incorporated by a simple majority vote in the concerned state legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert Article 21 into the fundamental right to life by abolishing death penalty, the Constitution may have to be suitably amended by Parliament using its constituent power.

Most importantly seven of the thirteen judges in the *Kesavananda Bharati* case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution[17].

Basic Features of the Constitution according to the Kesavananda verdict

Six senior judges of the Supreme Court (Chief Justice S M Sikri, who retired a day after the judgement; Justices J M Shelat, K S Hegde and A N Grover who, for deciding according to their conscience, were superseded for the office of the Chief Justice of India; and Justices P Jaganmohan Reddy and A K Mukherjea) held as follows:

(1) Parliament’s amending power is limited. While Parliament is entitled to abridge any fundamental right or amend any provision of the Constitution, the amending power does not extend to damaging or destroying any of the essential features of the Constitution. The fundamental rights are among the essential features of the Constitution; therefore,

[17]His Holiness Kesavananda Bharati Sripadagalavaru v State of Kerala and Another 1973 (4) SCC pp. 637-38.

while they may be abridged, the abridgment cannot extend to the point of damage to or destruction of their core.

(2) Article 31C is void since it takes away invaluable fundamental rights, even those unconnected with property. (The question of severability of the offending provisions of Article 31C, which was dealt with by one of the judges, is not referred to here.)

On the other hand, Justices A.N. Ray, D.G. Palekar, K.K. Mathew, M.H. Beg, S.N. Dwivedi and Y.V. Chandrachud held that the power of amendment is unlimited; and they held Article 31C to be valid.

Thus, six judges decided the case in favour of the citizen and six in favour of the state. Justice H.R. Khanna did not agree completely with any of these twelve judges and decided the case midway between the two conflicting viewpoints. He held that (a) the power of amendment is limited; it does not enable Parliament to alter the basic structure of framework of the Constitution; (b) the substantive provision of Article 31C, which abrogates the fundamental rights, is valid on the ground that it does not alter the basic structure or framework of the Constitution; and (c) the latter part of Article 31C, which ousts the jurisdiction of the Court, is void. Thus, by a strange quirk of fate, the judgment of Justice Khanna, with which none of the other twelve judges totally agreed, became the law of the land. This result follows from the fact that while Justice Khanna did not fully agree with the six judges who decided in favour of the citizen, he went a part of the way along with them; and the greatest common denominator between the judgments of the six judges in favour of the citizen and the judgment of Justice Khanna became the judgment of seven judges and thus constituted the majority view of the Supreme Court. But then he spelt catastrophe to 19(1)(f), when he held that Right to Property did not pertain to the basic structure of the Constitution.

In summary the majority verdict in *Kesavananda Bharati* recognised the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position *of Sankari Prasad* (1952) by restoring the supremacy of Parliament's amending power, in effect it did strengthen the power of judicial review.

Basic Structure concept reaffirmed- the Indira Gandhi Election case

In 1975, The Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution. A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the Thirty-ninth amendment to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament was to be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute. Amendments were also made to the representation of Peoples Acts of 1951 and 1974 and placed in the Ninth Schedule along with the Election Laws Amendment Act, 1975 in order to save the Prime Minister from embarrassment if the apex court delivered an unfavourable verdict. The *mala fide* intention of the government was proved by the haste in which the Thirty-ninth amendment was passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day. The Rajya Sabha passed it the next day and the President gave his assent two days later. The amendment was ratified by the state legislatures in special Saturday sessions. It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment.

Counsel for Raj Narain, who was the political opponent challenging Mrs. Gandhi's election, argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. Counsel also argued that Parliament was not competent to use its constituent power for validating

an election that was declared void by the High Court. Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute.
One judge, Beg, J. upheld the amendment in its entirety. Mrs. Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect.

The point is that all the fundamental rights together with the majority of the directive principles elucidate the constitutional conception of social justice for India; and this conception, like all conceptions of social justice, embodies values, which cannot be fulfilled concurrently in an economy of scarcity. Choices giving priority to one or the other value from amongst all the values of equal moral weight have to be made. When this is grasped, it would be impossible to honestly say in the abstract, for example that preferring the standard of just compensation is always contrary to "social justice" or that confiscation is always in consonance with "social justice."
The first question that immediately arises is whether the property amendments violate the basic structure of our Constitution and therefore void as being outside the amending power conferred by Article 368 on Parliament. Below is a brief account of the basic structure principle relevant while considering right to property:
(1) The doctrine of basic structure as laid down in Kesavananda Bharati case was accepted as the basis for deciding the Election case. Before the judgments in the "Election Case" were delivered, an application was made to the Chief Justice to hear a number of writ petitions to reconsider the doctrine of the basic structure. A Bench of 13 judges was constituted for that purpose; however the Chief Justice dissolved the Bench after two days. These facts reveal that the court was against reconsidering or was not prepared to reconsider it.
(2) Khanna J, whose judgement tipped the scale in the Kesavananda case in favour of the doctrine of basic structure, had held in that right to property was not part of the basic structure. The judgement had been interpreted to mean that he had held that all fundamental rights were not part of the basic structure. But he clarified his position in the

Election Case by observing, it is submitted rightly, that he had not so held, and his elaborate discussion of one fundamental right, right to property, would have been wholly unnecessary if all fundamental rights were not part of the basic structure. In fact, he struck down the conclusive declaration clause of Article 31C because it prohibited even a limited judicial review, and Article 32, which is a fundamental right, clearly provides for judicial review.

(3) In view of the clarification, it was submitted that after Election Case it would have become necessary for Khanna J to reconsider his earlier judgement, in the light of the further discussion of the amending power in the Election Case. For, the only kind of property he was called upon to consider in the fundamental rights' case was private property acquired by the state of Kerala under the two impugned Acts. In that case, neither state nor the court were called upon to consider the inter-relation of the right to property conferred by Article 19(1)(f) and Article 31(2) on the one hand and the other fundamental, and Constitutional, rights with which property is inextricably connected, on the other hand. Of the conclusive declaration clause of Article 31C which he struck down, Khanna J said:

"It seems that when incorporating the part relating to declaration in Article 31C, the sinister implications of this part were not taken into account and its repercussions on the unity of the country were not realised. In deciding the question relating to the validity of this part of Article 31C, we should not, in any opinion, take too legalistic a view. A legalistic judgement would indeed be a poor consolation if it affects the unity of the country."

The doctrine of basic structure has been mentioned at the threshold because the question whether property amendments violate that doctrine must depend upon the correct interpretation of the nature and effect of those amendments and their effect on fundamental rights and other basic features of the Constitution. For, it is well settled that every interpretation which would make those amendments void as being beyond the amending power of the Parliament could be rejected in favour of an interpretation, which would make them valid.