

# The Constitutional Framework and the Current Political Crisis in India\*

By VED P. NANDA\*\*

## I. The Nature of the Crisis

On June 26, 1975, the president of India, Fakhruddin Ali Ahmed, proclaimed a state of emergency.<sup>1</sup> He invoked his constitutional prerogative under which he is empowered to declare a "Proclamation of Emergency" if he is "satisfied" that a "grave emergency" exists or is imminent, threatening "the security of India or any part of the territory thereof . . . whether by war or external aggression or internal disturbance . . . ." <sup>2</sup> In this case, for the first time since the Constitution of independent India came into force on January 26, 1950, the rationale for the action was the threat of internal disturbances.<sup>3</sup> In accordance with the extraordinary constitutional powers bestowed upon the government of India following such presidential action,<sup>4</sup> Prime Minister Indira Gandhi's government arrested and jailed thousands of political opponents,<sup>5</sup> imposed strict censorship of the press,<sup>6</sup> suspended civil liberties,<sup>7</sup> banned several dissident parties,<sup>8</sup> and sought to consolidate its power by

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1. N.Y. Times, June 27, 1975, at 1, col. 8; Washington Post, June 27, 1975, at A-1, col. 5.

2. CONST. OF INDIA arts. 358-59 (1950).

3. N.Y. Times, June 27, 1975, at 12, col. 3.

4. CONST. OF INDIA arts. 358-59 (1950).

5. N.Y. Times, June 29, 1975, at 1, col. 5; *id.*, Aug. 5, 1975, at 10, col. 3; Rocky Mountain News, Aug. 3, 1975, at 24, col. 3 [hereinafter cited as R.M. News]; *id.*, Aug. 7, 1975, at 46, col. 1.

6. Washington Post, June 27, 1975, at A-18, col. 2; Christian Science Monitor, June 30, 1975, at 1, col. 3 [hereinafter cited as C.S. Monitor]; *id.*, July 23, 1975, at 28, col. 1; N.Y. Times, June 28, 1975, at 8, col. 1.

7. N.Y. Times, June 28, 1975, at 1, col. 6; *id.*, July 3, 1975, at 1, col. 3; *id.*, July 25, 1975, at 3, col. 1; Denver Post, June 29, 1975, at 5, col. 1.

8. R.M. News, July 5, 1975, at 3, col. 3; Denver Post, July 7, 1975, at 8, col. 1.

enacting laws, including constitutional amendments.<sup>9</sup> Since several members of the Parliament of India were under arrest and others boycotted the July parliamentary session in protest against Mrs. Gandhi's actions, which they denounced as authoritarian and designed to destroy democracy,<sup>10</sup> there was virtually no opposition to the legislation introduced by Mrs. Gandhi's ruling Congress party.<sup>11</sup>

The newly enacted constitutional amendments are intended specifically to curtail the scope of judicial review. Thus, the state of emergency is made a nonjusticiable issue, for one of the amendments explicitly states that the courts cannot adjudicate presidential proclamations of emergency.<sup>12</sup> Similarly, the Maintenance of Internal Security Act, in force since the 1971 declaration of emergency proclaimed at the time of the India-Pakistan war, has been removed from judicial scrutiny.<sup>13</sup> And finally, election laws were changed retroactively, eliminating the possibility of a judicial hearing on challenges to elections of four high government officials—the prime minister, the president, the vice-president and the speaker of the house.<sup>14</sup> Separate legislation passed by the Parliament of India leaves the matter of disqualification from office after conviction for violation of election laws to the discretion of India's president.<sup>15</sup> The last two enactments mentioned above would nullify Mrs. Gandhi's conviction by the Allahabad high court for violations during her 1971 election campaign, the conviction that triggered the current political crisis.<sup>16</sup>

Mrs. Gandhi's strong-arm tactics in the suppression of her political opponents have elicited widespread criticism.<sup>17</sup> It could be argued that her justification for taking drastic measures, for abandoning what she

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9. See notes 11-14 *infra*.

10. N.Y. Times, July 24, 1975, at 1, col. 7; *id.*, Aug. 4, 1975, at 1, col. 3; R.M. News, July 24, 1975, at 44, col. 1; *id.*, Aug. 6, 1975, at 27, col. 1; Denver Post, July 23, 1975, at 4, col. 1.

11. N.Y. Times, July 25, 1975, at 3, col. 1; *id.*, Aug. 9, 1975, at 3, col. 1; R.M. News, Aug. 6, 1975, at 27, col. 1; C.S. Monitor, Aug. 6, 1975, at 6, col. 1.

12. N.Y. Times, July 24, 1975, at 6, col. 3; *id.*, July 25, 1975, at 3, col. 1; C.S. Monitor, July 30, 1975, at 2, col. 1; Denver Post, July 24, 1975, at 6, col. 5; *id.*, Aug. 7, 1975, at 11, col. 2.

13. N.Y. Times, Aug. 8, 1975, at 3, col. 7.

14. N.Y. Times, Aug. 9, 1975, at 3, col. 1; R.M. News, Aug. 9, 1975, at 34, col. 1; Denver Post, Aug. 5, 1975, at 5, col. 1.

15. N.Y. Times, Aug. 6, 1975, at 2, col. 4; Denver Post, Aug. 5, 1975, at 5, col. 1.

16. N.Y. Times, June 13, 1975, at 1, col. 1; *id.*, June 14, 1975, at 1, col. 6.

17. See, e.g., N.Y. Times, June 28, 1975, at 8, col. 6; *id.*, July 28, 1975, at 20, col. 1; Washington Post, July 23, 1975, at A-14, col. 1; C.S. Monitor, July 1, 1975, at 28, col. 1; Nanda, *India Suffers an Aberration*, R.M. News, July 6, 1975, (Trend), at 2, col. 1.

called "a democracy of sorts" in India<sup>18</sup> —that "the threat of disruption was clear and imminent"<sup>19</sup> —is self-serving. Thus, it could be asserted that the suspension of civil liberties under the cloak of constitutional authorization is unwarranted, that the fatal flaw in Mrs. Gandhi's logic in invoking the wisdom of India's Founding Fathers "to provide for extraordinary situations" under which the government has purportedly acted,<sup>20</sup> lies in her utter disregard for the spirit of the Constitution. Her government has failed to make a persuasive case for the suspension of fundamental rights so explicitly enumerated and detailed in the Indian Constitution.<sup>21</sup> Similarly, the government's hastily enacted legislation, designed to deny the courts the right of judicial review—a right specifically granted under the Indian Constitution<sup>22</sup> —violates the basic tenet of a democratic check on the executive or legislative powers. By depriving the citizenry of their most essential protection against an attempted usurpation of powers, Mrs. Gandhi's government has taken an undemocratic and undesirable step.

The underlying causes of the recent political crisis in India and their impact on Asian and world politics are bound to be subject to varying interpretations and will surely be watched and analyzed by political observers. Intriguing questions pertaining to the public response to the emergency measures and to the shape of India's politics in the future deserve serious investigation by all concerned. Two of those questions, both presented within a constitutional framework but with wide-ranging political implications, will be briefly analyzed here. They relate to the nature of the emergency provisions and the scope of judicial review in the Indian Constitution. After exploring these questions within a historical and a narrow comparative setting, a few scenarios are presented and their implications discussed. The discussion concludes with a few observations on the role of the legal profession and legal institutions in a developing country, such as India, which is torn by serious economic, social and political tensions.

## II. Emergency Provisions in the Constitution of India

Unlike the United States Constitution, which has no specific provision for dealing with emergency conditions,<sup>23</sup> India's Constitution vests

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18. SATURDAY REV., Aug. 9, 1975, at 10, col. 2.

19. *Id.*

20. *Id.* at 48, col. 1.

21. CONST. OF INDIA arts. 12-35 (1950). For a perceptive commentary see G. AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 50-115 (1966).

22. See, e.g., CONST. OF INDIA arts. 131-36 (1950).

23. The United States Supreme Court has often said that extraordinary conditions

the president with extraordinary powers to declare an emergency.<sup>24</sup> In addition to the president's power to declare an emergency when "satisfied" that there is a threat or imminent threat to India's security,<sup>25</sup> other provisions allow such a proclamation in case of a failure of the constitutional machinery in a state of India.<sup>26</sup> If "satisfied" that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the Constitution of India, the president may assume the executive powers of the state while India's Parliament may assume legislative powers.<sup>27</sup> Also, the president, on being "satisfied" that the financial stability or credit of India is threatened, may declare a financial emergency.<sup>28</sup> The powers are extraordinary, since pursuant to such a proclamation the government of India is empowered to assume federal coercive powers over the states.<sup>29</sup> And, in emergencies proclaimed by the president other than financial emergencies, the government is authorized to take measures suspending some or all of the fundamental rights guaranteed under the Constitution.<sup>30</sup> While the emergency provisions on the failure of the constitutional machinery in a state have often been invoked,<sup>31</sup> raising interesting questions of federal-state relations, the discussion here is confined to the emergency provisions under article 352 of the Constitution of India relating to India's security. Only twice before has the president exercised this power. Both of these occasions involved external conflict situations—once during the India-China conflict in 1962 and secondly during the Bangladesh crisis in 1971.

The president's powers in article 352 are similar to the governor general's powers under the British rule. However, while the Government of India Act, 1935, gave the chief executive complete discretion to declare a proclamation of emergency,<sup>32</sup> the president is required to exercise the power under the advice of the cabinet ministers, for under the parliamentary system of government operative in India the real

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do not create or enlarge constitutional power. *E.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935).

24. CONST. OF INDIA arts. 352, 356, 360 (1950).

25. *Id.* art. 352.

26. *Id.* art. 356.

27. *Id.* arts. 356-57.

28. *Id.* art. 360.

29. *Id.* arts. 353-54, 56-57, 60.

30. *Id.* arts. 358-59.

31. A. HANSON & J. DOUGLAS, *INDIA'S DEMOCRACY* 121-22 (1972).

32. *See* 2 D. BASU, *COMMENTARY ON THE CONSTITUTION OF INDIA* 538 (3d ed. 1956) [hereinafter cited as D. BASU].

power rests in the prime minister while the president is for all practical purposes a mere figurehead.<sup>33</sup>

These emergency powers are a product of the special circumstances prevalent in India at the time the Constituent Assembly met from December 9, 1946 to November 26, 1949. The cold war had already begun which, in the words of a noted jurist and former chief justice of the Supreme Court of India, Gajendragadkar, made the framers of the Constitution apprehensive that "an external threat, either of a military or of an ideological character, may have to be faced by India; and so they were anxious to provide for emergency powers which would enable the Union Government to put the whole of the country on a war-footing and to enable it to face any possible danger."<sup>34</sup> In addition, the country's safety, unity and integrity were challenged on many fronts—unprecedented Hindu-Moslem riots had shaken the very fabric of society; Maharajas and Nawabs of princely states were intransigent, vocally advocating separation; lawlessness and terrorism were rampant in some states; and the division of India into India and Pakistan had led to the creation of an unfriendly state borderlining the western and the eastern sides of India. Thus the *raison d'être* of the provisions was that the nation faced grave and difficult times.<sup>35</sup> Commenting on these provisions, Gajendragadkar has recently remarked that the object "clearly is to safeguard the integrity and unity of, and the rule of law in, India and not to allow any emergency to affect them."<sup>36</sup> That explains why there was no opposition in the Constituent Assembly to article 362.

The serious consequences flowing from the issuance of a proclamation authorized by this article include the immediate suspension of article 19 which guarantees a citizen's right to seven specified freedoms—speech and expression, assembly, association, movement, residence, acquisition, holding and disposal of property, and practicing any profession and carrying on of any occupation, trade or business. The legislative and the executive branches of the government assume the power to make any law or to take any executive action, notwithstanding article 19 provisions.<sup>37</sup> The rationale seems to be that in modern wars, fought on ideological bases, internal subversive activities are likely to pose as grave a threat to a country's security as does external aggression.

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33. See CONST. OF INDIA arts. 74-75 (1950); 1 D. BASU, *supra* note 32, at 471-73.

34. P.B. GAJENDRAGADKAR, *THE CONSTITUTION OF INDIA: ITS PHILOSOPHY AND BASIC POSTULATE* 68 (1969) [hereinafter cited as P.B. GAJENDRAGADKAR].

35. *Id.*

36. *Id.* at 73.

37. See CONST. OF INDIA arts. 356, 358-59 (1950).

Although other fundamental rights guaranteed in Part III of the Constitution are not subject to automatic suspension, the president is authorized to make an order declaring that:

[t]he right to move any court for the enforcement of such of the rights conferred by Part III [Bill of Rights entrenching fundamental rights into the Constitution] 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 . . . .<sup>38</sup>

The far-reaching consequence affecting civil rights is that they become unenforceable. Thus, the right to obtain orders and directions or prerogative writs from the courts for the enforcement of these rights is suspended while the proclamation is in operation or for such shorter period as may be specified in the presidential order.

Two safeguards are provided in the Constitution. First, the Constitution provides that the proclamation ceases to operate unless approved by each House of Parliament within two months.<sup>39</sup> Second, it requires that a presidential order suspending fundamental rights (with the exception of article 19 freedoms) be presented to each House of Parliament "as soon as may be after it is made,"<sup>40</sup> which means "as early as is reasonable in the circumstances of the particular case."<sup>41</sup>

Contrary to the provisions found in other constitutions, the suspension of fundamental rights in emergencies allowed by the Indian Constitution makes no distinction between times of war and peace. For example, article 1, section 9, clause 2 of the United States Constitution provides for the suspension of the writ of *habeas corpus* but only "when in cases of rebellion or invasion the public safety may require it." It is submitted that if the emergency provisions in the Indian Constitution are to enable "the Union Government to put the nation on a war footing if an emergency either occurs or its threat is imminent,"<sup>42</sup> as asserted by Garjendragadkar, the actions taken by Mrs. Gandhi's government are in violation of the spirit of the Constitution.

### III. The Scope of Judicial Review

The judicial provisions of the Constitution pertaining to the appointment of the judges and their tenure, salaries and removal are

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38. *Id.* art. 359.

39. *Id.* art. 356 § 3.

40. *Id.* art. 359.

41. BASU, *supra* note 32, at 552.

42. P.B. GAJERDRAGADKAR, *supra* note 34, at 71.

designed to ensure an independent judiciary.<sup>43</sup> While the Constituent Assembly adopted a system of parliamentary government based on the English model, it also accepted to a limited extent the United States doctrine of judicial review. Thus, unlike the English Parliament, the Parliament of India is not a sovereign body, for the judiciary, the interpreter of the Constitution, is specifically empowered to declare a law unconstitutional if (1) it is in contravention of the fundamental rights guaranteed by the Constitution, or (2) it is beyond the competence of the legislature according to the distribution of powers provided by the Constitution. Limitations on the rights specifically enumerated in article 19 are subject to judicial review for reasonableness. However, when the emergency provisions are invoked the courts are powerless to intervene. Thus, the judiciary, which—unlike the United States system—is a centralized structure with India's Supreme Court at the apex and the state high courts subject to the Supreme Court's supervision, lacks the preeminent role it plays in the United States political system. As a leading lawyer and a prominent member of the Constituent Assembly, A.K. Ayyar said:

While there can be no two opinions on the need for the maintenance of judicial independence, both for the safeguarding of individual liberty and the proper working of the Constitution, it is also necessary to keep in view one important principle. The doctrine of independence is not to be raised to the level of a dogma so as to enable the Judiciary to function as a kind of super-Legislature or super-Executive. The Judiciary is there to interpret the Constitution or adjudicate upon the rights between the parties concerned. . . .<sup>44</sup>

Similar remarks were made by former prime minister, Jawahar Lal Nehru, deputy prime minister, V. B. Patel and G. V. Pant. During the deliberations in the Constituent Assembly on the right to property and the issue of compensation, especially in the context of land reform (land acquisition of big landlords for public purposes), Nehru said that "no Supreme Court and no Judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community."<sup>45</sup> Pant had earlier shown his displeasure concerning the proposed inclusion of substantive due process in the Constitution, for he was in favor of the determination of the future of the country by "the collective wisdom of the representatives of the people" but not by "the

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43. G. AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 176 (1966) [hereinafter cited as G. AUSTIN].

44. *Id.* at 174.

45. *Id.* at 99.

fiats of those elevated to the Judiciary."<sup>46</sup> Since communal disorders were a major problem confronting the country, he warned that "[t]o fetter the discretion of the Legislature would lead to anarchy."<sup>47</sup> Subsequently, during the discussion of due process in the context of land reform, Patel pointed out the danger that "a certain old type of judges may misinterpret this new process of law."<sup>48</sup>

These remarks by Ayyar, Nehru, Pant and Patel are indicative of the apprehension the framers of the Constitution had about a powerful judiciary which in their estimation could slow down the much needed socioeconomic reforms. In this connection, constitution adviser, B. N. Rau, was strongly influenced by the advice given by Justice Frankfurter (whom he visited in the United States) that the power of judicial review as implied in the due process clause of the United States Constitution was undemocratic because a few judges could veto legislation enacted by elected representatives.<sup>49</sup> Justice Frankfurter also considered the power burdensome to the judiciary.<sup>50</sup> Thus, although there was no mention of due process in the Constitution in connection with the right of life and personal liberty,<sup>51</sup> certain constraints were imposed on the power of the legislature.<sup>52</sup> However, as the following discussion shows, the judicial-executive-legislative confrontation, feared by the framers of the Constitution, did develop rather early and continues not only to aggravate the existing tensions within the body politic but to engender some new ones as well.

The major confrontation began in 1951 with a state high court's decision<sup>53</sup> invalidating a state land reform law for its violation of the right to equality. The government of India responded by amending the Constitution.<sup>54</sup> Since then several amendments have been enacted negating judicial interpretation on the rights to property, including the adequacy of compensation, guaranteed under article 31 of the Constitution. A significant part of the legacy left by the first two decades of the constitutional history of independent India for the future historian will surely include a record of heated debates in Parliament and lengthy opinions by various supreme court justices on these issues.

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46. *Id.* at 85.

47. *Id.*

48. *Id.* at 175.

49. *Id.* at 103.

50. *Id.*

51. *Id.* at 102. See CONST. OF INDIA art. 21.

52. G. AUSTIN, *supra* note 43, at 109-10. See CONST. OF INDIA art. 22.

53. Kameshwar Singh v. State of Bihar, 38 All India Rptr. 91 (Patna 1951).

54. CONST. OF INDIA arts. 31 A-B (1951, as amended 1955).



In a landmark decision in 1967, *Golak Nath v. State of Punjab*,<sup>55</sup> the Supreme Court challenged the Parliament's power to amend the Constitution. It held by a narrow majority of six to five that the word "law" in article 13 (2) which states that any law made by the state which "takes away or abridges" fundamental rights would be void, applies with equal force to a constitutional amendment. Thus Parliament's power to amend the Constitution was limited by article 13 (2) and a constitutional amendment which would take away or abridge the fundamental rights would itself be void. However, the majority applied the doctrine of prospective overruling and the amendments already adopted were allowed to remain as valid laws. Since *Golak Nath* the conflict between the judiciary and Parliament has further intensified. The major controversy centers around which of these institutions has the final say pertaining to the nature and scope of fundamental rights.

The government waited for four years following *Golak Nath* before accepting the Supreme Court challenge. Now that Prime Minister Indira Gandhi's Congress party had swept the polls in the 1971 elections, the government was assured of a comfortable margin in both houses to amend the Constitution. The 24th amendment explicitly stated that nothing in article 13 would apply to any amendment of the Constitution made under article 368, the amendment article, which requires a two-thirds majority of the total membership of each house present and voting in favor of a bill, and in no case less than a majority of the total membership of each house, before it could be presented for the president's assent.

Article 368 was changed to make clear that nothing in the Constitution, including article 13, would apply to the power of Parliament, made "in exercise of its constituent power" to amend the Constitution. Also, the giving of assent was made obligatory upon the president. Soon thereafter, the 25th amendment was adopted, changing the word "compensation" in article 13, to the nonnormative word "amount" because the former had been interpreted by the Supreme Court to mean the just equivalent of the "acquired property."<sup>56</sup>

During the amendment's debate in Parliament, proponents made statements to the effect that Parliament was asserting its supremacy to remove judicial hurdles in the way of the government's implementation

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55. 54 All India Rptr. 1643 (S. Ct. 1967).

56. See, e.g., *Vajravelu v. Special Duty Collector*, 52 All India Rptr. 1017 (S. Ct. 1964). For a commentary, see Sathe, *Judicial Review in India: Limits and Policy*, 35 OHIO ST. L.J. 870, 882 (1974).

of its program of socioeconomic reforms.<sup>57</sup> The few opponents warned that if Parliament had unrestricted power, it might be abused and that if the amendments were approved, not only the right to property, but other fundamental rights would be in jeopardy as well.<sup>58</sup>

The next round began with the Supreme Court's decision to hear *Kesavananda Bharati v. State of Kerala*,<sup>59</sup> in which the petitioners challenged the validity of the 24th and 25th amendments. The largest bench of the Supreme Court, consisting of thirteen judges, heard the case. By a majority of ten to three, the court overruled *Golak Nath*. The majority held that an amendment of the Constitution was constitutional law which is to be distinguished from ordinary law, that the word "law" in article 13 (2) applies to ordinary law and not to constitutional law, and that an amendment of the Constitution was not, therefore, within the scope of article 13 (2).

On the crucial issue as to the scope of Parliament's power to amend the Constitution, seven judges held that Parliament's power of constitutional amendment was not unlimited and that, through judicial review, the limits were to be enforced. However, six judges held to the contrary that there were no such limits, although three of the six judges holding this view doubted that such power included the power to repeal or abrogate the entire Constitution at one stroke. Among the seven judges who found limits on Parliament's power to amend the Constitution, six found implied limitations on destruction of the "basic structure" or "basic features" of the Constitution. Among the features recognized as basic are sovereign and democratic federal republic, supremacy of the Constitution, separation of powers, and basic freedoms of the individual. The seventh judge went only so far as to suggest that such power did not include the power to repeal or abrogate the entire Constitution. All thirteen judges upheld the 24th amendment, but their opinions differed on the correct scope of judicial review on the issue of compensation, notwithstanding the 25th amendment.

#### IV. Appraisal and Recommendation

The summary review presented in the preceding sections is designed to provide a factual background and historical context with which to examine the nature and implications of the current crisis. At its July session, Parliament has passed several more constitutional amend-

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57. *Id.* at 878-80, 883-84.

58. *See id.* at 880, 884.

59. 60 All India Rptr. 1461 (S. Ct. 1973). For an incisive commentary, see SATHE, *supra* note 56.

ments.<sup>60</sup> The Supreme Court is again faced with the dilemma of passing on the validity of a constitutional amendment—an amendment which bars the jurisdiction of the courts over any lawsuit challenging the election of four high government officials, including the prime minister.<sup>61</sup> It also provides that any court judgment involving the prime minister “shall be deemed always to have been void and of no effect.”<sup>62</sup> At the Supreme Court hearing on August 11, 1975, on the appeal from the Allahabad high court’s conviction of Mrs. Gandhi for violation of election laws, the attorney challenging the validity of the amendment cited *Kesavananda Bharati* in support of his contention that the amendment “makes an institutional change that is beyond the powers of Parliament.”<sup>63</sup> The argument suggested by *Kesavananda Bharati* is that since the amendment dilutes the powers of the courts, especially that of the Supreme Court, an institution enshrined in the Constitution, it tends to alter the basic structure of the Constitution. The majority in *Kesavananda Bharati* held that any alteration in the basic form of the Constitution was an invalid exercise of Parliament’s power to amend the Constitution.

During the recent parliamentary session, suggestions were made that Parliament might “have to have a look at the Constitution.”<sup>64</sup> The law minister has hinted that further constitutional amendments may be made to assure the supremacy of Parliament.<sup>65</sup> Government legal experts have reportedly been studying several countries’ constitutions with a view to suggesting basic changes in India’s Constitution.<sup>66</sup> These changes would be aimed at further centralization of the government’s power. Reportedly, there are several alternatives being considered, ranging from a strong presidential system based on one-party rule to making several small changes in the present constitution without rescinding it. If the government decides to make basic changes in the present constitutional structure, the existing Parliament may be transformed into a Constituent Assembly. Since Mrs. Gandhi’s Congress party holds an overwhelming majority in both houses as they are presently constituted, a new Constitution framed by these members will be imprinted with the Congress party philosophy. However, even if no

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60. See notes 12-14 *supra*.

61. See note 14 *supra*.

62. *Id.*

63. N.Y. Times, Aug. 12, 1975, at 10, col. 3; R.M. News, Aug. 12, 1975, at 28, col. 1.

64. N.Y. Times, Aug. 6, 1975, at 2, col. 4; R.M. News, Aug. 7, 1975, at 46, col. 1.

65. N.Y. Times, Aug. 7, 1975, at 9, col. 1.

66. R.M. News, Aug. 14, 1975, at 47, col. 1.

changes in the basic structure are undertaken in the near future, some constitutional amendments are still likely. Such changes might include further curtailment of fundamental freedoms, especially the freedom of the press, further abridgment of fundamental rights if they are considered to be in conflict with implementation of the directive principles of state policy contained in Part IV of the Constitution<sup>67</sup> and further downgrading of judicial review.

Mrs. Gandhi's statement justifying the proclamation of emergency powers<sup>68</sup> and statements by other spokesmen of the government, such as the ambassador of India to the United States,<sup>69</sup> suggest that the present struggle in India is between conservative and reactionary forces represented by various opposition parties and those of reform led by Mrs. Gandhi. The judiciary is maligned by some in the government as consisting of elitists who represent the status quo and whose major interest lies in protecting the untrammelled right to property. There are no facts to support these specious arguments. To recall the recent past, these arguments have been handily used as a ploy by many governments in Africa and Asia during the last two decades to destroy parliamentary democracies established earlier on the English model and to assume totalitarian power. The government of India seems to be using similar tactics.

To analyze briefly the judicial-legislative confrontation, two initial points need to be made. First, Parliamentary action in India as a practical matter means action by one political party, the ruling Congress party which has been in power continuously since India's independence in 1947; and second, the struggle between the judicial and the legislative institutions is not ideological, for the judges consider themselves as the protectors of the Constitution and not as a special interest group. In fact, the judiciary is proud of its role as the arbiter between the mighty executive and legislative branches of the government on the one hand and the lowly individual and weak minorities seeking the enforcement of basic constitutional rights on the other. Judicial pronouncements in nullifying legislative actions have invariably been prompted by the fear of further abridgment of civil rights and further curtailment of judicial review. Also, since the Constitution of India is detailed and specific, the

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67. CONST. OF INDIA arts. 36-51 (1950). See note 61 *supra*. These policy directives, which are primarily socioeconomic, are not enforceable. However, "it [is] the duty of the state to apply these principles in making laws." CONST. OF INDIA art. 37 (1950).

68. *Supra* note 18, at 10.

69. Kaul, *In Which Reasons for the State of Emergency Are Explained and Defended*, N.Y. Times, July 28, 1975, at 21, col. 1.

judiciary has minimal discretion and cannot be creative and active as their counterpart in the United States has been. Further legislative curtailment of the little discretion that the judiciary possesses will allow the unchecked assumption of power by Parliament, inviting despotism, arbitrariness and abuse.

Unfortunately, the legal profession and legal institutions in India have never been forces of economic and social change, and law has at best played a marginal role in the shaping of society.<sup>70</sup> Certainly the legal profession, especially the judiciary, needs to act as a cohesive force to see that law is accepted and used as a means of social control. However, politicians may all too easily cultivate and manipulate a distrust of lawyers among the populace and use the judiciary as a scapegoat for the prevalence of social ills. Many observers, in their oversimplification of problems in India, mistakenly conclude that the present ills stem from the costly luxury of democracy in which India has indulged for the last quarter of a century. But to suggest that the answer to India's problems lies in more centralization is to miss the point. The problems of India and of many developing countries are caused by a host of related factors—leadership, policy formulation, management and implementation, as well as current international institutions and policies pertaining to trade, aid and financing.

The proclamation of emergency seems to have been used as a camouflage to divert attention from the real problems. The social tensions in India are symptomatic of larger ills plaguing the body politic. Prevailing trends toward totalitarianism in India demonstrate total disregard for the existing constitutional framework, although thus far there has been compliance with the letter of the law. While India, as a developing country faces severe economic and social problems and tensions mount within the body politic, the answer to her problems lies not in further erosion of civil rights and individual freedoms or in the curtailment of judicial review, but in solving the crisis of leadership brought about by those who have been continuously in power for over twenty-eight years.

### Addendum

On November 8, 1975, Mrs. Gandhi's position was vindicated as the Supreme Court of India reversed her conviction in the High Court of Allahabad, basing its ruling on the retroactive changes in the election law made by the Parliament of India in June, 1975.<sup>71</sup> This outcome

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70. Von Mehren, *Law and Legal Education in India: Some Observations*, 78 HARV. L. REV. 1180, 1183 (1965).

71. N.Y. Times, Nov. 8, 1975, at 1, col. 1.

does not affect the foregoing analysis, as the Supreme Court invalidated a constitutional amendment which would have further shielded the prime minister's election from judicial review.<sup>72</sup> Three justices of the special five justice panel voted to nullify that section of the law which would have prevented courts from reviewing the elections of four high government officials, including the prime minister.<sup>73</sup>

Clearly, the dynamics involved in the legislative-executive-judicial relationships have a considerable potential of significantly affecting the future developments on the Indian political scene. These relationships need to be closely watched.

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72. *Id.*

73. *Id.*