THE AMENDING PROCESS IN THE INDIAN CONSTITUTION

by

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ABSTRACT

As the title of the thesis suggests, we have attempted to study the process of amendment of the Constitution of India in its various aspects.

To start with, in the First Chapter, the importance of the topic has been brought out. The Second Chapter traces the history of the amending procedure as provided in the Imperial Acts relating to the governance of India from 1600 to 1950. In the succeeding three Chapters (Chapters III, IV, and V), the amending procedure provided in the present Constitution has been explained and critically examined. The Sixth Chapter has been devoted to discuss the power-procedure controversy: whether Article 368 (the amending provision in the Constitution) contains only "procedure" or "procedure" as well as "power" to amend the Constitution. Besides this, the alleged express or implied limitations to the power of amendment have also been considered therein. Then the highly intricate issue, namely, whether Part III of the Constitution containing the Fundamental Rights is amendable by Parliament so as to take away or abridge the rights, has been tackled in Chapter VII. Along with this Mr. Nath Pai's Bill pending in the Lok Sabha

(Bill NO. 10-B of 1967) has been discussed. In Chapter VIII, all the amendments made to the Constitution of India have been reviewed with a special emphasis on the procedure adopted in enacting them. The propriety or otherwise of these amendments has been also discussed. The main conclusions reached in our study have been expressed in the last Chapter.

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ABBREVIATIONS

A.I.R.	All India Reporter (India)
A.C.	Appeal Cases
A.D.	South African Law Rep, Appellate Division.
A.L.J.	Australian Law Journal
C.A.D.	Constituent Assembly Debates (India)
Cal	Calcutta Series, Indian Law Reports
C.L.R.	Commonwealth Law Reports
Camb. L.J.	Cambridge Law Journal (Australia)
Can. Bar. Rev	Canadian Bar Review
Commentary	Commentary on the Constitution of India in 5 Vols by D.D. Basu.
Cranch	Cranch's Reports (Supreme Court)
Dall	Dallas Reports
F.L.J.	Federal Law Journal (India)
Fed. Rep	Federal Reporter
Harv. L. Rev	Harvard Law Review
How	Howard's Reports
I.C.L.Q	International and Comparative Law Quarterly
I.L.R.	Indian Law Reports
I.N.A.	Indian National Archives
I.Y.B.I.A.	Indian Year Book of International Affairs.
J.I.L.I.	Journal of the Indian Law Institute.
J.P.I.	The Journal of Parliamentary Information. (of India)

K.L.T.	Kerala Law Times (India)
Law. ed	Lawyers Edition, United States Supreme Court Reports.
L.S.D.	Lok Sabha Debates (of India)
L.Q.R.	Law Quarterly Review
M.L.J.	Madras Law Journal (India)
Mich. L. Rev	Michigan Law Review
P.C.	Privy Council
Parl. Debates	Parliamentary Debates of India.
R.S.D.(Debates)	Rajya Sabha Debates (of India)
R.P.C.B.	Rules of Procedure and conduct of Business of the Lok Sabha.
S.C.	Supreme Court
S.C.J.	Supreme Court Journal (India)
S.C.R.	Supreme Court Reports (of India)
U.S.	United States or United States Reports
Yale.L.J.	Yale Law Journal
U.T.L.J.	University of Toronto Law Journal.

C O N T E N T S

CHAPTER I

INTRODUCTION

> " Nature is changeable, that is, it is every moment changing in its entirety. On account of the changeability of nature, all its animate and inanimate kingdoms and all living and non-living, big and small units of these kingdoms, are always undergoing change."[1]

In studies on Constitutional law, if anything is conspicuous, it is the fact that the process of amendment of the constitution has always received inadequate attention, as if it were an insignificant issue whereas in reality it is one of the most important aspects of a constitution. While commenting on a constitution most authors discuss in detail the provisions relating to the structure of government, the Bill of Rights (Fundamental Rights), judicial review, the separation of powers and the taxation and commerce clauses. The provisions relating to the amendment of the constitution hardly receive the treatment they deserve. It is rarely realized that the existing provisions of a constitution can be completely changed by exercising the power of amendment. Logically, if a power is capable of altering all other powers provided for in the constitution, that power turns out to be

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1. Bhagwan Dev Atma, The Dev Shastra Part I, 1940, p 57.

superior to them all. In fact, the power of amendment by its very nature is a " power of a higher grade and of more potential importance than any other power provided for in the constitution,"[2] so much so that the very life of a constitution depends upon its amending provision . One writer has observed about the power of amendment as follows:

"Upon its existence and truthfulness i.e., its correspondence with real and natural conditions, depends the question as to whether the state shall develop with peaceful continuity or shall suffer alterations of stagnation, retrogression and revolution. A constitution which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected, if only the state be truthfully organized in the constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of a state."[3]

Not only can an imperfect constitution be improved by amending it but it can also be enabled to withstand unforseen stresses and strains put on it by the onward march of time. Therefore, it is obvious that the process of amendment is of paramount importance in the life of a constitution; it may revivify and rejuvenate it from time to time.

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2. Orfield, The Amending of the Federal Constitution XIII, 1942.

3. Burgress, J.W., Pol. Sc. & Comparative Constitutional Law, p 137, 1891.

If the people outgrow their constitution, either it must be amended formally or informally or the day will not be far off when the constitution falls into disuse. How true Mr. Nehru, the first Prime Minister of India was when he said :

" A constitution which is unchanging and static, it does not matter how good it is, how perfect it is, is a constitution that is past its use. It is in its old age already and gradually approaching its death. A constitution to be living must be growing; must be adaptable, must be flexible, must be changeable. And if there is one thing which the history of political developments has pointed out, I say with great force, it is this that the greatest strength of the British Nation and the British People has laid in their flexible constitution. They have known how to adapt themselves to changes, to the biggest changes constitutionally. Sometimes they went through the process of fire and revolution. Even so, they tried to adapt their constitution and went on with it."[4]

It is needless to stress that the study of a constitution remains incomplete unless the formal process of amendment by which it can be amended is fully studied.

In the Constitution of India, the formal process of amendment assumed unparallelled importance the day the Supreme

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4. Parl. Debates (of India), 1951, Vol XII, Col 9625-26.

Court exploded a "veritable bombshell"[5] in the Golak Nath case.[6] This case can be characterised as unique in the history of judicial review in India if not in the world. The uniqueness of the decision lies in the fact that it cannot be circumvented by Parliament even by exercising the power of amendment, notwithstanding the fact that the procedure prescribed for amendment has no express limitations as to the substance of amendment. Generally, when the power of amendment is provided in plenitude, there should be no obstacle which cannot be overcome by effecting an amendment to the constitution. But the Golak Nath decision has been derived by employing a process of reasoning which not only denies to Parliament the power of amendment in regard to Fundamental Rights in case these are taken away or abridged, but also disables Parliament from amending the Constitution to get round the Golak Nath decision. In this respect, it is an invincible interpretation of the Constitution.

Since 27th Feb, 1967- the date on which Golak Nath case was decided- a few articles have appeared in periodicals.[7] The members of Parliament have been making strenuous efforts to restore to parliament the power of amendment.[8] Thus while

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5. Subharao, G.C.V., Fundamental Rights in India versus power to amend the constitution., 4 Taxas, Int Law Forum, 291-339, 1968.
6. I.C. Golak Nath and others V State of Punjab, A.I.R. 1967, S.C. 1643.
7. These are referred to hereinbelow at appropriate places.
8. A Bill (Bill No 10-B of 1967) is still pending in the Lok Sabha.

this work was in progress the elite in India were seriously debating in Parliament as well as in the press, the issues raised by the Golak Nath decision.

Because the Golak Nath decision cried for a full understanding of the amending procedure provided in the Constitution, it was but unavoidable to study it in its various aspects. Only after a complete and crystal-clear understanding of the amending process was it possible to comment upon the decision authentically and to offer general suggestions for the future. As regards the nature of the study of the power of amendment, it can be aptly said that it is a meeting point of Political Science, Jurisprudence and Constitutional Law[9] and therefore, one has, of necessity, to intrude into other fields of knowledge than one's own. In our case, it became all the more necessary to see our way through the field of Jurisprudence because in the Golak Nath case the concepts of "power", "procedure", "constituent law" and "ordinary law" could be discussed only with the help of jurisprudential authorities. To cap this, it was also necessary to have studied the process of amendment provided in the main written constitutions of the world so that we might gain the maximum benefit by the experience of these

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9. Orfield, op. cit., supra, p xiv

countries and steer clear of all the unnecessary obstacles in our way. Moreover, there being a dearth of material on the topic, it was essential to evolve our ideas on a comparative basis while attatching special regard to the conditions existing in India. In this way we have tried to shed light on the subject from every possible quarter known to us and appreciated what appeared to be good and warned against what seemed to be deterimental to our country in so far as the amendment of the Constitution is concerned.

CHAPTER II

History Of The Amending Process in India

The purpose of this chapter is to look at the history of the amending process in India and the manner in which the constitution of India came to be amended from time to time. The word 'Constitution' is employed in this chapter in a wide sense as referring to the various organic Acts by which British India was governed. Our study is concerned only with British India and not with ' Indian India' that is the Indian States.

The period spanned by this chapter extends over three centuries. It is convenient to study this history in four periods, following the pattern of constitutional historians.

The first period extends from 1600, the year which saw the birth of the English East India Company, to 1765. Strictly speaking, this period is not very significant for our purpose because during this period, according to Sir Courtenary Ilbert, [1] ' the East India Company are primarily traders.' The Company got its charter on December 31,1600, from Queen Elizabeth I. The charter was given for 15 years and could be ended by giving notice of two years. In 1609, James I renewed the Company's Charter " for ever " with a condition that it might

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1. Ilbert, C., The Government Of India, p 1 , 1915.

be revoked by giving notice of three years in case the monoply given to the Company was proved injurious to the interest of the realm. The privileges and powers of the Company were extended from time to time. It is remarkable that no power was reserved to the Crown to alter any provision of the Charter; of course, the whole Charter could be revoked in cases of extraordinary emergency or delinquency.

The second period extends from 1765 to 1858. In this period the East India Company acquired the attributes of a territorial sovereign, which were taken over by the Crown in 1858. In 1773, Parliament passed the Regulating Act for the purpose of removing the evils resulting from the working of dyarchy in Bengal. It was the first Act passed by Parliament to regulate the government in India. It is said that the system of a written Constitution for British India started with this Act. It brought drastic changes in the set-up of the Company and its internal matters. Since the government had not reserved any power to interfere in the affairs of the Company, it was fiercely opposed and attacked as infringing upon the Charter rights. Burke described the Act as " an infringment of national right, national faith, and national justice." The city of London also petitioned against it as it was a " direct and dangerous attack on the liberties of the people,"[2] because, it alleged, the privileges

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2. Hansard, Parliamentary History 1771 to 1774, Vol XVI, p 889.

which the city of London enjoyed stood on the same security as those of the East India Company. In reality, what Parliament gained was the assumption of power of amending the Charter without revoking it. Among other things, the effect of this legislative measure was the recognition of the right of Parliament to interfere in the affairs of the Company. In a way, it transferred power from the Company to Parliament and established the fact that ultimately it was Parliament who could do or undo the law including the constitutional law governing the Company and British India. The events following it prove this beyond any shadow of doubt. When put into practice, the Regulating Act 1773, turned out to be defective, because it suffered from vagueness and lack of clearly defined powers. The Judicature Act 1781 was passed to remove those defects by defining the powers of authority as clearly as possible. Since 1781 the British Parliament had been passing one Act or the other to remedy the defects revealed by the working of the Government. The Pitt India Act 1784 established a system of dual control which reduced the court of Directors of the Company to no more than the Mayor and Alderman of any corporation. The Act of 1786, the Declatory Act of 1788, the Charter Act 1793, the Act of 1807 and the Charter Act 1813 passed by Parliament established unmistakably, among other things, the fact that the power to alter, amend or repeal the Charter lay in Parliament and not in the Court of Directors or the Board of Control

which was at the helm of the Government in India. The Charter Act of 1833 also brought many fundamental changes in the administrative system of the country. The Charter Act of 1853, the Government of India Act 1854 and previous statutes suffered from one main defect and that was that Indians were not associated with the Legislative Council. The mutiny of 1857 necessitated the enactment of the Government of India Act 1858 by which the political power was transferred from the Company to the Crown. The assumption of the Government of India by Queen Victoria's declaration is justly called the Magna Carta of India. With this, we pass into the third period.

The third period extends from 1858 to 1934. In this period the British Parliament zealously guarded its right to amend the Constitution of India. Sec 52 of the Indian Councils Act, 1861 is a clear pointer to this fact. All-embracing power to amend all Acts was expressly reserved in this section. Though this Act was amended in 1892 and 1909, the amending power was not parted with. However, no suit could lie against the East India Company for acts done by it as a sovereign power in India.[3] It was not until 1915 that Parliament felt the necessity of delegating to the Governor-General the power to amend certain provisions of the Government of India Act 1915. The said act empowered the Governor-

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3. The Secretary of State in Council of India V Kamachee Boye Sahaba. Moore I.A. (1857-60) Vol 7, p 476.

General in Council to repeal or alter certain provisions of the Act, as for instance Sections 62, 106, 108(I), 109, 110, 111, 112, 114(2), 124(I), 124(4), 124(5), 125, 126, 128, and 129.[4] The reason given for this delegation was that it was to save the power of the Governor General in Council to deal with certain provisions contained in the Acts of Parliament prior to 1861.[5] Except in respect of the provisions listed above, the Government of India Act 1915 was not amendable by the Governor General. The British Parliament alone could amend it.[6] Sec 44(I) of the 1919 Act (9 & 10 Geo 5 Ch 101) empowered the Governor General to make rules under the Act on certain prescribed matter , but this power was restricted and controlled by the Secretary of State and Parliament.[7] Thus by exercising his rule-making power, the Governor General could not amend the Act.

Now we enter into the fourth period beginning with the enactment of the Government of India Act, 1935 and ending in 1950 with the coming into force of the Constitution of India. This period is remarkably different from the period 1858 to 1935 in that the amending power came to be shared and also reduced in a sense. From the point of view of

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4. Government of India Act, 1915, Sec 131(3) & fifth Schedule.
5. Notes on the Govt. of India Act 1915-1916 (5 & 6 Geo 5, C 37, P. III)
6. Sec 31 of Govt of India Act 1915. C 61, 6 & 7.
7. Sec 44(3) of Govt of India Act 1919, 9 & 10 Geo 5 Ch, p 101

studying the amending power, the Government Of India Act 1935 exhibits its own singularity and that is why it has been thought proper to deal with it separately.

Sec 308 of the Government of Act 1935 provides the procedure for amending certain provisions mentioned in Sec 308(2) or an Order in Council made under the Act. It provides that the Federal Legislature or Provincial Legislature must pass resolution on montions proposed in each Chamber of the Legislature by a minister on behalf of the council of ministers recommending an amendment of the Act or an Order in Council made there under. The resolution was required to be presented to the Governor General in the case of the Federal Legislature, and to the Governor in the case of a Provincial Legislature by an address proposed and passed in the same manner as the resolution could be communicated to the British Parliament. The Governor General or the Governor, had to present the resolution to the Secretary of State for India along with his own opinion regarding the proposed amendment and its effect on the interests of any minority, praying that His Majesty might be pleased to communicate the resolution to Parliament. The Secretary of State had to cause it to be laid before both Houses of Parliament within six months after the resolution was communicated to him. It is to be noted that the resolution required a bare majority of votes of the members of the legislature present and voting.[8] In the

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8. Section 23 of the Govt of India Act, 1935.

House of Commons the provision of a bare majority remained a matter of considerable debate and many members moved an amendment to the clause to the effect that there should be a two-thirds majority for such a suggestion. Though it was made clear that the hands of the Imperial Parliament were not tied, the members argued that a resolution ought not to be regarded as expressing Indian opinion unless there was an overwhelming majority in its favour. Viscount Walmer said,

> " Remember what the situation is in the provinces. In five provinces there is a perpetual Hindu majority under this communal law. It is, I grant, a bare majority, nothing like a two-thirds majority, but it is perpetual. Is it right to say that the perpetual Hindu majority in those provinces or a perpetual Mohammedan majority in other provinces, is to have authority to demand, in the name of the whole province, an alteration of the constitution which may benefit its own party or denomination ?"[9]

He was in favour of a two-thirds majority so that in nearly every province there would have to be agreement between Moslems and Hindus on the proposed amendment. But Davies felt that a provision for a two-thirds majority would ' stultify the Chambers in India from passing any resolution at all'

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9. Offcial Reports, House of Commons, 1935, V 300, Col 1104.

and ultimately a bare majority was thought proper.

Sec 308 empowered the Indian Legislatures to express to His Majesty's Government their intention of a Constitutional change in respect of the matters specified therein. The actual power of amendment was placed in the hands of His Majesty's Government by Order in Council laid in draft form before both Houses as provided in Sec 309.[10] A.B. Keith comments on this section in these words:

> "As was inevitable in the circumstances, the Act confers on the federation no general constituent power, nor does it give authority to the provinces, such as is enjoyed by the provinces of Canada and the States of the Commonwealth, to mould their own constitutions in detail, within the federal frame work. The only power of change is vested in the Imperial Parliament with the exception that in a number of minor points, change by the crown in Council is permitted."[11]

The fact that the Indian Legislatures had not been given any constituent power, did not go unnoticed, rather it was lamented. Dr. Ambedkar opined: " There is no reason why constituent power should not have been given within certain defined limits to the Legislatures in India when they were

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10. Mahajan, V.D., Constitutional History of India, sixth Ed, p 136, 1964. And Bose, S.M., The Working Constitution of India, pp 493-94. 1939.

11. Keith, A.B., A Constitutional History of India,1600-1935, 1936, p 438.

fully representative of all sections and of all interests."[12]

There is no doubt that the amending power in the Act was virtually vested in Parliament but once the requisite number of Indian States had decided to join the federation, the amending power of Parliament would have been limited and restricted to a considerable extent. This follows from Sec 308(4) (ii) read with Schedule II. Sec 308(4) (ii) provided that the provisions of part II of the First Schedule to the Act could not be amended without the consent of the Ruler of any state which would be affected by the amendment. It is necessary to mention here that the 1935 Act sought to create a federation of provinces and states upon certain conditions being fulfilled. In brief, if the Rulers of States representing not less than half the aggregate population of the Indian States and entitled to not less than half the seats allotted to the Council of States (Federal Upper Chamber) acceded to the Federation in accordance with Sec 6, the Federation was to come into being. This event never came to pass. Sec 6 elaborates the conditions of the execution of an Instrument of Accession by a Ruler. Part II of the First Schedule provided the allocation of seats to the Indian States in the Federal Legislature. Therefore, according to Sec 308 (4) (ii) , the allocation of seats to the Indian States could not be interferred with by Parliament. unless the Ruler of any state , who would be affected by the

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12. Dr. B.R. Ambedkar: Federation Vs Freedom p 115, 1935.

change consented to it. The net result was that the power of Parliament to amend Part II of the First Schedule was reduced in this regard.

The Second Schedule specified the provisions of the Act which might be amended without affecting the accession of a State. If the Imperial Parliament wanted to amend the sections of the Act not falling within the pale of the Second Schedule, the amendment would remain inoperative in an Indian State unless its Ruler accepted the amendment by executing a supplementary Instrument of Accesion.[13] This is a result which the Imperial Parliament itself might not have visualized. After the establishment of the Federation, the Federal Constitution would have become very rigid. Dr. Ambedkar has observed on this aspect of the Act :

> " The only authority which can change the constitution is of course the British Parliamement. But very few seem to be aware of the fact that even Parliament has no power to alter the Federal Constitution."[14]

After this survey of the history of the amending process in action, it is not out of place to see the views of Indian thinkers on the amending procedure they would like in a Constitution framed by themselves.

Before 1928, there was no occasion for Indian constitu-

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13. Section 6 Cl. 5.

14. Dr Ambedkar, op. cit., supra, pp 115-16.

tional lawyers to consider this particular subject. In that year, the Nehru Report was prepared to meet the challenge thrown by Lord Birkenhead to Indiansto produce an agreed Constitution. The All Parties Conference, 1928, had appointed a Committee for framing the Constitution of India. The Committee made an admirable effort to frame a Constitution of India for the first time. This report goes by the name ' the Nehru Report', after its Chairman Mr. Moti Lal Nehru. Clause 87 of the Report laid down the procedure for amending the Constitution. It empowered Parliament to repeal or alter any of the provisions of the Constitution, with a proviso that the Bill embodying such repeal or alteration could be passed by both Houses of Parliament sitting together and at the third reading agreed to, by not less than two thirds of the total number of the members of both Houses.[15]

As is obvious, the States were not given any right to share in the amending process at any stage. Compared with the procedure provided in the Constitution of India, 1950, the Nehru Report prescribed a rigid procedure in so far as the special majority required is concerned. It is difficult to say whether the provision of both Houses sitting together, as opposed to sitting separately, would have made for flexi-

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15. Nehru Report, Clause 87, p 123, 1928.

bility or rigidity.

The Nehru Report was submitted to the All Parties Conference which met at Calcutta on 22nd Dec. 1928. Mr. Jinnah moved many amendments to the Report and one of them was that no amendment of the Constitution would come into force unless it was first passed by both Houses of Parliament separately by a majority of four-fifths and was approved by a similar majority of both the Houses in a joint session.[16] This amendment was accepted unanimously.

Mr Jinnah's amendment aimed at securing a right of veto for the minorities in regard to amending the Constitution. Muslims were a minority and his sole purpose was to save Muslims from a steam-roller majority of the Hindus in the Central Legislature. Needless to say if this provision had been embodied in the Constitution of 1950, rigidity of a high order would have been introduced.

Next in chronological order is the Sapru Report. In 1944, the breakdown of the Gandhi-Jinnah talks on the communal issue, necessitated the calling of a Non-Party Conference. The Non-Party Conference appointed a Committee to examine the whole communal and minorities question from a Constitutional and Political point of view. The Sapru Report is the result of the labours of this Committee.

The Report recommended the framing of a new Constitution

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16. All Parties Conference. Supplementary Report of the Committee, 1928, p 50.

of India by Indians. The amendment of such a constitution was to be effected by the procedure laid down in clause 20. This clause provided that the intention to move a motion in the Union Legislature for an amendment of the constitution should be notified to the public and such motion should not be taken for consideration by the legislature until the expiry of at least six months from the date of such notification. The approval of such a motion required at least a two-thirds majority of the sanctioned strength in each House of the Union Legislature. In addition to this, the motion had to be approved by the Legislatures of not less than two-thirds of the Units. Vital provisions of the constitution were required to be listed in a schedule to the Constitution Act, and not to be amended for a period of five years from the coming into force of the new Constitution. It is significant to note that the clause also provided that amendments of a purely formal character could be done through the ordinary legislative process of the Union Legislature. In pursuit of communal harmony, the Sapru Committee sought to put the centre at par with the units as far as the amendment of the Constitution was concerned.

The Hindu Mahasabha released a draft constitution called ' The Constitution of the Hindustan Free State Act,

1944. The procedure to amend the constitution was given in Sec 58. It fully realised the necessity of amending the constitution frequently for some time (the number of years was to be specified), after the constitution came into force and so provided for amendment by way of ordinary legislation. After the specified period had elapsed, the amending procedure was sought to be made very rigid. The amending bill passed by the two Chambers of the Federal Legislature was to be submitted to a Referendum of the people. A majority of the voters on the register had to record their votes on the register. The amending bill would be deemed to have been approved by the people in case either the votes of a majority of the voters on the register, or two-thirds of the votes recorded, had been cast in favour of such amendment.[17]

On behalf of the Radical Democratic Party, Mr. M.N. Roy published a draft called ' Constitution of Free India', on December 20, 1944. In the introductory part, he submitted that the procedure for the revision or amendment of the constitution had not been prescribed because it was implied in the draft. However, he hoped to add a chapter on the subject to the final draft. Art I (b) in the First Chapter read : ' The people have the inalienable

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17. Sec 58 of the Draft Constitution : The Constitution of the Hindustan Free State Act, 194, 1944.

right to alter and modify the political organisation of society.'[18]

As a matter of fact, most of the constitutional lawyers and statesmen started serious thinking regarding the type of constitution and its mode of amendment only when the task of constitution-making fell to be considered by Indians. Individuals and political parties produced their drafts of the Constitution so that their ideas might find a place in the future Constitution of India, which was being hammered out by the Constituent Assembly of India.

Constituent Assembly: The Constituent Assembly was elected according to the Cripps offer of 1942, reaffirmed in the paper issued on May 16th, 1946, by the Mission of the British Cabinet. Since the election of the Constituent Assembly on universal adult franchise would have caused undue delay, the elected Provincial Legislative Assemblies were utilized as the electing bodies. Each Province was allotted a number of seats proportional to its population, approximately in the ratio of one to a million. As the members of the Provincial Assemblies had been elected by the main communities separately, these communities came to be

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18. Roy, M.N., Constitution of Free India; A Draft 1945, Art. 1 (b).

represented in the Constituent Assembly. For this purpose, three communities were recognised, namely, Muslims, Sikhs and General, the last including all those who were not Muslims or Sikhs. The Indian States were allotted a maximum of 93 seats, the method of election being left to be decided by consultation. At the preliminary stage, the States were represented in the Constituent Assembly by a negotiating committee.

The elections to the Assembly were held in July, 1946. Out of 212 general places, Congress filled 203. In addition, the Congress Party elected four Muslims and one Sikh in the Provincial Legislature. Therefore, the Congress got 208 seats of the total of 296 allotted to the Provinces, making up a majority of 69% in the Assembly. The remaining sixteen seats were filled by five small groups. After partition, the number of Muslim League representatives fell to 28, shooting up the Congress majority to 82% in the assembly.[19]

The Indian Constituent Assembly, like the Australian conventions but unlike the American, Canadian and South African Conventions, adopted a policy of publicity as opposed to that of secrecy. As a matter of fact, in a country where delicate controversial matters had to be settled and embodied in the constitution, the policy of

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19. Austin, G., The Indian Constitution : Corner Stone of Nation, 1966, p 10.

secrecy would perhaps have been better. The Indian Constituent Assembly had no less complicated and complex matters to settle than any other Constituent Assembly in the world. It goes to its credit that it preferred the democratic tradition of publicity and held its sessions in the open and the " publication of its high level debates had no doubt a thrilling, educative and ennobling effect upon the country."[20] Since decision-making in the Assembly was democratic, the constitution " expresses the will of the many rather than the needs of the few."[21]

The Constituent Assembly was the master of its procedure and its powers were not limited or fettered by any other authority - indeed it was a self-directing and self-governing body. The editor of the Eastern Economist called it ' the second Assembly of its kind in Asia' the first being the Chinese National Assembly, conceived by Dr. Sun Yat Sen, and convened by his successor Marshall Chiang Kai Shek which was 'turbulently' in session at that time.

There was a doubt prevailing in the minds of some persons regarding the status of the Constituent Assembly and the character of the constitution it was called upon to frame.[22] The Assembly was not the result of a revolution as the cons-

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20. Venkataraman, T.S., History of Constituent Assemblies of the world, 1947, X F.L.J. p 111
21. Austin, G., op. cit., supra, p 9.
22. Roy, M.N., The Constituent Assembly, 1947 I.L.R. V. I p 7

titutional convention of the United States and hence some people had doubts regarding its sovereignty and the fate of the constitution it was going to frame. On the other hand, other people felt that " the British Government lost its status as the sovereign power"[23] on the day the Constituent Assembly met. The Constituent Assembly was not sovereign in that the British Parliament did not transfer its sovereignty over India to it. The Imperial Parliament was still the repository of sovereignty. No Act of transfer of power was passed before its creation. It was later on, when the Independence Act of 1947 was passed, that sovereignty was bestowed on the Constituent Assembly. The Independence Act 1947 removed, for ever, all doubts regarding the status of the Constituent Assembly and the people, by whole-hearted acceptance of the constitution framed by the Constituent Assembly, have put a stamp of sovereignty on it.

It is not out of place here to state, in brief, how the amending provision in the Constitution of India, 1950 came to be shaped and formed in the Constituent Assembly. This will help us in understanding and analysing the amending process in the Constitution.

The drafting of the amending provision started in June

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23. Eastern Economist V. 7 No 24, 1946, p 951.

1947 when the Union Constitution Committee began its meetings. From the documents before the Union Constitution Committee, it seemed that the amending process was on the way to rigidity. The Draft Constitution of K.T. Shah provided that amendments should first be passed by a two-thirds majority in each House of Parliament and then be ratified by a similar majority of Provincial Legislatures and approved by a majority of the population in a referendum.[24] K.M. Munshi's Draft Constitution required a two-thirds majority in each House of Parliament and ratification by one half of the Provinces.[25] Pannikar's and S.P. Mukerjee's replies to B.N. Rau's questionnaire favoured a two-third majority in each House of Parliament and ratification by the same majority of the Provinces. Ayyar's and Ayyangar's memoranda also supported the view held by Pannikar and Mukerjee.

B.N. Rau, the Constitutional Adviser to the Government of India played his unique role in regard to the amending provision. His view was that an amending bill should be passed by a two-thirds majority in Parliament and ratified by a like majority of Provincial Legislatures. But he wanted to insert a ' removal-of-difficulties clause in the constitution so that Parliament might make ' adaptations and modifications' in the constitution by amending it through an

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24. Shah, Draft Constitution, I N A - cited by Austin, G., op., cit. p 257.
25. Munshi, Draft Constitution Art. L. Munshi Papers.

ordinary act of legislation. This removal-of-difficulties clause was to remain in force for three years from the commencement of the Constitution.[26] In his memorandum of Transitional Provisions he strongly argued for such a provision in the constitution. He explained that such a clause was quite usual and that it was like Sec 310 of the Government of India Act 1935. In his Draft constitution, of September 1947, he further explained in a note that the clause was derived from Art. 51 of the Irish Constitution.[27] K.M. Munshi also supported Rau on this point and he justified it on the ground that : "In framing a constitution as we are doing under great pressure, there are likely to be left several defects; and it is not necessary that we should have a very elaborate and rigid scheme for amending these provisions in the first three years."[28] Moreover, many members had apprehensions that the Constitution might turn out to be bad when put into practice because this was the first attempt to frame a constitution and they lacked experience of constitution-making.[29]

In October, 1947 Rau went to Europe to consult various justices and statesmen of the U.S.A, Canada, and Ireland. Most of them supported him on a provision for easy amendment of the constitution in the first three rather than five years[30]

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26. Rau, B.N., India's Constitution in the Making; 1960, p 96.
27. Rau, Draft Constitution, cl 238.
28. CAD IV, I, p 546.
29. C.A.D. IX, 37, 1644-5
30. Rau: op. cit. Supra, p 311.

of the constitution. Rau wrote a letter to Dr Prasad, the President of the Assembly who passed the information to the Drafting Committee and to the Assembly. But the Drafting Committee rejected the proposal of inserting a clause for easy amendment of the constitution in the Transitional Provisions. Though the provision was rejected, yet the principle of easy amendment was adopted in that in various articles it has been provided that certain matters can be amended by a simple majority in Parliament. According to Granville G. Austin's speculation " it appears that Rau was stretching the customary meaning of a removal-of-difficulties clause into a device for the easy amendment of the constitution-- the need for which he strongly believed."[31]

Regarding the history of the main amending provision which ultimately was numbered as Art. 368 of the Constitution, the Union Constitution Committee first recommended that the amending Bill should be passed by a two-thirds majority in Parliament and ratified by a like majority of provincial Legislatures. After a few days, the Committee decided that there need only be one-half majority of the Provinces and not a two-thirds majority. Thereafter, the Committee appointed a sub-committee to consider the matter once again. The sub-committee met on 11th and 12th July 1947. The sub-committee, at the first meeting, recommended that the ratification should be by legislatures representing one-half

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31. Austin, G., op. cit. Supra, p 258.

the total population of the Units, including one third of the population of the Princely States.[32]

On 12th July, major changes were wrought by the sub-committee. It decided that amendments regarding the Union Legislative List, Representation of the Units in Parliament and powers of the Supreme Court required to be ratified by Provincial Legislatures; other provisions were to be amendable simply by a two-thirds majority in Parliament. This decision was incorporated in a supplementary report drafted on 13th July.[33] This overnight drastic change was explained as probably due to Nehru's presence in the second meeting, he being in favour of amendment by Parliament alone by a simple majority.[34]

These provisions as drafted by the Committee were never debated by the Assembly. Actually, when they came up for debate, N.G. Ayyangar pleaded that there be no debate on the clauses because it was being separately considered whether the Provincial Legislatures should be given constituent power and consquently the debate on the matter was deferred.

The Drafting Committee introduced significant changes in the amending provision. First, in regard to ratification, the Drafting Committee provided that along with one-half

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32. Minutes of the Meeting, 11 July, 1947; INA. cited in Austin op. cit. Supra, p 259.
33. Austin, G., op, cit. p 259.
34. Supplementary Report of the Union Constitution Committee pp 68-69.

of the Provinces, one third of the former princely states should be necessary.[35] The Constitution Committee's recommendation regarding the support of Legislatures representing a majority of the population was dropped. The Drafting Committee expanded the pale of the entrenched clauses; instead of only the Union list, it preferred to have all the Legislative lists. In addition to these, the Drafting Committee sought to give Provincial Legislative Assemblies the power to initiate an amending bill in the Assembly, relating to the method of choosing a Governor or relating to the number of the Houses of the Legislature in any state. This provision was removed from this article and embodied in Art. 169 of the Constitution.

The Drafting Committee also retained the provision prohibiting amendment of the articles reserving seats in the Legislatures for minorities for ten years from the commencement of the constitution. On the expiration of ten years, the provision would cease to have effect unless continued in operation by an amendment of the constitution.[36]

It is a strange irony that when draft Art. 304 (which became Art. 368) came up for debate in the Constituent Assembly on 17th September 1949, Dr. B.R. Ambedkar, the

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35. Art. 304 of the Draft Constitution of India 1948 prepared by the Drafting Committee.

36. Art 305 of the Draft Constitution of India 1948 prepared by the Drafting Committee.

Chairman of the Drafting Committee himself moved two amendments to it which resulted in an increase in the entrenched articles.[37] Dr Ambedkar's two amendments were ultimately adopted almost verbatim in Art.368 of the Constitution of India.

The whole debate in theConstituent Assembly took place on the two amendments of Dr. Ambedkar. Since the debate was held at the fag end of the session, only a few members showed interest in it. Contrary to Dr. Ambedkar's anticipation that there would be 'considerable debate' on the article, only eight speakers participated, besides Dr. Ambedkar himself.

Six of the speakers criticized the article on the ground that it was very rigid. They argued in favour of flexibility in the consititution. Dr. P.S. Deshmukh pleaded for a bare majority of the total membership of each House. Shri Brajeshwar Prasad also supported him on this point. Shri Mahavir Tyagi and H.V. Kamath also spoke for flexibility. Even the fact that the Constituent Assembly had superior status to a future Parliament was sought to be refuted on the ground that the members of the Constituent Assembly were never elected by the people directly.

There was a considerable debate for a clause for easy amendment of the constitution for at least a period ranging

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37. Amendment No. 18, No 207.

from 3 to 5 years. There was an amendment in the name of Pandit Nehru, (amendment number 3267) to the effect that the Parliament be enabled to amend the constitution in the beginning for a period of five years. Pt. Nehru did not move it and many speakers lamented the fact of its not being moved. Nehru's silence remained unexplained and Austin speculates that probably ' he had changed his mind and come to believe that the amending process was sufficiently easy regarding provisions relating to language and creation of new states and other stringent mechanisms were necessary ' to inspire confidence in the permanence of the federal structure.[38]

Only one speaker (Dr. P.S. Deshmukh) moved an amendment to make fundamental rights unamendable. Five amendments were sent to make the fundamental rights unamendable but except one speaker, others did not defend their motions on the floor of the Assembly.

Mr. Brajeshwar Prasad argued for introducing referendum on the model of the Australian Constitution. Babu Ramnaryan Singh supported him in this.[39]

Shri H.V. Kamath wanted the article, first of all, to define what an amendment is. He suggested the insertion of

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38. Austin, Op. cit. Supra, p 264.
39. C.A.D. IX p 1658.

the words ' by way of variation, addition or repeal' along with ' to amend'.[40] He also preferred, ' A proposal for an amendment' to be substituted in place of ' An amendment.' Shri H.V. Kamath also moved an amendment to the effect that the Presidential assent to an amending Bill should be mendatory and not discretionary.[41]

He further suggested that a period of six months must elapse between the initiation of the Bill and its final passage in Parliament.

One of the novel and unusual suggestions made in the Assembly was that of Dr. P.S. Deshmukh. In his amendment no 210 he suggested that, for a period of three years from the commencement of the constitution, the Parliament be empowered to amend the constitution by a simple majority in respect of the matters to be certified by the President as not being of substance. He meant only formal amendments but wanted to include in them ' any formal amendment recommended by a majority of the Judges of the Supreme Court on the ground of removing difficulties in the administration of the constitution or for the purpose of carrying out the constitution in the public interest and certified by the President to be necessary and desirable.'[42] Mr. Naziruddin

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40. Amendment No. 3246 C.A.D. IX p 1649
41. ibid, p 1649.
42. Dr. Deshmukh, P.S., C.A.D. IX , p 1644.

Ahmed fully sympathized with Dr. Deshmukh on the point and believed that many difficulties might arise in the near future.[43]

Shri R.K. Sidhwa supported Dr. Ambedkar's two amendments. Acharya Jugal Kishore accepted Dr. Ambedkar's amendments but suggested that the constitution should be kept easier to amend for five years and afterwards be made amendable in the way suggested by Dr. Ambedkar.

In the end Dr. Ambedkar replied to the speakers. He repudiated the charge of the Constituent Assembly being unrepresentative of the people. It was he who disclosed the third mode of amending the constitution by a simple majority in respect of a large number of articles. He explained that this fact had not been noticed by the members because there was no mention of it in Art. 304. Various articles which begin with the words 'until Parliament otherwise provides' were the articles amendable by a simple majority in Parliament. Ultimately the Assembly passed the two amendments of Dr. Ambedkar and rejected each and every amendment to his amendments. Dr. Ambedkar's two amendments were embodied in a new article numbered as 368 in the Constitution of India.

After reaching the end this long journey, one realises

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43. C.A.D. IX, p 1654.

that the final form and shape which Art. 368 attained, emerged out of a hard battle of ideas favouring rigidity on the one hand, and flexibility on the other, sometimes rigidity having the upper hand and sometimes flexibility gaining ground. In this struggle taking place mostly in the committees supporters of rigidity persisted strongly and were not prepared to give in. On the whole, flexibility seems to have suffered considerably, though it entered by the back door. This will be made clear in the following chapters in which Art. 368 itself will be subjected to minute scrutiny and thorough analysis.

CHAPTER III

The Analysis Of The Amending Precess

The moment the constitution of a state is reduced to writing, its amending provision assumes great importance because the very object of writing a constitution depends upon it. In fact, the essence of a written constitution lies in its mode of amendment. According to John Burgess, the amending process envisaged in a constitution is the first of the three fundamental parts of a constitution; the second and the third being the constitution of liberty and the constitution of Government.

> " A complete constitution may be said to consist of three fundamental parts. The first is the organisation of the state for the accomplishment of future changes in the constitution. This is usually called the amending clause and the power which it describes and regulates is called the amending power. This is the most important part of a constitution."[1]

In this chapter, an attempt is made to analyse the process by which Constitution of India can be amended. The analysis of Art 368 suggests, as we will show hereafter, that it is better to describe the subject-matter of Art 368 as the "process of amendment" rather than the "procedure for amendment". Though the words "process" and "procedure" are interchangeably used in law, there is a slight difference.

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1. Burgess, J., op. cit., supra, p 137.

Generally, 'process' denotes 'a continuous or regular, action, or succession of actions, taking place or carried on in a definite mannter,'[2] whereas, "procedure" denotes the mode of action.[3] Therefore, 'process' is a sufficiently comprehensive word for denoting an action being done in a definite manner. In our analysis of Art 368, the comprehensiveness of the word 'process' is limited in respect of the formal provisions of the constitution.[4]

The amending process in the constitution is contained in Art 368 which has the marginal note 'procedure for amendment of the Constitution' and reads as follows:-

> " An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

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2. The Shorter Oxford Dictionary Third Edn, p 1590.
3. ibid, p 1589.
4. Livingston (W.S.) thinks that the amending process includes a "complex of psychological and sociological habits and that makes men act they do."
   Federalism And Constitutional Change, 1956, p 303.

provided that if such amendment seeks to make any change in :-

(a) article 54, article 55, article 73, article 162 or article 241, or

(b) Chapter IV of part V, chapter V of part VI, or chapter I of part XI, or

(c) any of the lists in the Seventh Schedule, or

(d) the representation of states in parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the states by resolutions to that effect passed by those legislatures before the Bill making provision for such amendment is presented to the President for assent."

The scheme of this article was explained by the Chairman of the Drafting Committee, Dr. Ambedkar.[5] Prima facie, this article places all the articles of the Constitution in two categories for the purpose of amendment. In the first category are the articles which are amendable under the substantive part of Art 368, that is to say, when a Bill is introduced in either House of Parliament and passed in each House by a majority of the total membership and by a majority of not less than two-thirds of the members present and voting and also assented to by the President, the provisions sought to be amended shall stand amended. In the second category

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5. C.A.D. Vol IX, pp 1660-1661.

are the articles[6] specifically mentioned in the proviso to article 368 under items (a) to (e). These articles require, not only a special majority in Parliament i.e. a majority of the 'total membership' and majority of not less than two-thirds of the members of that House present and voting but also ratification by at least half the state legislatures.

But this is not the whole story. There is still another category of articles and schedules which, for the purposes of their own amendment, fall under either of the two categories mentioned above but also allow their content to be amended by a bare majority in Parliament by ordinary legislation. In fact, the provisions under this category can further be classified into two types : (a) those under which formal amendments can be effected to the Constitution and (b) those under which formal amendments are not effected to the constitution but otherwise serve the purposes of amendment.[7]

Meaning of " an Amendment": In common parlance,"amendment" might convey the sense of "improvement" or a slight change in the main instrument but the word " amendment", when used in relation to a constitution, carries all shades of meaning such as alteration, revision, repeal, addition, variation or deletion of any provision of the constitution.

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6. These articles and schedules will be dealt with in chapter IV.
7. These two types are discussed in detail in Chapter V herein below.

By usage, it has come to mean every kind of change brought about by the process of amendment in the constitution; it is used in the widest possible sense. Herman Finer goes to the extent of saying that " to amend is to deconstitute and reconstitute."[8]

Some of the early written constitutions contained no provision for their alteration.[9] With the passage of time, it was felt that constitutional amendment was necessary in order to adapt the constitution to changed conditions. The amending provision is all the more necessary in modern constitutions because the world in which we are living is growing constantly more crowded and complex and there is constant pressure on constitutions for amendment, or abandonment. Therefore, it is appropriate and indispensable that the word "amendment" be understood as including all kinds of change.

In Art 368, the expression "amendment" has been used in a very wide sense. When this article was discussed in the Constituent Assembly, Mr. H.V. Kamath moved an amentment[10] to add to Art. 368 that any provision of the constitution might be amended by way of variation, addition or repeal in the manner provided in the article. But this amendment

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8. Herman Finer: The Theory and Practice of Modern Government Vol I, 1932, p 193.
9. For example, the constitution of States in the United States. Dodd(W.F) . The Revision and amendment of State Constitutions, 1910, p 118.
10. C.A.D. Vol IX, p 1649.

was negatived.[11] Probably the reason for not adding the explanatory words "by way of variation, addition or repeal" to the article was that by then the word"amendment" itself as used in respect of the constitution had come to attain an all-comprehensive sense of change and, therefore, there was no need of having any explanatory words. The fact that the constitution framers did use these explanatory words in certain places does not prove that they intended to give narrow meaning to "amendment" in article 368. For instance, in schedule 5, para 7 and in schedule 6 para 21 the word "amendment" is followed by the words "addition, variation or repeal". But in article 368, such words were deliberately avoided. It appears that since the Founding Fathers knew well the meaning of "amendment" as used in regard to a constitution, they considered it unnecessary and superfluous to insert the words " addition, variation or repeal" in Art 368. But in regard to the amendment of the schedules they might be rightly apprehensive of the possibility of the word " amend" being interpreted narrowly. For instance, under the Civil procedure Code of India the amendment of a plaint is understood to incorporate only minor changes; it does not mean to change the plaint totally.[12]

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11. C.A.D. Vol IX, p 1663.
12. Ma Shawe Mye V Maung Mo Houng (1921) L.R. 48.1.A 214.

Thus, it seems that the drafters thought it better to make their intention clear by employing additional words like "addition, variation or repeal" in respect of the Schedules.

Meaning of "this Constitution": The word " Constitution" has been defined by various authors.[13] Most writers regard the document in which the rules governing the composition, powers and methods of operation of the main institutions are set out as the constitution. But the modern trend of inserting as many matters in the constitution as possible[14] indicates that it is no use defining the word "constitution" merely in terms of the rules regarding the institutions under it, because the definition holds good only in respect of some of the matters enumerated in the document called "constitution". In regard to a written constitution, the word "constitution" is taken in the documentary sense; it means the document itself irrespective of the type of rules it contains. Undoubtedly in the Constitution of India "this constitution" conveys the sense of 'document' and particularly so in regard to its amendment. The phrase "this constitution" includes all the provisions which have been written in the instrument called the Constitution of India. It is to be noted that the Supreme Court has

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13. Friedrich, C.J. Constitutional Government &Democracy, 1941, p 119.

14. Karl Loewenstein : Reflections on the value of Constitutions in Zurcher. A. constitutions and constitutional trends since World War II, p 197.

interpreted the phrase "this constitution"[15] as meaning all the provisions of the constitution except Part III. As a reaction to this decision, a Bill is pending at the moment in Parliament[16] by which "any provision of " is sought to be inserted before the words "this constitution" so that the first line of the article would read : " An amendment of any provision of this constitution."

Initiation of the Process of Amendment : The right to initiate the process of amendment has been given only to the House of the People (Lok Sabha) or Council of States (Rajya Sabha) and not to the people as in the Constitution of Switzerland or to Congress and the States as in the constitution of the United States of America or to the head of state as in the constitution of the Fifth French Republic, 1958.[17] Indirectly, of course, the states in India can initiate the process of amendment through their representatives in the Council of States.

Since the initiation of the process of amendment is to be done by introducing a Bill to that effect in either House of Parliament, the rules regarding the introduction, consideration and passing of bills are applicable to the

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15. Golak Nath Vs State of Punjab AIR 1967 S.C. 1643.
16. Bill No 10-B of 1967, introduced by Mr Nath Pai.
17. Art. 89.

amending bills also. The Lok Sabha has framed its Rules of Procedure and conduct of Business of the House under Art 118 of the Constitution. Rules 155 to 159 of the R.P.C.B, 1957, relate to a bill seeking to amend the Constitution. It has been provided therein that the rules of procedure applicable to ordinary bills will also apply to the constitutional amendment bills.[18] This means that Art 368 is not a complete code in respect of the procedure provided by it. The procedure prescribed in Art 368 is to be supplemented by the rules made by each House for regulating its procedure and the conduct of its business. In Sankari Prasad Vs Union of India[19] it was contended that the legislative procedure prescribed in Art 107, which specifically provides for a bill being passed with amendments, was not applicable to a bill for amending the Constitution under Art 368. The argument was further supported by pointing out that Art 108 which provides for a joint sitting of both Houses, was inapplicable to a Bill under Art 368. The Supreme Court, however, rejected the argument and held that, "having provided for the constitution of a parliament and prescribed a certain procedure for the conduct of its

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18. Rule No. 159.
19. AIR 1951 S.C. 458.

ordinary legislative business to be supplemented by rules made by each House (Art 118), the makers of the Constitution must be taken to have intended to follow that procedure, so far as it may be applicable, consistently with the express provisions of Art. 368"[20]

Introduction of the Bill: The procedure as to how and after what notice a bill is to be introduced has been laid down in the Rules and Procedure for the conduct of business in the Lok Sabha, 1957. A private member's bill has to undergo a special procedure, Rule 294(I) of the R.P.C.B. provides that the committee on private member's bills shall examine every bill seeking to amend the Constitution notice of which has been given to a private member, before a motion for leave to introduce the Bill is included in the list of business.

There is a convention in both the Houses of Parliament, that a bill is not to be opposed at the introduction stage. But sometimes this convention is not observed. Many a bill seeking to amend the Constitution has been opposed at the time of introduction.[21]

It is to be noted that Art. 117 forbids the introduction of money bills unless they have received presidential recommendation prior to their introduction. Art 117(3) is still

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20. AIR 1951 SC at 462.

21. The Constitution Ninth, Seventeenth, Eighteenth (which was ultimately withdrawn) and Twentieth Amendments Acts.

wider. It reads as follows:-

> " A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill."

This article has been made applicable to Bills seeking to amend the Constitution. On 26th May, 1967 Mr. Madhu Limaye introduced a Bill[22] in the House of the People (Lok Sabha). His Bill purported to amend Art. 37, 45, 47 so as to make the provisions of Art. 45 and 47 obligatory on the state. In short, he intended to make Art 45 and 47 enforceable[23] against the state just like the Part III rights. The nature of the Bill was certainly such as to involve expenditure from the Consolidated Fund of India, if it had been passed. When the Bill was to be taken into consideration, a member pointed out that the Bill could not be proceeded with because it required the recommendation of the President. There were two opinions regarding the interpretation of Art 117(3). The proponents of the Bill argued that Art 117(3) does not say that a Bill cannot be considered; it only says that it cannot be ' passed. '

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22. Bill No 45 of 1966. Govt of India Gazette Extra-ordinary Part 2 Section 2, July, 29, 1966.
23. Art 45 related to free and compulsory education for children and Art 47 directs the state to raise the level of nutrition and the standard of living and to improve public health. But these articles are unenforceable.

The whole point was whether 'consideration', 'discussion', and 'passing ' are one transaction or different transactions.[24] If these stages of the Bill are regarded as different then a Bill requiring prior recommendation of the President under 117(3), can be introduced and considered but not passed. Ultimately the Speaker followed a previous ruling that " there is no good" embarking upon an enterprise which will end in nothing."[25] Therefore, the Bill was not taken up for discussion.

It is submitted that the ruling obliterates the distinction between Art 117 (1) and 117(3) as regards the introduction of the Bill. Art 117(1) applies to a Money Bill as defined in Art 110 whereas Art 117(3) is in respect of a financial Bill other than a Money Bill and,therefore, a Bill under the former can be introduced only in the House of the People (Lok Sabha) but a Bill under the latter can be introduced in either House of Parliament. Secondly, a Bill under Art 117(1) requires the recommendation of the President even for its introduction. But Art 117(3) does not forbid expressly the introduction of a Bill which has not received a prior recommendation of the President; what it forbids is the "passing" of it. V.N. Shukla comments on the Bills under Art 117(3) as follows:

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24. L.S.D. 4th series Vol III col 1259.
25. ibid, col 1263.

> " They are different from Bills given in Article 117(1) in as much as such Bills can be introduced in the Council of States and need the recommendation of the President not at the time of introduction but only at the time of the passing of the Bill -- technically speaking, before the motion for passing is made."[26]

It isobvious that the ruling on Art. 117(3) deprives private members of their right of introducing a constitutional amendment, which is likely to be caught by miscief of Art. 117(3), because they are not in a position to secure the presidential recommendation unless the Council Of Ministers patronises the Bill. In other words, amendments to the Constitution involving expenditure from the Consolidated Fund Of India cannot be moved by private members of the House without governmental support. It is noteworthy that a member intended to get Art 117(3) and 207(3) amended in order to do away with the requirement of a prior recommendation of the President for a motion for circulation of a Bill for the purpose of eliciting public opinion, because such a motion does not bind the Legislature one way or the other.[27]

It is submitted that irregularity in the procedure ...

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26. Dr. Shukla, V.N., The Constitution of India, 4th Edn, 1964, p 221.

27. Bill No. 52 of 1965, The Gazette of India Extra-ordinary Part II Section 2, August 19, 1965.

prescribed in Art. 117(1) or Art 117(3) is not fatal to the validity of legislation because Art 255 cures the want of previous recommendation provided the Bill in question receives the assent of the President afterwards. Therefore, it seems that a Bill lacking a prior recommendation of the President under Art 117(3) is permissible for introduction and consideration but not for the final stage of 'passing' it.

" For the Purpose": As a matter of fact, these words in Art 368 are of great significance and embody an essential principle of constitutional amendment. These words are designed to emphasise the serious and important character of an alteration of the constitution. A Bill which seeks to amend the constitution is required to disclose its purpose clearly and specifically. In some constitutions, it is expressly provided that a Bill amending the constitution shall be expressed as a Bill to amend the constitution and shall contain no other provisions. [28] " This is to protect members of Parliament from being caught unwares." [29] The Constitution Amendment Bill should not spring a surprise on the members, moreover the members must apply their minds to the amendment sought and its effect on the Constitution as a whole. Therefore, it is necessary that the purpose of

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28. For instance Sec 210 of the Constitution of Burma 1961; and Art 20(2) of the Republic of Ghana, 1960.
29. Maung Maung : Burma's Constitution, 1961, p 193.

the Bill seeking to amend the constitution should be made as clear as possible.

"In either House of Parliament" : It is needless to say that the Bill can be introduced in either of the two Houses of Parliament. In enacting twenty one amendments to the Constitution to date, the first twenty amendments were introduced in the Lok Sabha (House of the People) first but the twenty-first amendment was introduced in the Rajya Sabha. However, private members have been introducing constitutional amending bills in the Rajya Sabha from time to time. When one House has passed a Bill, it is sent to the other House. It was contended in the Sankari Prasad case that a constitution amendment bill under Art 368 requires to be passed in each House in the form it is introduced, that is, it cannot be amended during passage. But this contention was refuted. It was held that each House can pass such a Bill with or without amendments to it during its passage. Uptil now, the House which has been in the last possession of such a bill has passed it in the form passed by the other House. In other words, no bill has been amended by the House which considered it after the other House had passed it.

It is to be noted that the Constitution (First Amendment) Act, 1951 was passed by the Provisional Parliament which

consisted of only one House. It was contended in the Sankari Prasad[30] case that Art, 368 postulates the existence of two Houses of Parliament. The contention was repelled by pointing out that the defect was removed by the Presidential order under Art 392 of the Constitution. The two Houses of Parliament are to be taken as these are constituted under Chapter II of part V of the Constitution.[31]

Meaning of 'the Bill is passed' : In the whole Art 368 the word "passed" has posed as formidable difficulties as the word "majority". Though this word seems to be very simple, when the First Constitution Amendment Bill was being discussed the question arose : What is the meaning of ' passed ' in Art 368 ?[32] Should it mean the last stage of the Bill i.e, the third reading or each stage of the Bill, that is, the first reading, the consideration stage and the third reading ? If it meant only the last stage of the Bill, the special majority required by Art 368 would have been necessary only at that stage. That means, the first and

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30. op. cit. Supra.

31. D.V. Cowen opines that in the Constitution of South Africa, the word ' Parliament' constains two concepts, namely, a static concept that has reference to its structure as provided for in Sec 19 of the Constitution; secondly, it has a dynamic concept that, the elements of Parliament functioning as a law making body, in some cases bicamerally as in Sec 23, and sometimes acting unicamerally as in Sec. 35, 137 and 152 of the Constitution:- Cowen, D.V., Parliamentary Sovereignty And the Entrenched Sections of the South Africa Act, 1951, p 10.

32. Parl. Debates (of India), 1951, Vol XII, Col 9748.

the second stages would have required only a bare majority to pass the Bill. The Speaker consulted the Attorney-General of India, who gave his opinion as follows:-

> " The expression ' when the Bill is passed in each House' has reference to the passing of the Bill at the final stage. The majority insisted upon by Art 368 is, therefore, applicable only to the voting at the final stage. It is, however, better to err on the safer side and take a stricter view insisting on the requisite majority at all stages of the passage of the Bill."[33]

This advice was strictly followed and since then a practice has been established to observe the special majority required by Art. 368 at all the effective stages of the Bill i.e. the motion that the Bill be taken into consideration, the motion that the Bill as reported by the Select Committee of the House or the Joint Committee of the Houses, as the case may be, be taken into consideration, the motion for passing of clauses and schedules to the Bill and the motion that the Bill with or without amendments be passed. Other motions such as that the Bill be circulated for the purpose of eliciting public opinion or that the Bill be referred to

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33. Quoted by M.N. Kaul in Practice and Procedure of Parliament, 1968, p 477.

a select or joint committee are passed by a simple majority only. The practice has hardened into rules and the Rules of the House specifically provide for this procedure.[34]

The practice of having a special majority at every effective stage of the Bill was introduced by way of caution and cannot be characterised as a constitutional requirement. This has made the amending process more rigid than what the framers contemplated. Of course, it has a bright side also. Members have to be careful in keeping themselves present in the House when a Bill seeking to amend the constitution is taken up by the House. It is noteworthy that in some constitutions it is specifically provided in the amending clause that the Bill must be passed by a special majority on the second and third readings.[35] In some countries a special majority is required only at the second reading[36] or only at the third reading.[37]

The voting is by division whenever a motion has to be

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34. Rule 157, R.P.C.B. of Lok Sabha, 1957.

35. Art 159, Constitution of Malaysia 1964; Sec 46 the Constitution of Malawi, 1964.

36. Art 138 Constitution of Italian Republic 1947.

37. Sec 118(1) Constitution of South Africa, 1961.

carried by a special majority under Art. 368. The result is declared by the Speaker or the Chairman and, in case the motion is carried, he announces also that the motion is carried by a majority of the total membership of the House and by a majority of not less than two-thirds of the members present and voting.[38] The names of the members who vote for 'Ayes ' or 'noes' are published in the Lok Sabha Debates and the Rajya Sabha Debates.

Voting Clause-by-Clause: Each clause or schedule in the Bill is put to the vote of the House and if passed by a special majority is deemed to be passed.[39] However, the Speaker in the Lok Sabha and the Chairman in the Rajya Sabha may, with the concurrence of the House, put any group of clauses or schedules together to the vote of the House.[40] In case any member requests that any clause or schedule be put separately,the Speaker Shall put that clause or schedule, or clause or schedule as amended as the case may be, separately.[41A] But the short Title, the Enacting Formula and the Long Title may be adopted by simple majority. The provision that the Speaker shall put clauses or schedules separately when requested so by a member gives a significant right to a

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38. Rule 158, of R.P.C.B., 1957.

39. Rule 155, R.P.C,B. Lok Sabha. 1957. There is a convention in the Rajya Sabha to the same effect.

40. Proviso to Rule 155.

41A. ibid.

member. In the absence of it, a member who wants to vote differently on the clauses sought to be put together would be deprived of his right to apportion his votes according to his choice. For instance, if three clauses are put to vote together and a particular member intends to vote 'aye' for one of them and 'no' for the other two, he would not be able to do so because he can only vote either 'aye' or ' No' for all of them.

Amendments to Clauses: The matter was settled after some controversy that proposed amendments to the clauses of the Bill should be decided by a bare majority.[41] While enacting the First Amendment Bill, the Speaker was of the view that even proposed amendments to the clauses of the Bill would have to be passed by a special majority. He informed the House that he did not want to run the risk of getting the whole legislation challenged in the courts and as a matter of greater caution he preferred to err on the safer side in having the division and voting record on each amendment.[42] But afterwards he changed his mind and he ruled that proposed amendments to the clauses of the Bill would be decided by a bare majority. Since then amendments to

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41. Parl. Debates, Parliament of India, 1951 Vol XII, Col 9794.

42. Parl. Debates(of India), 1951, Vol XII, 9748.

clauses of the Bill have been decided by a bare majority. (i.e. by the voice-vote). Members, while voting by voice over proposed amendments to the clauses of a Bill need not rise in their seats to mark their division numbers. If some/one chooses to challenge the decision of the Chair on any amendment, then it is in the discretion of the Speaker whether he grants a division. In the case of the Constitution Fourteenth Amendment Bill, the opposition members challenged the decisions of the Chair in respect of two proposed amendments to the clauses of the Bill and the Speaker allowed a division on each of them; the results of the divisions confirmed the decisions of the Speaker.[43]

"In Each House:" The Bill is required to be passed in each House of Parliament. Supposing, the two Houses disagree on a particular amendment, can a joint sitting of both the Houses be held under Art 108 ? There can be two views on the question. First that a joint sitting has been impliedly ruled out by requiring that the Bill be passed in each House of Parliament. Therefore if the two Houses disagree on a Bill seeking to amend the Constitution, the Bill cannot be passed in a joint sitting and consequently such a Bill would elapse. This view can be further supported by the argument that the number of the members of the House of the People(Lok Sabha) being more than double the members

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43. L.S.D. 3rd series Vol VIII col 5971.

of the Council of States(Rajya Sabha), it is likely that in a joint sitting the Lok Sabha would override the Rajya Sabha. Thus, the interests of the Rajya Sabha can only be safeguarded by providing no facility for a joint sitting. It can be said, in addition that the consititution framers have been guided by practical convenience in having separate sittings which are conducive to good discussion and serious thinking on constitutional amendments.

The second view is that there is no reason why a deadlock between the two Houses cannot be removed by the President summoning a joint sitting under Art 108. It can be argued that Art. 368 merely emphasises the requirement of a special majority and is not complete code in the matter of procedure. Parliament is competent to adopt its own rules of procedure as long as these rules are consistent with the requirements of Art 368. This view is fully supported by the Sankari Prasad decision[44] in which the Supreme Court repelled the argument that "legislative procedure" was not applicable to a Bill under Art. 368 and observed as follows:

> " Assuming that amendment of the consititution is not legislation even where it is carried out by the ordinary legislature by passing a bill introduced for the purpose and that Arts 107 to 111,

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44. A I R 1951 S C 458 = 1952 SCR 89.

> cannot in terms apply when parliament is dealing with a bill under Art. 368, there is no obvious reason wh y Parliament should not adopt, on such occasions, its own normal procedure so far as that procedure can be followed consistently with statutory requirements."[45]

The argument that interests of the Upper House are jeopardised in a joint sitting, can be repelled by pointing out that the Lok Sabha represents the will of the people and the will of the people must prevail. The Upper House should not become an obstacle in its way. Moreover, in case the amendment relates to any of the entrenched provisions, the interests of the States are not in danger because the amendment would require ratification by at least half the State Legislatures and the States can take care of their interests better than the Upper House.

The second view seems to be more logical than the first view which makes the Constitution unnecessarily rigid.

Meaning of "Majority" in the expression ' by a majority of the total membership of that House'.

The words "majority" of the total membership" were regarded as having a double import. One view was that "majority" here should be construed as of the total number of the members that should exist at a particular time irrespective of the fact whether they in fact do exist or not. The

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45. AIR 1951 SC 458 (462)

second view was that the total membership means the total number of members as they actually exist at a time. These two views give different results. For example, supposing at a particular time total membership is 500. Supposing further that 10 seats are vacant. According to the first view, the "majority" is 251 but according to the second view it is 246. The total number as it should be and the actual number of members are not necessarily one and the same, and the difference, therefore, has some significance. The first Speaker of the Lok Sabha, Mr. Mavlankar, requested the advice of the Attorney-General who expressed the following opinion on this question. :

> " The expression 'by a majority of the total membership of that House' means that it is not the actual number of members existing at a given point of time which has to be cosidered but 'the membership' meaning the totality of the members that should exist whether they in fact do exist or not. This aspect is emphasized by the use of the words 'the total' and also by the omission of the qualifying words ' present and voting."[46]

In passing the twenty-one constitution Amendment Acts, the totality of the membership has been taken into account in calculating the 'majority' but doubt has been cast on the

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46. Kaul, M.N., op. cit. Supra, p 477-78.

meaning of 'majority' at times. When the Constitution Fifth Amendment Bill (under the heading Seventh Amendment Bill) was voted at the consideration stage, it happened that 246 members voted for 'ayes' and 2 members voted for ' noes'. At that time the total number of members of the Lok Sabha was 499. The Speaker declared the result of the voting but wanted to reserve his opinion as to what was to be declared in regard to the Bill; he was not sure whether the total of the actual number as it exists should be taken or the total number of members as it ought to be, should be counted.[47] If the total number of members as they should exist is taken in the above case, the Bill is not carried because in that case the'majority' required comes to 250. But if the actual number of members be taken and if 8 or more seats in the House are vacant, the Bill is carried. There was much argument that the total membership should be interpreted as the strength of the House for the time being, that is, the total strength of the House minus the vacant seats. When a member pointed out that Rule 169 of the then Rules of the House required total membership, the Speaker announced that the motion was not carried in accordance with Rule 169. The fact that he did not announce that the motion was not carried in accordance with Art 368 shows that he was not convinced that 'majority should be

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47. L.S. Deb. 1955, Vol IX col 887.

calculated as of the total membership

In our opinion, Art 368 requires the majority of the total membership of the House as it should be, and the interpretation of the Attorney-General is correct. Rule 159 of the R.P.C.B. of the Lok Sabha makes the point clear beyond any shadow of doubt by providing an explanation to the effect that "total membership" means the total number of members comprising the House irrespective of the fact whether there are vacancies or absentees on any account.[48]

A Majority Of Not Less Than Two-thirds Of The Members Of That House Present And Voting :

The majority of two-thirds of the members present and voting is to be calculated by taking into account the number of members who are actually present at the time of voting. The Lok Sabha observes a convention of ringing the division bells for two minutes so that those members who happen to be outside the House at the time of voting may present themselves in the House and participate in the voting. After the bells have rung for two minutes, the doors of the House are closed. At the time the Constitution Fifth Amendment Bill was put to vote, the division bells were rung as usual, the doors were closed. Unfortunately the motion was

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48. Rule 159 R.P.C.B. Lok Sabha, 1957.

not carried. An objection was raised that the doors of the House should not be closed; otherwise, the meaning of 'present' in Art 368 fails to take into account those members who are just at the doors when these are closed. The Speaker ruled that it would be difficult to keep the doors open and "present" means those who are present in the House when the doors are closed after ringing the bells for two minutes."[49]

The words "present and voting" seem to have been inserted on the basis of the Americal experience in this connection. Art V of the Constitution of the United States provides for a majority of two-thirds of both Houses of the Congress, for a proposal by the Congress to amend the constitution. The question arose in the National Prohibihion Cases[50] as to whether "two-thirds" means two-thirds of the total number of members or two-thirds of the members present and voting. The Supreme Court held that "two-thirds" means 2/3 of the members present, assuming the presence of of quorum. Since Art. 368 requires an absolute majority along with a two-thirds majority of the members present and voting and the quorum of each House is 1/10 of the total strength of that House[51], it was unnecessary to mention the

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49. L.S.D. 1955 Vol IX col 886-87

50. 1920, 253 U.S. 350.

51. Art 100(3)

presence of quorem in Art. 368.

The use of the words "not less than" before two-thirds shows that the number of members may be exactly 2/3 of the members present and voting i.e. it is not necessary that their number should exceed the remaining 1/3. Supposing, the present and voting members are 450 and 300 are in favour of the Bill, 300 being exactly 2/3 of 450 and it also makes an absolute majority, (taking the total membership as 500), therefore, the Bill would be carried. The words "not less than" signify that the majority required may be exactly 2/3 or more than that, but not less than, the number of the members present and voting.

It is observable that the words 'present' and 'voting' have been joined with the conjunction 'and', indicating that only those members are to be counted for the purpose of 2/3rd majority who are both present and also are actually voting. In other words, those members who are present but do not vote in fact either way are not to be taken into account while counting the number of those who are present and also vote. By way of illustration, supposing at the time of voting on a Bill under Art 368 the total number of members present in the House is 450. Supposing of these 450 members, 50 members do not exercise their vote at all, 260 vote for 'ayes' and 140 for 'noes'. In this case, the 50 members who are present but who do not vote at all are not to be counted

for finding the total number of those who are ' present and voting'. Thus, the total number of those who are 'present and voting' would be 450-50 = 400 and the requisite two-thirds majority would be 2/3 rd of 400 i.e. at least 267. Therefore the Bill will not be carried, it falling short of 7 votes.

The word "present" makes it clear that physical presence of the members is necessary; they cannot exercise their votes by other means.

Presentation of the Bill to the President: When a Bill has gone through the procedure prescribed in Art 368 in both the Houses, and, if the Bill relates to any of the provisions entrenched under Art 368, it has also been ratified by at least half the state legislatures, it is mandatory that it be presented to the President for his assent. The words used being "shall be presented", their unmistakeable import is that it is not directory but mandatory that the Bill be presented to the President. In the Constituent Assembly a member moved an amendment to Art 368 which, if it had been accepted, would have made the assent of the President mandatory [52].

As to who shall present the Bill to the President for

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52. C.A.D. Vol. IX , p 1649.

his assent, we have to refer to the Rules of the Houses which provide that after a Bill is passed by the House the Presiding Officer of the House who is in possession of the Bill will authenticate the Bill by his signature[53] and then present it to the President. In case of absence of the presiding officers, the Secretary of each House is authorised to authenticate the Bill. So the President can give his assent only to a Bill which has been so authenticated and presented.

Role Of The President In TheAmending Process

What, after all, is the role of the Indian President in amending the Constitution ? According to Art 368, the presentation of a Bill, after it has been passed by both Houses of Parliament in accordance with the requirements of Art 368, to the President is imperative but it is not made mandatory that he must give his assent to the Bill. If the President gives his assent, the Bill amends the Constitution immediately. Since it is not provided that the President must give his assent, it falls to be considered whether he can withhold his assent or send the Bill for reconsideration or whether he can cause delay in the matter. It is also necessary to consider whether he can act under Art 143[54] in regard to such a Bill so that he may secure the opinion of

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53. Rule 128 of the Rules of House, 1957.

54. Art 143 provides that the President can seek the advisory opinion of the Supreme Court.

the Supreme Court.

Before we start considering these possibilities, it is relevant to note in contrast, that the amending process in the Constitution of the United States does not mention the President at all and the question arose whether a proposal of amendment of the constitution under Art V required the assent of the President or not. The Supreme Court held that an amendment of the federal constitution, being not a legislative act, does not require the assent of the President.[55] Justice Chase, as he then was, observed : "The negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the Constitution." Therefore, amendment of the Constitution is outside the scope of the Presidential veto power. It is to be noted that in some of the recently-adopted constitutions it has been provided that the amendment of the constitution is subject to the exclusive approval of the head of the State,[56] or it is mandatory for the head of state to give his assent or such assent has been done

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55. Hollingsworth V Virginia, (1798) 3 Dall 378.
56. Sec 126(1) of Constitution of Jordan, 1951.
57. Sec 210 of the Constitution of Burma, 1948, Art 96 of the Constitution ofJapan 1946. Art 12(2) of the Constitution of Republic of Korea, 1946, and Art 74 of the Constitution of Algeria, 1963.

away with.[58]

Can The President Withhold His Assent ?

The answer to the above question depends upon the position and power of the President as provided in the Constitution. There are three views about the position which the President occupies under the Indian Constitution. First, that his position corresponds to that of the Sovereign in England and, therefore, he is a mere nominal Head of State. In fact, this view is entirely based upon the parliamentary system envisaged in the Constitution. Since in the Parliamentary type of government the executive is responsible to, and removable by the legislature, therefore, the Head of State is only symbolical and represents the unity of the country and the real power lies in the Council of Ministers headed by the Prime Minister.[59]

The second view is that the President is not a mere figurehead but his position is one of great authority and

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58. Art 89 of the Constitution of the Fifth French Republic, 1958. It is to be noted that the initiative for amending the constitution belongs to the President.

59. Rau, B.N., Indian Constitution in the making, 1960, pp 202-213.
Setalvad, M.C., The Indian Constitution 1950-65, 1967, pp 23-25.

dignity.[60] This view is based upon the provisions of the Constitution. As a matter of fact, the Constitution provides no where that the President is bound by the advice of his Council of Ministers.[61] So far as the letter of the Constitution is concerned, the President is not under any legal obligation to act on the advice of his Council of Ministers and he may not only disregard the advice given by the Ministers but may act even contrary to it.

When the position of the President was discussed in the Constituent Assembly, it was pointed out by many members that it should be made clear that the President shall be bound by the advice of the Council of Ministers. Even Dr. Rajendra Prasad, President of the Constituent Assembly, expressed the view that " Art. 74(1) does not say that the President shall be bound to accept that advice."[62] He suggested that some provision should be put in the Constitution to make the President bound by such advice. Dr. Ambedkar felt that the expression " aid and advice" would serve the same purpose as it serves in section 11 of the B.N.A. Act, 1867, from where it was borrowed and embodied in Sec 9 and Sec 50 of the Govt of India Act, 1935, and transposed from there into the present Constitution of India.[63] Similarly, Alladi Krishnaswami, a

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60. Munshi, K.M., The President Under the Indian Constitution, 1963. Prof Gledhill, A., The Republic of India, 1964, p 121. Mishra, R.N., The President of the Indian Republic 1964, pp 182-193.
Kapur, R.P., Revolution or Dictatorship, 1967, p 267.
61. Art 74, 75, 78.
62. C.A.D. Vol VIII, p 216.
63. C.A.D. Vol VIII, pp 215-16.

great jurist and member of the Drafting Committee held the opinion that the expression " aid and advice" used Art 74 was an euphemism for act on the advice of his ministers and that in all circumstances the President would be bound by the advice of his ministers. In the beginning, the constitution framers had in mind to express the binding nature of the ministerial advice to the President, in the form of an Instruement of Instructions but ultimately the idea was dropped.

It is true that the members of the Constituent Assembly, referred to the position of the President as equivalent to that of the British Monarch, but the written words of the Constitution, as interpreted by accepted cannons of interpretation, do not say so. In fact, the position of the President as it exists at present, was expressed quite fairly by the President of the Constituent Assembly himself as follows:

> " Although there are no specific provisions, so far as I know, in the constitution itself making it binding on the President to accept the advice of his ministers, it is hoped that the convention under which in England the King acts always on the advice of his ministers will be established in this country also and, the President, not so much on account of the written word in the Constitution, but as the result of this very healthy convention, will become a Constitutional President in all matters."[64]

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64. C.A.D. Vol XI p 988.

It seems that the Founding Fathers in their wisdom left the matter to be resolved by conventions.

The Supreme Court favoured the first view given above and expressed it in these words:

> "In India, as in England, the Executive has to act subject to the control of the legislature; but in what way is this control exercised by the Legislature? Under Art 53(1) of our Constitution, the executive power of the Union is vested in the President but under Art 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet."[65]

The third view is that the constitution framers undoubtedly preferred the first view but intended that the second view should prevail in case the circumstances and conditions in the country frustrated the working of the parliamentary system. Therefore, the actual position and powers of the President depend more on the conditions prevailing in the country rather than the cold letter of the Constitution.

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65. Ram Jawaya V State of Punjab, AIR 1955 SC 549(556).

As long as the parliamentary system works satisfactorily on the whole, the President remains a figurehead, The moment this system fails, the President becomes competent to assume the maximum powers provided to him but he is expected to restore the parliamentary system as soon as he can in the circumstances. Prof Gledhill, discerns this scheme underlying the provisions relating to the relationship of the President and his Council of Ministers and observes as follows:

> " What the constitution contemplates is that normally the government shall be carried on by a Committee of Ministers selected from the elected representatives of the people but it recognises that circumstances may arise in which that system may breakdown, so it is desirable that there should be some authority empowered to continue the Government and set about restoring parliamentary government as soon as possible. It is for this reason that the constitution legally vests the executive power in the President."[66]

Thus, the constitution framers have shown their depth of wisdom, remarkable vision and farsightedness in providing the position and powers of the President in such a flexible

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66. Gledhill, A., The Republic of India, 1964, The Development its Laws and Constitution, p 115.

and elastic language as to meet adverse circumstances without having to amend the Constitution or violate its provisions. Indeed, this device has achieved an appreciable amount of inherent flexibility and inbuilt viability for the Constitution. Had the Constitution provided expressly that the President is a nominal head and that all the executive power lies in the Council of Ministers, there might perhaps have been created a power-vacuum and situations arising out of the failure of cabinet government would have been unprovided for. By clothing the President with legal powers, political power (de facto power) has been saved from degeneration and disintegration because, in that eventuality, it passes on to the President who has been sufficiently informed and instructed as to what to do with it and in what manner and how to return it to those to whom it belongs. It is to be noted that, though the constitutional provisions seem to make the President an autocract, in fact his powers would remain unused unless the political conditions warrant him to make any use of them. If the President fails to sense the political conditions correctly and acts indiscreetly in regard to his powers, he would meet utter failure. Perhaps, the position of the President can be described accurately in these words:

> " The President has practically no power when there is a stable majority in the Lok Sabha to support the Council of Ministers headed by a Prime Minister

> who rules the Country; but these powers increase in proportion to the instability and weakness of the Council. They will reach a maximum when there is no party in a majority in the Lok Sabha and the Union Government has to be carried on with shifting coalition minorities."[67]

It follows from the position and powers of the President that though there is nothing in the Constitution which prevents him from withholding his assent to an amendment of the constitution, it is rarely that he would do so. This is so because an amendment of the constitution, if it has gone through the procedure laid down in Art 368, testifies that at least an absolute majority of each House of Parliament has supported the Bill and in case he withholds his assent, the same absolute majority would take his decision with resentment. In other words, he would be inviting a direct conflict with Parliament, which no wise President would like to do. The President, however, would be entitled to refuse assent if he feels that the procedure laid down in Art 368 has not been followed or that at least half the state legislatures have not ratified the Bill. In such circumstances the amendment can be declared unconstitutional by the Supreme Court as well.

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67. Srivastava, V.N., The Indian President. The Journal of Parliamentary Information, 1967, Vol XII, p 22 (27)

There might be circumstances in which the Council of Ministers may advise the President to withhold his assent, as for instance if the Bill happens to be amended in the Rajya Sabha in such a form that the Council thinks it proper not to amend the Constitution. Such a situation is possible because it is not provided in the Constitution that the amending Bill should be passed in identical terms i.e. the Rajya Sabha is entitled to pass it with amendments. The Council of Ministers might also advise the President to exercise his veto power if such circumstances have taken place since the bill was passed as to render the amendment unnecessary. If the President declares that he withholds his assent from a Bill, there is an end to it.[68]

Can The President Use His Suspensive Veto ?

Art 111 provides that the President may return the Bill if it is not Money Bill to the Houses for reconsideration in part or as a whole, with or without his own suggestions. Therefore, except Money Bills all other Bills can be sent by him for reconsideration. If a bill introduced under Art 368 is sent for reconsideration and is again passed with or without amendment by each House by an absolute majority of the House and also by a two-thirds majority of the

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68. Basu,D.D. , Commentary on the Constitution of India, 1965 5th Edn, Vol 2, p 686.

members present and voting and then presented to the President for his assent, the President is bound to give his assent.[69] He cannot withhold his assent this time, otherwise he might be impeached for violation of the Constitution.[70]

It is of interest to note that the President's veto power in regard to a Bill under Art. 368 is more in accord with the qualified veto of the American President in that an extraordinary majority is required in both the cases but in respect of all other Bills remitted for reconsideration only a bare majority is required to repass the Bill.

It is to be noted that no time limit is prescribed in which the President must assent or refuse to assent or return the Bill for reconsideration. In this regard the only requirement is that if the President wants to return the Bill he shall do it "as soon as possible" after the Bill is presented to him.[71] Though the words "as soon as possible" are indefinite and vague, they emphasise that there should be no unreasonable delay. Therefore, if the President wants to cause delay by keeping the Bill on his desk for an unduly long time, he might find it difficult to justify his act in

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69. Art 111

70. Art 61

71. Art 111

case he is impeached under Art 61.

Who Shall Present the Bill After Reconsideration ? :

The Constitution is silent on the point as to who is responsible for representing the Bill to the President. Both the Houses have framed their Rules. R. 154 of the Rules of the House and R. 135 of the Rules of the Council provide that after a Bill has been passed again by the Houses, the Presiding Officer of the House, which is in possession of the Bill will authenticate the Bill by his signature and then present it to the president for his assent. In case of absence of the presiding officer, the secretary of each House is authorised to authenticate the Bill on their behalf. In no amendments to the Constitution enacted so far has the president withheld his assent or returned the Bill for reconsideration or kept it on his desk for a long time.

Can The President Consult The Supreme Court Before Giving Assent ?

The President is entitled to seek the advisory opinion of the Supreme Court under Art 143(1) if it appears to him that a question of law or fact has arisen or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme

Court upon it. The Supreme Court is not bound to give an opinion.[72] The scope of Art. 143 is very wide. Amendment of the Constitution, by its nature, is a matter of public importance. Moreover it is not necessary that the question of law or fact to be referred must arise in fact. Even if it is likely to arise, it can be referred. So, the President may refer to the Supreme Court any question of law or fact in regard to a Bill which seeks to amend the Constitution. Whether he would do so on the advice of his Council of Ministers or act suo moto is beside the point. The President may be having doubt as to whether the amendment Bill requires ratification of at least half the state legislatures or not. In the present state of the case law on the point,[73] it is not difficult to conceive that such a doubt can arise in regard to a number of Articles. The Supreme Court would apply the doctrine of pith and substance[74] or see whether the amendment of unentrenched Articles has "direct"[75] effect on the entrenched Articles or not. If it has "direct" effect it would require ratification under Art 368, otherwise not. It is only the Supreme Court who can

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72. Re, Kerala Education Bill AIR 1958 SC. 956
73. Sajjan Singh V State of Rajasthan AIR 1965 SC 845 and Golak Nath V State of Punjab A.I.R. 1967 S.C. 1643.
74. Per Gajendragadkar in Sajjan Singh Case AIR 1965 SC 845 (852).
75. Per Wanchoo J in Golak Nath case. AIR 1967 SC 1643(1687)

decide finally the question of "direct" effect. Therefore, the President may proceed under Art 143(1) to have the opinion of the Supreme Court in the matter so that the Government may act accordingly.[76] Sometimes a doubt might arise whether a constitutional amendment is necessary in order to enable an action to be taken. Thus the President referred three questions to the Supreme Court in regard to the implementation of the agreement relating to the Barubari Union.[77] After the Supreme Court had expressed its opinion, the Constitution was amended under Art 368.[78]

Availability of the Power of amendment to the President.

Art 368 gives the power of amendment to the three components of Parliament, namely, the House of the People (Lok Sabha), the Council of States (Rajya Sabha) and the President. But in view of the fact that the Supreme Court has held[79] that Art 368 does not contain the power of amendment but only lays down a procedure of amendment and that such power lies in Art 248 read with List I, item 97 in the Seventh Schedule , the power of amendment becomes available to the

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76. The advisory opinion under Art 143 is not binding upon the referring authority.

77. In Re Berubari 1960 3 SCR 250 = 1960 AIR S.C. 845.

78. The Constitution (Ninth) Amendment Act, 1960. This amendment has been discussed in detail in Chapter VIII hereinbelow.

79. Golak Nath V State of Punjab 1967 AIR S.C. 1643.

President exclusively in addition to his sharing it with both the Houses of Parliament. As the power of amendment of the Constitution has been regarded as "legislative" as opposed to "constitutent" and, therefore, was placed among the legislative powers of Parliament (List I), it can be also used by the President under Art 123. Art 123 empowers the President to promulgate such ordinaces as the circumstances appear to him to require at any time except when both Houses of Parliament are in session. Such ordinances have the same force and effect as Acts of Parliament. The duration of an ordinance depends upon the re-assembly, of Parliament. If on reassembly, Parliament disapproves of the ordinance it ceases to have effect immediately; otherwise it continues for another six weeks from the date of re-assembly of Parliament. As long as the Golak Nath decision holds the ground, the President can amend any provision except Part III (in case of abridgment or taking away the rights) of the Constitution under Art 123 because his legislative power is co-extensive with the power of Parliament. Of course, the duration of his ordinace is supposed to be temporary but it is not difficult to visualize a Union Government which intends to amend any of the entrenched provisions of the Constitution under Art 368, when lacking the support of half the State Legislatures being tempted

to amend Art 123 so as to remove the restrictions[80] regarding the duration of an ordinance and then advising the President to amend the entrenched provision in question by an ordinance during recess of Parliament. In this way, the Golak Nath decision, by tracing the power of amendment in the legislative powers of Parliament goes a long way in making that power available exclusively also to the President. Perhaps, it would be no exaggeration to say that in this way the whole amending machinery set up in Art 368 can be rendered useless. The President, thus, becomes the greatest and the easiest amending agency.

Significance of the expression: "this constitution shall stand amended."

Apart from the fact that the expression "this constitution shall stand amended in accordance with the terms of the Bill"[81], contains power to amend, it has also dispensed with a large number of formalities usually observed in incorporating the amendment in the constitution after it has been passed by the House and assented to by the head of the state viz, the requirement of its publication in the official gazette or Register or the requirement of some

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80. Art 123 being not entrenched, it can be amended by a majority of the total membership of each House and by a majority of two-thirds of the members present and voting in each House of Parliament; it does not require ratification under Art 368.

81. This is discussed in Chapter VI hereinbelow.

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interval between the passage and its entry into the Register. Such formalities may give rise to a lot of litigation. For instance, in the case of Collier V Fierson, 24 Ala 100, the legislature had proposed eight different amendments to the state constitution, which were approved by the people and had gone through all the requisite proceedings except that one of them was omitted by mistake in the ultimate resolution of ratification.

It was a fact that the legislature ratifying the resolution, ratified the amendment under the impression that eighth was also included in them. The dispute was whether the amendment left out was adopted or not. The court held that all the formalities must be gone through and the omission was fatal. Since the eighth amendment could not be said to have gone through the whole procedure, it was not adopted.

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82. Sec 210 Burma's constitution requires that an amending Bill after going through the prescribed procedure shall be signed by the President and then promulagated forthwith.

Sec 90(1) of Singapore's constitution, 1963 provides that an amending Bill, having been passed in the manner laid therein and assented to by the President, shall come into operation on the date of its publication in the Gazette or on some other date mentioned either in the Bill or any other law.

Similarly, an amending Bill in the Constitution of Algeria, 1963 requires promulgation under Art 74 by the President within eighth day following the date of referendum.

(Constitutions of Nations by Peasle)

So far, the main limb of Article 368 has been dealt with and the entrenched articles will be discussed in the next chapter.

CHAPTER IV

Amendment Of The Federal Clauses

After explaining the process of amendment provided in Art 368, it is proposed in this chapter to study the so-called entrenched provisions in the proviso to Art 368. There are two reasons for considering amendment of the federal clauses in a separate chapter. First, these clauses bear a special significance in the whole scheme of the Constitution and that is why they have been entrenched for the purpose of amendment. Secondly, the substantive part of Art 368 and its proviso have presented difficulties in interpreting the whole Article and, according to the present case law, the scope of the substantive part may affect the scope of the proviso directly or indirectly. That being so, it is necessary to deal with the proviso separately.

The Reason For Entrenchment: The reason why certain articles of the Constitution dealing with federal relations were entrenched was given by Dr. Ambedkar as follows:

> " If Members of the House who are interested in this matter are to examine the articles that have been put under/proviso, they/find that they refer not merely to the centre but to the relations between the centre and the Provinces. We cannot forget the fact that while we have in a large number of cases invaded provincial autonomy, we still intend and have as a matter of fact seen to it that the federal structure

of the constitution remains fundamentally unaltered."[1]

The entrenched articles are not the only articles which determine the relationship of the centre and the states but these are the most important ones. In fact the federal structure of the constitution rests upon them.

The entrenched articles in the proviso to Art. 368 are amenable to amendment only when a Bill passed to that effect in each House of Parliament by a majority of the total membership of the House and also by a majority of not less than two-thirds of the members present and voting and is thereafter ratified by at least half the state legislatures and then assented to by the President.

The entrenched provisions are as follows:-

(a) article 54, article 55, article 73, article 162, or article 241;
(b) Chapter IV of part V, Chapter V of part VI, or Chapter I of part XI;
(c) the lists in the Seventh Schedule;
(d) the representation of States in Parliament; and
(e) the provisions of Art 368.

Since the principle underlying the entrenchment is to

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1. C.A.D. Vol IX, p 1661.

safeguard and preserve the Centre-state relations in the constitution it is convenient to study the entrenched provisions according to their subject matter. Therefore, we propose to rearrange them in this way:-

(A) The manner of election of the President (Art 54 and Art 55)

(B) Distribution of legislative powers between the Union and the States (Ch. I of part XI; Seventh Schedule)

(C) Extent of the executive power of the Union and the States. (Art 73 and 162)

(D) Representation of States in Parliament

(E) The Supreme Court and the High Courts (Ch. IV of part V, Ch. V of part VI and Art 241)

(F) Amendment of the Constitution (Art 368)

To bring out their significance in regard to the centre-state relations it is necessary to briefly explain each of the above categories. Having done this, we may enquire into the question whether the federal principle has been sufficiently observed in so far as the amendment of the constitution is concerned.

(A) The Manner Of Election Of The President

Art 54 and 55 deal with the mode of electing the President. The President is not elected directly by the people but

indirectly by an electoral college consisting of the elected members of both Houses of Parliament and the elected members of the legislative assemblies of all the states.[2] The election aims at a double parity viz first among the states inter se and secondly between the states as a whole and the Union. The first parity is achieved by adjusting the weight behind each member of a legislative assembly in proportion to the number of people he represents in the state legislature. For this purpose, every elected member of the legislative assembly of a state has been given as many votes for the election of the President as there are thousands in the quotient obtained by dividing the population of the state by the total number of the elected members of the Assembly.[3] The second parity (between the union and the states) has been secured by providing that the number of votes a member of Parliament will have is to be arrived at by dividing the total votes of all the Assemblies by the number of the elected members of Parliament.[4]

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2. Art. 54.

3. Art. 55 (2) (a)

4. Art. 55 (2) (c)

Moreover, the system of proportional representation by means of the single transferable vote has been adopted in the election and the voting is by secret ballot.[5]

Significance of including Members of State Assemblies in Electoral College:

In the Constituent Assembly, the idea of having a direct election of the President was rejected for various reasons such as the large size of the electorate, the great strain on the administrative machinery, and the figurehead function of the President.[6] The alternative was to have indirect election by an electoral college consisting of all the elected members of Parliament. But this would have reduced the election to a party affair because the President would have been elected only when supported by the majority party in Parliament. A "middle course" was adopted lest the President might represent the same group or party as at the centre.[7] It is submitted that the expansion of the electoral college to include members of the Legislative Assemblies goes to prove that the President is not necessarily

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5. Art 55 (3)
6. C.A.D. Vol VII pp 987-999.
7. C.A.D. Vol IV, pp 734-35.

bound by the advice of the Council of Ministers in all matters, otherwise an electoral college consisting of only the members of Parliament would have been enough.

By including the elected members of the Legislative Assemblies in the electoral college, the states came to have a substantial right in the election of the President. Besides this, the system of proportional representation allows the minorities, according to Dr. Ambedkar, to have "some hand and some say" in the election.[8] Thus the way in which the President is elected makes him representative of the whole nation and he can claim moral independence and authority which would have not been possible, had he been an individual elected only by the majority in Parliament.

Viewed from the constitutional provisions, the position and powers of the President are such that it all depends upon him whether the Constitution should work federally or unitarily at a particular time.[9] Therefore, from the point of view of the federal principle, it is necessary that the states should have an equal share with the Union in electing the President. No doubt, the Upper House of Parliament (Rajya Sabha) has representatives of the states but this would have been ineffective in representing the states in the

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8. C.A.D. Vol VII p 1017.

9. For instance the emergency powers (Art 352-360); appointment and dismissal of Governor (Art 155, 156(1)); and powers of giving directions to state governments in matters enumerated under Art 275(2)(3), 339(2), 353(a) and 360(3).

election of the President, because the membership of the House of the People (Lok Sabha) is at least double that of the Rajya Sabha. But the question to be asked is whether this principle was adequately entrenched.

Loop-Holes in entrenchment: Art 54 creates an electoral college comprising all the elected members of Parliament and the Legislative Assemblies. But the crucial question is whether the election can take place when one or more legislative Assemblies stand dissolved. Supposing an emergency under Art. 356 is declared in a State and the Legislature is not functioning, can the Presidential election be held at that time? It seems that it can be held. In N.B. Khare V Election Commissioner of India,[10] a point was made by the petitioner that for a valid election of the President, all elections to the two Houses of Parliament should be completed before the election of the President is held; otherwise some members are denied the right to take part in the election. The Supreme Court expressed no opinion on the point. This point made the Government aware of the possibility of some one challenging the election of the President on the ground that some members of the electoral college were not returned at the time of the election of the President. Therefore, the Govt, amended Art 71 by inserting

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10. 1957 S.C.R. 1081.

a new clause which reads as follows:

> " The election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him."

Though Basu[11] holds the view that the word"vacancy" involves the idea of quitting and it is, therefore, doubtful whether it covers the case of the two Houses not being fully constituted by reason of the general election being not held for certain seats at all. It seems that clause 4 of Art 71 is so widely worded that it would be difficult to assert that such a case is not covered by it. The question has not yet been answered by the Supreme Court. If it ever arises, the Supreme Court might find it difficult to resolve the apparent conflict between Art. 54 and 71(4). If it is held that no election can take place when any legislature is not functioning, then an out-going President acting on the advice of his Council of Ministers[12], might be tempted to dissove one or two legislatures by declaring an emergency and thus perpetuate himself. On the other hand,

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11. Basu, Commentary, Vol II, p 398.
12. It is more likely that a majority party in the centre, being doubtful of further support from the states for its candidate for Presidentship, would tender such advice to the President in office.

if it is held that an election can take place even when any legislature is not functioning, an ambitious President would be tempted to dissolve hostile legislatures and contest for reelection. In any event, the purpose of Art 54 and 55 seems to have been defeated by Art 71(4) and with it the federal principle too. It appears that it did not occur to the Constitution framers to entrench Art 71 along with Art 54 and 55 and thereby the entrenchment itself is rendered ineffective if Art 71 (which is not entrenched) can undercut them.

(B) Distrubution of Legislative Powers Between the Union And States.

In a federal polity, it is essential to allocate legislative powers between the centre and the state (units) as clearly as possible. In the Constitution of India, Art 245 shows the extent of Union and State legislative power. The Union Parliament is competent to make laws for the whole or any part of the territory of India whereas a state legislature can make laws for the whole or any part of the territory of that state.

Subjects of legislation have been enumerated in the Seventh Schedule of the Constitution and have been classified into three lists, namely, the Union List (List I) the State List (List II) and the Concurrent List (List III). The Union Parliament has exclusive power to make laws with respect to matters included in the Union List and the matters

included in the State List are within the exclusive legislative competence of the States. As regards the Concurrent List, both the Union and the States have competence to make laws but, in case of inconsistency, the Union law prevails over the State law unless the State law has been reserved for the assent of the President and has received his assent.[13] It is to be noted that Art 246 secures the supremacy of the Union legislature in case of overlapping as between the various Lists.[14] The exclusive legislative powers of the State Legislatures is made subject to the powers of Parliament in List I and III, whereas the powers under List I are not subject to those under any other List. Residuary powers have been vested in the Union.[15]

The scheme of distributing the legislative powers between the centre and the states is not watertight but allows Union intervention even in the exclusive field of legislation of the States.

Under Art 200. the Governor of a State may reserve a bill passed by the state legislature, for the consideration of the President. This reservation is compulsory if the law

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13. Art. 254.
14. Art. 246(3)
15. Seventh Schedule, List I, item 97.

in question would so derogate from the powers of the High Court as to endanger its position under the Constitution.[16] The President may give his assent to the bill so reserved or withhold his assent therefrom. The matter of propriety or otherwise of assent or refusal to a State bill by the President cannot be questioned in any court.[17] Therefore, even within the exclusive field of legislation of the States there is scope for Union intervention.

Art. 249 provides that if the Council of State has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matters enumerated in the State List specified in the resolution it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force. The maximum life of such a resolution is one year but it can be kept alive for as many years as required by passing a resolution in the same manner as provided above every year.[18] This provision introduces for the first time a useful innovation designed to secure greater flexibility in working the federation.[19] In

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16. Proviso to Art 200
17. Art 201
18. Art 249(2)
19. Seervai, H.M., Constitutional Law of India, 1962, 78 L.Q.R. at 400

reality it constitutes a temporary amendment of the State List, without undergoing the process of amendment under Art. 368.

During a Proclamation of Emergency under Art. 356(1), the legislative power of Parliament extends to any of the matters enumerated in the State List.[20] In reality, the federal character of the constitution ceases to exist during a Proclamation of Emergency.

The exclusiveness of the State List is further qualified by the provision which empowers Parliament to legislate for two or more States by consent and for other States by adoption of such legislation[21], even though the subject matter of legislation falls exclusively in the State List. By way of comparison, we may refer to the proposed Fulton-Favreau formula in Canada which seeks to achieve flexibility in the amending process by adopting the delegation of powers of legislation. Section 9 of the Fultion Bill and Section 13 of the Favreau Bill provide that, under specified conditions the provinces can delegate to Parliament the authority to enact a particular law in respect of a subject coming within the major categories of provincial matters that would otherwise be within the exclusive jurisdiction of the provinces to enact and that Parliament can similarly delegate to the provincial legislature authority to enact a particular law

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20. Art 250.
21. Art 252.

that would otherwise be within theexclusive jurisdiction of Parliament to enact. Such delegation would specifically require, in each case, an Act and consent of both Parliament and at least four provincial legislatures.[22] It is to be noted that in this way jurisdiction is not delegated but only the enactment of a particular law. The delegating authority may subsequently revoke the consent. If it does, the specific statute ceases to have effect. Indeed," it is a practical means of adapting the exercise of legislative authority to changing conditions while maintaining ultimate control where the constitution has placed it."[23]

The power of the Indian Parliament in regard to treaties is also an important modification of the distribution of powers as between the Union and the States. According to Art 253, Parliament has the power to make any law for implementing any treaty, agreement or convention with foreign countries or any decision made at any international conference, association or other body.[24] According to Ivor Jennings, " on its face it (this provision) would seem to apply to any international organisation...."[25]

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22. Guy, Favreau, The Amendment of the Constitution of Canada Ministry of Justice, Feb, 1968, p 28.
23. Guy Favreau, op. cit. p 41
24. Art 253.
25. Jennings, Ivor, Some Characteristics of the Indian Constitution, pp 65-66.

It may be pointed out that the scheme of distribution of the legislative powers is applicable to the Union and the States but not in regard to the Union territories in respect of which the legislative power in its entirety is vested in Parliament.[26]

The distribution of legislative powers between the Union and the States is so designed that the need for any constitutional amendment in this matter has been reduced to the minimum. As we have seen above the State List is not exclusive in the real sense of the word. It can be interfered with by the Union in various ways. As compared with the distribution of legislative powers in the constitutions of Canada or Australia, the Indian Constitution follows the principle of flexibility to the maximum possible extent and yet carves out a legislative field for the States. In fact, the scheme adopted, though centre-biased, completely does away with the difficulties arising out of a divided jurisdiction. The founding fathers were fully aware that a federal constitution generally suffers from two defects, namely, rigidity and legalism and they adopted every possible technique to do away with them.[27] No doubt, the distribution of the legislative power is elastic but the federal principle requires that it should not be disturbed without the consent of the

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26. Art 246(4)
27. Dr. Ambedkar C.A.D. Vol VII pp 35-36.

States and entrenchment achieves this end only to a limited extent.

(C) Extent Of the Executive Power Of the Union and the States (Art 73 and 162)

Articles 73 and 162 read together determine the extent of the executive power of the Union and the States. Neither Article 162 nor 73 contains any definition as to what the executive function is. Generally, executive power has been taken to be the residue left after the legislative and the judicial powers have been taken into account.[28]

In respect of three specified matters, executive power is expressly conferred upon the Union and the State Governments. These are as follows:

1. Carrying of any trade or business (Art 298)
2. Acquisition, holding and disposal of property (Art 298); and
3. making of contracts for any purpose (Art 299)

It is to be noted that it is not necessary that there should be legislation to authorise the executive power to be used. Both Art 73 and 162 use the words " has power to make law " which indicate clearly that the legislative competence is enough to determine the validity of the executive act.[29]

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28. Ram Jawaya V State of Punjab, A.I.R. 1955 SC 554.
29. Ibid

In distributing the executive power between the Union and the States, the scheme of the distribution of the legislative power has been followed with a few exceptions. The Union has exclusive executive power over the matters with respect to which Parliament has exclusive power to make laws.[30] The executive power of a State extends only to its own territories and with respect only to those subjects over which it has legislative competence.[31] The exceptions to this general scheme are in the following cases:

(a) So far as the Concurrent List (List III) is concerned, though both the Union and the States have legislative power but the executive power is vested in the States, except in two cases:

(1) Where Parliament vests some executive power specifically by law in the Union.[32]

(2) Where the provisions of the Constitution itself vest some executive functions upon the Union.[33]

(b) There are provisions enabling the Union executive power to encroach on the state executive power. The Union can give directions to the State Governments as regards the

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30. Art. 73(1) (2)
31. Art. 162.
32. Proviso to Art 73(1)(a) read with Art 162.
33. Art 73(I)

exercise of their executive power in certain matters[34] in normal times. Further, during a Proclamation of national emergency, the Union can give a direction to any state as to the manner in which the executive power thereof is to be exercised.[35] Under Art 356(1), when constitutional machinery in a state has broken down, the President is entitled to assume to himself all or any of the executive powers of the State. Similarly during Proclamation of financial emergency also, vast executive powers to give directions to the states become available to the Union.[36]

(c) With the consent of the Union, a State Government is competent to entrust any of its executive functions to the Union.[37] Conversely, with the consent of a State Government, the Union may entrust its own executive functions relating to any matter to the State.[38]

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34. For instance ensuring due complinace with union laws and existing laws which apply in the state (Art 256); ensuring that the exercise of the executive power of the state does not interfere with that of the union (257(I); to secure the construction and maintenance of the means of communication of national or military importance by the State 275(2); to ensure protection of railways within the state Art 275(3); in regard to the drawing and execution of schemes for the welfare of the scheduled Tribes in the state (Art 339(2); to secure the provision of adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups (Art 350A) and to ensure the development of Hindi (Art 351)
35. Art. 353(a)
36. Art 360(3); 360(4)(b) and 360(4)
37. Art 258 A
38. Art 258(I)

(d) Under Art 258(2), a law made by Parliament relating to a union subject may authorise the Central Government to delegate its functions or duties to a State Government or its officers, irrespective of the consent of such Government.

(e) Certain pre-constitution Central Acts which entrust specific functions to the State Governments are to remain valid until Parliament provides otherwise, though the executive power relating to these subjects, lies with the Union.[39]

It follows from what we have noted above that the demarcation line between executive power of the Union and that of the States is not fixed or rigid but very flexible. In some cases, the executive power of the Union extends to the whole range of the legislative power of the State Governments e.g. in the matter of implementing a treaty. In this connection it is note-worthy that Art.73 and 162 both begin with the words " subject to the provisions of this constitution." That means that whatever scheme of demarcating the executive power has been followed in Art 73 and 162, it is overriden by the provisions of the Constitution.

It seems that the constitution framers have exhausted

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39. Art. 73(2)

all the possible ways of making the executive power of the Union and the State Governments as flexible and elastic as possible. For inscance, the general principle adopted in distributing the executive power on the basis of the legislative power itself yields a remarkable flexibility because undernArt 249 any of the legislative heads in List II (State List) can be shifted to the Union List, though for a temporary period (not exceeding one year for each resolution)[40]. When the legislative power belonging to the States is transferred to the Union under Art 249, the executive power is also transferred[41]. It is to be noted that the Council of States consists of representatives of the States and, therefore, the consent of the States can be said to have been indirectly given for such transfer. But it is to be observed that the special majority required is not two-thirds of the total membership of the House but only two-thirds of the members present and voting.

The constitution framers have introduced the method of delegating the executive power with the consent of the Union and of the States.[42] The centre can delegate its executive power to any State even without consent.[43] These

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40. See supra, p 105.
41. The executive function of the Union being co-extensive with its legislative functions (Art 73(I)(a).
42. Art 258A, 258(I).
43. Art 258(2)

provisions have provided for any unseen contingency which might happen.

Besides, the power of giving directions is an effective weapon of control of the Union over the States because a direct sanction has been attached for non-compliance with directions issued by the centre. In case of failure to give effect to such directions, the President is competent to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution and he can then exercise his powers under Art 356.[44]

As we have seen, during the Proclamation of Emergency, the union executive power can expand to cover the whole executive field of the State concerned.

The distribution of the executive power being what it is, the question arises whether there is any advantage in entrenching Art 73 and 162. It is submitted that, though the executive power has been distributed in a very flexible way and is therefore capable of meeting any conceivable contingency, the entrenchment has some significance. The States can remain content that, in normal times, there will not be any change in broad scheme of distribution of the executive power except with the consent of at least half the States. There might be slight modification in some matters,

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44. Art. 365.

sometimes with consent and sometimes even without consent, but the major scheme stands preserved and safeguarded.

(D) The Representation Of States in Parliament.

The States can be said to be represented in Parliament in the Council of States because mostly its members are elected by the elected members of the Legislative Assemblies of the States.[45] The maximum number of the members of the Council of States has been prescribed as 250 of whom twelve members are to be nominated by the President.[46] The system of proportional representation by means of the single transferable vote has been adopted in the election of the Council of States,[47] except in regard to the representatives of the Union Territories who are to be chosen in such manner as Parliament by law provides.[48] The States representation in the Council is not based on equality but on a fixed allocation of seats.[49] The allocation varies from 34 (Uttar Pradesh) to 1 (State of Nagaland).

It follows from the manner of the election of the Council of States that it is difficult to assume that its members

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45. Art. 80(4)
46. Art. 80(b) and (80(a)
47. Art. 80(4)
48. Art 80(5), part IVA in the Representation of the People Act (LXXII of 1950).
49. This allocation is given in the Fourth Schedule to the Constitution.

represent the States as units. The Council of States is not subject to dissolution but one-third of its members retire every two years.[50] Thus the members of the Council hold their seat for six years. Normally, legislative Assemblies are elected after five years,[51] and this period may or may not coincide with the period during which the representatives of the States in the Council of States hold their seats. Therefore, the members of the Council of States cannot be regarded as truly representing the State Legislatures or State governments. Nor can they be considered as representatives of the people of their States because they have not been elected by the people directly. Do they represent the interests of their States? Judged by their voting behaviour, they follow the party alignment rather than the interests of their States[52] and so it is difficult to assume that the members of the Council of States represent the States qua States any more than the members of the House of the People.

Be that as it may, a significant doubt remains as to the meaning of the expression : "the representation of States in Parliament" in the Proviso to Art. 368. Does it mean the number of the members elected by each state legislature,

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50. Art. 83

51. Art. 172

52. Rao, K.V., Parliamentary Government in India, 1965, p 135

keeping the total constant or does it include a variation in the total number of members of the Council of States or a complete removal of representation for an individual state? Does it include the manner of election of the Council of States because even the mode of election might affect the representation of the States? Alternatively, does it simply mean that the States must be represented in the Council of States and the manner of election and the number of the members elected by them are immaterial?

It is submitted that the phrase " the representation of States in Parliament" is very vague. In the Constituent Assembly, the entrenched articles were not discussed in detail and, therefore, it is not clear as to what the constitution framers really meant by the above phrase. Apart from the general purpose of the entrenchment and the fact that the entrenched articles are those significant provisions which establish the relation between the centre and the states, nothing can be learnt in this regard from the Constituent Assembly Debates.

In view of the vagueness of the phrase " representation of States in Parliament", it is difficult to say what sort of amendment of the Constitution can be characterised as requiring ratification under it by half the state legislatures. This uncertainity is aggravated by the fact that no

specific articles or provisions have been mentioned as falling under this category and some provisions of the Constitution go to negate the entrenchment. For instance, Art 2 provides for admission or establishment of new States and Art 3 provides for formation of new States and alteration of areas, boundaries or names of existing States. Parliament is competent to act under these articles by an ordinary law. A law under Art. 2 or 3 would naturally affect the First and the Fourth Schedules. Art 4(1) expressly provides that a law relatable to Art 2 or 3 may contain such provisions for the amendment of the First and the Fourth Schedules as may be necessary. Art 4(2) expressly provides that such law shall not be deemed to be a Constitutional amendment for the purposes of Art 368. In other words, acting under Art. 2 or Art 3 Parliament is competent to affect the representation of States in Parliament but such a law is outside the purview of Art 368. It is of interest to note that Parliament has amended the Fourth Schedule[53] by ordinary laws many times e.g. by enacting the Bombay Reorganisation Act, 1960, the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, and the State of Nagaland Act, 1962. Therefore, the number of members of the Council of States allocated to the States can

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53. Fourth Schedule contains the allocation of seats in the Council of States.

be altered by Parliament pursuant to Art 2 or Art 3 and this kind of alteration does not bring in the operation of Art 368 and, therefore,avoids ratification by the States. Moreover, if "the representation of States in Parliament" was intended to mean the number of members elected by each State to the Council, was it not necessary to entrench the Fourth Schedule also?

The use of the word'States' in the plural does not make it clear whether the representation of a single State is intended to be covered by the phrase or not. In any event the whole phrase is not free from ambiguity and the Supreme Court might be called upon to interpret this provision and determine what "the representation of states in Parliament" means and which Articles of the Constitution fall under its ambit. It seems that, except for the abolition of the Council of States, no amendment of the Constitution on this subject can be said to be caught by the phrase.

In view of the existing provisions of the Constitution, probably amendment of the Fourth Schedule for purposes other than those specifically mentioned in Art 2, 3 or 4 would be regarded as a constitutional amendment and would therefore, require ratification by at least half the state legislatures along with the special majority of Parliament required by Art 368. Again amendment seeking to abolish the Council of States seems to be one falling clearly under this category.

(E) The Supreme Court And The High Courts

(Chapter IV part V, Chapter V of Part VI and Art 241)

Chapter IV of Part V deals with the Union Judiciary i.e. the Supreme Court; Chapter V of part VI deals with the High Courts in the States and Art 241 deals with the High Courts in the Union Territories. We propose to deal with them separately.

The Supreme Court: The Supreme Court is at the apex of the Indian Judiciary and the law declared by it is binding on all courts in the land.[54] The Supreme Court interprets not only the Constitution but also the general law of the land. In the exercise of its jurisdiction, it may pass any decree or make any order to do complete justice in any cause or matter pending before it, which is enforceable throughout the territory of India in the manner laid down by law by Parliament. If there is no such law made by Parliament, the President may prescribe by order the manner in which the orders of the Supreme Court are to be enforced.[55] The Supreme Court is also a court of record with power to punish for contempt of itself.[56]

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54. Art 141; the expression "declared" was interpreted as being wider than the words "found or made". To declare is to announce an opinion. The latter involves a process while the former expresses a result. Golak Nath V State of Punjab AIR 1967 SC 1643 (1669)

55. Art 142.

56. Art 129.

The judges of the Supreme Court are appointed by the President after consultation with such judges of the Supreme Court and of the High Court in the States as he thinks necessary.[57] In the case of a judge other than the Chief Justice, the Chief Justice of India must be consulted. Normally a judge holds office until he attains the age of sixty-five[58] but a retired judge may be reappointed.[59] A judge of the Supreme Court cannot be removed except on the grounds of misbehaviour or incapacity and in accordance with the procedure prescribed in the Constitution.[60] No person who has held office as judge of the Supreme Court can plead or act in any court or before any authority within the territory of India. The judges of the Supreme Court are paid a specified salary[61] and their privileges or allowances cannot be varied to their disadvantage after appointment.[62] The conduct of the judges of the Supreme Court and High Courts cannot be discussed in Parliament with respect to their official conduct except upon a motion for their removal under Art. 124(4)[63]. Thus the Constitution establishes an independent Supreme Court.

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57. Art 124
58. Art 124(2)
59. Art 128
60. Art 124(4)
61. Art 125, Schedule II.
62. Art 125.
63. Art 121.

Besides its appellate jurisdiction in certain cases,[64] the Supreme Court has original jurisdiction in any dispute between the Government of India and one or more States or between two or more States inter se.[65] The jurisdiction extends to any question (whether of law or fact) on which the existence or extent of a legal right depends.[65] A few matters have been exempted from the original jurisdiction of the Supreme Court.[66]

In a federal State, along with a written constitution having distribution of powers between the centre and the units it is also necessary that there should be an impartial body, usually the judiciary to interpret the constitution.[67] In the Constitution of India, not only a body (Supreme Court) has been created but the provisions creating it have been entrenched under Art. 368.

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64. Art 132 to 136.

65. Art 131.

66. Proviso to Art 131, Art 262, Art 257(4), Art 258, Art 290

67. Some theorists argue that it is not derogatory to the federal principle, that the functions of interpreting the constitution and the settlement of disputes between the centre and the units are vested in a body other than the judiciary, as in the Constitution of Switzerland and of the U.S.S.R. All that is necessary is that there must be some impartial body. The arguments for and against Judicial review have been ably presented by Cowen, D.V., The Foundations of Freedom with special reference to Southern Africa, Chapter 7, 1961.

The entrenchment of the whole chapter IV of part V gives the impression that rigidity has been cast on a large chunk of what is generally regulated by ordinary legislation.[68] But, in fact, this statement is partially true because some of these entrenched provisions empower Parliament to make ordinary law in regard to them.[69] For instance, the number of the Supreme Court Judges can be increased by Parliament by ordinary law.[70] The privileges and allowances and the rights in respect of leave of absence and pension of the judges can also be varied by ordinary law but not to their disadvantage after their appointment.[71]

Parliament may by ordinary law provide that an appeal shall lie to the Supreme Court from the judgment, decree or final order of one judge of a High Court.[72] In regard to certain matters, the jurisdiction of the Supreme Court can be withdrawn without having to go through the process of amendment of the Constitution.[73] The power of the Supreme Court to review any judgment pronounced or order made by it

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68. Jennings, Ivor. op. cit, supra, p 16.
69. We propose to deal with these provisions in details in the subsequent chapter.
70. Art 124(1)
71. Art 125(2)
72. Art 133(3)
73. Art 135

is subject to ordinary legislation by Parliament or rules made under Art 145 by the Supreme Court with the approval of the President.[74] Similarly supplemental or ancillary powers may be conferred on the Supreme Court.[75] The manner in which the decrees of the Supreme Court should be enforced can be prescribed by or under any law made by Parliament.[76] The conditions of service of officers of the Supreme Court are liable to be modified by Parliament by ordinary legislation.[77]

It is to be noticed that if Parliament ever wants to change the salaries of the Supreme Court judges, it needs only to amend the Second Schedule for which ratification by the State legislatures is not required. Not only that, flexibility has been achieved by means other than ordinary legislation. For instance, the Supreme Court has been empowered to make rules in regard to the practice and procedure of the Court. But this power is subject to law made by Parliament and the rules so made must be approved by the President.[78] Appointments of officers and servants of the Supreme Court may be regulated by the President to a certain extent.[79] The seat of the Supreme Court can be changed from

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74.Art 137
75.Art 140
76.Art 142(1)
77.Art 146(2)
78.Art 145
79.Art 146(1)

Delhi to some other place by the Chief Justice of India with the approval of the President.[80]

It is to be observed that the entrenchment of Chapter IV of part V is the most significant one because without entrenching the provisions regarding the Supreme Court, the entrenchment of all other provisions would have been ineffective. The Supreme Court is the only body to decide whether the Union Government or the State Governments or other functionaries in the Union have transgressed on one another's powers and whether in effecting a measure the constitutional requirements have been complied with or not. It is the Supreme Court alone which can pronounce finally whether the procedure laid in Art 368 has been observed in enacting an amendment. If the Supreme Court itself is left unentrenched, the very purpose of entrenchment could be defeated by amending the provisions regarding the jurisdiction of the Supreme Court.

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80. Art 130

High Courts in States: A High Court is the highest court in a State. Every High Court is a court of record, having the power to punish for contempt of itself.[81] The independence of the High Court has been established almost in the same manner as in regard to the Supreme Court.[82] The High Courts have been vested with vast jurisdictions and powers to issue writs not only, like the Supreme Court, to protect a Fundamental Right, but also for any other purpose.[83]

There are changes that can be effected in Chapter V of of Part VI without going through the process of amendment under Art 368. Many matters have been left to the legislature to be changed, if so desired, by ordinary legislation.[84] Some changes can be effected by the President[85] or the Governor[86]. Thus, a measure of flexibility has been introduced in the provisions.

High Courts in Union Territories: Article 241(1) provides that Parliament may by law constitute a High Court for a Union territory or declare any court in a union

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81. Art 215
82. Articles, 121, 217, 218, 221, 224.
83. Art 226
84. See Articles 221(2), 222(2), 225, 229, 230, 231(1)
85. Art 216, 224, 222
86. Art 229.

territory to be a High Court for all or any of the purposes of this Constitution. Clause(2) of Article 241 applies the provisions of chapter V of part VI to the High Courts in the Union territories, subject to such modifications or exceptions as Parliament may by law provide. Further, clause 3 continues the extra-state jurisdiction of some of the High Courts over union Territories until Parliament by law excludes such jurisdiction. Parliament is competent to extend or exclude the jurisdiction of a State High Court to or from any union territory or part thereof.

From the above provisions it is obvious that Parliament has plenary powers in regard to High Courts in the union territories. In fact, Art 241 empowers Parliament to create the judiciary in a union territory on the model of a High Court in a State.

In view of the fact that Art 241 has been couched in a wide language, it is difficult to see how its entrenchment under Art 368 serves any purpose. It is to be noticed that a High Court for a Union territory is to be constituted or declared by an ordinary law and it is not necessary that all the provisions of chapter V of part VI should apply to such a High Court. On the other hand, these provisions can be modified or exceptions to them can be specifically provided. Therefore, the High Court in a Union territory can be made different and distinct from one in a State.

If the whole structure of a High Court in a union territory is amenable to amendment by ordinary law, what object is being sought by entrenching Art 241 in Art 368 ? The Judicial Commissioner's courts (Declaration as High Courts) Act (XV) 1950, provides that the provisions of Articles 216, 217, 218, 220, 222, 223, 224,230, 231 , and 232 shall not apply to the High Courts declared under Art 241. Since the law under Article 241 is an ordinary law, it can be repealed by an Act of Parliament or amended from to time. Then what purpose does the entrenchment achieve ? It seems that Art 241 is the most flexible article among the entrenched ones and its entrenchment is superficial. It is to be noted that if Art 241 is ever intended to be amended, the amending Bill must be ratified by at least half the state legislatures. It is anomalous that the union territories do not participate in the process of amendment. From the democratic point of view the union territories and not the state legislatures should be consulted in regard to the amendment of Art 241.

(F) The Provisions of Art 368

The last of the entrenched articles is Art 368 itself. Without entrenching this Article, it could be logically argued that all the provisions of the Constitution could be amended by Parliament alone by removing the requirement of ratification for the entrenched articles. Moreover, the requirement regarding the special majority in each House of

Parliament could also be amended by Parliament alone. Thus, if Art. 368 had not been entrenched, the purpose of entrenchment could have been easily defeated. By entrenching Art. 368, entrenchment has been fully secured and adequately safeguarded.

Probably, the idea of including Art. 368 also in the entrenched provisions was evolved from the difficulties caused by the amending process in the Constitutions of the United States and of Australia. In the U.S. Constitution, Art V is not mentioned in the express limitations provided in the Article itself. One of the express limitations to the process of amendment is that no State, without its consent, shall be deprived of its equal suffrage in the Senate. In other words, amendments affecting the equal representation of States in the Senate require unamity among the States. On the other hand, the process of amendment in Art V requires a three-fourths majority of the States for ratifying an amendment. It is argued against the requirement of unanimity, that the provisions of Art V should first be amended so as to do away with the requirement of unanimity. This being done, an amendment affecting the equal representation of States in the Senate could be passed by the special majorities laid down in Art V.[87]

Similarly in the Constitution of Australia, it is a

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87. Dumbauld, E., The Constitution of the United States, 1964, p 436.

matter of controversy as to whether the last paragraph of Sec 128 can be amended by the special majorities required by Sec 128 or whether all the States must agree to its amendment.[88]

In the Constitution of India, the constitution framers have avoided this sort of uncertainty by including the provisions of Art. 368 in the entrenched provisions.

We have studied in brief the entrenched Articles. Now we will consider a few points in the process of ratification.

Ratification

An amendment of any of the entrenched provisions requires ratification by the legislatures of not less than one-half of the States. The words " not less than one-half of the States" are significant because it is not a majority of the States that is needed. Even if the number of the ratifying State legislatures is just half of the total number, the amendment is carried.[89] If a requirement of a majority of the state legislatures was intended, the relevant words ought to have been 'more than one-half of the States.'

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88. Dr. Wynes: Executive, Legislative and Judicial powers in Australia, 1962, p 695.
For further discussion see Express Limitation in Chapter VI hereinbelow.

89. It is submitted that Basu is not right in saying that more than half the state legislatures are required to ratify the amendment.
See, Commentary, Vol V, 4th Edn, p 239.

Resolutions:- The ratification is to be made by passing resolutions. It is not clear as how a resolution is to be passed for the purpose of Art. 368, that is to say, whether the Governor is required to give his assent to such a resolution. In Jatin Chakravarty V Mr. Justice Himansa Kumar Bose.[90] the Constitution Fifteenth Amendment Act was challenged on the ground that it was not validly ratified. There were 14 States at that time. Seven States (Madras, Punjab, Orissa, Gujarat, Mysore, Bihar and Jammu and Kashmir) passed resolutions ratifying the amendment. No such resolution was passed by three states (U.P, Maharashtra and M.P. No assent of the Governor was given in 11 states. It was argued by the petitioner that the Governor is a part of the legislature and since his assent was not given, the ratification was not valid. The Court held that there was no definition of "legislature" in Art 366 which is the definition section. The General Clauses Act also contains no definition of "legislature". Following the Supreme Court's observation in State of Bihar V Kameshwar Singh[91], however, the Court held that a resolution under Art 368 does not require the assent of the Governor. While it expressly provides for the assent of the President, it does not provide

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90. A.I.R. 1964 Cal. 500.
91. A.I.R. 1952 S.C. 252.

for the assent of the Governor.

Moreover, it is also not clear whether the resolution is to be passed by a special majority of the legislature or by an ordinary one. Some writers take the view that ratification in each legislature again requires a two-thirds majority of the members present and voting and also a majority of the total membership of the House.[92] However, in the absence of any express provision in this regard, it is submitted that a bare majority is enough to pass the resolution. It is not required that an amendment should be placed before or considered by all the State legislatures. " All that is necessary under Art 368 is that an amendment should be ratified by the legislatures of not less than one-half of the States. As long as the necessary number of State legislatures have ratified the amendment, the Parliament is empowered to present the amendment to the President for assent."[93]

It may be noticed that, though the requirement of Art 368 is fulfilled when half the State legislatures have ratified an amendment, it appears undesirable that some of

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92. e.g. Sharma, Ram : Some Aspects of the Indian Constitution, 1949, Modern Review p 115 at 117.
Diwan Chaman Lal: 1954 R.S. Deb. Vol VII Col 3624.

93. A.I.R. 1964 Cal. 500(503).

the States either are not asked to pass a resolution or, if asked, are not given sufficient time to pass the required resolution. In the case of the Constitution (Third Amendment) Act, the Constitution was amended even before some of the States could consider the provision on the ground that half the States had already approved it. The Legislative Assembly of Mysore took strong objection to this procedure.[94] Similarly in respect of the Constitution(Fifteenth Amendment Act), no resolution was passed by three States (U.P, Maharashtra and M.P.).

Time limit for Ratification: There is no time limit prescribed within which the state legislatures must pass the resolutions. The question might arise in India as it arose in the United States, for what period should an amendment awaiting ratification be considered as alive? While submitting the Eighteenth Amendment to the States, the U.S. Congress stipulated that it should be inoperative unless ratified within seven years. The Supreme Court held the limit to be valid and observed:-

> " As ratification is but the expression of the approbation of the people and is to be effective when had in three-fourth of the states, there is a fair implication that it must be sufficiently

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94. Rao, K.V., Parliamentary Democracy in India, 1965, p 342.

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> contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which, of course, ratification scattered through a long series of years would not do."[95]

Since the proposal and ratification were not treated as unrelated acts but as succeeding steps in a single endeavour, it can be inferred that they should not be widely separated in time. In other words, the ratification must be within some reasonable time after the proposal.

The U.S. Supreme Court refrained from determining the reasonable time in such a case but it left the matter to the final discretion of the Congress.[96] It rested content by pointing out that a large number of variant, social, political and economic factors would have to be taken into account in the determination of "reasonable time"[97]. The Congress had proposed an amendment in 1924 to limit, regulate and prohibit the labour of persons. After having been duly passed by Congress, the amendment was submitted to the State legislatures for ratification but the matter was

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95. Dillon V Gloss 256 U.S. 368(1921)
96. Coleman V Miller, 307 U.S. 433
97. ibid.

contemporaneous in that number of states to reflect

delayed because the requisite number of States could not ratify it. In 1939, the Supreme Court was asked to decide whether the amendment was still alive. The Court held that since no time-limit had been prescribed for ratification and the Congress had declared the proposal of amendment to be valid, it was perfectly valid. It was solely for the Congress and not, for the Supreme Court to declare the amendment as valid or otherwise.

In case such a problem arises in India, probably the Indian Supreme Court will follow the American precedents in the matter.

Can the Union Government Withdraw An Amendment Awaiting Ratification ?

This question might create difficulties in the future. Supposing Parliament submits an amendment to the States for ratification and before half the state legislatures ratify it, elections to Parliament are held. An opposition party is returned to power in Parliament and the new Parliament wants to withdraw the amendment: Can it do so ? The Constitution is silent on this point and , therefore, no definite answer can be given. In case the requisite number of the States have ratified the amendment, it is unclear whether Parliament can kill the amendment by not presenting it to the President for his assent. Most probably, it can. In case the amendment is awaiting Presidential assent at the time the new Ministry is formed, the only alternative left

to it is to advise the President not to give his assent. If the President follows the advice, the amendment will not come into existence at all. Assuming that he can refuse to follow such advice,[98] there is nothing in the Constitution to avoid the amendment.

Can A State Rescind Its Ratification ?

The answer to this question is also equally uncertain. In the United States, the position is that a State cannot rescind its ratification if it has once agreed to the amendment and communicated the fact to the Secretary of State.[99] The reason for this view is that Art V creates a power of ratification and not of "rejection". Applying this very reason, it was held in Chandler V Wise[100] that a State can ratify an amendment even if it has rejected it previously.

It is argued that ratification should not be more final than rejection and that it is more democratic to allow the reversal of a prior affirmative action because a truer picture of public opinion at the final date of ratification is obtained. It is said that if reversal of an acceptance is

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98. The position of the President has been discussed in the preceding Chapter. op. cit. Supra. pp 77-85.

99. Coleman V Miller (1939) 307 U.S. 433.

100. (1939) 307 U.S. 474.

not allowed, a cautious legislature might not act at all.[101] It is logically consistent that both acceptance and rejection should be treated as either conclusive or not conclusive but it should not be ignored that allowing the reversal of an acceptance not only creates confusion but also makes the amending process more rigid. Therefore, the view that rejection can be reversed but acceptance cannot be seems to be appropriate and can be safely imported into the amending process under Art 368, if a situation calling for it ever arises in India.

Date Of Enforcement Of An Amendment

Does an amendment come into force on the date on the President gives his assent or on some earlier or later date ? Art 368 specifically provides that when the Presidential assent is given to the Bill, " the Constitution shall stand amended in accordance with the terms of the Bill." This provision provides a key to the problem of ascertaining the date of enforcement of an amendment. If the terms of an amending Bill do not express any particular date on which the amendment is to come into force, the date on which the President gives his assent to the Bill is the date of enforcement. In case Parliament wants to enforce an amendment

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101. Orfield. op. cit., Supra, p 70.

on a particular date--- whether retrospective or prospective-- it should provide so in the terms of the Bill. In that case, the amendment would be enforced not on the date the Presidential assent is given but on the date mentioned in the Bill. For instance, in the Constitution (First Amendment) Act, 1951, changes in regard to Art 19 were intended to be enforced retrospectively and, therefore, in Sec 3 of the Amending Bill it was expressly provided that the clause " shall be deemed always to have been enacted" in the form provided. Similarly, in the case of the Constitution (Ninth Amendment) Act, 1960, Parliament was not sure of the date on which the transfer of the territories would take place. Therefore, it was expressly provided in the Bill that the First Schedule to the Constitution would be amended on the "appointed day" which was defined in the Bill as " such date as the Central Government may, by notification in the Official Gazette, appoint as the date for the transfer of territories to Pakistan in pursuance of the Indo-Pakistan agreements." As a result of this provision, the amendment came into force on the "appointed day" i.e. 17th January 1961, though the President had given his assent on 28th December 1960. On the other hand, the Constitution (Twelfth Amendment) Bill was assented to by the President on 27th March 1962 but it was enforced retrospectively. This was achieved by providing in Sec 2 of the Bill that the Act

"shall be deemed to have come into force on 20th day of December 1961."

By way of comparison, it may be noticed that the Supreme Court of the United States has ruled that the controlling date of ratification is the date on which the State completing the three-fourths number of the States ratifies the proposed amendment and not the date on which the proclamation of ratification is made by the Secretary of State.[102]

Procedure For Communication:- The communication of an amending Bill to the States for ratification has been through the Union Ministry of Law. When the Bill is passed by both the Houses of Parliament, the House which happens to be in last possession of the Bill sends it to the Ministry of Law for taking necessary steps to get it ratified by the State Legislatures as required by Art 368. The Ministry of Law informs the Rajya Sabha Secretariat when the required number of State legislatures has ratified the Bill, enclosing copies of the letters received from the Governments of these States indicating the necessary resolutions have been passed by the respective legislatures. The Bill is duly endorsed by the Chairman of the Rajya Sabha and sent to the President for his assent through the Secretary of the Ministry of Law.[103]

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102. Widenmann V Colby, 265 Fed. 998.

103. See M.N. Kaul., op. cit., Supra, 1968, p 480.

The Rules Committee of the House which examined this method and expressed its opinion in favour of a procedure of sending direct communications from the secretariat to the secretariats of the legislatures of the States in preference to the procedure of getting the amendments ratified through the Ministry of Law. The Committee pointed out that there might be contingencies in which the procedure suggested would prove more beneficial. For instance, it would be more useful,

> "in a contingency where there was difference of opinion with the states in the ratification of amendments and where, as a result of resolutions received from the states, they had to be reconsidered by parliament and an agreement reached through messages between parliament and the states legislatures. It would also be a more suitable procedure in the case of a Bill introduced by a private Member and passed by both the Houses inspite of the opposition by the government and where Government might not be interested in pushing the Bill through."[104]

It is submitted that the suggestion given by the Rules Committee is very significant and ought to be adopted.

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104. Quoted by M.N. Kaul., op. cit., Supra., 1968, p 480.

Twenty one amendments have been made to the Constitution of India by 10th April 1967 and of these, the third, sixth, seventh, fifteenth and twentieth amendments were duly ratified. It is significant to note that when ratified amendments are assented to by the President, these are published in the Gazette of India but the names of the ratifying states are not so published. It would be better if the States who ratify an amendment are also mentioned along with the fact that the President has given his assent to it. This would not only inform the public of its State's attitude towards the amendment but also help to ascertain whether the amendment was ratified by just half the number of States or by more than half. In the absence of such information, it remains obscure whether an amendment was ratified by an overwhelming majority of the States or whether it was opposed by any State. Since the party in power at the Centre might be different from those in the States, the information regarding the ratifying States would reflect their political stand on the issues involved in the amendment. In case a State legislature refuses to ratify an amendment when the bulk of its population might favour it, the people of the State must know about it so that they may think twice before returning the party again in the next election.

Federalism And Constitutional Amendment

Many writers on federalism have agreed that one of its defining characteristics is the existence of an amending procedure in which the units (states) as separate entities must participate.[105] This characteristic is derived by defining federalism as " a tendency to substitute co-ordinating for subordinating relationship"[106] which necessarily involves " a division of authority between the national government and the separate states."[107] But this very definition of federation is criticized as "legalistic"[108] and "traditional".[109] On the contrary, it is asserted that the essential nature of federalism lies in the economic, social, political and cultural forces and not in " the shading of legal and constitutional terminology."[110] In fact, federalism is a concept the definition of which has been changing from time to time.[111]

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105. Wheare, K.C., Modern Constitution 1960, pp 121-122
Bryce Studies in History and Jurisprudence, 1901, p 173.
Finer, The Theory and Practice of Modern Government, Vol I p. 204.
Friedrich, Constitutional Government and Democracy, Boston, p 209.
Moore, W.H., The Constitution of the Commonwealth of Australia, 1902, p 316.
Gerin-Lajoie Paul., Constitutional Amendment in Canada, p 262.

106. Boehm. H., Encyclopaedia of Social Sciences Vol VI, p 169.

107. Dicey, A.V., Introduction to the Study of the Law of the Constitution (9th Edn) p 151.

108. Livingston, W.S., op. cit., Supra, 1956, p1.

109. Ray,A., The Inter-Governmental Relations in India, 1966, p 2.

110. Livingston, W.S., op. cit., p 1.

111. C.A.D. Vol XI pp 950, 953.

Since there are various definitions of federalism, it is not necessary to provide an amending procedure in which the states are consulted. The constitutions of New Zealand, Soviet Russia, Austria, Germany under Weimar and Bonn, have been described as "federal", though none of these contains any provision for consulting the component units in the process of amending the Constitution.[112] Although it is not absolutely necessary to provide for state participation in the amending process such participation is desirable because all other federal characteristics can be varied by exercising the power of amendment, and thus the federal balance can be affected.[113]

Generally , the state participation is provided in the following forms:-

(I) Requirement of ratification:- It is provided that a certain number of component units must consent to the adoption of the amendment before it can become a part of the constitution. It is to be noted that it is not the unanimous concurrence of the states that is required; the number required might be half or a majority or two thirds or three-fourths or any other fraction of the total number of

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112. Livingston: op., cit. p 301; Bowie R.R. Studies in Federalism, 1954, p 791.

113. Alexandrowicz, C.H., Constitutional Development in India 1957, p 167.

the units. Judged from this criterion, the Constitution of India provides a federal amending process. In regard to the entrenched provisions which can be regarded as very significant in the centre-state relationship, ratification by at least half the state legislatures is required.

(2) Right to Initiate: If it is provided that the states may initiate amendments to the Constitution, it is regarded as observance of the federal principle. In the U.S.A. Constitution, two-thirds of the States may petition the Congress to call a constitutional convention for submitting amendments for ratification. This form has not been adopted in the amending process in India. The Supreme Court held in State of West Bengal V Union of India[114] that the Constitution is liable to be altered by the Union Parliament alone and that the units have no power to alter it and, therefore, it is not federal. It may be pointed out that it is not necessary that the units must have power to amend the Constitution; what is necessary is that these must be consulted in the matter. No doubt the States in India have no initiatory right in regard to amendments but they a right to ratify an amendment relating to the entrenched provisions and that is enough to characterise the process as federal.[115]

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114. (1963) A.I.R. S.C. 1241

115. Pillai, K.M., Reflection on the federal Structure of the Indian constitution (1964) K.L.T.(Journal) p 37.

In passing, it may be submitted that it was for practical reasons that the power of amendment has been conferred on Parliament alone.

> "Political and parochial stresses and strains in the States might otherwise influence amendments in the states section of the constitution which would run counter to the concept of national unity, which is sought to be preserved and fostered in many of the constitutional provisions. It would be unfortunate also if the uniformity introduced were to be destroyed by any of the states acting unilaterally."[116]

(3) Limiting The Power Of Amendment: In some constitutions it is specifically provided that certain provisions of the constitution are unamendable or can be amended only with the consent of the state concerned e.g. the provision regarding the State's equality of representation in the U.S. Senate cannot be amended without the state's consent. Though this device is not necessarily federal, it can be adopted as such.[117] There is no such provision in the Constitution of India.

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116. Ashok Chand: Federalism in India., 1965, pp 56-57.

117. Livingston W.S., op. cit., Supra, p 307.

(4) Fourthly, the representation of the states in the second chamber in the centre is also regarded as safeguarding the federal structure of the Constitution. Considered from this point of view, the representation of States in Parliament has not only been provided in the constitution but also has been entrenched in Art 368. Therefore, the federal principle has been fully observed in the amending process.

"The Principles of parliamentary government and federalism which run through the constitution are all recognised in the formal amending process."[118]

Though the federal principle has been followed in the formal amending procedure, there is a lot of truth in the statement that the federal character of the Constitution stands disregarded and is ineffective when the techniques and devices employed to gain flexibility are used. The Central Government can change, by ordinary majority, the boundaries of the States without their consent. Thus, the very existence and integrity of the States can be threatened.[119] Originally, Art 3 provided that the President must ascertain the views of the State whose boundaries are sought to be changed before the bill for that purpose is introduced in

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118. Joshi,G.N., Aspects of Indian Constitutional Law, 1964, p 33.

119. Watts,R.L., New Federations, 1966, p 307.

either House of Parliament. But the Constitution (Fifth Amendment) Act, 1955 modified this condition. At present, such a Bill can be introduced only on the recommendation of the President and after the time prescribed by him for the State legislature for expressing its views on it has expired. "If the territorial integrity of a State can be destroyed by a simple majority in Parliament, it is no wonder that a theme of subordination of the states to the national government runs right through the fabric of the Indian Constitution."[120] The distribution of powers can be affected under Art 249 without undergoing the process of amendment. Again, the emergency power vested in the President, obviates the necessity of amending the constitution in regard to its federal structure. By the Third Amendment Act, 1954 the concurrent List has been amplified resulting in the increased powers of the Union at the expense of the states.

In addition to it, some of the entrenched provisions, as we have already shown, can be affected otherwise also than by acting under Article 368. In the result, although the amending process ostensibly embodies the federal principle, in view of the fact that certain provisions striking at the root of the principle are outside the ambit of Art 368 and that the various devices and technique adopted

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120. Chanda, Ashok., Federalism in India, 1965, p 41.

to allow changes to be made without activising the amending process, it can be said that the federal principle has been recognized to a limited extent only.

Conflict between the Substantive Part of Art. 368 and the Proviso to it:

Before we close this Chapter, it is relevant to consider how a conflict can arise between the main part of Art. 368 and the entrenched provisions listed in the proviso to it. It is possible that a provision of the Constitution, when amended, may affect a provision entrenched in Art 368. Can a question be raised that if the amendment of the unentrenched provision affects any of the entrenched provisions, the amendment should be ratified by the requisite number of the State Legislatures?

This question was raised for the first time in Sankari Prasad[121] case, in which the Constitution (First Amendment) Act, 1951 was challenged. It was argued that the newly inserted Art 31-A and 31-B in the Constitution deprived the High Courts and the Supreme Court of their powers to issue appropriate writs under Art, 226 and Art 132 and 136 respectively. Since these provisions are entrenched in

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121. 1952 S.C.R. 89; A.I.R. 1951 S.C. 458.

Art 368, the amendment in question required ratification by the requisite number of the State legislatures and, not having been so ratified, the amendment was unconstitutional and void. The Supreme Court rejected this argument and held that :

> "It is not correct to say that the powers of the High Courts under Art 226 to issue writs 'for the enforcement of any of the rights conferred by Part III' or of this Court under Arts. 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of cases has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there could be no occasion hereafter for the exercise of their powers in such cases."

Such a question was again raised in the Sajjan case[122] on the ground that the Constitution (17th Amendment) Act, 1964 affected the powers of the High Courts under Art 226 and, therefore, there was a necessity for ratification. Though

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122. 1965 I.S.C.R. 993.

the Supreme Court held unanimously that the amendment did not require ratification and that it was valid, it admitted the possibility of there being a conflict between the two parts of Art. 368 Viz: the substantive part and the proviso to it. The Court sought to resolve such a conflict by putting a harmonious construction on the two parts and consequently propounded the following test:-

> "If the effect of the amendment made in the fundamental rights on the powers of the High Courts prescribed by Art 226, is indirect, incidental, or is otherwise of an insignificant order, it may be that the proviso will not apply. The proviso would apply where the amendment in question seeks to make any change, inter-alia, in Art 226, and the question in such a case would be : does the amendment seek to make a change in the provisions of Article 226? The answer to this question would depend upon the effect of the amendment made in the fundamental rights."

Justice Mudholkar differed on the test as propounded by the majority. He would emphasise the substantial rather than the direct qualities of the test. He observed as follows:

> "To this I would like to add that if the effect of an amendment is to curtail substantially, though indirectly, the jurisdiction of the High Courts under Art. 226 or of this Court under Art 136 and recourse has not

been had to the Proviso to Art 368, the question whether the amendment was a colourable exercise of power by Parliament will be relevant for consideration."

In Golak Nath V State of Punjab,[123] the judges who considered whether the Constitution(Seventeenth Amendment) Act, 1964 affected Art 226, observed that it is only a "direct" change in Article 226 which would require the procedure as to ratification.[124]

So far the conflict between the two parts of Art 368 has been considered in regard to Part III of the Constitution only but it can be presumed that the test of 'direct effect' would be applied in respect of other provisions of the Constitution. Since it is not clear as to which particular provisions are purported to be covered under the "the representation of states in Parliament" (item (d) among the entrenched provisions), probably the above test will be useful in a case where an amendment of the unentrenched provisions has the effect of amending " the representation of states in Parliament" to all intents and purposes.

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123. A.I.R. 1967 S.C. 1643.

124. Per Wanchoo J, Bhargava and Mitter JJ, ibid, p 1674.
Per Bachawat, J, ibid, p 1727.
Per Ramaswami, J, ibid, p 1739.

CHAPTER V

Provisions Which Allow Easy Changes

As stated in the second Chapter, there are provisions in the Constitution of India which permit easy changes to be made with or without a constitutional amendment. Generally, such provisions have been characterised as alterable by a simple majority in Parliament.[1] But this statement is not strictly correct because an alteration in any of these provisions falls under Art 368. It is true, however, that Parliament can render such provision inoperative by enacting legislation in which case the provision is not altered but merely ceases to operate. Provisions of this type can be divided into two categories: (A) those provisions which necessarily entail an amendment of the Constitution and (B) those provisions under which no formal amendment need be affected to the Constitution but which nevertheless have the effect of making a change in the law.

The provisions under (A) are as follows:-

Art 4 read with Art 2 and 3, Art 169, Schedule 5, para 7 and Schedule 6 para 21.

Under Art 2, Parliament is competent to enact a law by

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1. See Dr. Ambedkar. C.A.D. IX pp 1660-61;
Joshi, G.N., op. cit., Supra p 36.

ordinary majority and admit into the Union or establish new states on such terms and conditions as it thinks fit. Art 3 empowers the Parliament to form a new state, to increase or diminish its area or to alter the boundaries or the name of any state. A Bill for this purpose can be introduced in either House of Parliament only on the recommendation of the President. In case the Bill affects the area, boundaries or name of any of the States, it must be referred by the President to the legislature of that State for expressing its views on it within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed must expire before the Bill is introduced. Any law relatable to Art 2 or Art 3 shall contain such provisions for the amendment of the First and Fourth Schedules as may be necessary to give effect to the provisions of the law. Article 4(2) specifically provides that such a law as aforesaid in Art 2, 3 and 4(1) shall not be an amendment of this Constitution for the purposes of Art 368.

Art 169(1) provides that Parliament may by law abolish the legislative Council of a State or create one in a State having no such Council, if the legislative Assembly of the State passes a resolution to that effect by a majority of not less than two-thirds of the members of the Assembly present and voting.

Similarly para 7 of schedule 5 and para 21 of schedule 6 confer power on Parliament to amend schedule 5 and schedule 6 respectively by an ordinary law.

The above provisions confer the power of amendment of certain other provisions on Parliament, to be exercised by an ordinary majority but only in regard to the specified matters. In other words, it is not a general power. In case Parliament wants to amend any of the above provisions it is required to act under Art 368 and undergo the procedure laid down therein.

Art 4(2) provides that Parliament is competent to redraw the internal frontiers of India to increase or diminish the area of any state or to alter the name of any state, by passing a law by a simple majority after observing the conditions laid down in Art 3. Such a law is not an amendment of the Constitution for the purposes of Art 368. But if Art 3 or, for that matter, Art 4 itself is sought to be amended in any respect, Parliament is required to proceed under Art 368. Parliament amended Art 3 by the Constitution Fifth and Eighteenth Amendment Acts by observing the procedure prescribed in Art 368 i.e. the requirement of a special majority was fulfilled. Similarly, Parliament may by ordinary law[2] provide for the abolition of the legislative Council of a state, or the creation of such a

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2. Art 169 (3).

council, provided the legislative Assembly of the state passes a resolution to the effect, in accordance with the terms of Art 169. It is of interest to note that the operation of Art 368 has been specifically made inapplicable in regard to the amendment of the subject matter of the above articles by providing that such laws shall not be deemed to be amendment of this Constitution for the purposes of Art 368.[3] The word "deemed" does not mean that the Constitution has been amended in fact but not to be considered as amended in theory; it only means that the special machinery provided for the amendment of the Constitution in Art 368 is not to be used in regard to these articles.[4] It is indeed, a remarkable mechanism designed to achieve flexibility in these provisions of the Constitution. The founding fathers visualized that there would be frequent changes in regard to these provisions of the Constitution and, therefore, they thought it fit to provide a fairly flexible way of effecting these changes without having resort to the amending process provided in Art 368. It seems that the whole mechanism is based upon a distinction between power to make a law and the content of a law. The power of Parliament to make constituent law under the provisions of this category is alterable only under Art 368 but the content of law i.e. the subject-matter

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3. Art 4(2), Art 169(3), Sch 5 para 7, Schedule 6, para 21

4. Seervai. op cit., Supra, p 1092.

of these provisions is alterable by a simple majority in Parliament. Though the law is passed by an ordinary majority in fact and form it is a constituent law because it brings about a formal change in the body of the Constitution.[5]

The following provisions can be put under category B :-

Articles 11, 59(3), 65(3), 73(2), 75(6), 97, 98(2), 98(3), 100(3), 105(3), 106, 118(2), 120(2), 124(1), 125(2), 133(3), 135, 137, 142(1), 146(2), 148(3), 149, 158(3), 164(5), 171(2), 186, 187(2), 187(3), 189(3), 194(3), 195, 208(1), 208(2), 210(2), 221(2), 222(2), 225, 229(2), 230(1), 231(1), 239(1), 239A, 241(1), 241(2), 241(3), 241(4), 275(2), 283(1), 283(2), 285(1), 287, 289(2), 300(1), 309, 313, 343(3), 345, 348(1), and 373.

We propose to rearrange these articles according to their subject-matter and explain briefly how changes can be brought under them, though the text of the Constitution is not changed thereby.

(1) Right of Citizenship (Art. 11) : The constitutional provisions relating to citizenship are found in Art 5 to 10 but a comprehensive law relating to citizenship has not been

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5. We have shown in Chapter VII that the sole criterion to distinguish between an ordinary law and a constituent law is not the manner in which it is enacted but the nature of it, which depends on the criterion whether or not it brings a formal change in the letter of the Constitution. If it brings a formal change, it is a constituent law otherwise not.

laid down therein. Art 11 gives power to Parliament to enact such law. It has been held by the Supreme Court that the power under Article 11 is not fettered by Arts 5 to 10 and it is competent for Parliament, in exercise of this power, to take away or affect citizenship already acquired under Arts 5 to 10.[6] By exercising this power, Parliament has passed the Citizenship Act, 1955. In reality, Art 11 enables Parliament to regulate the right of citizenship by ordinary legislation, obviating the necessity of amending the Constitution in this regard under Art 368.

(2) Continuance of Executive Power of the State Art 73(2) .

Under the Govt of India Act, 1935, certain legislative powers belonged to the provinces, which have been transferred by the Constitution to the Union. For instance, item 9 of List II of the Act of 1935 gave the Provincial Legislature exclusive power with respect to 'Compulsory acquision of land' but the Constitution has placed the legislative power as to 'acquisition or requisition of property for the purposes of the Union' in Entry 33 of List I.[7] In the Constitution, these legislative powers have been transferred to the Union but the

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6. Izhar Ahmed V Union of India, A.I.R. 1962 S.C. 1052.
7. Entry 33 of List I has been omitted and Entry 42 of the Concurrent List has been substituted by the words: " Acquisition and requisitioning of property." by Sec 26 of the Constitution (Seventh Amendment) Act, 1956.

executive powers in respect thereof were intended to be exercised by the States. Therefore, Art 73(2) provides that a State and any officer or authority of a State may continue to exercise the executive power which it could exercise immediately before the commencement of the Constitution, until otherwise provided by Parliament. In other words, Parliament may divest the states of the executive power saved by Art 73(3) by enacting an ordinary law; it need not amend Art 73(2) under Art 368 for this purpose.

(3) Provisions permitting changes in the Second Schedule:

Arts 59(3), 65(3), 75(6), 97, 125(2), 148(3), 158(3), 164(5), 186, and 221(2).

The Second Schedule to the Constitution provides for the privileges to be enjoyed by and the emoluments, allowances and salaries to be paid tothe President, the Governors of the States, the Speakers and the Deputy Speakers of the Lok Sabha and the Legislative Assemblies, the Chairman and the Deputy Chairman of the Rajya Sabha and the legislative Councils of States, Judges of the Supreme Court and of the High Courts, and the Comptroller and Auditor-General of India. These provisions apply until Parliament determines by law the privileges, emoluments, salaries and allowances attachable to the above offices. Therefore, if Parliament ever wants to amend the Second Schedule in regard to these

matters it needs only to enact an ordinary law and there is no need to amend the Second Schedule.

It is to be noted in this connection that the salaries of all the officers mentioned above except the judges of the Supreme Court and of the High Courts can be varied in this way. It seems anomalous that the salary of the Head of State can be varied by an ordinary law enacted by Parliament but the salaries of the Supreme Court and High Court judges cannot be varied by an ordinary law[8], the matter requiring amendment of the Second Schedule under Art 368. The reason is not far to seek; it is for establishing an independent judiciary in India.

It is to be further observed that if the Second Schedule is intended to be amended, Parliament is required to act under Art 368 and to observe the procedure laid down therein. Part B of the Second Schedule providing for the salaries and allowances of the Prime Minister and the Ministers at the Centre as well as in the States was omitted by the Constitution (Seventh Amendment) Act, 1956.

(4) Salaries and Allowances of the Members of Parliament and of the State Legislature (Art 106 and Art 195)

The salaries and allowances of the members of either

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8. Arts 125(1) and 221(1).

House of Parliament or of either House of a State Legislature can be determined by law by Parliament,[9] and the State legislature respectively and, until such laws are passed, the members of Parliament continue to receive such salaries and allowances as were paid to the members of the Constituent Assembly and the members of a State legislature as were paid to the members of the Legislative Assembly of province, immediately before the commencement of the Constitution.

(5) Quorum for either House of Parliament or of a State Legislature (Art 100(3) and 189(3)):

Art 100(3) provides that the quorum to constitute a meeting of either House of Parliament shall be one-tenth of the total number of members of the House until parliament by law otherwise provides. Similarly Art 189(3) prescribes the quorum for either House of the State legislature as ten members or one-tenth of the total number of the House, whichever is greater, but the state legislature is competent to provide otherwise by enacting a law to that effect. In case Parliament or a State legislature passes a law providing a quorum different from that prescribed in Art 100(3) or 189(3) the constitutional provisions relating to the quorum would cease to be operative. It is significant to note that

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9. Parliament has passed the Salaries and Allowances of Members of Parliament Act, 1954 to provide for the salaries and allowances of Members of Parliament. Act 30 of 1954.

changes in the quorum may make the legislative process difficult or easy. Supposing the quorum for either House of Parliament is prescribed as one-fifteenth, obviously fewer members would be required to enact a valid law.

(6) Privileges of Parliament and the State legislatures (Art 105(3) and 194(3)):

The powers, privileges and immunities of each House of Parliament and of the legislature of a State have been left to be defined by them respectively by law and, until so defined, are such as were enjoyed by the House of Commons of the Parliament of the United Kingdom on 26th January, 1950. Therefore, it is by ordinary law that the powers, privileges and immunities of the legislature can be varied from time to time.

(7) Rules of Procedure: (Arts 118(2), 208(1), 208(2))

Each House of Parliament and of a State legislature is competent to make the rules of procedure for itself, subject to the provisions of the Constitution. Until such rules are made, each House has to observe the rules of procedure applicable to it immediately before the commencement of the Constitution.

(8) Language in Parliament and in a State Legislature: (Art 120(2) and 210(2))

Hindi and English are the two recognized languages to be used in Parliament for the first fifteen years from the commencement of the Constitution.[10] However, the Presiding Officer in each House is authorised to permit any member who cannot adequately express himself in Hindi or in English to address the House in his mother tongue.[11] After the expiration of the period of fifteen years, English is to cease to be a parliamentary language, unless Parliament by law provides otherwise. In a State legislature, the official language or languages of the State or Hindi or English can be used[12] and the presiding officer in each House of the State legislature is authorised to permit any member who cannot adequately express himself in any of these languages to address the House in his mother-tongue.[13] Unless the legislature of the State by law otherwise provides, after the expriation of a period of fifteen years English ceases to be a language to be used in the state legislature.[14]

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10. Art 120(1)

11. Proviso to Art 120

12. Art 210(1).

13. Proviso to Art 210.

14. Art 210(2).

(9) Language to be used in the Supreme Court and the High Courts:

Until Parliament by law provides otherwise, all proceedings in the Supreme Court and the High Courts and the authoritative texts of Union and State laws shall be in English.[15] With the previous consent of the President, the Governor is competent to authorise the use of Hindi or any other language used for any official purpose of the State, in proceedings in the High Court having its principal seat in the State.[16] But the order made by the Governor under Art 348(2) is not applicable to any judgment, decree or order passed or made by the High Court of the State.[17]

(10) Official Language: (Art 343(3) and 345):

Art 343(1) declares that the official language of the Union shall be Hindi in the Devanagari script but English shall continue to be used for all the official purposes of the Union upto 1965. However, the President is empowered to authorise the use of Hindi in addition to English during this period.[18] Therefore, English ceases to be an official

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15. Art 348(1)
16. Art 348(2)
17. Proviso to Art 348(2)
18. Art 343 (Proviso)

language after 1965. If however, parliament wants to keep English for any purpose even after the prescribed period, it is required to pass a law to that effect.[19] Such a law has already been passed by enacting the official Language Act, 1963. It provides for the continued use of English for the official purposes of the Union indefinitely." Notwithstanding the expiration of the period prescribed in Art 345(2)."

In the States, English is to continue to be used for the purposes it was being used immediately before the commencement of the Constitution until the legislature of the State adopts any one or more of the languages in use in the State or Hindi for all or any of the official purposes of the State.[20]

(11) Number of Supreme Court Judges (Art 124(1)):

The number of the judges of the Supreme Court is another matter which can be determined by Parliament by an ordinary law.[21] The Constitution provided a Chief Justice and not more

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19. Art 343(3)

20. Art 345.

21. Art 124(1).

than seven other judges but this number has been increased to 13 by now.[22] It is to be noted that if Art 124(1) is itself sought to be amended, Parliament is required to observe the procedure laid down in Art 368 and the amending Bill requires to be ratified by atleast half the State legislatures, Art 124 being in Chapter IV of part V of the Constitution which is entrenched in Art 368.

(12) Jurisdiction and Powers of the Supreme Court in Certain matters: (Art 133(3), 135, 137, 142(1))

Art 133(3) provides that, unless Parliament by law provides, no appeal shall lie to the Supreme Court from the judgment, decree or final order of one judge of a High Court. Article 135 vests in the Supreme Court the jurisdiction and powers of the Federal Court with respect to any matter not covered by Art 133 and 134, until Parliament by law otherwise provides. The Supreme Court has been given the power to review any judgment pronounced or order made by it but this power is subject to any law made by Parliament[23] or any rules made by the Court under Art. 145. It is for Parliament to provide in an ordinary law the manner in which the decrees or orders of the Supreme Court should be enforceable throughout the territory of India. Until Parliament

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22. Vide Act 17 of 1960.

23. Art 137.

enacts a law in this respect, the President may by order prescribe the required manner.[24]

(13) Judicial System and Administration of Union Territories:

(Arts : 239(1), 239A, 241(1), 241(2), 241(4), 230(1), 231(1))

The Administration of Union territories[25] lies in the hands of the President but Parliament is empowered to make a law in this regard and then the powers of the President become exercisable subject to the law.[26] Art 239A provides that Parliament may by law create local legislatures of any type for certain Union territories. Sub-clause 2 of Art 239A lays down that no such law shall be deemed to be an amendment of this Constitution for the purposes of Art 368 even if it contains any provision which amends or has the effect of amending this Constitution. Under Art 241, Parliament is competent to constitute a High Court for a Union territory or declare any court in any territory to be a High Court by enacting ordinary legislation.[27] It is not necessary that a

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24. Art 142(1).
25. Art 366(30) defines a Union territory as "any Union territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule."
26. Art 239.
27. Art 241(1)

High Court in a Union territory must be having all the powers that a High Court in a state has.[28] Even a state High Court might be empowered to exercise jurisdiction in regard to a union territory.[29] Parliament may by law establish a common High Court for two or more States or for two or more States and a Union territory.[30]

(14) Jurisdiction of Existing High Courts. (Art 225):

Art 225 seeks to preserve all the powers possessed by the High Courts at the date of commencement of the Constitution until affected by any law passed by a competent legislature.[31]

(15) Compensatory allowances to High Court judges. (Art 222(2)):

In case a judge is transferred from one High Court to another he is entitled to receive a compensatory allowance in addition to his salary, which is to be determined by Parliament by law. Until Parliament makes such a law the compensatory allowance is to be fixed by the President.[32]

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28. Art 241(2)
29. 241(4), 230(1), entry 79 of List I.
30. Art 231(1)
31. Entries 79, 95 of List I; Entries 3 and 65 of List II and Entry 46 of List III.
32. Art 222(2)

(16) Composition of the Legislative Councils. (Art 171(2)):

The composition of the Legislative Council of a State has been laid down in Art 171(3) but it can be varied or affected by law made by Parliament.[33]

(17) Duties and powers of the Comptroller & Auditor-General (Art 149):

The duties and powers of the Comptroller and Auditor-General of India shall be such as may be prescribed by or under any law made by Parliament. Until provision in this behalf is made, his duties and powers in relation to the accounts of the Union and the States are such as were exercisable by the Auditor-General of India immediately before the commencement of the Constitution.[34]

(18) Custody of C.F.I. and C.F.S. (Art 283(1), 283(2) :

The custody of the Consolidated Fund of India and the Contingency Fund of India is to be regulated by law made by Parliament and, until provision in that behalf is so made, it is to be regulated by rules made by the President.[35] The custody of the Consolidated Fund of a State and the Contingency Fund of a State is to be regulated by law made by the State

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33. Art 171(2)
34. Art 149.
35. Art 283(1)

legislature. Until the state legislature makes such a law, it shall be regulated by rules made by the Governor.[36]

(19) Recruitment and conditions of service of Civil Servants:

It is by ordinary legislation that the recruitment and conditions of service of officers and servants of the Supreme Court and of persons serving the Union or in the secretariat of Parliament,are to be regulated.[37] Similarly in a State, the recruitment and conditions of service of officers and servants of a High Court[38] and of persons[39] serving the State or in the secretariat of the State legislature[40] are to be regulated by an ordinary law passed by the State legislature concerned.

(20) Exemption of Union property from State taxation and State property from Union taxation: (Art 285(1) 289(2), 287)

The property of the Union has been exempted from State taxation except in so far as Parliament by law otherwise provides or in case it is specifically excepted under Art

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36. Art 283(2)
37. Art 146(2), 98(2), 98(3), Art 229(2).
38. Art 229(2)
39. Art 309
40. Art 187(2)

285(2). Similarly, the property and income of a State is exempt from Union taxation.[41] But the Union can levy tax in respect of a trade or business carried on by or on behalf of the Government of a State.[42] The Union has also been exempted, save in so far as Parliament may by law otherwise provide, from a State tax on the consumption or sale of electricity as specified under Art 287.

(21) Suits and Proceedings : (Art 300(1))

Art 300(1) provides that the Union of India and the Governments of States shall be juristic personalities for purposes of suits or proceedings but the Constitution itself does not lay down the circumstances in which such actions lie. Therefore, the power to sue or be sued is left to the legislatures of the Union and the respective States and , subject to such legislation, the existing law relating to this matter is to be operative.

(22) Power of President to make certain orders : (Art 275(2) And Art 373)

Art 275(2) provides that powers conferred on Parliament under Art. 275(1) in respect of grants from the Union to

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41. Art 289.

42. Art 289(2)

certain States shall be exercisable by the President by order, until provision is made by Parliament under Art 275(1). Under Art 373, the President was given power to make orders in respect of persons under preventive detention in certain cases until the expiration of one year from the commencement of this Constitution or until provision was made by Parliament in this behalf, whichever was earlier.

(23) Transitional provisions relating to the Public Services: (Art 313)

Art 313 validates all the laws in force immediately before the commencement of the Constitution applicable to any public service, so far as consistent with the provisions of the Constitution, until other provision is made in this behalf under the Constitution.

From the study of the aforesaid provisions, it is clear that there is a large number of articles which empower Parliament or the State legislatures to make laws by ordinary majority so as to effect practical changes in these provisions. But it is to be noted that changes effected in this way, though they may be significant and far-reaching, cannot be said to be amendments of the Constitution because these changes do not alter the provisions of the Constitution. In other words, the letter of the Constitution remains untouched and the changes are embodied in ordinary laws. The

only effect of laws is to substitute the provisions of the Constitution by different provisions.

Taking a typical example, Art 105 (3) provides that the powers privileges and immunities of each House of Parliament shall be such as may from time to time be defined by Parliament by law, and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution. The members of Parliament in India are entitled to the powers, privileges and immunities as were available to the members of the House of Commons in the United Kingdom on 26th January, 1950. Of course, it is not easy to ascertain what these were at that particular point of time. But we are not concerned with that question here. Our point is that if the Indian Parliament intends to codify the powers, privileges, and immunities of its members, it will have to pass a law and when this law comes into operation, the members of Parliament will have the powers, privileges and immunities as provided under the law and not those enjoyed by the members of the House of Commons in the United Kingdom on 26th January, 1950.[43] In other words, the law passed by Parliament will have the effect of ceasing the operation of Art. 105(3). For practical purposes, it would be an

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43. Since it was held in Re Under Art 143 of the Constitution, that a law providing for the powers, privileges and immunities of each House of Parliament is liable to be struck down in case it takes away or abridges the Part III rights, Parliament has not enacted such a law. See. A.I.R. 1965 S.C. 745 (767)

amendment of Art. 105(3) but nevertheless it cannot be said to be an amendment of the Constitution because the law makes no change in Art 105(3). Such a process can at the most be characterised as an informal amendment of the type brought about by usage, conventions and judicial interpretations. If Parliament ever wants to amend Art 105(3) it will have to act under Art 368.

All the articles discussed above are transitory in nature and cease to operate when a law is made on the subject. None of them can be regarded as conferring the power of amendment of the Constitution. They can be compared to the legislative entries provided in the Lists in the Seventh Schedule. Just as a law made by Parliament or by a State legislature under a legislative entry cannot be termed as an amendment of the Constitution, a law made in pursuance of one of the aforesaid provisions cannot be charaterized as an amendment of the Constitution. Similarly, just an ordinary law has to comply with the provisions of the Constitution, the validity of the laws so made is open to challenge in a court of law on the ground of constitutionality.

The constitution framers discovered a unique process of amendment which treats different provisions of the Constitution differently for the purpose of amendment . There

are entrenched provisions dealing with the relationship of the Centre and the States which require not only a special majority in Parliament but also ratification by at least half the State Legislatures. Many provisions require only a special majority in Parliament while a few require only a simple majority. Finally there is a large number of articles which are not amendable by a bare majority but, at the same time, can be bent to serve the purpose of amendment by only a simple majority in Parliament or a State legislature. This kind of gradation of different provisions of the Constitution according to their significance and then their subjection to various modes of alteration was not found in any of the written constitutions of the world at the time the Indian Constitution was framed. No wonder it evoked this appreciative comment from no less an authority than Prof. K.C. Wheare " This variety in the amending process is wise but it is rarely found."[44] It seems that, by discovering new modes of amendment which were not hitherto known to constitutional draftsmen, the Indian constitution framers have made an important contribution to the theory and practice of constitutional law. It is interesting to note examples of similar techniques of prescribing different modes of amendment. D. Fulton has

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44. Wheare, K.C., op. cit., Supra, p 143.

evolved an amending formula for Canada in which the provisions of the British North America Act have been divided into five categories, each being assigned a different procedure for amendment, thus attaching different degrees of rigidity to different provisions of the constitution.[45] The same technique has been employed in the Draft Treaty (1954) of the European Community.[46] Similarly, in the Constitution of Malaysia of 1964, the provisions have been placed in different categories for the purpose of amendment. Some provisions are amendable by the votes of not less than two-thirds of the total number of members in each House of Parliament,[47] some can be amended only if consented to by the Conference of Rulers,[48] some are amendable by a bare majority in Parliament[49] and there are others in which the concurrence of the Governors is necessary.[50] This kind of device has enabled the draftsmen to draw the boundary line between flexibility and rigidity with more precision and exactness. In the absence of such a device

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45. Laskin, B., Amendment of the Constitution 15 U.T.L.J. 1964, p 191.

46. The text of the Draft Treaty embodying the statute of the European Community has been given in Studies in Federalism by R.R. Bowie (Appendix II).

47. Art 159.

48. Art 159(5)

49. Art 159(4)

50. Art. 161E(2), 161E(4), and 161H (1).

it is not only difficult but impossible to apportion the desired amount of flexibility or rigidity to the various parts of a constitution. The lengthy Constitution of India would have been either too rigid or too flexible but for the novel device adopted for its amendment.

Rigidity and Flexibility :

Constitutions have been classified as "rigid" or "flexible" or "controlled" or "uncontrolled".[51] A constitution which may be modified or repealed in the same way as an ordinary piece of legislation is described as "flexible" or "uncontrolled" and a constitution which can only be altered with some special formality is characterised as "rigid" or "controlled". Though rigidity and flexibility are relative terms, neither is free from defects. If the constitution is very flexible, it may become a plaything in the hands of transient majorities and, therefore, may not last long. The great danger inherent in an easy amending process was exemplified by the Constitution of the Weimar Republic. In 1933, a bare majority of Nationalists and National Socialists deputies abused its legislative to bar part of the opposition (the Communists) and then amended the amending provision, giving absolute power to the Government to amend the

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51. McCawley V The King 1920 A.C. 691 at 704, Per Lord Birkenhead.

Constitution.[52] Moreover, Bryce holds the view that flexible constitutions tend towards an aristocratic structure of government because "it needs a good deal of knowledge, skill and experience to work a flexible constitution safely, and it is only in the educated classes that these qualities can be looked for."[53] It is also thought that the satisfactory functioning of a flexible constitution presupposes the existence of deep-rooted traditions as well as a profoundly conservative spirit, as in the United Kingdom.[54]

On the other hand, rigidity is also regarded as dangerous if it stands in the way of the natural development of a country.[55] Finer says "Too difficult an amending procedure necessarity requires, if not killing of the body, then the killing of the mind".[56] Rigidity in the amending process is also regarded as a cause of revolution. Bryce holds the view that

" when a party grows up clamouring for some reforms

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52. Friedrick C.J., Constitutional Government, 1941, p 139.

53. Bryce, James, Studies in History and Jurisprudence, Vol I p 179.

54. Sen, D.K.S., A Comparative Study of the Indian Constitution, 1966, p 302.

55. Bryce, op. cit., p 223.
Burgess, J.W., op. cit. p 151.

56. Finer, op. cit., Supra, p 193.

which can be effected only by changing the constitution, or when a question arises for dealing with which the constitution provides no means, then, if the constitution cannot be amemded in the legal way, because the legally prescribed majority cannot be obtained, the discontent that was debarred from any legal outlet may find vent in a revolution or a civil war."[57]

Mukharji observes as: " A constitution which cannot be constitutionally amended is an invitation to revolution."[58]

But others take the view that even the most flexible amending process cannot guarantee the constitution against revolution.[59] " For revolutions may be made by others than those who would constitute a constituent group."[60]

Rigidity is supposed to achieve stability and flexibility makes room for growth or development. Since both are equally

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57. Bryce, J., op. cit., Supra , Vol I , pp 223-224.

58. Mukharji, P.B., The Critical Problems of the Indian Constitution, 1968, p 191.

59. Hidayatullah J., Golak Nath V State of Punjab, A.I.R. 1967, S.C./at 1693 1697.

60. Friedrich C.J., Constitutional Government and Democracy, p 142.

desired, it becomes important to strike a happy balance between the two.[61]

"One of the main problems to which the framers of a constitution must address themselves is how to reconcile the idea of a stable juridical order, affording no scope for sudden or hasty changes with the idea of growth and development. It is, therefore, a mistake to overemphasise either flexibility or rigidity. What is necessary is the judicious blending of the two."[62]

Is the Indian Constitution Rigid or Flexible?

There are two schools of thought on this question. One view is that the Constitution is rigid[63] and the other and more predominant view is that the Constitution is fairly flexible.[64] The explanation for this difference of opinion seems to be that those who support the flexible view compared

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61. Jameson, J., A Treatise on Constitutional Conventions, 1887, p 82.
    Joshi, G.N., op. cit, Supra p 41.
62. Sen , S.D.K., op. cit., Supra, p 302.
63. Jennings, I.V. , Op.cit. Supra , pp 59-60.
    Gledhhill, A., op. cit. Supra, p 74.
64. Joshi, G.N. op. cit p 41.,
    Alexandrowicz, op cit. Supra, p 231.
    N.V. Gadgil, C.A.D., Vol XI, p 658-659.

the amending procedure with the amending procedures provided in the constitutions of the United States, Canada and Australia. For instance, Dr. Ambedkar referred to the aforesaid constitutions while passing judgment on the amending procedure. Similarly, others also seem to have these very constitutions in mind . On the other hand, those who described the Constitution as rigid did so on the consideration of the practical difficulties involved in securing an amendment.[65]

It is submitted that a comparative study of the various amending processes provided in other constitutions is no sure guide to the rigidity or flexibility of a constitution. Much depends upon the cultural background of the people. For instance, the constitution of Switzerland and that of Australia have almost similar amending processes but there have been far more amendments in Switzerland than in Australia. The reason for this lies more in the cultural background of the people than in the constitutional provisions.[66]

" Flexibility is not a function of the amending procedure so much as it is a function of the willingness of the people to countenance changes in the basic structure of their institutions."[67]

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65. Jennings, I.V., op. cit. pp 59-60.
66. Livingston, W.S., op. cit., Supra p. 198.
67. ibid, p. 147.

Besides the formal amending procedure, custom, usage and conventions may lend flexibility to a constitution.[68] Judicial interpretation is another factor in making a constitution flexible or rigid. It has been said that more changes have been brought about in the U.S. Constitution by the Supreme Court than through the amending process.[69]

Many authors take the view that if a constitution is filled with details, it will require frequent alteration.[70] Thus, Jennings took the elaborate character of the Indian Constitution into consideration when he observed:-

> "What makes the Indian constitution so rigid is that, in addition to a somewhat complicated process of amendment, it is so detailed and covers so vast a field of law that the problem of constitutional validity must often arise."[71]

Though it can be argued that in a detailed constitution

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68. Austin, G., op. cit., Supra, p 255.

69. Orfield: op. cit., Supra, p 120.

70. Ames. H.V. in Annual Report of the American Historical Association for 1896, p 302.
Dodd, W.F. : The Revision and Amendment of State Constitutions. 1910, p 129.
Finer, H. : op. cit., p 240.
Jennings, I.V., op. cit., p 9.

71. Jennings, op. cit., pp 9-10.

much is already provided, and, therefore, there would be lesser need for amendment, in view of the facts that human language is anything but unequivocal, the working out of human relationships is difficult to forecast and the actual conditions of human society change, there is no escape from the conclusion that a constitution must require alteration and a detailed constitution needs all the more alteration.

Besides the length of a constitution, the language used also gives flexibility or rigidity to it. If the constitution is couched in elastic words or "thin language" it would require less need of amendment.[72]

As regards the amending process provided in the Indian Constitution, it is certainly more flexible when compared with those of the constitutions of the United States, Australia or Canada but it is rigid when considered in the Indian context. It is to be noticed that the flexibility or rigidity of the process would depend, inter alia, on the complex of political parties at the Centre as well as in the States . If the present domination of one party were to cease, as it is already beginning to do, and a multiplicity of parties was to appear in the country, the absolute majority and the two-thirds majority required under Art. 368 would be almost

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72. M. Markandan; K.C., : Directive Principles in the Indian Constitution, 1966, p 149.
Dawson, MacGregor : The Constitution of Canada, p 137.

impossible to obtain. In case different parties were to be in control at the Centre and in the States, the amending process in regard to the entrenched provisions can hardly be made use of.

On the basis of the Fourth General Elections[73] and the present political conditions in the country, there is a strong trend for the emergence of a larger number of political parties and the days of one party domination in India seem numbered.

The fact that twenty one amendments were effected to the Constitution in the first seventeen years led many to think that the amending process is fairly flexible. It is submitted however, that this fact was due to one party domination at the Centre as well as in the States and cannot be cited as proof of the flexibility of the amending process.

Frequent amendments: It is argued that frequent amendments make the people lose reverence or regard for the constitution. It is submitted that it is not frequent amendments

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73. The Indian National Congress secured only 284 seats in the Lok Sabha out of 520 whereas it had 361 seats in the third general elections. The Swantantra Party, The Bharatiya Jansang and D.M.K. increased their strength considerably. Similarly, in the state legislatures also the strength of the Congress is much reduced and other parties gained at its expense. (The Fourth General Elections--- a statistical Indian National Congress Publication---- 1967; Report on the Fourth General Elections in India 1967 by Election Commission of India.)

but amendments for selfish or partisan purposes that lead to disrespect for the constitution. If there is a genuine necessity for amendment the constitution must be amended and it should not matter that it has been already amended many times. After all the constitution is meant for the nation and not the nation for the constitution. The Swiss change their constitution when they need to but it does not mean that the constitution loses any respect in their eyes. Livingston remarks:

> " It does not imply a lesser respect for law and order or even for the constitutional document itself; it merely means that the constitution and the law are called upon to respond to the purposes for the people they are designed to serve and that this response must be immediate and direct. The constitution becomes a tool to be used as needed rather than idol to be worshipped from afar."[74]

It is proposed to analyse in a later chapter the circumstances in which the various amendments to the Indian Constitution were made and to examine whether there was any need for them.

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74. Livingston : op. cit., p 195.

CHAPTER VI

Power of Amendment and Alleged Express or Implied limitations to it:

The recent decision of the Supreme Court in Golak Nath V State of Punjab[1] has raised the controversy whether the power of amendment of the Constitution lies in Art. 368 or somewhere else. In this chapter, we propose to consider the question in detail and also to examine whether or not there are any express or implied limitations to the amending power.

It was said in the Golak Nath case that Art. 368 merely provides the procedure to pass an amending Bill and does not grant power to amend the Constitution. This question had not been raised in the Sankari Prasad[2] case and until the Golak Nath decision it had been assumed that Art 368 contains both the power and procedure for amendment. In a startling pronouncement, however, the Supreme Court held in Golak Nath that Parliament's power to amend the Constitution is derived from its residuary power of legislation.[3]

It is true that the marginal note to Art 368 reads " procedure for amendment of the Constitution" but " a marginal note cannot control the meaning of the body of the section if the

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1. A.I.R. 1967 S.C. 1643.
2. Sankari Prasad V Union of India A.I.R. 1951 S.C. 458
3. Golak Nath V State of Punjab A.I.R. 1967 S.C. 1643.

language employed therein is clear and unambiguous"[4]. The heading of Part XX of the Constitution which contains only Art 368 is "Amendment of the Constitution." It is an accepted fact that a heading is regarded as giving the key to the interpretation of the clauses ranged under it. Therefore, it is not correct to characterise Art. 368 as a mere procedural provision only on the basis of its marginal note. Then, is there anything else in the Article which shows that it merely lays down the procedure for amendment?

Distinction Between "Power" and "Procedure"

What is the test to determine whether Art. 368 is merely procedural or procedural as well as substantative? This necessarily leads to the distinction between 'procedure' and 'power' or substantive right. The main majority in the Golak Nath case expressed the view that Art. 368 is merely procedural because the power to amend has not been expressly conferred and need not be implied as the power lies elsewhere in the Constitution. The Court did not, however, discuss the distinction between "power" and "procedure".

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4. Nalinakhya Bysack V Shyam Sunder Halder and others A.I.R. 1953 S.C. 148(150).
This case was relied on by the Supreme Court in W.I. Theatres v Municipal Corporation Poona. A.I.R. 1959 S.C. 586.

Power has been defined as " ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons."[5] Thefore, power is the ability created by law to alter legal relations; its correlative is liability.[6] The law which creates such power is classified as "substantive law".[7] However, regarding the distinction between "substantive" law and "procedural law", there exists no accurate criterion. Salmond observes " it is not an easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure."[8] In a similar view Paton states " one of the orthodox classifications is that which distinguishes between substantive and procedural law, but it is difficult to draw a clear line between them."[9]

Julius Stone also feels the same difficulty. He observes:

"The categories of "substance" and "procedure"

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5. Salmond : Jurisprudence, Twelfth Edn, 1966, pp 229-30
6. Ibid, p 230.
7. Paton, G.W., A Text Book of Jurisprudence, 1964, p 535.
8. Salmond, op. cit, Supra, p 461.
9. Paton, G.W., op. cit, Supra, 1964, p 535.

> compete to control a vast variety of matters, producing a confusion in at least one field which led the Law Revision Committee to refrain sine die from proposing reforms on the singular ground that it is a problem of considerable difficulty."[10]

A distinction is attempted on the basis of 'substantive law' being an end and " procedural law " a means to that end. " Substantive law is concerned with ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are attained."

Another jurist draws a distinction in these words:

> "That part of the law which creates or defines rights is "substantive law", that part which aids or protects them is 'adjective law' or procedure."[11]

The difficulty begins when 'procedural law' becomes as substantive as substantive law itself. Salmond gives numerous examples of this[12] which are not necessary to cite. In an interesting

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10. Stone, Julius: Legal System And Lawyer's Reasonings 1964, p 249.

11. Taylor, H. : The Science of Jurisprudence, 1908, p 523.

12. Salmond, op. cit., Supra, pp 461-62.

article,[13] W.W. Cook pondered the distinction between "substance" and "procedure" and searched for it in the law in general and in the conflict of laws in particular. According to him, in distinguishing "substantive law" from "procedural Law" "some imaginary line has arbitrarily been taken as a boundary." His own view is that the two can be demarcated by a line only on the basis of the purpose of the law in question. He goes on to say, " If once we recognize that the line can be drawn only in the light of the purpose in view it cannot be assumed without discussion that as our purposes change the line can be drawn at precisely the same point."[14] According to him, the demarcating line goes on moving as the purposes of the law go on changing and for some purposes the distinction may disappear completely. He further observes that "for some purposes the basis for any such classification disappears entirely and all can be treated or regarded as substantive."[15]

Cook illustrates his argument by two examples. First

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13. Cook, W.W., "Substance" and "Procedure", 1932, 42, Yale, L.J., 333.

14. Ibid, 337.

15. Ibid, 336.

taking up constitutional law, he quotes the principle that "constitutional prohibitions against retrospective laws are generally held not to apply to acts which affect procedure only."[16] How to determine whether a retrospective law is merely procedural or substantive as well ? The prohibition is against substantive law only. Cook says that we must try to discover the purpose of the law. It seems clear that the underlying idea of the distinction is that it would not be fair to individuals to alter their substantive rights by subsequent legislative enactment but the machinery for the enforcement of those rights may be altered. Therefore," the precise meaning to be given to 'substance' and to ' procedure' ought to be determined in the light of this underlying purpose to be fair to the individual concerned."[17]

Cook takes the second instance from the conflict of laws, in which the 'substantive law' of some country is applied to determine the rights of the parties but the procedure to enforce them is to be determined by the law of the forum. He discovers in this instance that the purpose of the law is convenience to the court. To determine legal consequence, foreign substantive law is applied because of some factual

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16. Ibid, 341

17. Ibid, 343.

connection of the situation but it would be quite inconvenient to the court, but not unfair to the litigants concerned, to make use of all themachinery of the foreign court for enforcing the rights involved. In the light of this purpose of convenience, we can draw the distinction between the two laws. He observed:

> "If we admit that the 'substantive'shades off by imperceptible degrees into the 'procedural' , and that the 'line' between them does not 'exist', to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this : How far can the Court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?"[18]

Following the guiding lines given by Cook, let us enquire what the purpose of Art 368 is and, in the light of that purpose, whether it is a merely procedural or substantive also. Obviously, the purpose of Art. 368 is to carry out amendments to the Constitution. The means adopted

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18. Cook, W.W., op. cit., supra, pp 343-44.

connection of the situation but it would be quite inconven

to carry out this purpose is the introduction of a Bill in either House of Parliament, to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting and also to be assented to by the President. In respect of the articles mentioned in the Proviso to Article 368, further ratification by at least half of the state Legislatures is also required. This means that Art 368 can be reasonably said as laying down the procedure for amendment. Had the Article said nothing else, it could be argued that it was merely procedural. But Art. 368 also contains the statment that"the Constitution shall stand amended in accordance with the terms of the Bill." This can only connote that the purpose of Art 368 is to permit the Constitution to be amended by adopting the above-mentioned means or procedure. There is another indication that these words contain the power to amend the Constitution. If we refer to the definition of 'power' given by Salmond.[19] as ability conferredby law to alter legal relations', it is quite clear that 'power would manifest in the form of change in legal relations only when

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19. Salmond, op. cit, Supra, pp 229-30.

it is exercised. In other words, two things are clear. First, power would manifest only when it is exercised. Second its manifestation would be in the form of a change in legal relations. The portion of Art 368 which we have emphasised, namely, "the Constitution shall stand amended in accordance with the terms of the Bill," has both qualities i.e. the manifestation of power as well as the effect of a change in legal relations. Therefore, the result achieved by these words shows that they contain the power of amendments. Wanchoo J who delivered the principal dissenting judgment in the Golak Nath case, seems to have laid his hand on the truth when he observed ".....and we have no doubt that the words ' the Constitution shall stand amended in accordance with the terms of the Bill' to be found in Art 368 confer the power of amendment."[20] It is significant to note that Art V of the Constitution of the United States does not have any words like " Congress is empowered" or "power to amend" and Art V has nevertheless been interpreted as conferring power to amend the Constitution.

The Constitution of Australia provides in Sec 128 the mode of altering the Constitution. The marginal note to Sec 128 is "mode of altering the Constitution,", and the

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20. Wanchoo J., Golak Nath, A.I.R. 1967 S.C. at 1676.

High Court of Australia never doubted that Sec 128 grants power to amend the Constitution.

It is reasonable to assume that, since the constitution framers provided a procedure to amend the Constitution in Art 368, they intended to vest the Parliament with the power to amend the Constitution, especially when they devoted one Part i.e. Part XX to the subject of amendment itself. The mere fact that the amending procedure is to be used by Parliament postulates that Parliament is clothed with that power. If Art 368 is only procedural, an enquiry must be directed to the question of the source of the power to amend the Constitution. It is submitted that that power cannot lie elsewhere except in Art. 368. The majority in the Golak Nath case came to locate the power to amend under Part XI in Art 245, 246 and 248 read with List I item 97 in the Seventh Schedule i.e. under the residuary power of legislation vested in Parliament. This location of the amending power, it is submitted, seems to disturb the whole scheme of the Constitution and leads to absurd results.

(A) Art. 245 provides in its opening words that all the legislative powers provided in the Union list and Art. 248 are to be exercised by Parliament subject to the provisions of the Constitutions. In other words, the legislative powers under Art 245, 248 read with List I in the Seventh Schedule

are to be exercised in such a way as not to override any of the provisions of the Constitution. If the amending power is traced to item 97 of List I, it would have to exercised in conformity with the provisions of the Constitution but this would never be possible because the amending power by its nature must contradict the letter of the Constitution. Chief Justice Subha Rao relied upon a very subtle and specious argument to show that there would be no inconsistency at all. He observed:

> "Can it be said reasonably that a law amending an article is inconsistent with the article amended? If an 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 law is subject to the said Article. It may well be that in a given case such a limitation may also necessarily be implied. The limitation in Art. 245 is in respect of the power to make a law and not of the content of the law made within the scope of its power."[21]

It is submitted that inconsistency arises because words,

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21. Golak Nath V State of Punjab A.I.R. 1967 S.C. 1643 at 1658.

"subject to the provisions of this Constitution," control both the power to make a law and the content of the law . For instance, when a statute is struck down under Art 13 as being violative of fundamental right, it is the content of the law which is found defective and not the competence of the legislature to enact the law on the subject-matter. On the other hand, a law may be perfectly valid under Art 13 (2) but may be beyond the power of the legislature because of territorial restrictions or federal conflict or something else. In both cases, the law is bad because of the words "subject to the provisions of the Constitution," in Art. 245.

The phrase "subject to the provisions of this Constitution" itself clearly indicates that all powers in Art 245, and 248 read with List I item 97 should be of such a nature as to be exercised in conformity with the text of the Constitution. Alternatively those powers cannot include a power which is not in conformity with the text of the Constitution unless the text itself is altered. This point is conspicuously clear if we observe the exercise of all the powers enumerated in Part XI. For instance, supposing Parliament makes a law on any of the matters in List I, List III or under Art. 248 in such a way as to be inconsistent with the text of the Constitution, such a law would be undoubtedly invalid under Art 245, because it failed to pass the test

imposed by Art 245 i.e. compliance with the provisions of the Constitution. Then, will it not be unreasonable to place a power among the legislative powers which can never pass this test which all other legislative powers have to pass to attain validity? The barriers placed by Art. 245 upon the exercise of legislative powers admit of only those laws which can live without altering the terms of the Constitution and, if they require alteration in the terms of the Constitution to fall in line with them, they may come by another way but certainly not through Art 245; otherwise, the restriction imposed by Art. 245 is rendered meaningless. According to Prof G.C. Venkata Subbarao,if constituent power is supposed to lie in the residuary power in item 97 List I, the expression "subject to the provisions of this Constitution" is treated as a general prohibition as well as a proviso. Because in that case, it is a prohibition proper in respect of all the legislative entries other than entry 97 List I so that no law can be made which is in any way at variance with the provisions of the Constitution. But that part of entry 97 which takes in constituent power is regarded as meaning " item 97- includes Power of Constitutional Amendment, subject to the provisions of the Constitution, i.e., except where there is a prohibition in

the Constitution."[22] This also brings out clearly that constituent law by its very nature is different from ordinary law. Therefore, it is not correct to regard amendment as ordinary law having its root in legislative powers. As another writer has rightly observed, the residuary power can consist of legislative powers only and powers of a different kind cannot be thrust into it.[23] We are, therefore, not justified in depriving Art 368 of its potency by tracing the power to amend in the residuary power of legislation.

(B) If Art. 368 had been procedural only, logically it should have found a place in an article after article 109 which provides for legislative procedure. Its separate place and that too almost at the end of the Constitution shows unmistakably that it is neither mere procedure nor 'legislative' in character.

(C) It is a historical fact that in the beginning the constitution framers intended to vest the residuary power of legislation in States but they finally vested it in the Union. If the original intention had been carried out, it could not possibly have been argued that Parliament had no

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22. Subbarao G.C.V. The Mimansa Approach to the Indian Constitution, 1967, II S.C.J. at 85.

23. Vidwans, M.D. A.I.R. 1968, Journal Section, p 65.

role in the amending process particularly in view of the language in Art. 368. The mere fact that it came to be vested with the union should not mean that it includes constituent power.

(D) Since Lists I, II, and III were made sufficiently exhaustive, in case the framers intended to keep the constituent power in List I, there is no reason why they could not provide specifically for it when the subject of amendment was so clear to them that they allotted a part to it in the Constitution.

(E) Seervai[24] has pointed out that if the amending provisions in Art 304 of the Draft Constitution were to be compared with Art. 368, it becomes clear that the power to amend cannot be in the residuary power. Art 304 of the Draft granted a limited power of amendment also to the State legislatures but, later on, the idea was dropped. Nevertheless it shows that the State legislatures having no resort to the residuary power, power to amend the Constitution for the States must be deemed to have been provided in Art 368. In that case, one could never regard the residuary power as a source of amending power for the States.

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24. Seervai, H.M., op. cit., Supra, p 1096.

(F) It is of interest to note in this connection that the residuary power is exclusively of the Parliament whereas the amending process in Art 368 is not entirely exclusive to Parliament but is to be shared with at least half the State Legislatures in respect of the matters entrenched in the Proviso to Art. 368. Thus an exception would have to be read in Art. 248 that, in certain circumstances where the Constitution was to be amended, the residuary power is not exclusively with Parliament but is to be shared by Parliament and the State legislatures.

Moreover, if Art. 368 is merely procedural and the power of amendment lies in the residuary power of Parliament, the question arises : What is the State's source of the power to ratify an amendment? It is submitted that the only source of the power to ratify amendments is Art 368 because there is no such power given in the legislative powers of the States. Therefore, it is anomalous and absurd to say that Art. 368 is only procedural so far as the Parliament is concerned but it is procedural as well as substantive so far as the states are concerned .

(G) If the only purpose of shifting the amending power from Art 368 to the residuary power is to limit the power to amend in relation to Part III, it runs contrary to the intentions of the founding fathers who actually wanted to

give ample power to amend the Constitution to Parliament. The intention of the constitution makers regarding the power of amendment can be ascertained from the Constituent Assembly Debates. But the unfortunate thing is that the Supreme Court applies the rule of exclusion in regard to their admissibility in general and the speeches of the members in particular, whereas the reasons for the rule of exclusion had disappeared long ago.[25] As Kilgour traces the history of the rule against the use of legislative history beginning from 1669 upto the present time, one is convinced that the circumstances in which the rule originated were quite different. In those days the Parliamentary debates were not freely and officially published and hence they were neither authentic nor reliable; but in modern times authentic official records of Parliamentary debates are available. Moreover the fifteenth century doctrine of absolute literal authority of statute has undergone a change in favour of admitting supplementary aids to interpretation. Kilgour has marshalled a catena of decisions to the affect that the rule had been a counsel of caution and never a cannon of construction. It seems that there is a strong case for admitting legislative history in appropriate cases

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25. Kilgour, D.G., The Rule Against the use of Legislative History: "Canon of Construction or Counsel of Caution? 30 can. Bar. Rev. p 769.

Merrillat: The Sound Proof Room: A matter of interpretation, 9 JILI (1967), p 521.

and for making discriminating use of it as one of the supplementary aids in interpretation.[26]

The speaches of the members of the Constituent Assembly bear clear testimony to the effect that they intended to grant power to amend the Constitution to Parliament. While speaking about the amending procedure which was eventually incorporated in Art. 368, Dr Ambedkar, the Chairman of the Drafting Committee, went on record to say:

> "The Draft Constitution has eliminated the elaborate and difficult procedures such as a decision by a convention or a referendum. The powers of amendment are left with the Legislatures Central and Provincial. It is only for amendments of specific matters-- and they are only a few-- that the ratification of the state Legislature is required. All other articles of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of the members of each House present and voting and majority of the total membership of each House. It is difficult to conceive a simpler method of amending the Constitution."[27]

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26. Alexandrowicz, H.C. op. cit., Supra, p 230.
27. Dr. Ambedkar, C A D VII , p 43.

As a matter of fact, the Constituent Assembly never doubted that it was granting power to amend under Art 368.

> "In an important sense, their concern for the procedure of participation by the federating units in the federal complex of the provisions was also an expression of their preoccupation with the locus of the amending power. The procedure for amendment would represent allocations of decision- making power with regard to constitutional changes between the Union and federating units."[28]

(H) One of the absurd and obnoxious results of looking for the amending power under the residuary power of the Union is that the ordinance-making power of the President under Art 123 is vastly extended. The extent of the ordinance-making power is co-extensive with the Legislative power of Parliament. An ordinance is an ordinary law and must conform with the provisions of the Constitution. Art 13(3) (a) defines "law" as used therein as including "ordinance" along with other subordinate legislation. Therefore, an ordinance must not violate the Part III rights. The results of the holding in the Golak Nath case that the power to amend lies

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28. Baxi, Upendra., "The little Done, the Vast Undone." 9 J.I.L.I. 1967, 373- foot note.

in item 97 List I is that the President comes to avail of that power while exercising his ordinance-making power. One writer has highlighted this drastic result :

> "If this legislative power of Parliament includes the power of the constitutional amendment, then pro tanto, the Presidential ordinance making power is enlarged. That means that making use of the ordinance-making power the President can (when Parliament is not in session) create a new Constitution without violating th the present Constitution. The new constitution may be wholly unlike our present democratic constitution. It may be purely of totalitarian character."[29]

This result alone is a sufficient corrective to the erroneous view that the residuary power takes in constituent power. In fact, the whole scheme of the Constitution would be totally disturbed if the amending power is misplaced under the residuary power. Then the Constitution can be amended by the President without resorting to the procedure provided in Art. 368 whereas the fact is that the President's legislative power is not an act of supreme legislation because it can be replaced by Parliament and if it is to continue it requires ratification by Parliament.[30] Then, is

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29. Subbarao, G.C.V.: Mimansa Interpretation, 1967, II S.C.J. at p 99.

30. Misra, R.N., op. cit., Supra, p 103.

it not illogical and unreasonable that the President's subordinate legislative power can do what the Parliament's supreme legislative power cannot achieve. Is it right to hold that amendment of the federal structure or entrenched clauses can be done by the President all alone whereas the Parliament cannot do it unless and until it seeks the cooperation of at least half the State Legislatures?

Is it not against the spirit and letter of the Constitution that it should be amended by the President in this fashion? The essence of a special majority and ratification in respect of the entrenched provisions provided in Art. 368 becomes meaningless. This again assures us that in the Constitution of India legislative and constituent powers have been separately vested in the Parliament. The ordinance-making power of the President is co-extensive only with the legislative power of the Parliament. The constituent power of the Parliament lies in Art. 368 and the President is not empowered to take it in his ordinance-making power under Art 123. This inevitably leads us to the conclusion that the right source of the power to amend the constitution is Art 368 itself and certainly not the residuary power in item 97 List I read with Art 248.

Are there express or implied limitations on the Amending Power?

After considering the locus of the amending power, it is

necessary to study the limitations, if any, on that power. Limitations can be of two types, either express or by implication. It is proposed here to deal with express limitations first. To obtain a clear view of express limitations, it is essential to study them as they occur in the constitutions of other countries. Such a study would reveal their significance and utility as well as the complex and intractable problems which they give birth to in the growth of constitutional law. In this respect, we would consider the constitutions of the United States, Australia, and Canada in particular.

Express Limitations:- Constitution makers sometimes feel it imperative to impose certain limitations on the power to amend and, therefore, they expressly lay down them in the constitution. For instance, the makers of the United States Constitution provided in Art V that no amendment made prior to 1808 would affect the first and fourth clause in the ninth section of the first Article and that no State shall be deprived of its equal suffrage in the Senate without its consent. The former restrictions are now unimportant, but the limitation regarding a permanent prohibition against any amendment whereby a state is deprived of its equal suffrage in the Senate without its consent is still existing. It is needless to add that this restriction is not absolute.

If any amendment eliminating representation in the Senate were ratified by every State, it would be perfectly valid because the only requirement of a State's consent is satisfied in this way. Alternatively, this clause itself could be repealed by an amendment ratified by all the States. Therefore, in practice this clause turns out to be "a restriction on the method rather than the scope of amendment."[31]

But can this restriction be done away with in any manner short of unanimity? There is a view[32] that the restriction can be removed in two stages: first repealing the proviso in Art V and, second, by the amendment changing representation in the Senate. But this seems to be fallacious because the repeal of the proviso by the procedure given in Art V would be a violation of the terms of the proviso itself; the proviso requires unanimity of all the states. Rottschaeffer thought that had these limitations been permanent, they might have been ignored on the ground that these make the constitution unworkable.[33] It seems that, short

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31. Orfield, L.B., op. cit., p 84.

32. Prof William Starr Myers-cited by Edward Dumbauld in the Constitution of the United States, 1964, p 436.

33. Rottschaefer , A Handbook of American Constitutional Law 1939, pp 9-10.

of unanimity, there is no legal method by which the restriction could be romoved. The only method left in such a case is by way of revolution such as was adopted by the people in substituting the Articles of Confederation, which required unanimous consent of the states for the purposes of amendment,[34] by the present Constitution of 1787. In view of the fact that logic in such a case provides no method other than revolution, logic itself should yield to convenience and the attempt to limit the power of amendment be held as an exercise in futility, though this view itself might be regarded as nothing but revolutionary because[35] " an amendment, unless legal, is achieved by revolution." But one type of revolution can be chosen in preference to another. Prof. Rottschaefer observed on this point:

> "there has been found no case in which the power to amend has been employed to directly or indirectly modify a constitutional provision expressly excepted from that power. The issues that such an attempt would raise could not be settled by any reasoning derived by logical processes from prevailing conceptions of sovereignty, and those based on considerations of convenience and expediency point to the solution that such attempts to limit the power of amendment should be held futile. The necessities of orderly government do not require that one generation should

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34. Art XIII of the Articles of Confederation.
35. Hidayatullah J. in Golak Nath, A.I.R. 1967 S.C. at 1697.

be permitted to permanently fetter all future generations."[36]

Be it as it may, this is a situation where the bounds of law end and those of extra-legal considerations begin. Within the boundary of law, the position is clear that an amendment to be valid must be achieved by observing the conditions laid down by the constitution itself.

Now let us study the express limitations on the amending power in Australia. Sec 128 of the Australian Constitution Act 1900 provides that no alteration diminishing the proportionate representation of any state in either House of the Parliament, or the minimum number of representatives of a state in the House, or increasing, diminishing or otherwise altering the limits of the state, or in any manner affecting the provisions of the constitution in relation thereto, shall become law unless the majority of the electors voting in that state approve the proposed law. It is a matter of controversy whether an amendment of Sec 128 itself omitting this paragraph, would be valid. Dr. Jethrow Brown[37] held the view that such amendment was logically invalid. Mitchell[38] joins with him on the ground that the amendment would be

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36. Rottschaefer, H., A Handbook of American Constitutional Law, 1939, pp 9-10.
37. Brown , J., Austinian Theory of Law, 1920, p 162.
38. Mitchell, E.F., What Every Australian Ought to know, p 79

contrary to the "political compact" . But Dr. Wynes holds that the amendment of this limitation in the manner provided in Sec 128 itself is valid.[39] His reasons for the view are: First, the power of amendment extends to alteration of "this constitution" which includes Sec 128 itself. Therefore, there is nothing wrong with an amendment, if carried through by the procedure of Sec 128, repealing the last limb of Sec 128. There is considerable force in this argument. Secondly, he points out that in the Constitution of the United States which also has a similar limitation in Art V, the limitation begins with the words "provided", indicating an exception from the previous grant of power whereas in the Australian constitution there is no such qualification. The argument based upon the "political compact" was met by saying that the compact came into being after full discussion of Sec 128 itself. It is submitted that Dr. Wynes's view seems to be correct because the limitation in the last para of Sec 128 is a limitation on the mode of amendment and not on the power of amendment . In other words, it is not an absolute limitation and what has been provided in the limitation is itself subject to amendment upon the fulfilment of the condition specifically mentioned in the last para of

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39. Dr. Wynes, Legislative, Executive and Judicial Powers in Australia, 1962, p 695.

Sec 128. If Sec 128 itself had provided that the last para would not be a subject-matter of amendment, then, of course there was reason to hold a contrary view. As the provision stands, a state is entitled to refuse to accept a law changing the number of its representatives in the House of Representatives or changing the limits of the state unless and until the last para of Sec 128 is repealed. Once the para is repealed, it would become a dead letter and thereafter a law bringing the required changes can be passed. It is of interest to note in this connection that on 27th May, 1967 the Australian government held a referendum on two issues namely, to change the method provided in the constitution for determining the size of the House of Representatives i.e. Section 24 of the constitution, so that the number of the representatives be increased; and secondly, to change the constitution suitably to assist the aborigines, at the instance of the federal government. The Government argued for the first change on the ground that the work of the House was increasing day by day and the representatives were already over-worked. More members would release the pressure of the work. In spite of the fact that the government as well as the opposition party in the House were in favour of the change sought and only seven Senators voted against it in the Senate, the electors disapproved of the first

proposal in five states, displaying their old prejudice against the politicians. However, they said'yes' to the aborigines proposal.[40]

The Canadian constitution furnishes a rare example of express limitations. The B.N.A. Act 1867 had no provision for its amendment save to the limited extent provided in Sec 92(1) in which Provincial Legislatures were empowered to alter the constitution of the Province except the office of Lt- Governor. It was only in 1949 that the Parliament of the United Kingdom gave certain limited authority to amend the constitution excepting the distribution of legislative power and many other matters mentioned in Sec 91 (1) . Sec 91(1) provides express limitation on the amending power to be exercised by the Parliament. Theoretically, it is the Imperial Parliament which has the power to amend the B.N.A. Act but in practice that Parliament never exercised the power of amendment suo moto but only on the suggestion of the Dominion Parliament of Canada. The real controversy regarding the amending procedure is whether the Dominion Parliament is bound to obtain unanimous consent of the provinces before requesting the Parliament of the United Kingdom to effect a particular amendment to the B.N.A Act.

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40. Miller, J.D.B.:"The 1967 Australian Referendum," The Parliamentarian , 1968, IL No 2, p 59.

Of the amendments so far effected important amendments in regard to the distribution of power were achieved by unanimous consent of the Provinces e.g. Section 94A. But there are other amedments to the Act in which provinces were not consulted at all, not to speak of securing their unanimous consent.[41] The Canadians have been making serious efforts to evolve a domestic amending procedure since 1927 and these efforts resulted in a formula known as the Fulton-Favreau formula[42] which was approved by all the provinces except Quebec and hence failed to be ripe for the approval of the British Parliament. The formula is discussed elsewhere in this work. It is submitted here that, so far as express limitations on the amending power are concerned, the formula does not improve the existing position.[43] Bora Laskin made a "brutal" but "true" appraisal of it that "the agreement was reached on the basis that no one need agree."[44]

Some of the modern constitutions also provide for express limitation. To name a few, the Constitution of the Fifth

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41. The list of such amendments are given by Laskin. B. in Canadian Constitutional Law, pp 33-34.
42. The Draft Statute given in Appendix 2, ibid.
43. Alexander: A Constitutional Strait Jacket for Canada, 1965 43, Can. Bar. Rev, p. 262.
44. Laskin, Bora, Canadian Constitutional Law, 1966, p 37.

French Republic, 1958 provides in Art 89 that the republican form of government is not subject to revision and also that the amending procedure may not be initiated or pursued when the integrity of the territory is under attack.[45] Almost similar provisions occur in the constitution of Dahomey Jan, 1964,[46] in the Constitution of Gabon Feb, 1961,[47] in the constitution of the Republic of Guinea, 1958,[48] in the constitution of the Ivory Coast, 1960-63,[49] the constitution of Togo, May 5, 1963,[50] and the constitution of Upper Volta, Nov. 1960.[51] The constitution of the Federal Republic of Germany, 1949 provides that an amendment affecting the division of the Federation into Laender, the participation in

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45. Art. 79.

46. Art 99.

47. Art 69.

48. Art 50.

49. Art 73.

50. Art 85.

51. Art 73.

principle of the Laender in Legislation, or the basic principles laid down in Art 1 and 20 is inadmissible.

From the study of express limitations, two things are outstandingly clear. First, that express limitations can be of two kinds , either absolute or qualified. Secondly, absolute limitations pose more formidable difficulties in the exercise of the amending power than qualified ones. Logically, there is no other way than revolution to do away with the absolute limitations. However, to avoid revolution, the judiciary may disregard them by holding them as making the constitution unworkable.[52] Theoretically, an attack on their basic assumption can be launched. Obviously, absolute limitations stem from the belief of constitution makers in the superiority of their wisdom as compared with that of the coming generations. This assumption is vulnerable in that a generation has no right or duty to bind the succeeding generations because the earth belongs in usufruct to all the living , and the dead have neither powers nor rights over it.

As regards qualified limitations, amending power must invariably be exercised while observing the conditions. To

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52. Rottschaefer: op. cit. supra, pp 9-10.

exercise legislative or constituent power validly, the conditions for the exercise of such powers must be satisfied, otherwise the measure fails to attain the required validity or the force of law. The American Jurisprudence states:" An attempt by the majority to change the fundamental law in violation of self-imposed restrictions is unconstitutional and revolutionary."[53] There is a number of cases decided on this point. In Bribery Commr. V Ranasinghe[54] a legislative measure was passed by the Ceylon Parliament without observing the conditions required to be observed in passing the Act and the Privy Council rightly declared the Act to be invalid. Lord Pearce observed:

"....a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law."[55]

Trethowan's case[56] is another authority for this view. In 1929, the New South Wales Legislature consisting of a

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53. V. II Sec 25, pp 629-30.

54. 1965, A.C. 172.

55. 1965, A.C. 172(197).

56. A. G. for New South Wales V Trethowan, 1932, A.C. 526.

legislative assembly and a legislative council passed a law to the effect that the Upper House of New South Wales might not be abolished except by a Bill which required approval of the electors at a referendum before being presented to the governor for assent. The Parliament had power to pass such a law under the N.S.W. Constitution Act 1902 and also was assisted by Sec 5 of the Colonial Laws Validity Act 1865. In 1930 a new Labour Government came into power and it intended to repeal by ordinary procedure i.e. without holding a referendum, the law passed by the previous government, incorporated in the constitution as Sec 7, and also to abolish the legislative council. Trethowan and some members of the legislative council sought a declaration from the Supreme Court of New South Wales to the effect that the proposed action was illegal, which was granted. The High Court confirmed the decision by a majority of four against two and the Privy Council confirmed the majority.

Trethowan is an authoritative decision establishing the view that the conditions of law-making must be observed to breathe validity into the law and even the concept of sovereignty of Parliament is not of any avail to avoid such conditions. Sir Owen Dixon, who was one of the judges

of the Australian High Court in the Trethowan case, observed later as follows:

> "The law existing for the time being is supreme when it prescribes the conditions which must be fulfilled to make a law. But on the question what may be done by a law so made, Parliament is supreme over the law."[57]

Another case which provoked much controversy and was directly on the point was Harris Vs Minister of the Interior[58] The case was decided by the Appellate Division of the Supreme Court of the Union of South Africa invalidating an Act passed by the Parliament called the Separate Representation of Voters Act, 1951 which provides separate representation of "non-European" voters in the Province of the Cape of Good Hope. This Act was passed by a majority of that House and not by a specific majority required by Sec 35 and Sec 152 of the South Africa Act 1909---the constitution of the union of South Africa. The arguments from the government proceeded on three main points:

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57. Sir, Dixon, O., The Law and The Constitution, 1935, L.Q.R., p 590(603).

58. 1952. T.L.R. 1245= 1952 2 S.A.LR. 428.

Firstly, that the Statute of Westminister 1931 by Sec 2(2) has given wider power to the Parliament and impliedly amended the South Africa Act 1909, so much so that Sec 35 and Sec 152 pro tanto stand amended. The argument was rejected on the ground that Sec 2(2) of the Statute of Westminister 1931 does not amount to repealing Sec 35 or Sec 152 of the Constitution Act 1909; the Statute of Westminister immunizes the Parliament from the effects of laws passed by the Mother Parliament but it leaves Sec 35 and Sec 152 unchanged. Secondly, the government relied on the Status of the Union Act, 1934 which declares the Parliament to be the sovereign legislative power in and over the union. The Court refused to accept the point that the legislative powers of the union were not limited. Thirdly, the Supreme Court refused to follow an earlier case[59] decided by it, in which an Act was declared valid by the Supreme Court but the judges expressed their opinion in a wider language than warranted by the facts of the case on the legal points involved in it. The powers of Parliament in that case were described as "limitless" and "sovereign".

The Union Parliament, to overcome the result produced

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59. N Dlwana V Hofmeyr , 1937, A.D. 229.

by the judgment, enacted a law constituting a High Court of the Parliament whose purpose was to review the judgment of the Supreme Court invaliding any Parliament Act, at the instance of a Minister of State, by lodging an application to that effect. The members of the High Court of Parliament were all the senators and members of the House of Assembly. In Harris Vs Minister of Interior-(II)[60] this Act was also held untra-vires by the Supreme Court.

Position In India:

In answer to the question whether there are any express limitations on the amending power under Art. 368, it is submitted that the terms of that Article clearly show that there are none except that the prescribed procedure must be followed. To pass an amendment to the Constitution validly, the Parliament must observe the majority rule required by Art. 368 and, in case of entrenched articles, the ratification of at least half the State legislatures must be obtained. Thereafter Presidential assent must be given.

It is of interest to note that the Draft Constitution had Art 305 which actually would have laid an express limitation to the amendatory power in Art 368. Art 305 of the

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1952(4) S.A. 769.

Draft Constitution ran as follows:

> "Notwithstanding any thing contained in article 304 (now Art 368) of this constitution, the provisions of this constitution relating to the reservation of seats for the Muslims, the Scheduled Castes, the Scheduled Tribes or the Indian Christians either in Parliament or in the Legislature of any state for the time specified in Part I of the First Schedule shall not be amended during a period of ten years from the commencement of this constitution and shall cease to have effect on the expiration of that period unless continued in operation by an amendment of the constitution."

This draft article was dropped, but it indicates unmitakably that the constitution framers were well aware that the amendatory power could limited by providing an express provision to that effect. Since they thought it better to drop Art. 305 of the Draft Constitution, Art 368 became free from any express limitations or exceptions. As the article stands, it requires the observance of the procedure and there exists no other limitation on the exercise of the amendatory power.

Are there any implied limitations to the amendatory Power?

Implied limitations arise because of some provisions of the Constitution which call for such limitations; they are the products of a dialectical approach and arise through the mode of interpretation. Sometimes, a particular provision of the constitution is pointed out as imposing a limitation to the amending power, by implication or by pushing logical conclusions to the extreme to show that the consequences justify the construction in favour of imposing a limitation. For instance, in the National Prohibition[61] cases, implied limitations were sought to be imposed on the power of amendment in Art V of the Constitution of the United States. It was urged on behalf of the petitioners that the amending power is only a precautionary safeguard to correct minor errors. On the other hand, if ample power is construed in Art V, it would bring about a constitutional revolution, converting the sovereignty of the people into a sovereignty of officials. An ingenious argument was made on the basis of "This Constitution," occuring in Art V, that this phrase shows that the constitution , as it is, permits of minor amendments. The court however said :

"This constitution" is not a code of transient laws

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61. 253 U.S. 350.

> but a frame work of government and an embodiment of fundamental principles. By an amendment, the identity or purpose of the instrument is not to be changed; its defects may be cured, but 'this constitution' must remain."[62]

Pointing out the consequences of an unlimited power of amendment, it was urged that the limited government would have the power to do away with its own limitations.[63] But the Supreme Court rejected all these arguments.

Similarly, constitutional lawyers in Australia contend that the covering sections[64] of the Constitution Act 1900 are outside the ambit of Sec 128 because they are not a part of the constitution and Sec 128 relates to "this constitution". Proceeding further, it is urged, any amendment inconsistent with the preamble of the Act, referring to the sections which refer to "indisolluble" or "Federal" character, would be invalid. It is argued that the covering clauses can be amended only by the Imperial Parliament which enacted the Statute.[65]

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62. ibid, pp 355-357.
63. ibid, 357.
64. The Preamble and the first nine sections of the Constitution/are regarded as the covering sections.
65. Wynes. W.A., op. cit., Supra, 696.

It is submitted here that the preamble is only a recital of the intention which the Act seeks to effect. If the effective part is subject to amendment under Sec 128, it is illogical to hold that the recital part i.e. the preamble is beyond the reach of the power to amend. As compared with the effective part of the constitution, the preamble is definitely less important. In statutory interpretation, the preamble is generally excluded from consideration. It is not reasonable to limit the power of amendment by relying on the preamble to the Constitution.

In the Australian Constitution Act 1900, Sec 105A was added by amending the Act. This Section says that a financial agreement made by the Commonwealth with the States would be binding, "notwithstanding anything contained in this constitution or the constitutions of the several States or in any law of the parliament of the commonwealth or of any state." Since this section uses the words "notwithstanding anything contained in this section," it is argued[66] that this section is not amendable under Section 128 and any amendment which is itself, or which authorizes any legislation which is, inconsistent with any such agreement is impossible unless all the parties to any such agreement have given

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66. Mitchell, E., op. cit., Supra

their consent. Dr. Wynes opines that Sec 105A is amendable and his view seems to be correct. Apart from the fact that when Sec 105A was put to pupular vote, attention was not directed to its fifth clause to the effect that it was to be exempted from alteration under Sec 128[67] or to the fact that Sec 128 occurs later in sequence than Sec 105A and a later provision overrides an earlier one, it is illogical that Sec 105A,which was brought into being by virtue of Sec 128, should restrict Sec 128 and control the instrument.[68] The financial agreement---the subject matter of Sec 105A--- should not impose restrictions unpon the duly constituted means of amending the constitution. It is true that any amendment of the constitution which has the effect of destroying the bases of financial agreements might bring those agreements to an end, " but it seems an inversion of reason to suppose that the nature, or extent, or mutability of the constitutional source of legislative power should be in any way be controlled by some action taken pursuant to that power."[69] On the other hand, if the amending power in

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67. Canaway, A.P., Sec 105A of the Commonwealth Constitution, 12, A.L.J. 325, (1939).

68. R.G.M. 5 A.L.J. (1931-32), pp 357-58.

69. Ibid, p 358.

Sec 128 was intended to be curtailed, it was necessary that Sec 128 itself should have been altered when Sec 105A was inserted in the constitution. Since Sec 128 was not touched at all, it is unreasonable to suppose that Sec 105A by implication has reduced the power of amendment provided in Sec 128.

Alleged Implied Limitation to the Amendatory Power In The Constitution Of India.

Though the Indian Supreme Court has not yet decided the question whether there are any implied limitations on the Constitutional amending power, several judges have indicated sympathy with this argument. For instance, Subba Rao C.J., delivering the main majority judgment in the Golak Nath[70] case characterised the argument that Parliament, while exercising the power of amendment, cannot destroy the structure of the Constitution but it can only modify the provisions, as having "considerable force". As the question was not necessary for the decision of the case, he left it open and suggested that "the question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution."[71]

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70. A.I.R. 1967 S.C. 1643 at 1664.

71. Ibid, 1664.

Similarly Hidayatullah J, observed as:

> "It is the duty of this Court to find the limits which the Constitution has set on the amendatory power and to enforce those limits. This is what I have attempted to do in this judgment."[72]

Let us examine the arguments and reasons advanced for justifying implied limitations to Art 368.

I Meaning of Amendment: One of the easiest ways to raise implied exceptions to the amendatory power is to narrow down the meaning of "amendment". It is said that the constituent power and the amending power are of the same character but the latter is derivative and limited. Mortati held this view:

> "It follows that while constituent power is exhausted in the very act of creating the constitution, the power to amend the constitution develops at intermittent periods as gradually the need for adaptation manifests itself."[73]

Similar is the dictum in Livermore v. E.G. Waite,[74]

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72. Ibid. 1718.

73. Mortati Concetto Limiti, Procediment della Revisione Constituzionale, Studi di Dritto Constituzional, 1952, p 379.

74. 102 Cal 113 : 25 L R A 312.

> "On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed."

The corollary to this proposition is that amendment is to be done for modification, for improvement, and for minor changes here and there. Alternatively, the basic structure (whatever that may mean) is not amenable to amendment. But this narrow approach was rejected in the United States.[75] In Golak Nath, the main majority judgment, left it open[76] but Hidayatullah rejected it.[77] Wanchoo J rightly pointed out the danger inherent in such an approach:

> "To say that amendment in law means a change which results in improvement would make amendments impossible, for what is improvement of an existing law is a matter of opinion and what, for example, the Legislature may consider an improvement may not be so considered by others."[78]

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75. National Prohibition Cases (1919) 253 Us 350.

76. Per Subba Rao C.J. A.I.R. 1967 S.C. at 1664.

77. Ibid, at 1696.

78. Ibid at 1680.

If amendment is taken to mean as capable of introducing slight changes only, and not changing the so-called basic features,

> "The result would be that every amendment made in the constitution would provide a harvest of legal wrangles so much so that parliament may never know what provisions can be amended and what cannot."[79]

Moreover, Art 368 happens to include the word "change" indicating thereby that "amendment" and "change" were intended to be synonymous.

Apart from the difficulties in characterising a provision as "basic", it is not easy to distinguish a minor change from a major one. This point can be illustrated from the constitutional law of Switzerland which makes a distinction between total revision and partial revision. The distinction is not scientific and precise. Generally, a total revision is understood as overhauling the whole constitution whereas a partial revision is limited to certain articles specified therein. But at what point does a revision cease to be partial and amount to total? A deputy of the council of states rightly pointed out:

> "Suppose that it was proposed to suppress the council of states, or to vest executive power in the hands

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79. Ibid. at 1681.

> of a President elected for life, no one would call this a partial revision, but an important fundamental change, although only one or two articles would be affected by it. It is therefore impossible to give an exact definition of a partial revision, or to draw any precise distinction between a total and a partial revision."[80]

Similarly, Borgeaud held that the said distinction is not a distinction of law but of fact and an amendment of one article may amount to a total revision.

> "This or that modification of a single fundamental article may be more important than an entire series of minor changes, covering a great number of articles, and which might for this reason be qualified as a total revision."[81]

It is submitted that neither the dictionary meaning of "amendment" nor its general acceptance admits of a narrow connotation. The Oxford English Dictionary defines the word

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80. Session of the Council of States, 17th December 1891; Quoted by Deploig, S. The Referendum in Switzerland, 1898, pp 126-127.

81. Borgeaud, C. Adoption and Amendment of Constitutions in Europe and America, 1895, at p 321.

"amend" as "to make professed improvements (in a measure before parliament); formerly to alter in detail, though it may be to alter its principle so as to thwart it." It is obvious that the word takes in even a contrary purpose as well.

"The term 'amendment' connotes a definite and formal process of constitutional change."[82] The proponents of implied limitations in the Golak Nath[83] case invited the attention of the court to the fact that the word "amend" is followed by the words "by way of addition, variance or repeal" in the Sixth Schedule to the Constitution and they argued that, since these words have been omitted in Art 368, therefore, "amendment" should be understood to serve only a narrow purpose of making minor changes.

It is clear that the founding fathers had before them the main written constitutions of the world viz, the constitutions of the United States, Australia, Canada, Ireland, South Africa, Germany and, especially in regard to the amendment of the constitution, their attention was definitely fixed on them.[84] It can, therefore, be safely assumed that they used the word "amendment" in the same sense as it had been used in those constitutions. Since none of them gave a narrow meaning to

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82. Encyclopaedia of the Social Sciences vol.II, Macmillan, 1963, p 21.

83. AIR 1967 S.C. at 1680.

84. Rau, B.N. Table of Amending Process (Constitutional Precedents 1st Series).

"amendment", we are not justified in attributing a narrow purpose to "amendment" as used in Art 368.

Sathe thinks that in the Constitution of India the power of amendment should be limited by the enduring values such as liberty, justice and equality enshrined in the constitution but he admits that such a limitation is only a rule of political morality.[85] In other words it is not a legal argument to put limitation on the amendatory power.

Another way to curtail the meaning of the term "amendment" is found under the pretext of "intentions". It is said that anything which destroys the intention expressed in the constitution cannot be a valid amendment.[86] It is submitted that an amendment to a constitution may be necessary even to change the original intentions of the constitution makers, which may not suit a generation which is to work with the constitution. Therefore, to hold that an amendment not falling in line with the original intentions of the founding fathers is not valid, does not seem to be a sound view.

In addition, to raise implied limitations to the amending power certainly creates rigidity in the document which, if it crosses a desirable point, blocks the growth of the constitution

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85. Sathe, S.P. Fundamental Rights and Amendment of the Constitution, 1968, p 51.

86. Subramania, C.S. Express or Implied Limitation on the Amending Power under Art 368, S.C.J. vol.XVIII, 1955, p 101.

and of the people working under it and is, therefore, not desirable. Orfield rightly observed:

> "Yet it would seem extremely unfortunate to impose any limitations on content, both because any one generation cannot foresee the needs of another and because such restrictions make a revolution necessary to accomplish the change which is forbidden."[87]

(2) "This Constitution"

The argument based upon "this Constitution" is a double-edged weapon and can be used in favour of both flexibility as well as rigidity. It is interesting to note how it was used to gain flexibility in the constitution of Portugal, 1822. In 1826 Dom Pedro reproduced almost word for word the provisions of the Constitution of 1822. The amending process in the 1822 constitution was very cumbersome and one of the devices to overcome it was to define the "constitution" in this way:

> "144. Those only are constitutional acts which determine either the respective limits and attributes of the political authorities or the political or individual rights of the citizens. Every act, not constitutional may be altered by ordinary legislatures, without the above-mentioned formalities."[88]

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87. Orfield, op.cit. supra, 1939, p 205.

88. Quoted by Borgeaud, op.cit. supra, p 93.

It is needless to add that this definition made many articles amenable to amendment by ordinary legislation and saved them from the rigours of the amending process. Thus a fair amount of flexibility was gained.

An ingenious argument is often advanced to show that Art 368 itself admits of exceptions to it. In Sajjan Singh[89] Hidayatullah J. observed that "this constitution" occurring in Art 368 does not mean each individual article wherever found and whatever its language and spirit. The main support for this argument is found in the fact that the constitution itself provides in various articles[90] that certain changes can be effected by following ordinary law-making procedure i.e. by simple majority, and these articles also specifically provide that their amendment in this way is not an amendment for the purpose of Art 368.

If sufficient attention is paid to the phraseology of such articles, it is evident that these articles themselves are not alterable by a simple majority : What of them is alterable by a simple majority is their content and not the power they confer on the parliament to amend the content by a bare majority. There is a distinction between power to make a law and the content

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89. Sajjan Singh (1965) S.C.J. 393 : AIR 1965 S.C. 845 at 862.

90. Art 4, 169, Sch.V para.7 and Sch.VI para.21.
These Articles have been discussed in Chapter V, supra p 152.

of law. The point can be further explained by pointing out that each of these articles provides for certain matters, its subject matter, and can be termed as its contents. For instance Art 4 provides for a law altering the subject matter of Art 2 and Art 3 i.e. admission or establishment of new states and formation of new states, alteration of areas, boundaries or names of existing states. The Parliament is empowered to make an amendment to these matters by a bare majority but if the parliament intends to alter Art 2 or 3 or even Art 4, it is not a bare majority which is sufficient but a majority of the entire membership of each House and a two-thirds majority of each House present and voting as required by the main limb of Art 368.

Similarly, Art 169 empowers Parliament by a bare majority, to abolish the legislative council of a State or to create such a council in a State not having one. An amendment Bill abolishing a council of state would amend Art 168 (1) (a) to the limited extent permissible under Art 169 (2) i.e. inserting or omitting the name of a state. In other words, such an amending Bill cannot amend clauses (1), (1) (b), and (2) of Art 168 and if Parliament wants to amend the aforesaid provisions, it will have to proceed under Art 368.

Moreover, each of the aforesaid provisions has a sub-clause which provides that the law so made "shall not be deemed to be an amendment of this constitution for the purposes of Art 368."

As Seervai has pointed out, the word "deemed" does not mean that though the Constitution has been amended in fact, it is to be considered not to have been amended. Its only import is to exclude the special machinery provided for the amendment in Art.368, as is clear from the words "for the purposes of Art 368."[91]

The basic idea underlying these provisions seems to be that the Constitution should be saved from being amended time and again in the manner laid down in Art 368 in respect of the minor matters. But does this mean that these articles are to be regarded as exceptions to Art 368? The answer is certainly in the negative. If Parliament ever intends to repeal any of the above said provisions or amend them in regard to the power they confer, Art 368 would have to be complied with. Therefore, the inescapable conclusion is that far from being exceptions to Art 368, all these articles are subject to Art 368, though Parliament is competent to amend the matters referred to under them by ordinary procedure of law-making. Therefore, the argument that the words "this Constitution" in Art 368 do not mean each and every article of the Constitution, is without any substance.

Justice Hidayatullah observed that Art 35 which begins with a non-obstante clause: "Notwithstanding anything in this

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91. Seervai, op.cit. supra p 1092.

constitution, (a) Parliament shall have, and the legislature of a state shall not have, power to make laws...." excluded Art 368.[92] He compared Art 35 with S.105A of the Australian Constitution and, since in the New South Wales v. The Commonwealth case[93] the Australian High Court viewed S.105A as an exception to S.128, so he considered that Art 35 excluded Art 368. There is a sharp division of opinion among the Australian constitution lawyers on the question of the amendability of S.105A under S.128.[94] As a matter of fact, there is nothing comparable in Art 35 of the Indian Constitution to S.105A of the Australian Constitution except the non-obstante clause. Unless one is inclined "to play a grammarian's role"[95] to reach the result by a mechanical jurisprudence,[96] no analogy can be drawn between these two constitutional provisions. The main reason for regarding S.105A of the Australian Constitution as being outside the scope of S.128 is the binding nature of the financial agreement made under S.105A.

"The imperious character of the language employed in this

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92. AIR 1967 S.C. 1643 at 1718.

93. New South Wales v. The Commonwealth 46 C.L.R. 155.

94. Canaway, A.P. op.cit. p 326.
Wynes, W.A. op.cit. p 698.

95. AIR 1967 S.C. 1643 at 1693.

96. Ibid.

> sub-section of the constitution, in my opinion, renders certain the paramount force of any Financial Agreement to which the subsection applies."[97]

The Learned Judge further observed:

> "Section 105A (5) is not a dead letter: it pulsates with the vitality of the constitution and imbues with the force of a fundamental law any agreement to which it applies."[98]

The non-obstante clause in Art 35 was introduced in order to give the power of legislation in respect of the matters mentioned therein to the Union Parliament exclusively, so as to maintain uniformity in the laws restricting the fundamental rights. But for the non-obstante clause, Parliament would have had no power to legislate with respect to the police force because such legislation falls under Entry 2 of List II in the Seventh Schedule. The subject-matter of Art 35 itself makes it clear that the non-obstante clause was not intended to safeguard the article from being amended. On the other hand, when Art 35 empowers Parliament to make law to give effect to the fundamental rights, how can this conferment of the power to make law be understood as delimiting the power of amendment in Art 368? Far from putting any restraint on the Parliament, from which alone any implied limitation could be derived by any process of

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97. McTiernan, J. in New South Wales v. The Commonwealth 46 C.L.R. 155 at 228.

98. Ibid. at 228-229.

reasoning, Art 35 strengthens the hands of the Parliament in making the fundamental rights effective.

(3) Obligation to uphold the Constitution

An implied limitation to the amending power in Art 368 is conceived on the basis of the provision requiring every member of Parliament to take an oath or make an affirmation to the effect that he will bear true faith and allegiance to the Constitution.[99] In other words, the duty of allegiance to the Constitution seems to clash with the power to make an amendment to it.[100] Here a relevant question to ask is whether the duty of allegiance is to a static or a dynamic constitution. If the duty is to a constitution which is static, one can make out a case for an implied limitation against amending it. But in reality, no constitution can be static; it is always changing, though the changes may be invisible and imperceptible. Customs, usages and judicial interpretation go on effecting changes in a constitution.[101] Though changes brought out by these agencies are informal, nevertheless these changes are like amendments to the constitution.

Therefore, an allegiance to the constitution can only be to

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99. Third Schedule Form B.

100. Mudholkar J. in Sajjan Singh AIR 1965 S.C. 845 at 864.

101. Wheare, K.C. op.cit. supra Chapter VIII.

a constitution which is being changed by customs, usages, political conditions and judicial interpretation. Formal amendments also change a constitution. If an allegiance to the constitution is not affected in any way when the constitution is being amended by informal amendments, it is difficult to understand how that allegiance is affected when the constitution is amended formally. Moreover, if the nation overgrows its constitution, and the constitution is not amended suitably from time to time, it may lose its own value. In such cases, to effect a desirable amendment to the constitution is to fulfil one's allegiance to the constitution; otherwise, what is the value of an allegiance which itself makes the constitution unwieldy and unworkable? Therefore, allegiance to the constitution seems to mean the constitution as amended from time to time informally as well as formally. In the Indian constitution, it is all the more evident that the "constitution" means the constitution as amended from time to time. The wording "the constitution shall stand amended in accordance with the terms of the Bill" in Art 368 shows that after the constitution has been amended, it is not the less "the constitution"; it is still "the constitution" after it has been amended. Hence, the provision relating to an oath of allegiance cannot stand in the way of amendment.

Let us examine the argument that the provisions relating to taking of oath in Art 84 and 173 read with the Third Schedule of the constitution, "impliedly import an entrenched clause into the

constitution on the amendment process itself."[102] The Sixteenth Amendment Act, 1963, amended, inter alia, the forms of oath in the Third Schedule meant for every candidate for membership of Parliament or State legislature, Union and State Ministers, Members of Parliament and State legislatures, judges of the Supreme Court and High Courts and the Comptroller and Auditor-General of India, to the effect that they should utter the additional words "to uphold the sovereignty and integrity of India." The argument proceeds that the oath to uphold the sovereignty and integrity of India runs contrary to the purpose of an amending Bill seeking to cede any part of the territory of India to a foreign country. In other words, the oath acts like a limitation on the amending power in that amendments providing for cession of territory would be in conflict with the oath to uphold the sovereignty and integrity of India. The argument is based upon a misconception. "Sovereignty" and "integrity" are highly indeterminate concepts. "Sovereignty" has evoked a spate of writings,[103] and thinkers differ on the meaning of the term. The word "integrity" has not been judicially interpreted in India so far, and it appears that it has not been judicially defined in common law countries either because none of the main legal dictionaries gives its meaning.[104] Unless "integrity" is held as connoting the

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102. Rao, K.N. Constitution (Sixteenth Amendment) Bill 1963 - Anti-Secession Measure 1963, 5 JILI p 153 (157-158).

103. Cohen, H.E. Theories of Sovereignty 1937

104. Burrows, R. Words and Phrases 1944 V VIII and Stroud's Judicial Dictionary 1952 V 2.

preservation of the territorial limits of India,which is highly improbable in the circumstances in which the Sixteenth Amendment Act 1963 was passed, cession of territory to a foreign country cannot be considered as against the integrity of the country. The Sixteenth Amendment Act 1963, was passed on the report of the Committee on National Integration and Regionalism appointed by the National Integration Council. The main theme and purpose of the Report was to achieve national integrity of the people of India. Moreover, it is a matter of opinion whether national integrity is preserved or destroyed in ceding some territory to a foreign country in exchange for some other territory in order to resolve an international dispute. Nationalism may yield one answer and internationalism another in such a situation. In addition, when an amending Bill ceding some territory to a foreign country is voted by a two-thirds majority of the members of each House of Parliament present and voting and also by an absolute majority, there is no escape from the conclusion that an overwhelming number of the representatives of the people considers the amendment in the interest of the country, and if this is so, how can it be regarded as against the integrity of the country? Without commenting on the desirability of cession of territory to a foreign country even under an agreement or arbitration and limiting our thinking to purely legal and constitutional problems in this regard, it is submitted that

Parliament can remove the legal obstacle by repealing the changes brought about by the Sixteenth Amendment Act in the forms of oath in the Third Schedule. Thus, considered from various angles, it is quite clear that the provisions regarding the oath of upholding the sovereignty and integrity of India, cannot be regarded in any event as an implied limitation to the amending power in Art 368.

(4) Distinction between "State" and "Government"

Hidayatullah J. suggested another avenue for bringing in implied limitations by making a distinction between "Government" and "State". According to him, "State" is a superior entity to "Government" which is an agency of the "State".[105] In his own words:

> "The State is no doubt legally supreme but in the supremacy of its powers it may create impediments on its own sovereignty. Government is always bound by the restrictions created in favour of fundamental rights but the state may or may not be. Amendment may be open to the state according to the procedure laid down by the constitution. There is nothing, however, to prevent the state from placing certain matters outside the amending procedure....

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105. AIR 1967 S.C. 1643 at 1698.

Amendment can then be by a fresh constituent body. To attempt to do this otherwise is to attempt a revolution."[106] To summarise Hidayatullah J's view, Parliament being an agency of the State cannot take away or abridge any of the fundamental rights since the State itself cannot do so because of the self-imposed restriction in Art 13 (2). The State can remove this restriction but Parliament cannot do so.

With due respect to the learned judge, his argument proceeds on the fallacious premise that "State" means the same thing in both political and legal senses. The distinction drawn by the learned judge between "State" and "Government" may have significance in the political sense but is irrelevant for legal purposes because the expression "State" is defined in Art 12 of the constitution as, inter alia, including "the Government and Parliament of India". It is, therefore, submitted that it is not permissible to make any distinction between "State" and "Government" for the purposes of the amending power with respect to Part III of the constitution.

As a matter of fact, the whole confusion arises because the word "State" has been used in a very comprehensive sense. A member in the Constituent Assembly rightly pointed out that

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106 AIR 1967 S.C. 1696-97.

"the word 'state has been grossly misused. 'State' means no less than several different kinds of institutions in the Constitution, and a reader will have to take careful note of the special definitions of the word 'state' in each Part in order to know what is really meant and even then he cannot be sure."[107]

(5) Preamble

Can the Preamble be construed as an implied limitation to the power to amend the Constitution in Art 368? In the Sajjan Singh case, Justice Mudholkar expressed doubt whether the basic features of the Constitution can be amended as long as the Preamble stands unamended. He observed as follows:

"To illustrate my point, as long as the words 'sovereign democratic republic' are there, could the Constitution be amended so as to depart from the democratic form of government or its republic character? If that cannot be done, then, as long as the words 'justice, social, economic, and political, etc.' are there could any of the rights enumerated in Articles 14 to 19, 21, 25, 31 and 32 be taken away? If they cannot, it will be for consideration whether they can be modified."[108]

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107. C.A.D. vol.XI p 632.

108. Sajjan Singh v. State of Rajosthan AIR 1965 S.C. 845 at 865.

This brings us to the place and significance of the Preamble in the interpretation of the Constitution. The Supreme Court has had occasion to consider the role of the Preamble to the Indian Constitution. In re Beruban And Exchange of Enclaves[109] the Court observed that the Preamble is not a part of the Constitution but is,

> "in the words of Story, 'a key to open the mind of the makers' which may show the general purposes for which they made the several provisions in the Constitution...."

In State of West Bengal v. Anwar Ali Sarkar[110] the Court held that the Preamble can be referred to, in cases of doubt, to ascertain the extent and purpose of an Act. But where the operative parts of the Act are clear and there is no ambiguity, the Preamble cannot be allowed to control the express provisions. Seervai has rightly, it is submitted, averred that the view taken by the Supreme Court that the Preamble is not a part of the Constitution is not correct as it is not in accord with modern authorities.[111] Moreover, when the Preamble was adopted, the President of the Constituent Assembly put it to vote in these words: "That the Preamble stand part of the Constitution."[112]

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109. (1960) 3 SCR 250 at 281-82.

110. AIR 1952 S.C.75.

111. Seervai, H.M. op.cit. supra p 75.

112. C.A.D. vol.X p 456.

Justice Mudholkar sought to have the Preamble regarded as a part of the Constitution on the ground that it is an epitome of the broad features of the Constitution and on the ground of its own special quality. In his own words:

> "It has been said, no doubt, that the Preamble is not a part of our Constitution. But, I think if upon a comparison of the Preamble with the broad features it would appear that the Preamble is an epitome of those features or to put it differently, if these features are an amplification or concretisation of the concepts set out in the Preamble it may have to be considered whether the Preamble is not a part of the Constitution. While considering this question it would be of relevance to bear in mind that the Preamble is not of the common run such as is to be found in an Act of a Legislation. It has the stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it?"[113]

Conceding that the Preamble is a part of the Constitution, and accepting the fact that it bears "the stamp of deep deliberation" and the fact that the founding fathers did attach special

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113. AIR 1965 S.C. 845 at 865.

significance to it, should it automatically follow that the Preamble be regarded as delimiting the power of amending the Constitution in Art 368? It is submitted that even if the Preamble be considered as a significant part of the Constitution, it does not necessarily imply that the Preamble or the broad features it epitomizes are saved from being amended under Art.368. First, when Article 368 empowers the Parliament to amend the "epitomized features" of the Constitution, how can the "epitome" itself act as a limitation to the power of amendment, especially when the rules of statutory interpretation forbid the importation of any limitation from a Preamble to the powers granted by the Constitution?[114] Secondly, the Preamble uses words which are highly indeterminate, ever-changing and having a vast coverage of various conflicting ideologies. "The concepts of liberty and equality are changing and dynamic..."[115] Regarding social justice, Bhagwati J observed: "Social justice is a very vague and indeterminate expression."[116] Allen lists a large variety of the shades of meaning being attributed to "social justice" in these days.[117] The word "democratic" is

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114. AIR (1960) S.C. 845.

115. Ramaswami J. in Golak Nath Case (1967) AIR S.C. at 1735.

116. Muir Mills Co. Ltd. v. Suti Mills Mazdoor (1955) I S.C.R. 991.

117. Allen, C.K. Aspects of Justice, 1958, p 31.

an adjective from "democracy" which is again, "one of the most comprehensive terms used in political science. It may mean a political, social, as well as an economic condition."[118] The word "Republic" is also used in various senses.[119] The highly elastic words used in the Preamble indicate that even if the so-called basic features of the Constitution are amended drastically it is most unlikely that there would be a conflict between the "epitome" and the "epitomized features" for the purposes of the interpretation of the Constitution and if there exists no conflict between the two, no case for holding the Preamble as an implied limitation to the amending power can be made out because the justification for such a limitation is based only on the existence of a conflict. For the sake of argument, supposing some conflict is shown to exist between the Preamble and the provisions of the Constitution in case a particular amendment is effected to the Constitution, it is still very difficult to call in aid the Preamble in order to restrain the meaning of the provisions of the Constitution, unless some compelling reason is advanced. Viscount Simonds restated the rule of interpretation in regard to a Preamble as:

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118. Basu, D.D. Commentary 5th Edn. 1955 V.I. p 69.

119. Ibid. p 70.

> "I would suggest that it is better stated by saying that the content of the Preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it."[120]

The effect of the Preamble is diluted if its own meaning is ambiguous. "Still less can the Preamble affect the meaning of the enacting words when its own meaning is in doubt."[121] On the other hand, a contrary conclusion is all the more reinforced by the language of the Preamble, that the founding fathers intended to use flexible expressions, so that, as far as possible, all sorts of unforeseen changes may be accommodated in the Constitution from time to time by effecting as little amendment as possible to the Constitution.

(6) Scheme

Does the scheme of the Constitution suggest a limited amending power in Art 368? There is a view that the first four Parts of the Constitution are sufficiently self-regulative[122] and hence admit of no amendment under Art 368. It is said that Part I dealing with the Territories of the Union provides in Art 3 that it is by a special law of Parliament that new states

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120. A.G.V. Prince Ernest Augustus of Hanover (1957) A.C. 436 at 463.

121. Ibid. at p 463.

122. Munikanniah, D. Amendments to Constitution, 1964, p 128.

can be formed, and the areas, boundaries and names of the existing states can be altered. Art 4 (2) permits changes to be made to Part I without calling in aid Art 368. In Part II, Art 11 empowers the Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. Therefore, there is a specific saving for Parliament for making further provision connected with citizenship. Regarding Part III, Justice Hidayatullah opined that Part III itself is self-regulative. He observed:

> "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."[123]

Blackshield also holds this view.[124] Since Part IV contains constant principles to instruct and inform legislative measures, there would be hardly any need to amend it. By this fairly flexible scheme it is sought to be established that the amending power in Art 368 is not intended to be made applicable in regard to the first four Parts of the Constitution. In this way, by

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123. Sajjan Singh v. State of Rajasthan AIR 1965 S.C. 845 at 862.

124. Blackshield, A.R. Fundamental Rights 1966, 8 JILI, p 139.

advancing this view of the scheme of the Constitution, Art 368 is regarded as limited in its operation.

It is submitted that this is a misconceived view of the scheme of the first four Parts of the Constitution. It is true that the First, Second, and Third Parts are designed to be fairly flexible within their frame-work, but it is sheer exaggeration to say that these are too flexible to admit of any amendment under Art 368. The falsity of this argument of keeping Parts I, II, and III beyond amendment is exposed when the purpose and function of the provisions on which the claim is made to rest, are fully assessed. Starting with Part I, Art 4 (2) serves a limited purpose of changing the boundaries, areas, and names of the existing states; it is not sufficient to effect an amendment to the matters enumerated in Art 2 or 3. Neither is it true to say that the language of these articles need no amendment at all. Therefore, it is Art 368 and that Article alone which must be resorted to for amending any of the Articles in Part I.

No doubt parliament has been empowered to make any law relating to citizenship under Art 11, but laws cannot be made under Art 11 to contradict the provisions of Part II. In case Parliament wants to make laws in connection with citizenship and in contradiction to the provisions of Part II, it is essential that the conflicting provisions would have to be amended to make them fall in line with the laws and it is under Art 368 alone under which the Parliament must move an amending Bill.

Hence Art 368 cannot be dispensed with under the pretext that Art 11 contains sufficient law-making power.

The argument that Part III is self-regulative fails totally when it is seen that Part III failed to be self-regulative in regard to the Zamindari Abolition Acts. The self-regulative aspect of Part III is a technical device to preserve the viability of Part III but it certainly cannot meet the demands of an amendment. To think that the inbuilt flexibility of Part III brooks no amendment to that Part is to magnify the flexibility to an extreme not permissible by Part III.

It is quite reasonable to assume from the nature of Part IV that Part IV would not need as frequent amendment as Parts I, II, and III. But this does not suggest that Part IV is exempted from the scope of Art 368. The inherent flexibility of Parts I, II, and III and the less need of amendment to Part IV cannot be exaggerated to the point of saving them from the operation of Art 368.

(7) The Argument of Fear

An implied limitation is conceived by invoking fear of the abuse of the amending power in Art 368. It is said that if the all-comprehensive power of amendment in Art 368 is not construed as limited, frightful consequences will follow. Being clothed with so vast a power, Parliament may scrap Part III, abolish elected legislatures, change the present form of government and

may change the federal structure into unitary.[125] It is submitted that this is no reason to put a limit on the amending power. It was rightly pointed out in reply to this argument by Wanchoo J., that "possibility of abuse of any power granted to any authority is always there; and if possibility of abuse is a reason for withholding the power, no power whatever can ever be conferred on any authority."[126]

In fact, the argument of fear is based upon an assumption that unlimited power of amendment in Art 368 will make the Parliament sovereign, meaning by sovereign a legal sovereign.[127] For our purpose it is not necessary to go into the basis of sovereignty,[128] which is, indeed, a "dusty desert of abstractions".[129] But it is necessary to consider whether the doctrine of parliamentary sovereignty would hold good in respect of the Indian Parliament, if ample power to amend the Constitution is vested in it.

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125. Golak Nath AIR (1967) S.C. at 1688.

126. Ibid. p 1688.

127. James Bryce analyses sovereignty as of two types, legal (de jure) and practical (de facto). Studies in History and Jurisprudence vol.II, pp 51-73. Other authors criticise this division on the ground that, "Sovereignty is authority, not might. The sovereign power is the highest legal authority qua legal not qua actual..." McIlwain, C.H. Constitutionalism and the Changing World, 1939, p 30.

128. Wade, H.W.R. thinks that sovereinty is a political fact for which no legal authority can be constituted... The Basis of Legal Sovereignty, Camb. L.J., 1955, p 196.

129. Bryce, J. op.cit. p 50.

The doctrine of parliamentary sovereignty in the United Kingdom has been established by a series of obiter dicta and no decided case can be cited to the effect that Parliament is a sovereign body or that none of its acts can be challenged,[130] yet it is defined as "the legally unlimited capacity to create jural relations".[131] Dicey would further add to it that no person or body has any right to override or set aside the legislation of Parliament,[132] including the courts of law.[133]

It is submitted that even if unlimited power of amendment is granted in Art 368, the Indian Parliament does not become a sovereign body. It is true that there is no rule of law which it cannot amend. But the point to be considered is whether he "who has the power to alter the Constitution is master of the state".[134] In our view the Indian Parliament is not such a master. The reason is that there are two ways to prevent abuse of power; one is to withhold power completely, the other

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130. Henston, R.F.V. in Oxford Essays in Jurisprudence by Guest, A.G.

131. Wright, Quincy. Mandates under the League of Nations 1930, p 281.

132. Dicey, A.V. The Law of the Constitution 9th Edn. pp 40-41.

133. Jennings, Sir I. The Law and the Constitution 3rd Edn. pp 139-140.

134. Finer, H. op.cit. supra p 204.

is to restrict its use. To use Andrew's words, either "power is proscribed,"[135] or power is granted, but "procedure is prescribed".[136]

Prior to the Golak Nath decision, the Indian Parliament was regarded as being vested with unlimited power to amend the Constitution subject to observing the prescribed procedure in Art 368. Where the compliance of procedure prescribed is very essential, such rules of procedure are logically superior to the sovereign.[137] Perhaps, the position was accurately described by Sir Owen Dixon in these words:

> "The law existing for the time being is supreme when it prescribes the conditions which must be fulfilled to make a law. But on the question what may be done by a law so made, parliament is supreme over the law."[138]

There is a view that the "manner or form" in which sovereign power is to be exercised is in no way incompatible with the doctrine of parliamentary sovereignty.[139] It is submitted that

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135. Andrew, W.G. Constitutions and Constitutionalism, 1968, p 13.

136. Ibid.

137. Wade's Introduction to Dicey's Law of the Constitution p 38.

138. Dixon, Sir Owen. The Law and the Constitution, 1935, 51 L.Q.R. 596.

139. Cowen, D.V. Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act, 1951, pp 8-9.

much depends on the nature of "manner or form" and sometimes it may amount to denial of power. Friedmann commenting on the Trethowans case[140] gave an example that if the Commonwealth Parliament passes an Act that no change in the existing powers and structures of the upper House shall be made unless eighty per cent of all voters agree in a referendum to such an alteration, it would make any constitutional amendment of the functions of the upper House virtually impossible, though it may look like a provision relating to "manner or form".[141]

In the Indian Constitution as long as the procedure laid down in Art 368 is there, it is not correct to say that the Parliament is sovereign. The procedure itself imposes a restriction on Parliament in regard to the use of the power to amend the Constitution. It is the right rather the duty of the Supreme Court to see that the procedure is fully complied with when Parliament acts under Art 368. Courts cannot inquire into proceedings of the legislatures in regard to their irregularity[142] but they have full jurisdiction to see that the constitutional provisions are complied with.[143] Any irregularity in regard

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140. 1932 A.C.526.

141. Friedmann. Trethowan's case, Parliamentary Sovereignty, and the Limits of Legal Change 24 A.L.J. (1950) p 105.

142. Art 212.

143. Vinod Kumar v. State of H.p. AIR (1959) S.C.223.

to the procedure prescribed in Art 368 is not only an irregularity of proceedings but a non-compliance with the provisions of the Constitution and must be regarded as fatal to the exercise of the amending power. Therefore, besides the political check on the use of the amending power, there is sufficient institutional check in the procedure of amendment. It is wrongly assumed that it is not difficult to gain a two-thirds majority of members present and voting and an absolute majority of the total membership of each House of Parliament. In fact it was because of the monolithic position of the ruling party - the Congress - at the centre as well as in the State legislatures that we have as many as twenty-one amendments in the first seventeen years of the Constitution. Had there been a strong opposition in the Parliament, the number of amendments would have been much less. With the growth of a multi-party system in the country, it would be not only difficult but almost impossible for Parliament to obtain the special and absolute majorities required by Art 368 to pass an amendment Bill.

There is a further argument against parliamentary sovereignty. Theoretically, we may hold that Art 368 vests Parliament with the power provided for therein. But in view of the fact that that power remains unused in regard to the entrenched provisions until and unless at least half the State legislatures co-operate with the Parliament, there is no escape from the conclusion that Parliament cannot be said to be sovereign.

After considering the alleged implied limitations,it is submitted that it is useless for the judiciary to impose any implied limitations on the power of amendment because all judicially implied limitations are removable by using the amendatory power. Of course, the amendatory power must be exercised in the manner laid down in the Constitution. It may happen that the process of amendment may be very rigid and may thus make changes almost impossible. But it is clear that implied limitations cannot stand in the way of the exercise of the amending power. Unless a Constitution specifies some absolute limitations on the power of amendment, each and every article of the Constitution is amenable to amendment and no matter provided in the Constitution is exempted from its own amendment. To think otherwise is to get one's vision beclouded regarding the nature of amendment. "For to amend is to deconstitute and reconstitute."[144]

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144. Finer, H. op.cit. supra p 193.

CHAPTER VII

AMENDMENTS OF THE FUNDAMENTAL RIGHTS

Part III of the Constitution of India guarantees Fundamental Rights which may be classified as: (i) right to equality; (ii) right to freedom; (iii) right against exploitation; (iv) right to freedom of religion; (v) cultural and educational rights; (vi) right to property; and (vii) right to constitutional remedies. These rights are not absolute but limited by "reasonable" restrictions in the public interest.

The question whether Parliament can amend these rights so as to take away or abridge them, has become a knotty constitutional problem in India. It is of interest to note that neither Part III of the Constitution nor Art 368 provides specifically whether the rights enshrined in Part III are amendable or not. In the absence of any specific provision on the point, the answer to the question whether the Fundamental Rights are amendable by Parliament depends on the construction and interpretation of certain Articles of the Constitution. One writer has described the problem of interpretation in this regard as "a fascinating intellectual puzzle"[1] and another feels that it

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1. Blackshield, A.R. Fundamental Rights and the Institutional Viability Indian Supreme Court, 1966, 8 JILI p 139 at 140.

requires one "to cut the Gordian knot".[2]

The controversy arises mainly because of Art 13 (2) which reads 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."

The question is how wide is the expression "law" in Art 13 (2)? Does it include a constitutional amendment? If it does, the amendability of Fundamental Rights in such a way as to eliminate or reduce them is denied to Parliament. Because even if Parliament amends Art 13(2) or Art 368 in order to arm itself with the power to amend Part III in any way it likes, that amendment itself is liable to be struck down by the Supreme Court on the ground that the amendment is "law" within the meaning of Art 13 (2) and therefore ultra vires of Parliament.

JUDICIAL INTERPRETATION

Parliament amended the Constitution in 1951 by enacting the Constitution (First Amendment) Act, 1951. The Act, among others, amended Art 15 by adding a new clause (4) to it. It substituted new clauses instead of clauses (2) and (6) of Art 19.

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2. Chaudhari, P.S. Golak Nath Case - A Critical Appraisal AIR (1968) Journal Section p 90 at 97.

Art 31A and 31B were inserted after Art 31.

In Sankari Prasad v. Union of India,[3] the Constitution (First Amendment) Act, 1951 was challenged on a number of grounds, one of them being that "law" in Art 13 (2) includes "constituent law" and since the amendment in question abridged the fundamental right under Art 31, it was unconstitutional and void. The Court described the argument as "attractive" but held unanimously that "law" in Art 13 (2) did not take in an amendment; it was only a restriction on the legislature in regard to ordinary laws and not in respect of constituent laws, there being a well-recognized distinction between ordinary law and constituent law. The Court observed as follows:

> "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 exercise of constituent power."[4]

It is clear from the above observation that the word "law" as such does not prohibit the inclusion of constituent law, though there is a clear distinction between ordinary law and constitutional law. In fact, it was due to "other important

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3. 1952 S.C.R. 89 ([illegible]).

4. AIR 1951 S.C. 463.

considerations" that the Supreme Court ruled that "law" in 13 (2) does not include constituent law. The Court said:

> "We are inclined to think that they (Constitution framers) 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 alteration of the Constitution itself in exercise of constituent power."[5]

Moreover, the Court observed that the terms of Art 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. If the Constitution makers intended to save the fundamental rights from the operation of Art 368, it would have been perfectly simple to make that intention clear by adding a proviso to that effect to Art 368. In any event, where two Articles (Art 368 and Art 13 (2)) are widely phrased but conflict with each other "harmonious construction" requires that one should be read as controlled and qualified by the other.

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5. AIR 1951 S.C. 463.

The Court held that the constitutional prohibition in Art 13 (2) against the state making any law which abridges or takes away the fundamental rights, applies to rules or regulations made in exercise of ordinary legislative power and not to constitutional amendments made in exercise of constituent power. Besides this, it was also held that Parliament had power to amend every provision of the Constitution including the provisions of Part III and that such power was derived from Art 368 itself.

The decision in Sankari Prasad was assumed to be correct by the Supreme Court in S. Krishnan v. State of Madras,[6] State of West Bengal v. Anwar Ali,[7] and Basheshar Nath v. Commr. of I.T. Delhi and Rajasthan.[8] In Sajjan Singh v. State of Rajasthan,[9] the Constitution (Seventeenth Amendment) Act, 1964, was sought to be held invalid. The petitioners were affected by one or the other Act added to the Ninth Schedule by the Constitution (Seventeenth Amendment) Act. Their main contention was that the amendment being constitutionally invalid, the validity of the Acts by which they were affected could not be saved. It was argued that since the amendment affected the jurisdiction of

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6. AIR 1951 S.C. 301 at 312.

7. AIR 1952 S.C. 75 at 104.

8. AIR 1959 S.C. 149 at 162.

9. AIR 1965 S.C. 845.

the High Courts under Art 226, it needed to be ratified by half the state legislatures as required by Art 368 and since this ratification had not been obtained, the Amendment Act was invalid.

The Court rejected the argument on the ground that the Amendment Act did not make any alteration in Art 226 and any incidental effect on that Article was irrelevant.

During the course of oral arguments, counsel for the petitioners urged the Court to reconsider the correctness of the Sankari Prasad decision in so far as it held that Parliament had the power to amend Part III of the Constitution. The Court declined to do so but thought fit to comment on that decision. As regards Art 13(2) three of the five judges, including the learned Chief Justice, observed:

> "It is true that Article 13 (2) refers to any law in general and literally construed, the word 'law' may take in a law made in exercise of the constituent power conferred on Parliament; but having regard to the fact that a specific, unqualified and unambiguous power to amend the Constitution is conferred on Parliament, it would be unreasonable to hold that the word 'law' in Art 13 (2) takes in Constitution Amendment Acts passed under Art 368."[10]

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10. AIR 1965 S.C. 845 at 857.

The majority also expressed the view that it would have been better if Part III had been included in the Proviso to Art 368 so that Parliament would not have had unchecked power to amend the fundamental rights. It is submitted that this view misses the point of the Proviso which is to enable the states to participate in the process of amending the federal provisions of the Constitution.

Hidayatullah and Mudholkar, JJ, delivered separate judgements expressing their doubts on the merits of the reasons given by the majority judges. Justice Mudholkar took the view that the amending process in Art 368 is itself a legislative one, and if it is so, "law" in Art 13 (2) would embrace even a constituent law. He observed:

> "The language of Art 368 is plain enough to show that the action of Parliament in amending the Constitution is a legislative act like one in exercise of its normal legislative power. The only difference in respect of an amendment of the Constitution is that the Bill amending the Constitution has to be passed by a special majority (here I have in mind only those amendments which do not attract the Proviso to Art 368). The result of a legislative action of a legislature cannot be other than 'law', and therefore, it seems to me that the fact that the legislation deals with the amendment of a provision of

of the Constitution would not make the result any the less a 'law'."[11]

The matter stood in this state till 27th February 1967, when the Supreme Court rendered a decision[12] which apart from its political, economic and constitutional consequences, has historical significance also. The Court gave two reasons for reopening the question of Parliament's power to amend Part III of the Constitution, namely, "the conflict between the majority and the minority in Sajjan Singh's case" and the "great importance of the question raised".[13]

The wisdom of reopening this question at the present stage of the country's development has been questioned. Writing before the Golak Nath decision, Blackshield observed:

> ".... even if a day may come when the Court should 'enshrine' Part III, it would be better to postpone the day until constructive judicial 'social engineering', and social and even legislative appreciation of this, have become deeply rooted Indian traditions. On this basis, the wisest course for the time being would be to allow the whole issue to remain in the unresolved openness in which the Sajjan Singh case has left it, intellectually unsatisfying though this might be."[14]

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11. Sajjan Singh v. State of Rajasthan AIR 1965 S.C. 845 at 863.
12. Golak Nath v. State of Punjab AIR 1967 S.C. 1643
13. Ibid.1655.
14. Blackshield, A.R. Fundamental Rights, 1966, 8 JILI, 139 at 172.

In the Golak Nath case, petitioners challenged the Punjab Security of Land Tenure Act, 1953, on the ground that the said Act infringed the petitioners' rights under clauses (f) and (g) of Art 19 and Art 14 of the Constitution and therefore should be declared unconstitutional. Since the Act was included in the Ninth Schedule to the Constitution by the Seventeenth Amendment Act, the Amendment Act itself was challenged as ultra vires of Parliament. These petitioners were joined by petitioners from Mysore who attacked the Mysore Land Reforms Act (No. 10 of 1962) on similar grounds. The petitioners sought to challenge the Constitution (Seventeenth Amendment) Act, 1964, along with the Constitution (Fourth Amendment) Act, 1955, and the Constitution (First Amendment) Act because the validity of these amendments could not be sustained if the Seventeenth Amendment Act, 1964, was declared unconstitutional.

The Court, comprising all eleven judges of the Supreme Court, was sharply divided on the interpretation of Art 13 (2) and Art 368. The majority of six judges overruled the decision in the Sankari Prasad and held that "law" in Art 13 (2) includes a constitutional amendment because "amendment cannot be made otherwise than by following the legislative process".[15]

In order to understand the differing viewpoints expressed by the various judges it will be useful to summarise their main conclusions.

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15. AIR 1967 S.C. 1643 at 1659.

The main conclusions reached by the majority are as follows:

(Chief Justice Subba Rao, Shah, Shalet and Vaidialingam, JJ)

(1) The power of the Parliament to amend the Constitution is derived from Arts 245, 246, and 248, and not from Art 368 which only deals with procedure.

(2) Amendment is "law" within the meaning of Art 13 of the Constitution, and therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, the Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of the Supreme Court they were valid.

(4) By applying the doctrine of "prospective overruling", the decision will have only prospective operation and therefore the said amendments will continue to be valid.

(5) The Parliament will have no power from the date of the decision to amend any of the provision of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

(6) As the Constitution (Seventeenth Amendment) Act is held valid, the validity of the Punjab Security of Land Tenures

Act X of 1962, as amended by Act XIV of 1965, cannot be questioned on the ground that they offend Arts 13, 14, or 31 of the Constitution.

Justice Hidayatullah's conclusions were as follows:

(i) The Fundamental Rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights;

(ii) Sankari Prasad's case, 1952, S.C.R.89, and Sajjan Singh's case, 1965, I.S.C.R.933, concluded the power of amendment over Part III of the Constitution on an erroneous view of Art 13 (2) and 368;

(iii) The First, Fourth and Seventeenth 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) Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in Art 368, any further inroad into these rights from the date of the decision will be illegal and unconstitutional unless it complies with Part III in general and Art 13 (2) in particular;

(v) For abridging or taking away Fundamental Rights, a constituent body will have to be convoked; and

(vi) The two impugned Acts are valid under the Constitution not because they are included in Sch.9 of the Constitution but

because they are protected by Art 31A and the President's assent. The petitions were dismissed but without cost.

(Per Wanchoo, Bhargava and Mitter, JJ)

The power to amend the Constitution is to be found in Art 368 and the power to amend the Constitution can never reside in Art 245 and Article 248 read with Item 97 of List I.

The power conferred under Art 368 is constituent power to change the fundamental law, i.e. the Constitution, and is distinct and different from the ordinary legislative power.

When Art 13 (2) prohibits the state from making any law which takes away or abridges rights conferred by Part III, it is only referring to ordinary legislative power conferred on Parliament and Legislatures of States and cannot have any reference to the constituent power for amendment of the Constitution contained in Art 368.

There being no implied limitations on the power to amend under Art 368, it is open to Parliament to amend any part of the Constitution, including Part III.

Sankari Prasad's case was correctly decided and the majority in Sajjan Singh's case was correct in following it.

The argument that the Seventeenth Amendment affects the

powers of the High Court contained in Art 226 and therefore should have been ratified by half the state legislatures under the Proviso to Art 368, was rejected on the ground that the Amendment has brought no actual change in the terms of Art 226.

Ramaswami and Bachawat, JJ, delivered separate judgements agreeing with the conclusions reached by the main minority led by Justice Wanchoo.

It may be pointed out that the majority was considerably influenced by an article[16] written by A.R. Blackshield just after the Sajjan Singh case, in which the writer suggested how the main obstacle in accepting the view that Art 13 (2) takes in amendment could be removed by applying the doctrine of "prospective overruling" in respect of the Constitution Amendment Acts which affected Part III rights adversely, and, thus save them from becoming void. Though the learned author cleared the way for the majority in Golak Nath's case, he himself came to realise the inherent dangers and difficulties with which the whole approach and its end bristled. Therefore he took abundant care to express a large number of caveats.[17]

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16. Blackshield, A.R. Fundamental Rights and Institutional Viability of the Indian Supreme Court, 1966, 8 JILI p 139.

17. Ibid. pp 169-190.

As a result of the Golak Nath decision, Art 13 (2) has become an impervious rock of prohibition against the State and any amendment of the fundamental rights so as to take away or abridge them has become a legal impossibility.

WHAT IS THE NATURE OF LAW IN ART 13 (2)?

It is submitted that the key to the question whether Parliament can amend Part III so as to take away or abridge the rights enshrined therein lies in the determination of the scope and nature of "law" in Art 13 (2). Therefore, the scope and nature of "law" in Art 13 (2) is studied under the following heads:

(A) Distinction between "ordinary law" and "constituent law"

(B) Contextual arguments

(C) Intentions of the founding fathers, and

(D) Consideration of issues raised by Golak Nath.[18]

(A) Distinction between "ordinary law" and "constituent law"

In the Golak Nath case, the majority held that since amendment is done by legislative process, with ordinary majority or with special majority, therefore, there remains no distinction between ordinary law and the law made in the exercise of constituent power.[19]

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18. AIR 1967 S.C. 1643

19. AIR 1967 S.C. 1643 at 1660 Per Subba Rao, C.J. at 1695 per Hidayatullah J.

It is submitted here that the essence of the distinction between ordinary law and constituent law is entirely lost, if the only criterion to distinguish them is the difference of procedure to be followed in each case and perhaps all the controversy would have been resolved if sufficient attention would have been paid to the criteria to judge ordinary law and constituent law.

It is of interest to note that Justice Hidayatullah tried hard to apply a few tests[20] to distinguish between ordinary law and constituent law e.g. written constitution, different kinds of procedure for amendment, preference for constitution, constitutions having form and power of government and not rules of private law which are found in ordinary law, and temporariness of ordinary law and permanence of constitutional law.

According to him, under the scheme of the Indian constitution, there exists no distinction between the two.[21] At the end of this discussion he asks, "But if the legislative and constituent processes can become one, is there any reason why the result should be regarded as law in the one case and not in the other?"[22]

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20. AIR 1967 S.C. 1643 at 1695-96.

21. Ibid.

22. Ibid.p 1696.

Here again, though the points of difference between the two types of laws were marked, but the main criterion was presumed to be the procedure and if the procedure followed in both the laws is one and the same, there exists no difference. It may be safely submitted that generally, there is some difference of procedure in both the cases, but the distinction does not depend at all on the procedure. Even if the constituent law and ordinary law are made by following one and the same procedure, there still exists a distinction between the two. If the procedures were the only criterion, there would have been no such thing as constitutional law of England and other than constitutional laws, e.g. civil or criminal laws in England, because the Parliament of England follows one and the same procedure in both the cases. Yet, there is a distinction between the two. Then the question arises what is the real test to tell the one from the other.

Search for test of "Constituent Law"

In this section an attempt will be made to search for the test of constituent law. It is submitted that,

though the distinction between ordinary and constituent laws suggests that "law" in Art 13 (2) should not contain constituent law, that itself is not the sole criterion to hold that "law" does not include constituent law. To say that there is a distinction between constituent law and ordinary law is one thing and to say that "law" in Art 13 (2) means only ordinary law is quite a different thing. However, if the character and nature of constituent law is closely examined in contradistinction to ordinary law, that examination itself is fruitful and helpful to the extent it sheds light on our problem and that is why we need to go deep in search for the main test.

There is a large number of authorities who affirm that there is a distinction between constitutional law and ordinary law.[23]

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23. Dicey, A.V. Law of the Constitution 10th edn. p 110.

Jennings, W.I. Law and the Constitution (1933) p 51.
American Jurisprudence 2nd edn. Vol.16, p 181.

Salmond. op.cit. supra. pp 83-84.

Hamilton, A. & Madison, J. The Federalist (1961)
53rd letter, p 67.

Willis, H.E. Constitutional Law of the United States p 875.

Cooley, T.H. Constitutional Limitations (1903) Vol.I. p 4.

Orfield. op.cit. supra. p 146.

It is not necessary to quote all these authorities because besides the affirmation of the existence of the distinction, no criterion to distinguish is expressly laid down. But we can deduce the criterion by pondering over what these authorities said. Sir W. Ivor Jennings says:

> "A written constitution is thus the fundamental law of a country, the express embodiment of the doctrine of the reign of law. All public authorities ... legislative, administrative and judicial ... take their powers directly or indirectly from it. Whatever the nature of the written constitution it is clear that there is a fundamental distinction between constitutional law and the rest of the law ... there is a clear separation, therefore, between the constitutional law and the rest of the law."[24]

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24. Jennings: op.cit.supra. p 51.

What we get from this is that the distinction between constitutional law and other laws does not depend upon the nature of the written constitution, that is to say, the constitution may be unitary or federal, rigid or flexible, the distinction is there, and also that the constitution stands on a higher pedestal because all other authorities and ordinary laws derive their power and validity from it.

In America, the distinction between constitutional law and other laws is well established. In The Federalist has been summarised the American position that the constitutional law is fundamental and other laws are non-fundamental:

> "The important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government, seems to have been little understood and

less observed in any other country."[25]

It was further pointed out by the editor of The Federalist that:

> "This distinction was not new in 1787, nor is it entirely an American creation, but it is true that America had carried to an extent not elsewhere accepted certain tendencies of the middle ages and of early modern times."[26]

In America, theoretically sovereignty is taken to be residing in the people and since the Constitution derives its authority from the people, it comes to assume higher authority. Lawrence Lovell proceeded logically to carry this theory to an extreme . He argued that:

> "If all laws received their sanction from a direct popular vote, this distinction would disappear. There would cease to be any reason for considering one law more sacred than another, and hence our courts would soon lose their power to pass on the constitutionality of statutes. The courts have in general no such power in Switzerland, where indeed the distinction between constitutional law and other laws is not so clearly marked as in America."[27]

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25. Hamilton, A., Madison, J. op.cit. supra. p 67.

26. Ibid. p 67.

27. Lawrence Lovell, A. The Referendum and Initiative (1895) Int. J. of Ethics. Vol.VI. p 59.

Salmond expresses the view that incorporating fundamental law in a special document called the Constitution is nothing but maintaining the distinction between the constitutional law and an ordinary law, the Constitution not being alterable by ordinary legislative procedure.

> "In some states, though not in England, the distinction between constitutional law and the remaining portions of the legal system is accentuated and made definite by the embodiment of the former in a special and distinct enactment, the terms of which cannot be altered by the ordinary forms of legislature."[28]

The author elaborates the point that what is considered to be fundamental and what is not fundamental is a mere matter of practical convenience rather than of obedience to logical requirement.[29] People differ on the point as to what is more important and primary and should be written in the constitution.[30]

In Marbury v. Madison,[31] Chief Justice Marshall expressed his reasoned view on this point in these words:

"The Constitution is either a superior, paramount law,

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28. Salmond. op.cit. supra. pp 83-84.

29. Ibid. p 83.

30. Wheare, K.C. op.cit. supra., 1951 edn. p 46.

31. 1803 (I cranch 137); 2 L Ed. 60 (1803).

> unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true then a legislative act contrary to the constitution is not law; if the latter part be true then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

This brings out an essential point; a written constitution must impose limitations on the powers of the institutions it seeks to create, otherwise it establishes its own futility. In other words, superiority of the constitution is based upon the existence of limitations on various functionaries created under and by the constitution. K.C. Wheare interprets the arguments as follows:

> "On this argument, if a constitution claims, by its terms, to limit the powers of the institutions it creates, including the legislature, its provisions must surely be regarded as of superior force to any rules or actions issuing from those institutions. To think otherwise reduces a constitution and the business of constitution-making to nonsense."[32]

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32. Wheare, K.C. op.cit. supra. 1951 ed. p 82; 1966 ed. p 57.

Jameson attempted to mark off the points of difference between a constitutional law and an ordinary law very clearly and succinctly. First, ordinary laws are tentatory occasional, whereas fundamental laws are primary. Secondly, fundamental laws precede ordinary laws in point of time. He illustrated the distinction by considering the case of a ship to be dispatched by its owner upon a distant voyage in which the owner of the ship would prescribe the termini, object of the voyage and general duties of the officers on board the ship, leaving everything else relating to the voyage to the discretion of the master of the ship. According to Jameson, fundamental laws are just like the owner's main instructions and ordinary laws are like the matters left for the master's discretion.[33]

From these authorities, the following points are observable:

(1) The legal system of a country can be divided, according to practical convenience, into two categories, the primary and the secondary. The primary is called fundamental and the secondary as ordinary.

(2) Written constitutions preserve this distinction by incorporating more important matters in the document called the constitution.

(3) The constitution precedes ordinary laws in point of time.

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33. Jameson, John A. A Treatise on Constitutional Conventions (1887) pp 84-85.

(4) All functionaries, including the legislature created by the constitution derive their power from the constitution.
(5) Generally, written constitutions are not alterable by ordinary legislative procedures.
(6) A written constitution having limitations on the powers of the institutions created by it turns out to be superior by virtue of the limitations that it imposes.
(7) In America, the constitution is taken to be established by the people in whom the sovereignty is supposed to reside, so the constitution is treated as higher law because it derives power from the people.

These points of difference undoubtedly establish the distinction between the two types of laws but do not give us a test to apply in a particular case to know whether it is a constitutional law or an ordinary law.

Before we evolve a test, it is necessary to note the views of those who want to obliterate the distinction between the two.

W.W. Willoughby thinks that the constitution is subordinate to the state because a constitutional law is the creation of the state for its purpose; the constitution ordinarily limits the government and not the state; however, there is nothing to prevent the state from limiting itself.[34] Sovereignty is traced to

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34. Willoughby, W.W. The Fundamental Concept of Public Law (1924) p 84.

reside in the state and in this way, a heirarchy of powers is created. The state occupying the apex position in the heirarchy of powers, the constitution comes next followed by the government under the constitution. This theory is meant to see the constitution as a law rather than a higher law because there is still a higher authority than the constitution and that is the State which is sovereign in its own nature and can enact any law. In this way assimilating the ordinary law and constitutional law to the same status, he argues that when the courts declare a law as not valid the courts are not declaring a conflict between the ordinary law and the constitutional law.

> "That which they do is simply to say that the statutes in question, though enacted in the usual form, are not laws at all, and never were laws, because their subject-matter did not lie within the legal competence of the Legislature enacting them. As Cooley says in his Principles of Constitutional Law,'such enactment is in strictness no law, because it established no rule; it is merely a futile attempt to establish a law'. Strictly speaking, then, the term 'unconstitutional law' is a contradictio in objecto: if it is unconstitutional it is not law; if it is law, it is not unconstitutional."[35]

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35. Willoughby, W.W. op.cit. p 86.

It is submitted that the theory of state sovereignty as opposed to popular sovereignty does not, in fact, obliterate the distinction between the constitution and the ordinary laws. One may place sovereignty wherever one likes, either in the people or in the state, but the constitution, if it imposes limitations on its functionaries, would turn out to be a superior law in its working in regard to those functionaries and their acts. Therefore, the moment a constitution serves as a guide in determining whether a statute is valid or not, whether the Legislature has exceeded the limits set upon it by the constitution itself, the constitution becomes a higher law vis-a-vis the statute in question.

Similarly, Professor Labland attributes sovereignty to the state and assimilates the constitution to the ordinary law because both are an act of the will of the state. He goes to the extent of saying that the constitution may be amended indirectly by enacting special laws without modifying the text of the constitution.

> "The doctrine that individual laws ought always to be in harmony with the constitution, and that they must not be incompatible with it, is simply a postulate of legislative practice. It is not a legal axiom."[36]

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36. Prof. Labland quoted by Borgeaud, C. in Adoption and Amendment of Constitution in America and Europe, 1895, p 69.

It is submitted that if the terms of the constitution require that the laws passed under the constitution must conform to the constitution, it would be difficult to accept that laws not conforming to the constitution could be passed without altering the constitution, because it would lead to contradictions and irregularities.

H. Bishop, another critic of the distinction between constitutional law and ordinary laws, based his argument on the monarchical principle. He considered that the principle that the constitutional law is higher than ordinary law is illogical because it is contrary to the monarchical principle, the reason being that it is the monarch which breathes life into both the laws. He holds that such a difference is maintainable if the two types of laws proceed from two different authorities and he refuses to accept the view that the constitution emanates solely from the sovereign people by branding it as an odious product of the revolution. Robert Von Mohl thrashes out the fallacy in H. Bishop's argument by pointing out that monarchy is not necessarily identical with absolute government. Monarchy, if not absolute, is not necessarily incompatible with the principle of the constitution being a higher law. In his view constitutions are higher not because they emanate from popular sovereignty but because of the competent authority producing them. It is not out of place here to quote him.

> "Now it is notoriously false that constitutions are regarded and treated as laws of a superior order because men see in them the emanation of popular sovereignty. They are recognised as such because competent legislative authority has clothed them with this attribute. The question is not what this authority is, but simply, had it the right to make this declaration? A royal charter is considered the supreme, unquestioned law of the country if the monarch, at the moment of its presentation, was indisputably the absolute master of Legislation. On the other hand, it is difficult to see how the authority of a prince is incompatible with the existence of positive rule whose modification is rendered difficult and which cannot be overturned by ordinary legislation. Only when one identifies monarchy with absolute government, with exemption from loyalty to promises, and with the denial of any rights to the citizens, can one advocate theories like these."[37]

In other words, Robert Von Mohl's argument is that the distinction between constitutional law and ordinary law can exist even in a monarchical system provided the constitution puts limits on the powers of the monarch or lays down conditions precedent to the exercise of those powers. Monarchists might advance an argument

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37. Robert Von Mohl quoted by Borgeaud, op.cit. p 67.

that sovereignty itself is illimitable and cannot be determined even by the monarch himself. This argument provoked a great controversy in the past and now it seems that the matter has been settled that the sovereign is capable of delimiting his power and once limitations are put, these must be observed and fulfilled. This, undoubtedly militates against the principle that the present generation has no right to bind the succeeding ones, but this is the current jurisprudential view.[38] Theories of sovereignty bring complications into the matter and we have dealt with them briefly in their relevant place.[39] For our purpose here, it is sufficient to say that if the constitution prescribes conditions for the exercise of the powers of the so-called sovereign and the authority of the constitution maker is valid, the limitations are perfectly valid and those conditions must be satisfied for a valid exercise of those powers.

If the present position that a sovereign authority can validly lay down restrictions on its power or the manner or form in which it is to be exercised is accepted, it removes a lot of confusion regarding the distinction between constitutional law and ordinary law. For instance, it is said that only the authority which frames a constitution is competent to alter it

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38. Stone, J. Legal System and Lawyers' Reasonings, 1964, p 110.

39. See "The Argument of Fear" in Chapter VI supra.

even though that authority itself might have vested the power to amend the constitution in the legislature - a body created by and under the constitution.

Before we proceed further it should be noted that the power to amend a constitution is the same as to constitute or "deconstitute"[40] and quite aptly it is termed as "constituent power".

The emphasis on the competence of a constitutional convention or constituent assembly alone to alter the constitution even when the constitution gives ample power to the legislature to amend the constitution resulted in a misunderstanding that if the power to amend the constitution lies in an authority which makes ordinary laws, the distinction between the two is completely obliterated. For instance, in Europe it was the constitution of Prussia, 1850, which for the first time provided for its amendment by ordinary legislative enactment. Its Art 107 provided:

> "The constitution may be altered by ordinary legislative enactment. For such alterations a majority vote of each house, expressed in two successive ballots, separated by an interval of twenty-one days, shall suffice."[41]

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40. Finer, H. op.cit. supra. p 193.

41. Cited in Borgeaud, op.cit. supra. p 62.

Borgeaud observed that, "Unfortunately this was accomplished at the expense of the distinction between constitution law and ordinary law."[42] There can be two assumptions for this view. First, that the distinction between ordinary law and constituent law exists only when the constitution is amended by another body than the legislature. Secondly, the manner of constitutional amendment should be different from the manner in which an ordinary law is made and if it is one and the same, the difference between the constituent law and ordinary law is effaced thereby.

The first assumption does not hold good at the present time, though it was considered to be so in the eighteenth and nineteenth centuries. In many of the constitutions of the States in America and in the constitutions of many other countries also, constitution makers expressly provided for the amendment of the constitutions by the legislature, though approval by the people in a referendum is also required in some cases. Probably, practical convenience or expediency dictated the shift in the amending power from the constitutional convention to the legislature. Be that as it may, constitutional amendments are also done by the legislature and this fact alone is incapable of blotting the distinction.

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42. Ibid.

The second assumption that, if the legislature is empowered to amend the constitution by following its ordinary procedure of legislation with or without special majority, the distinction between the constituent law and other laws no longer remains, has provoked a sharp division of opinion among jurists. The question came up for decision in the United States on the point whether the Congress does a legislative act while following the procedure of amendment of the Constitution under Art 5 of the Constitution.

The difficulty in this matter is that the similarity of procedures in legislative acts and constituent acts to be followed by the same body gives one the impression that there should be no difference or distinction between the two. Even in cases where a special majority, as opposed to a simple majority which is generally required for ordinary laws, is insisted upon in regard to constituent laws the whole process is regarded as legislative merely because the ordinary procedure of law-making is still being followed and special majorities are considered as a minor or more aptly negligible departure from the usual procedure. Obviously, it is an important question to enquire into, namely, whether the similarity of procedure in constituent acts and legislative acts goes to identify them with each other or does there still remain any distinction between the two? Such an enquiry is necessary because there has not

been evolved so far any test to distinguish a constituent law from an ordinary one though there is a large number of points of difference which have been mentioned above.

In such cases, the manner of doing a thing has been stressed unduly so much so that the manner itself has been regarded as a determinant factor in characterizing the nature itself. It is submitted that the similarity of procedure does not affect the nature of the constituent law and constituent law still remains entirely different from ordinary law, though it has been achieved by following an ordinary legislative procedure. To distinguish the two, we should look at the quality and nature of the final product and not the manner followed in obtaining it. Posing the question whether there is any test for distinguishing constituent law from an ordinary one, one writer says,

> "Surely the answer to such question should depend not so much on how a thing is done as on what is done; i.e. on the nature and quality of what is done. So that it is possible that under one constitution Bills passed by the country's legislature by a simple majority under certain circumstances are characterised as constituent; while in particular circumstances measures passed by a three-fourths majority and ratified by the people at a referendum under another constitution are not. The important

point is whether the end-product of such deliberations is such that it can be characterised as special."[43]

If the final product itself is examined, it is quite obvious that the amendment of the constitution is different from the legislative act. In fact the two powers are so different that these can never be mixed together, and hence they produce quite different things.

"Legislative power, as the term itself indicates is the power to enact laws, rules and regulations governing in the main relations between individuals or corporate bodies not partaking of the character of an organ of the state. The term 'constituent power' connotes the power to formulate laws and principles regarding the organisation of the state, the functioning of its authorities and the reciprocal relations between the state and its citizens. The difference between the two powers is, therefore, ratione materiae; the subject matters of the exercise of the two powers belong to two different categories. There is a further point of difference. Legislative power accrues from a constitutional grant and is, therefore, subject to such limitations and conditions as may be prescribed by the constitution. Constituent

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43. Jagat Narain. Constitutional Changes in India - An Inquiry into the Workings of the Constitution, 1968, 17.I.Com.L.Q. Vol.XVII p 878 at 893.

> power, on the other hand, is, as Virga points out, inherent in the juridical order. More appropriately it may be described as an essential element of the judicial sovereignty of a state, whether such sovereignty appertains to a single individual or a group of individuals or the entire body of the people."[44]

It is quite clear that an amendment of the constitution brings a change in the constitution itself and the change is formal in the sense that it alters the letter of the constitution by way of addition or deletion. The important point here is that the amendment achieves a formal change in the test of the constitution. It is to be noted that the constitution may be modified in reality without altering the letter of the constitution by the judiciary or by constitutional conventions or usages. If the change is effected by any other means without altering the text of the constitution it is not regarded as an amendment of the constitution. If this were not so, the constitution could be said to be amended by every decision of the highest judicial authority which interprets the provisions of the constitution. But changes effected in actuality by judicial interpretations are never labelled as "amendments". The question

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44. Sen, D.K.S. op.cit. supra. p 288.

arises, why not? The answer is clear that amendment signifies only a formal change in the actual text of the constitution; whereas interpretation does not bring about a formal change; of order otherwise. Judicial changes are rightly called as informal and course, it does effect changes of a high/amendatory changes as formal. One writer has observed:

> "The formal procedure of amendment is of greater importance than the informal processes, because it constitutes a higher authority to which appeal lies on any question that may arise. While changing conventions, new legislative acts, and new interpretations may effect serious changes in the constitutional structure, the formal amendment is superior to them all; it may override any of the others and none of the others may override it."[45]

K.C. Wheare describes an amendatory change as formal.[46]

> "It is well to ask first just what is meant by saying that judicial interpretation and decision can change a constitution. Courts, it must be emphasized, cannot amend a constitution. They cannot change the words."[47]

The essence of an amendment of the constitution lies in the fact that it alters the text of the constitution. The formal aspect of amendments is rightly emphasised in some of the newly

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45. Livingston: op.cit. supra. pp 13-14.

46. Wheare, K.C. op.cit. supra.p 121.

47. Ibid. p 153.

enforced constitutions. To name a few, the Burmese constitution, 1961, provides specifically that the proposal for an amendment shall be in the form of a Bill and shall be expressed as a Bill to amend the constitution.[48] Art 20 (2) of the Constitution of the Republic of Ghana, 1960, provides that an Act to amend the Constitution must state that it amends the Constitution and goes a step further to lay down that the Act must contain no provisions other than those which repeal or alter.[49] Similarly the Constitution of Federal Republic of Germany 1949, known as Basic Law, provided in Art 79 that the Basic Law can be amended only by a law which expressly amends or supplements the text thereof. Similarly, the constitution of Malawi, 1966, provides in Art 97 that an amending Bill shall not be passed unless the Bill is in its title expressed to be an Act to amend the constitution.

If we study the nature of constituent law and ordinary law, one thing is significant, namely, that a constituent law changes the text of the constitutions by way of deletion, alteration, or addition; whereas an ordinary law does not affect the letter of the constitution. If this distinction is

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48. S.210 of the Constitution of Burma, 1961.

49. Art 20 (2), Constitution of the Republic of Ghana, July 1st, 1960.

borne in mind, the two laws cannot be mixed together even though they are made by following the same procedure. The similarity of procedure cannot fog our vision regarding their nature. A stricter procedure is generally adopted in regard to amendment of a constitution because, obviously, that there should be a larger concurrence of opinion to amend the constitution. In parliamentary government, the party in power must seek the co-operation of opponent parties to secure a larger majority which is generally required to amend the constitution. In some constitutions a particular period is set for considering the proposal to amend the constitution. This is provided so that those who are responsible for making the change must think it over for sometime. The provisions for a special majority or special period of time do attach importance to a constituent law as compared to an ordinary law and especially in case of a written constitution, such provision is essential to maintain the importance of the constitution. It is to be noted that even in countries where the constitution is alterable by an ordinary procedure of law-making, the distinction still exists. For instance the British Constitution, though not 'written' in the sense of being in one whole document, can be altered by the Parliament by following its ordinary procedure. But does it obliterate the distinction between constitutional law and ordinary law? In fact, it does not. The constitutional law in Britain consists of a few Acts, e.g. The Act of Settlement, 1701, The Act of Union with Scotland, 1707,

the Act of Union with Ireland, 1800, the Parliament Act, 1911, the Representation of the People Acts, 1832, 1867, 1884, 1918, 1928 and 1948, the Ballot Act, 1872, the Judicature Acts, 1873, 1875 and 1925, the Incitement to Disaffection Act, 1934, His Majesty's Declaration of Abdication Act, 1936, the Regency Act, 1937, and the various Acts to set up different ministries.[50] Therefore, every Act passed by the Parliament is not placed on the same footing as the constitutional laws. The inevitable conclusion is that the similarity of procedure does not affect the nature of the constituent law. We may add here that, though the Constitution of Britain is highly flexible in the sense that the Parliament is sovereign but the practice had been established that before significant changes can be brought, public opinion is taken into account. Considerable discussion, debates and publicity in the papers precede the passing of the Bill.[51]

Friedrich writes that the two-party system in England is sufficient restraint upon the amending process. In important matters the government feels obliged to appeal to the electorate on any major issue.[52] In other countries the same purpose is

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50. Wheare, K.C. The Statute of Westminster and Dominion Status 4th edn. p 8.

51. Livingston. op.cit. supra. p 271

52. Friedrich, C.J. op.cit. supra. p 138.

achieved by providing for constitutional amendment by a special majority. In either case the purpose is to provide for detailed discussion of the proposed measure and securing larger concurrence for it.

In some constitutions, ordinary laws are passed subject to the provisions of the constitution and, therefore, if a law is contradictory to the provisions of the constitution, it is declared to be void. Such a provision gives added importance to the constitution and to the judiciary also and brings out the distinction between the two kinds of laws to the fore. But it is not a fundamental or a decisive criterion to distinguish the one from the other. It is submitted that the test to distinguish an ordinary law from a constituent law should be based on the fact that amendment brings a formal change in the text of the constitution, and not on the difference in procedure or the body who brings the change, i.e. constituent assembly or legislature. Thinking on similar lines, one writer attempted to formulate the test in these words:

> "The real test, it is submitted, should be whether the amendment brings about a change in the basic law. If it does it must be regarded as 'constitutional law', if it does not, it is 'ordinary law'!"[53]

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53. Chaudhari, P.S. The Golak Nath Case - A Critical Appraisal AIR (1968) Journal 90 at 94.

The present writer would like to explain that the test as formulated may be susceptible of misinterpretation in that it may be interpreted as a change in the meaning of words used in the constitution and not a formal change in the text, and in this way the essence of the test may be lost. What is being stressed here is that the amendment must change the text of the constitution; if the words of the constitution are not changed, it is not an amendment and hence not constituent law. So, it seems that for the sake of clarity it is better to state the test as follows: whether the law brings about a change in the text of the constitution or not. If it does, it is "constituent law", if it does not, it is ordinary law. The word "change" here includes all shades of the meaning of amendment, i.e. alteration, modification, deletion, addition. It is also necessary to state that the formal aspect should not be misconstrued as allowing only minor changes and not drastic changes; changes may be minor or drastic. The essence of our test is that it must change the letter of the constitution. If the distinction given above is kept in mind or the simple test is applied in cases of doubt, an amendment of the constitution can never be an ordinary law or vice versa.

Application of the Test

It is necessary here to examine the two cases on which Chief Justice Subba Rao relied heavily for the proposition that "an amendment of the constitution can be nothing but law,"[54] meaning, it is submitted, by "law", ordinary law in the context. First he considers the case of McCawley v. The King.[55] In this case a statute passed by the Legislature of Queensland was sought to be invalidated on the ground that the provisions of the statute were inconsistent with the Constitution Act 1867 and the main argument was that the legislature could not disregard the constitution, though it could alter it. It is to be noted that the Legislature of Queensland was empowered to alter the Constitution Act, 1867, in an ordinary manner except the provisions regarding the constitution of the legislative council in which case a two-thirds majority of the legislative council and the legislative assembly was required. The Privy Council upheld the impugned statute on the ground that the Legislature was fully empowered to pass the impugned Act, and therefore it was valid. The learned Chief Justice Subba Rao viewed the decision as an authority for the proposition that an amendment is "law" in the sense of ordinary law. It is humbly

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54. Golak Nath AIR, 1967, S.C. at 1660.

55. (1920) A.C. 691.

submitted that the decision does not support the proposition at all, the reason being that the statute in question did not amend the Constitution. The amendment of the constitution is invariably a formal alteration of the constitution, as opposed to informal or judicial alteration. Actually it was an ordinary law and it was not intended to alter the Constitution Act, 1867, though impliedly its effect was to render a provision of the constitution nugatory. If we apply the test, whether the Act in question brings about a change in the text of the Constitution Act, 1867, or not, the answer is undoubtedly in the negative.

Regarding the plea that the impugned Act was in conflict with the Constitution, the Privy Council concluded that the Legislature was fully empowered to pass the Act, that the Constitution Act itself did not restrict the power of the Legislature in regard to the passing of the impugned Act. It is submitted that the Act was valid but suffered from an irregularity in so far as its provisions were in conflict with the Constitution Act, 1867. In this case, the Legislature should have altered the provision of the Constitution to bring it in accord with the statute. The decision of the Privy Council proceeded on the argument that the Legislature of Queensland was fully competent to pass the Act in question, and also to alter the provisions of the Constitution said to be in conflict with each other in the same ordinary manner of law-making as the Act itself was passed.

The fact that the Legislature had general power to legislate except on one subject which was not in question, led the Privy Council to hold the Act to be valid, treating it as pro tanto alteration of the constitution. In fact this decision rendered the provisions of the Constitution Act as nugatory as opposed to repealed or modified. In this way an irregularity had been perpetuated, which could have been cured by the legislature by amending the Constitution Act suitably. It is pointed out here that the Act in question cannot be regarded as an amendment of the constitution in the right sense of the word. Had it been an amending Act, it would have not left the letter of the constitution untouched and the question of conflict between the two Acts would have not arisen at all.

The second case cited by Chief Justice Subba Rao was Bribery Comm v. Rana Singhe.[56] In this case the Bribery Amendment Act, 1958, passed by the Ceylon Legislature was challenged on the ground that S.41 of the said Act was in conflict with S.55 of the Constitution which vests power to appoint judicial officers in the Judicial Service Commission. S.29 (4) of the Constitution says that no Bill for the amendment or repeal of any of the provisions of the Constitution may be presented for

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56. (1965) A.C. 172.

the Royal Assent unless it has endorsed on it a certificate under the hands of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House. Therefore once it is shown that an act amends the Constitution the certificate of the Speaker under the proviso to Section 29 (4) of the Constitution is essential. The Act in question did not have any certificate to this effect. The Privy Council held the Act as ultra vires and void on the ground that a Legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. The main argument of the Appellant was that the Legislature of Ceylon being sovereign, therefore, possessed inherent power to pass any law. The Privy Council rejected this argument.

> "But the proposition which is not acceptable is that a Legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be valid law unless made by a different legislative process. And this is the proposition which is in reality involved in the argument."

Chief Justice Subba Rao holds the Act as an amendment of the constitution and therefore, an authority for the proposition that a constituent law is law meaning thereby, it is submitted, ordinary law. It is submitted here with all due regard to the learned Chief Justice that it is not correct to regard the Act in question as an amendment. In fact, it was an ordinary Act which by implication, if held valid, rendered S.29 (4) as meaningless. The subject matter of the Act required a special majority for passing the Act but this condition was not observed in passing it and hence it was held invalid even though it had received Royal Assent. P.J. Fitzerald viewed the Act to be an ordinary law in these words:

> "In the Bribery Commissioner v. Rana Singhe the Privy Council held invalid an Act of the Ceylon Parliament which had received the Royal Assent. Here, however, there was a conflict between a fundamental rule of the constitution and an alleged Act of Parliament, and the constitution took precedence over the statute."[57]

It is submitted that the Act was rightly held as invalid because the conditions to pass the law validly were not observed. But to hold the Act as a constituent law is to stretch the meaning of "amendment" beyond its limits and purpose.

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57. Fitzerald, P.J. (editor): Salmond on Jurisprudence 12th edn. p 121.

We have already made clear that the process itself is no criterion to judge whether it is a constituent law or any other law; the right criterion is to judge its nature and quality and the test in such cases is to see whether the Act changed the text of the constitution or not. Applying this very test, we find that the Act in question did not change the letter of the constitution.

In reality, in a legislative body having absolute power to make or unmake any constituent law as well as ordinary law in one and the same manner, the legislative and the constituent powers seem to be so indistinguishably mixed that both of them seem to be one and the same thing, and one is most likely to be misled and call the whole activity as legislative merely because that body itself is called a legislative body and/or the bulk of its work is legislative and so the small quantity of constituent law is made to lose sight of its own existence and character just as a deep colour in a picture seems to absorb completely a light but little colour along with it, if seen by a cursory or distant glance. But if we do not go by the manner a law is passed but by the nature and quality it possesses, the ordinary law and the constituent law stand clearly distinguishable from each other.

We may state here that what is done under Art 368 in the constitution of India is nothing but a constituent law and

never an ordinary law. The essence of our test has been so wisely expressed in the Article itself that one is filled with a sense of admiration for the drafters. Particularly, the phrase, "The constitution shall stand amended in accordance with the terms of the Bill," fulfils the very purpose of an amendment, i.e. a change in the text and our test is carried to complete fruition. The Article leaves not a shadow of doubt that it produces constituent law and nothing but constituent law. The customary procedure of law-making has been employed to make constituent law and there is nothing bad in it. Constituent law can be perfectly made by following ordinary procedure of law-making; mere procedure being no touch-stone to distinguish the ordinary law from the constituent law. It should be noted that, strictly speaking, it is not exactly the similar "legislative" procedure which is followed in Art 368.

The procedure of carrying out amendment to the Federal constitution has been provided in Art 112 of the constitution of Switzerland, 1848, as follows: "Amendment is secured through the forms required for passing Federal laws." Borgeaud comments upon this in these words:

> "It (the Article) signifies that the customary rules of legislative procedure shall be adhered to in cases of constitutional revision. It would be impossible to

> argue from it that the Federal Constitution authorizes an assimilation of the exercise of constituent functions with ordinary legislative acts."[58]

In fact, Justice Hidayatullah seems to have realized that the product of an amending process is nothing but constitution itself, when he observed: "An amendment of the Constitution has been aptly called a constitution in little ..."[59]

(B) Contextual Arguments

It is clear from what has been said above that there does exist a distinction between a constituent law and an ordinary law, especially in case of written constitutions. Now regarding the problem whether "law" in Art 13 (2) includes constituent law or not, it is submitted that the question cannot be decided on the basis of the meaning of "law" itself. "Law" is a generic term and it is difficult to define it precisely. Writing on the definition of law, a great jurist of our time writes:

> "In so far as definition imports specific differentiation within the genus, we have thought (and still think) that to offer a definition of law is to obscure and impoverish, rather than to clarify and enrich, the understanding of it."[60]

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58. Borgeaud, C. op.cit. supra. pp 293-294.

59. Golak Nath, AIR 1967, S.C. at 1697.

60. Stone, J. in Australian Studies in Legal Philosophy (ed. Tammelo), 1963, p 6.

Again he writes: "In either case 'definition' cannot be more definite nor more definitive than the exposition which it calls to mind."[61] Law, as such, includes every type of law including constituent law. But the question before us is not whether "law" in its generic sense includes constituent law or not. The question is whether "law" as used in Art 13 (2) includes constituent law or not. The difficulty is that the meaning of "law" in Art 13 (2) has been derived in the Golak Nath case from the word "law" in its widest possible generic sense. It is not denied that "law" in its generic sense does include constituent law, but the point to be considered is whether "law" in Art 13 (2) has been used in a generic sense or some limited sense. This enquiry into the meaning of "law" in Art 13 (2) should be based on the context in which the word "law" has been used in Art 13 (2) and not on the intrinsic meaning of law, otherwise it would be begging the question. Professor Subba Rao attempted to find the meaning of "law" from the word itself. For instance, he argues that a law which can enlarge fundamental rights by adding to Part III can be only constituent law and hence "law" in Art 13 cannot exclude a constitutional amendment.[62]

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61. Stone: op.cit. p 31.

62. Professor Subba Rao, G.C.V. The Mimansa Approach to the Indian Constitution, 1967, Sup. Ct. Journal, p 94.

It is submitted that the nature of a law which adds to Part III does not help us in determining the nature of a law which takes away or abridges the rights enshrined in Part III, simply because the word "law" in Art 13 (2) is used in respect of a law which takes away or abridges the rights existing in Part III and not in respect of a law which adds to them. Art 13 does contemplate a valid addition of rights but it cannot be reasonably said that such a "law" is covered under the term "law" in Art 13 (2). With due respect to the Supreme Court, it is submitted that the Golak Nath case attached a generic sense to the word "law" in Art 13 (2), without paying sufficient attention to the context in which it has been used. The comprehensiveness attributed to the word "law" in Art 13 (2) stems from this fallacy and the total neglect of the context has resulted in lifting the term "law" higher than constituent law because "law" in Art 13 (2) overrides, according to the Golak Nath judgement, even a constituent law if it takes away or abridges the fundamental rights enshrined in Part III of the Constitution. The context in which a word is used cannot be ignored if its true meaning is to be discovered.

> "Once the relativity in the use of words and of the concepts for which the words stand is recognised, it is seen that 'logic' alone does not and cannot settle the matter."[63] In this connection, quite pertinent and

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63. W.W. Cook, Substance and Procedure Yale L.J. 1932-3, p 333 at 345

relevant is the observation of the Supreme Court of the United States made in Lamar v. U.S.:

> "The same words may have different meanings in different parts of the same Act, and of course words may be used in a statute in a different sense from that in which they are used in the Constitution."[64]

It is apt here to point our that the commerce clause in the Australian Constitution Act, 1900, happens to be so widely worded as "trade, commerce and intercourse among the states shall be absolutely free," and yet the High Court of Australia interpreted the words "absolutely free" as meaning not absolutely free.[65] It is one of the outstanding examples to bring our point home that words used in the constitution are not necessarily to be understood in their generic sense as the word "law" in Art 13 (2) has been construed by the Golak Nath majority but must be interpreted taking into consideration not merely their text but context also, meaning by "context" not merely the total document or existing law to help interpret a particular provision but also the larger social context in which the constitution is being worked. The significance of the context in the process of interpretation has been rightly

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64. (1916) 240 U.S. 60 at 65.

65. Duncan v. State of Queensland, 1916, C.L.R. 556 at 573 Per Griffith C.J.

stressed by Professors McDougal and Lasswell in these words:

> "From the standpoint of the task of interpretation, the most sweeping point to be made is the contextuality of any process of communication. Every feature may affect the outcome."[66]

The contextual area would be covered under the following rubrics:

(i) Significance of Fundamental Rights and their proper place in the Indian Constitution

Our enquiry into the nature of the Fundamental Rights in the Indian Constitution is directed to a limited purpose, namely, their significance to the individual and whether they are, or were intended to be, permanent in the sense of not being touchable by way of amendment under Art 368 when these are taken away or abridged by such amendment. Therefore, it is neither necessary nor possible within the range of our enquiry to deal with all these rights in detail in their various aspects. Our sole endeavour is to find out whether these rights or their significance warrant any limitation on the power of amendment in Art 368.

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66. McDougal and Lassell: Interpretation of Agreements and World Public Order: Principles of Content and Procedure 1967, p 15.

The chapter on Fundamental Rights represents mainly an ideology of individualism propounded by Bentham and preached by J.S. Mill and a host of other philosophers. The idea of individual liberty and freedom is significant because it "permits the full development of the personality of every citizen in the best way he can achieve it ..."[67] Though individual liberty is precious, yet it is not so precious as to be unlimited; its proper sphere is to be delimited by other factors responsible for the needs of the community or the society. If individual liberty is not to be delimited by social controls, its results are most undesirable; as absolute freedom to contract results in a state of slavery,[68] so is the case with liberty in general. K.M. Panikkar describes this result in these words:

> "The laissez-faire tradition of liberalism on which the doctrine of individual liberty is based and to which we hark back did not lead to an Arcadian system of happiness. It meant inevitably the right of the capitalist to exploit the worker, of the powerful to oppose the weak, of the rich to grow richer, and the poor to grow poorer, all in the sacred name of the

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67. Gajendragadkar, P.B. Law, Liberty and Social Justice, 1965, p 65.

68. "... To put no restrictions on the freedom to contract would logically lead to contracts of slavery." Cohen: The Basis of Contract, 1933, 46 Harv. L. Rev. 553-586.

liberty of the individual. It was the doctrine of the devil taking the hindmost. Life was conceived as a race for success with the state heavily weighted in favour of privilege, as the umpire. It is the omnipotent state that has set right some of these injustices of a competitive society by emphasising the ideals of economic equality, social security, nationalised health services, organisation of labour to prevent exploitation, control of production and distribution in order to secure for every one the minimum necessities of good living."[69]

The constitution framers in India were well aware of the importance of Fundamental Rights as well as the need of their proper delimitation. They knew that "true individual freedom cannot exist without economic security and independence. Necessitous men are not free men."[70] A great philosopher of India expressed the same idea on the day the constitution came into force, in these words:

"For the vast majority of human beings the main anxieties are economic rather than political. Political freedom is mainly a means to a better life. The right to work,

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69. Panikkar, K.M. The State and the Citizen, 1956, p 5.

70. Shah, K.T. Prasad Papers File 4--c/47: quoted by Austin, G. op.cit. supra. p 60.

> the right to a living wage, the right to care and maintenance in infancy, old age, and ill health, are more important to the ordinary man than the right to vote or freedom of speech and assembly."[71]

The needs of India's millions far exceeded the resources of the Government and the constitution framers, being realistic, appreciated that positive rights could not be granted; what they could provide for were negative rights in Part III and non-justiciable state obligations in Part IV of the Constitution. The constituent assembly members realized that these negative rights, or in other words, legal restraints on the legislatures and other functionaries subsumed compendiously as "the state", could not be absolute in their nature. The founding fathers were on the horns of a dilemma when they had to face the problem of defining the rights precisely and spelling out the limitations to them.

On the one hand, they intended to grant individual freedom, on the other hand they desired that the public weal should not be overridden by private rights. Therefore, it was a difficult task to set out limits to private rights so that the interest of the public

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71. S. Radhakrishnan: Economic Rights of Man; The Hindu, 26th January 1950.

would get priority over that of the individual. One of the devices to limit the rights was by way of their suspension in certain circumstances, and the founding fathers showed their wisdom by adopting this device during an emergency in respect of Art 19 and of other rights specifically mentioned in a Presidential order.[72] Secondly, individual liberty was circumscribed by allowing state intervention for certain social purposes. The right to equality was not to stand in the way of making special laws protecting women and children, and freedom of religion was not to prevent the state from passing social reform legislation. Similarly, the freedoms enshrined in Art 19 can be regulated to serve the interests of the general public mentioned in clauses (2) to (6) of Art 19.

Therefore, the scheme of the Fundamental Rights makes it clear that the sphere carved out for individual freedom is not fixed or permanent but flexible, increasing or diminishing in proportion to the pressure of the public interest. The one discernible thread running through Part III is that all the rights have been made subservient to the public interest. In this connection it is of interest to note that the riders to the rights are highly flexible and ever-changing in their nature. For instance, concepts like "public interest" and "morality",

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72. Art 358-359.

"reasonable restrictions" which have been employed to regulate the scope of the Fundamental Rights are such as to defy all attempts to define them. In fact, these elastic expressions made the boundaries of the spheres of individual freedom and of the public weal to be fluid. Therefore, it is obvious that the rights as they have been written in Part III have no sign of permanency in them. Art 13 does not give them any "inviolability" or "transcendental" character. An ordinary law taking away or abridging any of these rights, if held justified under any of the limits imposed upon the rights, is still a valid law. It is only when such a law fails to be "reasonable" that it is hit by Art 13 (2) and declared ultra vires.

Moreover, Parliament has been authorised to restrict the operation of these rights. Arts 33 and 34 empower Parliament to take away or modify the availability of Fundamental Rights to the Armed Forces. Finally, the Directive Principles incorporated in Part IV also suggest that Part III was not intended to be permanent in the sense of being unamendable.

(ii) Directive Principles

It is an historical fact that the Directive Principles and the Fundamental Rights were both regarded by the founding fathers as rights and their separation into two parts, so that Part III became justiciable and Part IV non-justiciable was an

after-thought. Though one of the Constituent Assembly members described the Directives contemptuously as "a veritable dustbin of sentiment ... sufficiently resilient as to permit any individual of this House to ride his hobby horse into it,"[73] the fact is that the Directives and the Fundamental Rights together are "the conscience of the Constitution."[74] Dr. Ambedkar likened the Directive Principles to the instrument of instructions issued to the Governor-General and to the Governors under the Government of India Act, 1935.[75] He also described them as nothing but "implied powers" given to the legislature to make laws on the matters mentioned therein.[76] K.M. Munshi justified them on the ground that they serve to provide some basis of protest against arbitrary legislation.[77] To him, "they are a body of doctrines to which public opinion can rally." Dr. Ambedkar also had a similar idea when he said: "What great value these Directive Principles possess will be realized better when the forces of right contrive to capture power."[78] There is a view that there is no provision in the

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73. Krishanamachari, T.T. C.A.D.VIII, p 583.

74. Austin Granville: op.cit. supra. Chapter 3 (Heading).

75. C.A.D.VIII, p 41.

76. c.f. Markandan, K.C. Directive Principles in the Indian Constitution, 1966, p 85.

77. Austin: op.cit. p 78.

78. C.A.D.VII. pp 41-42.

constitution to prevent a misuse of the legislative power.[79] Perhaps, the Directive Principles pose a great check on the misuse of legislative power and it is the chapter on Directives which would be a corrective to the Legislature, when the people register their protest invoking any of the Directives against the Legislature which intends to misuse its legislative power. The fact that the Directive Principles were not made justiciable does not render them mere "pious wishes" or much window-dressing for the social revolution, as one of the Assembly members thought.[80]

Professor Gledhill has rightly observed that the courts may determine the "public interest" in the light of the Directive Principles, and thus, restrict some of the Fundamental Rights.[81] Markandan, in his studies on the Directive Principles in the Indian Constitution, says:

> "The courts as a matter of fact took the help of the Directives in defining what was 'public purpose' and weighed the reasonableness or otherwise of statutes on the basis of standards and norms set forth in the Directives."[82]

79, Narayan, J. (1968) 17.I.C.L.Q. p 878.

80. Shah, K.T. Shah's minute: Prasad Papers File I-E/45, quoted by Austin, op.cit. p 79.

81. Professor Gledhill, A. The Republic of India, 1964, p 206.

82. Markandan, K.C. op.cit. supra. p 251.

While interpreting the Constitution, courts must not ignore the Directives. It is relevant here to point out that when the Constituent Assembly substituted "enforceable" for "cognizable" in Art 37, they really meant to allow the courts to take into consideration the Directive Principles in the interpretation of the constitution.[83]

Blackshield prefers to describe the provisions of Parts III and IV as moral rights:

> "To adopt Lon Fuller's now well known distinction, the 'fundamental rights' are a 'strict morality of duty' which India's constitution-makers set for themselves; the Directive Principles are merely a 'morality of aspiration'. Nevertheless it is clear that the two sets of articles have a great deal in common."[84]

He further observed:

> "Above all, the distinction between Part III and Part IV is not that Part III, being justiciable, is the responsibility of the courts (and not of the Parliament), whereas Part IV, not being justiciable, is the responsibility of the Parliament (and not of the courts). All the moral rights reflected in Part III and Part IV are the responsibility of the organs of government."[85]

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83. c.f. Ibid. p.154.

84. Blackshield, A.R. Fundamental Rights 10.J.I.L.L.(1968) p 44.

85. Ibid. p 45.

If we take into consideration the fact that the Fundamental Rights are negative whereas the Directives are positive, though unenforcable, it seems that the Directive Principles, if given due effect, would be more significant to the individual than the Fundamental Rights. The Directives have been described as more potent than the Fundamental Rights.[86] Another author speaks in similar refrain:

> "Truly speaking, the Directive Principles are more fundamental than fundamental rights from the point of view of the constitution since the ideals enshrined in it, "Justice, social, economic and political," are loftier in conception, and seek to secure to the individual tangible benefits of great significance than fundamental rights. It is for this reason that both in the objective Resolution and in the Preamble to the constitution the ideal of "Justice, social, economic and political" is mentioned first and prior to the securing of guarantees under fundamental rights. It is also for the same reason that when B.N. Rau prepared the draft outline of the constitution he included the provisions relating to Directive Principles in Part 'A' and those on Fundamental Rights in Part 'B'."[87]

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86. Anderson, J.N.D. (ed.) Changing Law in Developing Countries (1963) p 89.

87. Markandan, K.C. op.cit. supra. p 148.

It was suggested by B.N. Rau, the Constitutional Advisor to the Constituent Assembly, that in the case of conflict between Fundamental Rights and Directive Principles the former should be made subservient to the latter; otherwise he believed, as he was warned, that the framers might not be accused of "sucking the Bill of Rights dry".[88]

In the beginning the judicial attitude towards the Directives was one of indifference. In the State of Madras v. Srimati Champakam Dorairajan[89] it was observed:

> "The chapter of 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 of Fundamental Rights."

Later on, it was also accepted that in the interpretation of the Constitution, the Directive Principles should be given attention to and the courts should endeavour to give effect to them as far as possible. In re. Kerala Education Bill,[90] the Supreme Court realized the importance of the Directives and observed:

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88. Rau, B.N. India's Constitution in the Making, p 333.

89. (1951) S.C.R. 525 at 531.

90. AIR 1958 S.C. 956.

"The Directive Principles have to conform to and run subsidiary to the Chapter on Fundamental Rights. Nevertheless, in determining the scope and ambit of the Fundamental Rights relied on by or on behalf of any person or body the court may not entirely ignore these Directive Principles of state policy laid down in Part IV of the constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible."

It is submitted that in the interpretation of the Constitution, the Fundamental Rights need not be over-emphasised otherwise the Constitution itself would be failing in its aims and objectives.

"The Fundamental Rights Chapter deals only with liberal rights of individuals and they seem to conform to the old school of thought which has outlived its utility, the school of utilitarians and liberals. As against this, the principles enunciated in Part IV approach a socialistic pattern. The sincerity or the goodness of this government will be judged by how far they go to implement these Directive Principles. It is very easy to stick to Fundamental Rights and appear progressive while doing nothing to reduce class differences. But really, liberty will have no meaning unless there is

economic equality."[91]

Mr. Nehru described the Fundamental Rights as representing something static, whereas the Directive Principles are "dynamic".

> "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 sometimes it must so happen that that dynamic movement and that static standstill do not quite fit into each other."[92]

He further observed that if Fundamental Rights are over-emphasised as compared with the Directives, then,

> "the result would be that the whole purpose behind the Constitution, which was meant to be a dynamic constitution leading to a certain goal, step by step, is somewhat hampered and hindered by the static element being emphasized a little more than the dynamic element."[93]

The study of the Directive Principles makes two points clear: First, though the directi es are unenforceable, they impose a solemn moral duty on the Legislatures to observe them

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91. Parliamentary Debates (lok Sabha) Part II, 1955, Vol.II, Col.2129.

92. Parliamentary Debates (of India) Part II, Vol.XII, Col.8822-8823.

93. Ibid.

in enacting laws. That is why they have been described as "nevertheless fundamental" in Art 37. Failure to observe them may earn disrepute for the legislatures and overall progress may be hindered. Secondly, the Directives affect indirectly the sphere of the individual liberty and freedom as do the limitations to the fundamental rights in Part III. The judiciary as well as the legislature and the executive have to give effect to Directives as well as Fundamental Rights and though the conflict in some cases may be hard to resolve, the delicate task of accommodating and harmonising the two parts as far as possible is always there. The very existence of such a situation brings it in light, that it is neither possible nor desirable to attribute any permanency to Part III. Part III is ever to be in flux as regards its real sphere and scope; its real area or scope is left to be determined by the circumstances, economic and political, from time to time. Therefore, it is quite futile to assert that the Fundamental Rights are "inalienable" or "sacrosanct", "permanent" or "transcendental". Moreover, it is meaningless to call them "transcendental" without answering the question, "transcendental to what?"[94]

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94. Annual Survey of Commonwealth Laws (1967) p.41.

In this connection, let us see whether the founding fathers really intended to make Part III untouchable by way of amendment under Art 368, so that the rights may not be abridged or taken away. Of course, too much reliance on the intentions of the framers is neither necessary nor desirable in the interpretation of the constitution because a constitution is not a contract, in which the real intentions of the parties count much; a constitution is intended to be an instrument to last for ages to come and the intentions of the framers may not suit the coming generations. That is why some of the constitutionalists recommend a "progressive interpretation" of the constitution.[95]

The intentions of the constitution makers, however, always have some relevance particularly when the constitution has been recently framed so that their intentions are more or less of a contemporaneous nature. Viewed in this light, the intentions of the Indian founding fathers can be a useful guide to determining whether the fundamental rights should be treated as amendable or not

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95. Basu, D.D. Commentary, 1965, Vol.I. p 56.

C. Intentions of the Founding Fathers

Jawahar Lal Nehru, while presenting to the Constituent Assembly the Interim Report on Fundamental Rights, expressed his idea regarding the nature of the Fundamental Rights:

> "A Fundamental Right should be looked upon, not from the point of view of any particular difficulty of the moment but as something that you want to make permanent in the Constitution."[96]

The point to be considered is whether he meant by "permanent" unamendable in the legalistic sense, or something else. It seems that by "permanent" he never meant "unamendable" because he clarified his view later on in these words:

> "... that 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 proposed, lay down a period of years - whatever that period may be - during which changes to that constitution can be easily made

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96. CAD III, p 454.

without any difficult process."[97]

Pandit Nehru was all in favour of a flexible constitution and the fundamental rights were no exception to it. Rather he favoured the view that the constitution should be amendable by a simple majority.[98] Moreover, if he intended to make the rights unamendable in any way by Parliament, he would not have moved that the Constitution (First Amendment) Act, 1950, just after the Constitution came into force,[99] which abridged certain Fundamental Rights. After giving examples of the better framed and better phrased constitutions of the Weimar Republic of Germany and of the Republic of Spain, he expressed his views on the flexibility of constitutions:

> "A constitution which is unchanging and static, it does not matter how good it is, how perfect it is, is a constitution that is past its use. It is in its old age already and gradually approaching its death. A constitution to be living must be growing, must be adaptable, must be flexible, must be changeable. And if there is one thing which the history of political developments has pointed out, I say with great force,

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97. CAD VII. pp 322-323.

98. Austin, G. op.cit. supra. p 259.

99. Parliamentary Debates (of India) May 16th, 1951, Vol.XII, Cols.8814-8815.

> it is this that the great strength of the British nation and the British people has laid in their flexible constitution. They have known how to adapt themselves to changes, to the biggest changes, constitutionally. Sometimes they went through the process of fire and revolution. Even so, they tried to adapt their constitution and went on with it."[100]

Therefore, it is clear from the record that he never intended to make the fundamental rights unamendable by Parliament.

Speaking on Art 32 which guarantees the constitutional remedies for enforcing the Fundamental Rights, Dr. Ambedkar described Art 32 as, "the very soul of the constitution and the very heart of it,"[101] because that article alone makes the rights effective by their speedy enforcement. The uniqueness of Art 32 was pointed out by a learned author in these words:

> "There is no other country where citizens and others can in the first instance, go to the highest tribunal in the land and obtain a final pronouncement regarding their fundamental rights."[102]

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100. Parliamentary Debates (of India) May 16th, 1951, Vol.XII, Cols.9625-9626.

101. Dr. Ambedkar, CAD VII, p 953.

102. Triphati, P.K. Mr. Justice Gajendragadkar and Constitutional Interpretation (1966) 8 JILI p 479 (583).

Dr. Ambedkar emphasised the point that without the constitutional remedies, the rights would have been meaningless[103] but he did not rule out their amendability.

> "The constitution has invested the Supreme Court with these writs and these writs could not be taken away until and unless the constitution itself is amended by means left open to the Legislature."[104]

He considered that the constitutional remedies provided for in Art 32 were "the greatest safeguards" and in this way the fundamental rights were not "glittering generalities"[105] or pious declarations but made real by guaranteeing their enforceability by the Supreme Court under Article 32. It is obvious that if he regarded Art 32, which is the only provision making the Rights effective, as amendable by Parliament, it can be safely inferred that the other Rights cannot be considered as unamendable.

Speaking about the amending provision of the Draft Constitution, Dr. Ambedkar said:

> "The powers of amendment are left with the legislatures central and provincial. It is only for amendments of

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103. Dr. Ambedkar: CAD VII, p 953.

104. Ibid.

105. Ibid.

specific matters - and they are only few - that the ratification of the state legislatures is required. All other articles of the constitution are left to be amended by Parliament."[106]

This very view was reiterated by him when he replied to the critics of the amending procedure:

"The Assembly has not only refrained from putting a seal of finality and infallibility upon this constitution by denying the people the right to amend the constitution, as in Canada, or by making the amendment of the constitution subject to fulfilments of extraordinary terms and conditions, as in America or Australia, but has provided for a facile procedure for amending the constitution ... those who are dissatisfied with the constitution have only to obtain a two-thirds majority, and if they cannot obtain a two-thirds majority in the parliament elected on adult franchise in their favour, their dissatisfaction with the constitution cannot be deemed to be shared by the general public."[107]

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106. CAD VII, p 43.

107. CAD XI, p 976.

There is one ambiguous statement of Dr. Ambedkar which throws some doubt regarding the amendability of the Fundamental Rights, but does not make clear what he had in mind.[108] Explaining the final form of the amending procedure under Art 304 of the Draft Constitution (Art 368 of the Constitution), he informed the Assembly that Art 368 divides all the articles under three categories, namely, first, articles amendable by parliament by a simple majority, secondly, by a two-thirds majority and an absolute majority, and thirdly, those provisions which require ratification by the half the states.

He then went on to say:

> "If the future parliament wishes to amend any particular article which is not mentioned in Part III or Article 304, all that is necessary for them is to have a two-thirds majority. Then they can amend it."[109]

Since Article 304 (368) is an entrenched article in the proviso to that article, it is amendable by a two-thirds majority and an absolute majority plus ratification as required by Art 368.

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108. Subba Rao C.J. relied upon this paragraph in the Golak Nath case, op.cit.supra. p 1657.

109. CAD IX, p 1661.

Linking Part III with Art 304 may mean that he might be thinking that Part III is also entrenched which is not so or he might be intending that Part III is unamendable. In the latter case, there emerges a fourth category of articles (of Part III) which are not amendable at all. But according to him there are only three categories of articles for the purpose of amendment. In any event, the statement is quite ambiguous and does not clearly affirm that Part III is not amendable. In the light of his earlier statements which are quite clear and emphatic, and the fact that he enlightened the House on the justification of the Constitution (First Amendment) Act, 1951, as Law Minister,[110] this statement seems to be meaningless and takes us nowhere.

In the Golak Nath case, Justice Hidayatullah referred to the historical efforts to have fundamental rights embodied in the Constitution and hence construed them to be permanent.[111] For instance, he quoted this statement from the Nehru Report:

> "It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances."[112]

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110. Parliamentary Debates (of India), 1951, Vol.XII, Part II, Cols.9004-9031.

111. Golak Nath AIR, 1967, S.C. at 1694.

112. All Parties Conference, Report of a Committee to Determine Principles of the Constitution for India, 1928, (Nehru Report) pp 89-90.

It is relevant to point out that in spite of the fact that the Motilal Nehru Report (1928) laid emphasis on fundamental rights to make them permanent, the amending provision in Clause 87 of the Report empowered the Indian Parliament to repeal or alter any of the provisions of the Constitution. No doubt, the Nehru Report was a close precursor of the fundamental rights; ten of the nineteen sub-clauses re-appear materially unchanged and three of the rights were shifted to the Directive Principles,[113] but in regard to their amendment, the Nehru Report and the Sapru Report (1944) were largely ignored by the Union Constitution Committee.[114] Therefore, it is not reasonable to attribute any permanency to fundamental rights on the basis of these Reports. It is said that the word "fundamental" as an adjective to the rights, and the "guarantees" in Art 32 are intended to bestow permanency upon the rights. It may be submitted that the epithet "fundamental" is not synonymous with permanent in the sense of being unchangeable. "Fundamental" only means that the rights are essential but certainly not as "unamendable". Finer's warning is most relevant in this respect:

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113. Austin Granville: op.cit. p 55.

114. Ibid. p 257.

"There are no fundamentals capable of standing proof against time, except entities so vague as to be meaningless. Stability and change, settlement and flux, must then be expected and men will constantly hover between the extremes and struggle for their fixture in constitutions. And the lesson of it all is that there is nothing so fundamental that it may not change, and nothing so fundamental that it ought not change; nor anything so fugitive that it may not be one day fixed and worshipped as an absolute dispensation."[115]

In the Constituent Assembly, Mr. Deshmukh had moved an amendment to the effect that the fundamental rights be not amended so as to restrict their scope.[116] But later on he withdrew this amendment.[117] It has been suggested that Mr. Deshmukh withdrew his amendment because some members must have drawn his attention to Art 13 (2), which already safeguarded the fundamental rights.[118] There is no record of such a suggestion in the Constituent Assembly Debates and even assuming that such a suggestion was made, then, how is it that no member of the Constituent Assembly has described the

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115. Finer, H. Theory and Practice of Modern Government, Vol.I, p 239.

116. Amendment No.212, CAD IX, p 1644.

117. CAD IX, p 1665.

118. Dr. Minattur thinks so. See Fundamental Rights, 1968, II M.L.J. (Journal Section) p 23.

the Part III rights as unamendable by Parliament? It is submitted that if the constitution framers had intended to make the fundamental rights unamendable, they must have made a clear provision to that effect in the Constitution. It seems that the real reason why Mr. Deshmukh withdrew his amendment was that he failed to muster any support for it in the Constituent Assembly.[119]

Beginning from the Objectives Resolutions, "the foundation stone of the Constitution,"[120] to the passing of Art 304 of the Draft Constitution, at no time was the view ever expressed in the Constituent Assembly, that any Part of the Constitution was unamendable. On the contrary, several members expressed apprehension whether the document they were forging would work properly or not.[121] How could they put a seal of finality on any part of the Constitution when they were in such a state of mind? Moreover, it was highly improbable for them to keep any part of the Constitution beyond amendment when they believed in a Constitution capable of keeping pace with the changing situation.[122]

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119. CAD IX, Pp 1644-1665.

120. Seth Govind Das, CAD XI, p 611.

121. See CAD IX, 1645; CAD XI, pp 625, 644 and 684.

122. Dicken Cherry, H. The Constitutional Philosophy of India, India Quarterly VIII, 401 at 416.

How can the constitution framers be regarded as intending to keep Part III beyond amendment, when they did not even think fit to entrench them in the Proviso to Art 368. Austin describes the fact that the fundamental rights were not entrenched, as a "surprising aspect of constitution-making in India."[123] It is submitted that, in view of the fact that only those provisions were intended to be entrenched which relate to the Centre-State relationship, there is no reason to be surprised that the fundamental rights were not entrenched.

There can be no more convincing proof of the intentions of the founding fathers than the fact that the Constitution (First Amendment) Bill, which drastically abridged certain fundamental rights, was passed by the same House (though under the designation of "Parliament") which enacted the constitution. During the passage of this Bill, no member raised any objection in regard to the competence of the House to amend Part III.

If their intentions are gathered from what they said in the Constituent Assembly and their overt act in passing the Constitution (First Amendment) Bill, there is overwhelming evidence that they never intended to make Part III permanent in the sense of its being unamendable by Parliament in any way.

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123. Austin, G. op.cit. p 262, foot-note.

If the founding fathers ever happen to know of the Golak Nath decision they would realise how true Bishop Hoadly was when he uttered: "Whoever hath absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them."[124]

D. Consideration of Issues Raised by Golak Nath Decision

Besides the textual meaning and the intentions of the framers of the Indian Constitution, there is a large number of other considerations which also reinforce the conclusion that the decision in the Golak Nath case was reached on misconceptions. The Golak Nath judgment raises more issues than it solves. A brief discussion of these issues will prove the correctness of our view.

(i) A strange construction of Article 13 (2)

If Art 13 (2) was a prohibition against amendment of the fundamental rights, how is it that constitutional lawyers and text-book writers failed to appreciate its potency? D.D. Basu, a great commentator on the Constitution of India, took the view that the entire chapter on fundamental rights can be amended by

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124. Bishop Hoadly, quoted by Gray: Nature and Sources of the Law 2nd Edn, 1921, p 102.

the majority in Parliament.[125] Professor Gledhill did not hold that the fundamental rights were unamendable by Parliament though he appealed for their security and permanency.[126] Professor K.C. Wheare[127] and Sir Ivor Jennings,[128] who considered the provisions relating to the amending process, did not point out that Art 13 (2) prohibits the amendment of the fundamental rights. The Indian text-book writers[129] also never viewed the permanency of these rights in the way the Supreme Court did. Not only these jurists, but the Supreme Court itself in its earlier decisions in the Sankari Prasad and Sajjan Singh cases came to the view that Part III was amendable and the prohibition in Art 13 (2) was only against the legislative power of the Legislatures and other functionaries in the "state". The Golak Nath majority of one was also very slender. If the number of all the judges who considered the question be counted, twelve judges hold the contrary view as against seven judges. The soundness of the decision in Golak Nath must be judged against the fact that the Sankari Prasad

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125. Basu, D.D. The Indian Constitution through American Eyes XII, FLJ, p 158.

126. Gledhill, A. India's Fundamental Rights IYBIA, 1952, V.I.P.9.

127. Wheare, K.C. op.cit.supra;

128. Jennings, Sir Ivor: op.cit. supra.

129. Jain, M.P. The Indian Constitutional Law, 1962.
Seervai, H.M. The Constitutional Law of India, 1967.
Joshi, G.N. The Constitution of India, 1961.

case was unanimously decided by five judges, Sajjan Singh by a majority of three to two, the minority view not being dissenting but expressing doubts only. The interpretation of Art 13 (2) in other cases also militates against the view of the majority in Golak Nath. For instance, in A.K. Gopalan v. State of Madras,[130] Kania, C.J. said:

> "... the inclusion of Art 13 (1) and 13 (2) in the constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the court has always the power to declare the enactments to the extent it transgresses the limits invalid."

It stands to reason that if Art 13 (2) is a mere matter of abundant caution, and performs the same functions as Art 245 does, namely to invalidate a law to the extent it violates fundamental rights, what is the justification of giving any dterminative effect to Art 13 (2) in respect of amendment under Art 368?

Considering the question whether a taxing law under Part 12 of the constitution is hit by Art 13 (2), the Madras High Court held:

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130. (1950) SCR.88.
Hidayatullah, J. referring to this observation, said that far from belittling the importance of fundamental rights it emphasised their commanding position - see Sajjan Singh v. State of Rajasthan (1965) ISCR. 933 at 961.

> "It (Art 13) does not enact that other portions of the Constitution should be void as against the provisions in Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole. Art 13, therefore, cannot be read so as to render any portion of the constitution invalid. This conclusion is also in accordance with the principle adopted in interpretation of Statutes that they should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of them inoperative should be avoided. For these reasons, I must hold that operation of Part 12 is not cut down by Part III and that the fundamental rights are within the powers of the taxation by the state."[131]

This interpretation of Art 13 was supported by the Supreme Court in M.S. Sharma v. Sri Krishana Sinha.[132] On parity of reasoning, it can be argued that Art 13 warrants an interpretation which gives effect to other Parts of the Constitution including Part XX (Amendment of the Constitution).

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131. A. Krishnan v. State of Madras AIR (1952) Mad.395 at 405.

132. AIR (1959) S.C. 397.

(ii) Importing Rigidity

The Golak Nath holding does not prevent Parliament from amending Part III; what it forbids is an amendment seeking to take away or abridge the rights in Part III. That means that Parliament can amend Part III so as to add to it any new rights or enlarge the existing rights but not so as to detract from or reduce them. Such a proposition is logically absurd because it means that a body which can add to Part III cannot take away the added part. When it has power to add to Part III, there is no reason for denying it the power to take the addition away. Faced with the question that the law can never be static, but must change with social changes, Hidayatullah, J. suggested that only a Constituent Assembly, and not a constituted body, i.e. Parliament, can amend Part III if any of the rights therein is intended to be taken away or abridged.[133] The numerous insurmountable difficulties involved in calling a Constituent Assembly will be considered later and it will be shown that it is not legally possible to call any Constituent Assembly. It was rightly pointed out by one of the minority judges[134] that if the Constitution provides its own method of

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133. Hidayatullah, J. suggested that a distinction be made between possession of a right and its exercise. The first is fixed and the latter controlled by justice and necessity. 1967 AIR SC 1704

134. Blackshield viewed that alteration for just adaptation be allowed. (1968) 8 JILI.p 166.

134. Ramaswami J. AIR (1967) S.C. at 1737.

amendment, any other method of amendment would be unconstitutional and void. Secondly, when Parliament has no power to amend Part III according to the Golak Nath decision, how can it delegate such a power to any other body created by it? Moreover, according to the prevailing constitutional doctrine of the Supreme Court, Parliament cannot delegate essential legislative functions.[135] It is needless to say that constitutional amendment is a very essential law-making function and the Golak Nath decision holds amendment as an ordinary legislative act. Parliament is empowered to delegate its amending power to any other body, the doctrine regarding non-delegation of essential legislative functions is also overruled thereby. Thirdly, supposing a constituent body is called and proposes an amendment to Part III to take away any of the rights, would that amendment not qualify to be a "law" within the prohibition of Art 13 (2)? To suggest a Constituent Assembly for amending Part III is to set up an almost impassable and insuperable barrier against amendment, which is not there even against the States, since federal clauses can be amended without any Constituent Assembly. The founding fathers were proud of the fact that they gave the nation an easily amendable constitution

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135. In re Deehi Laws Act (1951) II.SCR.747.

by avoiding the rigour of rigidity in the amending process[136] but the conclusion reached in Golak Nath has reversed this position by importing rigidity into the Constitution.

(iii) Does the Golak Nath decision safeguard fundamental rights?

This question can be considered from two points of view. First, the legalistic view; second, the sociological view.

(a) Legalistic view: The only consideration on which the majority based its decision is that the fundamental rights must be safeguarded and protected from being eroded away. But the point to be considered is whether the decision achieves the end it purports to achieve. It is submitted that without deciding the fate of Art 31A, Art 31B and the Ninth Schedule, fundamental rights can still be made ineffective by Parliament. This is so because Art 31B is susceptible of two views.[137] First, the narrow view that Art 31B was meant for a definite and determinate restriction on the fundamental rights in regard to the first thirteen specific statutes. Secondly, the broad view, according to which Art 31B imposes an indefinite and indeterminate restriction on Part III. The latter view seems to be more authentic since Art 31B was used for adding more statutes

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136. CAD VII, pp 35-36.

137. Blackshield, A.R. Fundamental Rights, 1968, 10.JILI, p 1 at 101.

to the Ninth Schedule in the Fourth and Seventeenth Amendment Acts. This means that Parliament, if it wants to save any statute in respect of at least the property rights, needs only to amend the Ninth Schedule so as to include it in the list of already existing sixty-four statutes. Since Art 31A and Art 31B and the Ninth Schedule shall remain protected after the Golak Nath decision also,[138] the amendment is perfectly valid. This demonstrates the utter failure of the holding in Golak Nath in regard to the purpose it claims to achieve.

Secondly, granting that Parliament is deprived of the right to amend Part III, then also the rights are not protected at all. Ex-Chief Justice Subba Rao himself[139] admitted that along with the Executive and the Legislature, the Supreme Court also curtailed the freedoms guaranteed in Part III. He rightly based his conclusion on the judicial interpretation in the cases of A.K. Gopalan v. State of Madras,[140] State Trading Corporation v. Commercial Tax Officer,[141] Ujjambai v. State of Uttar Pradesh,[142] Daryao Singh v. State of U.P.,[143] and Sharma v. Sri Krishna Sinha.[144]

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138. Golak Nath AIR, 1967, S.C. and Subba Rao: Frequent Amendments to Constitutions: Hindu Weekly Review, 5th February 1968, p 7.
139. Subba Rao: Freedoms in India, 1968, AIR, Journal Section, p 22.
140. AIR 1950 S.C.27.
141. AIR 1963 S.C.1811.
142. AIR 1962 S.C.1621.
143. AIR 1961 S.C.1457.
144. AIR 1959 S.C.395.

Therefore, the Golak Nath decision is a shield against the Executive and Legislature but not against the Supreme Court itself. The Supreme Court, by employing the judicial technique may reduce the contents of the fundamental rights or widen their scope. It is a strange irony that the learned Chief Justice, being well aware of the fact that the Supreme Court itself may reduce our liberties by interpretation, bases his own decision in the Golak Nath case on the vulnerable presumption that the Supreme Court never abridges or takes away the rights but always safeguards them.

(b) Sociological view: There is a view that fundamental rights are better safeguarded if kept out of the Constitution than by incorporating them in it.[145] It is said that what makes them effective is not their being written in a document but the public opinion behind them. Be that as it may, it is a fact that all other freedoms become meaningful only when a required economic standard is achieved.

> "The greatest of all the freedoms is 'freedom from want' - while it is true that man does not live on bread alone but it is equally true that we cannot preach freedom or high values on an empty stomach ... All the freedoms

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145. De Smith, S.A. Fundamental Rights in the New Commonwealth 1961 10.I.C.L.R. p 83.

> in a way depend upon this freedom. If this freedom is not achieved by the people, the frustration created among them will become a fertile field for totalitarianism and despotism, which in its turn destroys all the other freedoms."[146]

This is a very significant point to be considered in the Indian context. The Part III rights are meaningful only to those who have adequate material conditions of life. But the rights should also become meaningful to those who lack such means. Therefore if economic conditions are not improved, Part III rights remain entirely useless to the masses. Blackshield rightly thinks:

> "But for millions of India's hundreds of millions, the material conditions of life were not adequate, nor likely to become so. Given the facts of mass starvation of these millions of human beings and the real possibility that an entire nation may eventually fall into hopeless famine, political and spiritual ideals have a certain air of unreality."[147]

It is true that "existence is prior to essence".[148] This

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146. Subba Rao, K. Freedoms in India, 1968, AIR journal section, p 22
147. Blackshield, A.R. Fundamental Rights, 1968, 10.JILI, p 1 at 27.
148. Blackshield: 1968, 10.JILI at p 27.

is not to suggest that fundamental rights may be sacrificed at the altar of economic improvement; the point is that economic development is an essential and prerequisite element to enable the Part III rights to play their role of civilizing and spiritualizing the masses. If fundamental rights are over-emphasised to the point that economic development is hampered and hindered, this sort of over-emphasis itself would precipitate their erosion. Considered against this background, the Golak Nath decision, under the pretext of false protection of fundamental rights, may stand as a formidable obstacle in the way of economic development. Baxi comments upon this aspect as follows:

> "In so exceptional a situation as Golak Nath, obviously much more is at stake than self-luminous judicial policy. What is at stake can, perhaps over-simply (but not erroneously), be stated in one phrase: the economic development of India."[149]

It is another fact that the Constitution First, Fourth and Seventeenth Amendment Acts were validated by "prospective over-ruling"[150] and "acquiescence"[151] but the reasoning in Golak Nath

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149. Upendra Baxi: The Little Done; The Vast Undone, 1967, JILI p 323 (383).

150. Per Subba Rao, C.J. and four other judges: Golak Nath.

151. Per Hidayatullah, J: Golak Nath.

first holds them invalid and void. No doubt these amendments abridged some of the rights but at the same time these amendments were responsible for improving the economic conditions of millions of people in India and thereby enabled them to avail of these rights. If the Golak Nath view had been taken in the Sankari Prasad case so as to make the Land Abolition Acts a nullity, the wrong in the decision would have been well demonstrated, constitutionally and politically. Enough time has not elapsed after Golak Nath to present practical difficulties before the legislatures. However, Mr. Gae, Law Secretary to the Government of India, was able to point out just eight months after the Golak Nath decision that the Land Acquisition (Amendment and Validation) Act, 1967, is liable to be invalidated by the Supreme Court.[152]

In addition to this, India being a welfare state, economic measures to ameliorate the conditions of the masses are a "must". It is experienced by all the states claiming to be service states, that individual rights cannot be saved from being affected by social legislation[153] and the problem of striking a

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152. Gae, R.S. Amendment of Fundamental Rights, 1967, 9.JILI, 475 at 517.

153. Friedmann, W. Law in a Changing Society, 1959, p 485.

just balance between the individual freedoms and social justice remains ever-perplexing. This was expressed as far back as 1950 by Justice Fazl Ali:

> "I am aware that both in England and in America and also in many other countries there has been a re-orientation of the old notions of individual freedom which is gradually yielding to social control in many matters."[154]

In the Indian context, it is not fair to put unneccessary restrictions on the state in its welfare activities and particularly when "an average individual's pursuit of well-being in India depends less on his freedom to exercise fundamental rights and more on the State's freedom from restrictions."[155]

In view of these circumstances, it has been justly said that the Golak Nath decision is "productive of the greatest public mischief"[156] and is a disservice to both "fundamental rights" and "democracy".[157]

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154. A.K. Gopalan v. State of Madras, 1950, SCR 88 at 188.

155. Baxi, U. op.cit.supra. p 411.

156. Seervai, H.M. op.cit.supra. p 1117.

157. Baxi, U. op.cit.supra. p 382.

(iv) Adjustment of fundamental rights inter se made difficult

When considered at an institutional level, the Golak Nath case opens a Pandora's box. How the institutions of "Parliament" and "judiciary" may be affected will be considered under the heading of "Balance of Power". Here we will consider how the mutual adjustment of fundamental rights among themselves is likely to be endangered. For instance, Art 17 abolishing untouchability comes in conflict with Art 25 and 26 conferring freedom of religion. The state can ban the practice of untouchability from non-religious places. But can it ban untouchability from religious places? "Can it throw open the religious institutions ... to persons to whom these institutions are closed according to the tenets of their religion?"[158] Supposing, Parliament in future wants to ban untouchability from religious places also, it would be giving effect to Art 17 but the scope of Art 25 and 26 would be definitely affected. The conflict between them can be removed in such a situation by amending these articles suitably but the Golak Nath decision is likely to pose a difficulty because the amendment would abridge the freedom of religion.

Similarly, the freedom of religion as interpreted by the Supreme Court is said to have impinged upon the liberty of the

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158. Luthera, V.P. The concept of the Secular State in India, 1964, pp 106-107.

people. Reviewing the case law on Art 25 and Art 26 up to 1965, a learned author has concluded that the Supreme Court has been establishing "autonomous and inviolable government of the Mahants and the Dais even at the expense of the liberty of the men and women belonging to the respective denominations."[159]

Criticising the view of the Supreme Court that the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion, Dr. L.M. Singhvi described the doctrine of "auto-interpretion" and "autogenesis" as dangerous. He argued that, if the scope of a religion is to be determined by the religion itself, perhaps, a case could be made in favour of "sati".[160]

For our purpose, it is clear that the Supreme Court may by interpretation expand the sphere of the freedom of religion. Supposing it did and Parliament intending to set the Supreme Court right, brings an amendment to Art 25 or 26 or to any other Article would the Golak Nath decision allow this?

Theoretically it is possible or perhaps the future may render it desirable that the scale of values embodied in Part III be changed; one right may be more emphasised than the other.

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159. Tripathi, P.K. Secularism: Constitutional Provision and Judicial Review and its Implications for Law and Life in India, ed. Sharma, G.S., 1965, p 193.

160. Ibid. p 243.

Blackshield suggests that "personal" rights be preferred to "property" rights on the pattern of the "double standard" applied in America.[170] Justice Hidayatullah holds that it was an error to place the right to property in Part III.[171] Mr. Nath Pai, a Member of Parliament, moved a bill to the effect that the property right should be taken out of Part III and provided for in a separate statute.[172] Without commenting upon the wisdom or otherwise of such a measure, it is pointed out that the Golak Nath decision denies validity to such an amendment. In America, the Bill of Rights is considered as imposing no limitation on the amending process in this respect.

> "Even these constitutional limitations, however, do not deny the group's right to revise the scale of values handed down to it from the past; they merely restrict the legal methods of their revision."[173]

(v) Balance of power between Judiciary and Legislature disturbed

It is unfortunate that the relations between the judiciary and legislature in India have not been as cordial and co-operative as these ought to have been. The causes of this lack of co-operation between the two wings of the government have been discussed

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170. Blackshield: Fundamental Rights, 1968, 10.JILI I at 86.

171. Hidayatullah J. Golak Nath, AIR, 1967, S.C.1710.

172. The Statesman, 14th December 1968. (The Statesman Weekly)

173. Rottschaefer: Legal Theory and the Practice of Law (1926) 10.MINN.L.R.382.

by a number of authors.[174] The whole blame cannot be laid only at one of them. What is required to be emphasised is that Parliament as well as the judiciary need to walk hand in hand and neither of them should impinge upon the sphere of the other if the Constitution is to be worked properly. It is not by show of power that good relations can be built up, but by realizing each other's difficulties and trying to see each other's points of view. While the judiciary enjoys the maximum independence and full powers to interpret the Constitution and other laws, it should avoid a show of superior authority and overtones which serve no purpose except embittering its relations with the legislature. In any event, the judiciary is not justified in provoking Parliament unnecessarily. The unduly harsh criticism made by the Golak Nath majority on the use of the amending power by Parliament was uncalled for. To think of Parliament as a mere party before the court[175] is to underestimate the powers of Parliament. To expect of Parliament complete obedience to judicial decisions is to attempt to impose the judicial will on Parliament.[176]

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174. Irani, P.K. The Courts and the Legislatures in India, 1965, 14.I.C.L.Q. p 850 at 859-862.
Tripathi, P.K.in Secularism: its implications (ed. Sharme, G.S.) 1965, p 193.

175. Subba Rao, K. Freedoms in India, AIR, 1968, Journal, p 22.

176. Ibid.

The history of the judiciary in other countries bears testimony to the fact that if the judiciary fails to avoid conflicts with the legislature, it threatens its own existence though the constitution might have given the judiciary unlimited powers. The Supreme Court of the United States got involved in such a conflict with President Roosevelt on the validity of the New Deal Legislation in the 1930s. Later events showed that the Supreme Court had to give way to the will of the Congress and if it had not done so the President's plan to pack the Court would not have been defeated in the Congress. Not long ago, the Supreme Court of South Africa, though quite justified in its interpretation of the constitutional provisions, had to yield to the will of Parliament.[177] It seems that in a power struggle between the Supreme Court and Parliament, the former is always bound to lose. Perhaps this observation about the Supreme Court of the United States is equally true of the Indian Supreme Court:

> "The judiciary is beyond comparison the weakest of the three departments of power... (It) has no influence over either the sword or the purse; no direction of

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177. Harris v. Minister of Interior, 1952, 2.S.A. 428. Minister v. Harris, 1952, 4.S.A. 769, culminating in the Senate Act Case, 1957, (1)S.A.552.A.D.
For a detailed discussion of the cases, see Marshal, G. Parliamentary Sovereignty and the Courts, pp 170-240.

> the strength or of the wealth of the society; and can take no active resolution whatever. It can truly be said to have neither force nor will, but merely judgment."[178]

This is not to suggest that the Supreme Court should not invalidate a law which is inconsistent with the provisions of the Constitution under the fear of the political power enjoyed by Parliament. It is just to stress the point that the Supreme Court should refrain from a power struggle. Particularly, the sensitive areas of possible conflict should be dealt with delicacy and a sense of humility. For instance, in matters of social legislation, the Supreme Court should try to uphold it as far as possible in accordance with the provisions of the Constitution. Cases falling in the border area of the jurisdiction of the Supreme Court and the powers of Parliament need to be handled with the greatest possible care and awareness. The American Supreme Court has evolved the doctrine of "political question"[179] to meet such cases. It is not suggested that that doctrine should be imported into India; it is only to point out that various judicial techniques can be evolved in such eventualities. Probably the Indian Supreme Court would do better

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178. The Federalist No.78.

179. Luther v. Borden, 1849, 7 Howe (48.U.S.) I.

to follow this observation of the U.S. Supreme Court: "The most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible."[180]

Judged against this background, the Golak Nath decision worsens the already uncordial relations between the judiciary and the Parliament. Mr. Nath Pai's recent Bill to arm Parliament with full power of amendment[181] is a reaction to the Golak Nath decision. Replying to the criticism that the decision has introduced a conflict between the judiciary and the Parliament, ex-Chief Justice Subba Rao observed that there cannot be a dispute between a court and the parties before it.[182] It is submitted that Parliament is not a mere party before the court but a co-ordinate department of the government. In fact, in the guise of interpretation of the law, the Supreme Court is claiming an excessive jurisdiction over the Parliament by denying it the power of amendment in regard to Part III of the Constitution. Because if Part III is made untouchable by Parliament by way of amendment, the Supreme Court comes to have an area in which it becomes the monarch of all, there being no

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180. United States v. Lovett, 328 U.S. 303 at 320.

181. The Statesman Weekly, 14th December 1968.

182. Subba Rao, K. Freedoms in India, 1968, AIR Journal, p 22.

check or balance on it. Thus the way is clear for the supremacy of the Supreme Court and there would be no surprise if gradually and imperceptibly, the government of the people is replaced by a "government of judges". If the Golak Nath path is constantly trod, the two wings of Government are set on a collision course and a clash would inevitably occur. Visualising such a situation, there seems to be no exaggeration in saying that, "it would be a strange irony if judgements which seek to preserve cherished human rights not only fail to do so, but lead to the destruction of a cherished judicial system."[183]

(vi) Search for a proper check on amending power

Since the Constitution was amended seventeen times in the first fifteen years, the Golak Nath decision is designed to put a restraint on the frequent use of the amending power under Art 368. It is submitted that the number of amendments need not give us a cause for concern or worry. Some of the amendments were necessitated by decisions of the Supreme Court. Some of them were mere verbal changes,[184] and some were expected even by the founding fathers for adapting the constitution in the lights of the defects brought out in its working.[185]

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183. Seervai, H.M. op.cit.supra. at 1119.

184. For instance, the Sixteenth Amendment.

185. CAD. Vol.XI, pp 717, 719.

The proper check to the amending power is to be found in the opposition parties. The main reason for having such a large number of amendments is that the ruling Congress party had been having a steam rolling majority in the centre as well as in most of the states.[186] It is submitted that with the waning influence of the Congress party and the growth of other parties, the amending power will not be so easily used. If the present trend of the development of a multi-party system is any indication, the special majority required for amending most of the articles of the Constitution would be hard to gain so much so that the Constitution, which is felt to be very flexible at the moment may prove to be almost as rigid as the Australian Constitution. Therefore, the check on the power of amendment lies in healthy political growth rather than the doubtful legal restraint imposed by the Golak Nath decision.

The fact that the fundamental rights were amended three times in the first thirteen years, does make one feel that they bear "an unfortunate air of impermanence."[187] It is obvious

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186. In 1952 it secured 364 out of the 489 seats in the Lok Sabha; in 1957, 371 out of the 494 seats; and in 1962, 356 out of the 489 seats.

187. Gledhill, A. India's Fundamental Rights, I.Y.B.I.A.,1952, VI, p 9.

that Part III is of the utmost value for living an honourable and dignified life as a free citizen of India. It is also equally important for non-citizens. It is also significant that Part III safeguards the rights of the minorities, e.g. freedom of religion, educational and cultural rights. Therefore, if Part III is not sufficiently secured, communal harmony is difficult to attain and the minorities are not adequately assured of their rights. Generally, the number of amendments suggests that the rights are mere "playthings" of a special majority in Parliament. But if considered rationally, is the special majority of two-thirds in each House easy to obtain? If it is, should the special majority be further increased to three-quarters, or an additional requirement of ratification by the states be required? It is submitted that the scheme of the Constitution is well planned to last for a long time and the instrument need not be made unamendable under any supposed fear that "a time might come when we would gradually and imperceptibly pass under a totalitarian rule."[188] The Constitution has provided an adequate balancing wheel and a sufficient check to the amending power in the two-thirds majority. It is submitted that it is the complexion of the political parties which makes easy or difficult the attainment of this special

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188. Subba Rao C.J. in Golak Nath, AIR, 1967, S.C. at p 1666.

majority and the future trend is likely to make it almost unattainable.

It is to be noticed that in requiring Part III to be made more difficult of amendment than what it is today, Parliament is being distrusted. As a matter of fact, Parliament is as much a guardian of the fundamental rights as the Supreme Court and it does not seem to be fair to think that Parliament is all out to empty Part III of its meaning.[189] The amendments so far made indicate unmistakably that it is for unavoidable and well justified reasons that Part III had to be amended.

It is argued that if Part III is made amendable, a party having a two-thirds majority, may scrap Part III and bring in a dictatorial regime. Normally this would not happen. Supposing for the sake of argument, any dictatorial party

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189. Sathe, S.P. Amendment of Fundamental Rights, 1969, S.C. Journal, vol.XL, No.3, p 33.
The writer argues that the constitutional history of India furnishes instances where parliamentary processes have thwarted all attempts to impose unnecessary and unjustifiable curbs on fundamental rights. For instance, in 1964, the Constitution was sought to be amended to immunize the state and its officials for acts done in violation of the fundamental rights during the period of emergency but the Government withdrew the proposed amendment (Eighteenth Amendment) Act when it was severely opposed in Parliament and vehemently criticized in the press.

comes into power and does what is now feared, would the Golak Nath decision deter it from doing what it wants to do? If the Supreme Court adheres to its view in the Golak Nath case, can the party enjoying the special majority not undermine the judicial system and undercut the powers of the Supreme Court indirectly by appointing judges of its own choice to the Supreme Court? Is the threat or warning given by Pt. Jawahar Lal Nehru[190] less potent and less effective in that situation? Would it not be undemocratic that the will of at least 66% of the representatives of the people is thwarted by the judges of the Supreme Court who are not elected by the people? Given the facts of such a situation, can the Supreme Court dare to go against a party having such an overwhelming majority? In that situation, the Golak Nath decision is a mere scare-crow. The fear underlying the majority decision of the Supreme Court is entirely baseless, and in any event, the remedy is not effective in allaying that fear.

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190. "No supreme court and no judiciary can stand in judgment 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 country is concerned no judiciary can come in the way ... 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 sea 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." CAD.Vol.IX, pp 1195-1196.

To a ruling party having a vast majority in the Parliament, the Golak Nath decision is no hindrance and a party which fails to muster a two-thirds majority does not need the restriction imposed by Golak Nath because its own weak position would not allow it to act under Art 368 save for an exceptional situation when opposite parties may be willing to support it on the amendment. On the authority of Golak Nath, the Supreme Court can, however, weaken an already weak ruling party by frustrating all its efforts of passing social legislation, if they, in the opinion of the Supreme Court, abridge or take away the fundamental rights.

Thus, the decision, far from helping the enhancement of fundamental rights, is going to harm the harmonious working of the Constitution.

One must appreciate the intentions of the Supreme Court to safeguard the fundamental rights as jealously as it can, especially when it has been entrusted with the task of acting as a guardian of the constitution in general, and in regard to fundamental rights in particular. One is, indeed, overwhelmed with a sense of respect and regard for the Supreme Court, when one realises the depth of sincerity and loyalty of the Supreme Court judges in discharging their duty, undaunted by any subsequent consequences. The court's purpose to preserve the rights is laudable but the means adopted to do so are such

as to tilt the scale for the worse rather than for the better. To have a situation in which the fundamental rights may be taken away at any time by a special majority is bad but to have an unamendable Part III is worse still. Here the choice is not between good and bad; it is between bad and worse. The present writer would have gone all the way in sympathy with the Supreme Court but for the dangerous results likely to flow from the judgment, which convince beyond any shadow of doubt that the position gained for Part III by the Golak Nath decision is worse than it was before; it practically jeopardises the fundamental rights, the Constitution, the Supreme Court, the judicial system, the hopes and aspirations of the constitution framers and even the economic development of India - the dire need of the hour.

Convening a Constituent Assembly

It is proposed here to study the institution of a constituent assembly for the purpose of amending the consitution. A suggestion was made by the Supreme Court that if Part III is required to be amended to overcome the prohibition in Art 13 (2) a constituent assembly is needed to effect such an amendment.[191]

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191. Golak Nath, AIR, 1967, S.C. at 1646. Per Hidayatullah J.

It is necessary to enquire whether the constitution requires, in respect of amendment of any of its provisions, the convening of such an assembly to effect the amendment. Even if the constitution does not require this, the question remains whether it is desirable to put the suggestion into practice.

It is submitted that the suggestion may sound novel and democratic but bristles with legal problems.[192] Is it legally possible within the frame-work of the constitution? Supposing it is possible who should call the assembly and by what authority? How should it be elected? Who should elect it? - the parliament or state legislatures, or both, or the people? What qualifications should be laid down for the assembly? What procedure should govern its proceedings? Supposing the assembly exceeds its powers, who should be the final judge in the matter? What place should be fixed for its deliberations? Should the members of the assembly draw a salary? If yes, who should pay for it? What time limit should be laid down within which the constituent assembly must accomplish its task? If the assembly arrives at no decision regarding the proposed amendment, what should be done? What value should be attached to a proposal for amendment made by the assembly?

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192. Kagzi, M.C.J. The Constitution of India, 1967, p 585.

Should the parliament be bound by it or not? If not, what alternative course is open to it? To answer these and other questions in regard to the position and status of a constituent assembly, it is essential to study the institution in its various legal aspects.

The Institution of Constituent Assembly

A body which frames a constitution of a state may be called a constituent assembly or a constitutional convention. In America such a body is popularly called convention. The constitutional convention is a by-product of revolutions in the American States;[193] it is an off-shoot of the theory of the sovereignty of the people. Since sovereignty is supposed to be residing in the people, they have the right to elect the members of the constitutional convention whose task it is to frame a workable constitution for the State. Some of the state constitutions framed in the revolutionary period provided that these could be altered by conventions, e.g. the constitutions of Pennsylvania, Vermont, Georgia, Massachusetts and New Hampshire; some of the revolutionary constitutions contained no provision for alteration in any manner;[194] presumably the

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193. Dodd, W.F. The Revision and Amendment of State Constitutions 1910, p 191.

194. Ibid.

framers visualized no necessity of amendment or believed that these instruments were too perfect to require alteration. But there were some revolutionary constitutions which provided for their alteration by legislative action, for instance, the constitutions of Maryland, Delaware and South Carolina (1778). It is of interest to note that none of the earlier constitutions in the states provided for more than one method of amendment, i.e. the conventional as well as legislative. Experience revealed that the conventional method was very cumbersome and inexpedient for effecting minor changes, and therefore, during the nineteenth century the advantages of the legislative method for partial revision and that of the convention for a general revision of the constitution were realised.[195] But, "the two modes of amending Constitutions are of about equal antiquity and of about equal authority."[196]

> "The amendment of constitutions by conventions really antedated the general use of the method of partial amendment through legislative action, although the two methods were introduced at the same time - the convention was more extensively used at first, but its cumbersomeness

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195. Jameson, J.A. A Treatise on Constitutional Convention, 1887, p 550.

196. Ibid. p 551.

for small changes soon caused the states which employed it to adopt in addition or as a substitute the method of initiating proposed amendments in the legislature."[197]

Judge Jameson held the view that from the point of view of expediency, conventions are better than legislative bodies for a general revision of constitutions.[198] Legislatures being usually preoccupied with other matters of law-making, are unable to devote sufficient attention to the subject. As compared with it, the attention of a convention will be confined to, and concentrated on, the one task of framing a constitution. Since it had been a practice to obtain for membership in conventions a higher grade of men than in the ordinary legislative bodies,[199] the result had been invariably far better in quality. Legislatures consisting of political parties are not free from party discipline and political partiality; conventions perform their duty without any political bias. It was on the basis of this impartiality that Dr. Ambedkar justified the right of the constituent assembly of adopting the constitution by a bare majority but denying the same right to a future Parliament by providing for a special majority for amendment of the constitution. He said:

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197. Dodd, W.F. op.cit.supra. p 120.

198. Jameson: op.cit.supra. p 562.

199. Bryce, J. American Commonwealth, 1928, pp 667-670.
Jameson: op.cit.supra. p 561.

> "The constituent assembly in making a constitution has no partisan motive. Beyond securing a good and workable constitution it has no axe to grind... Parliament will have an axe to grind while the constituent assembly has none. That is the difference between the constituent assembly and the future parliament."[200]

For effecting trivial changes in the constitution the legislative mode is generally considered as more expedient and useful.

Legal Position of a Constitutional Convention

About the legal position of a convention, there is a sharp division of opinion among jurists. One school of thought holds that conventions are sovereign. Sovereignty is attributed to them on the ground that they have been elected by the people in whom the ultimate sovereignty resides. Once a convention comes into being, it is bound by no authority and can lay down in the constitution whatever it desires. Whatever measures it adopts are perfectly valid even if they fly in the face of the existing constitutional provisions. "Their validity rests not upon constitutional provisions, nor upon legislative acts, but upon the fundamental sovereignty of the people themselves."[201] The sovereign status based upon the sovereignty

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200. Dr. Ambedkar: CAD.VII, pp 43-44.

201. Hoar, R.S. Constitutional Conventions, Their Nature, Powers and Limitations, 1917, p 52.

of the people is further substantiated by reasons of expediency. A body chosen by the people to revise the organic law of the state should be as free from interference from the several departments of government as these departments are from interference from each other; otherwise the will of the people might easily be nullified by the existing judiciary or legislature.

Diametrically opposed to this view is the thesis of Judge Jameson who argues for almost a complete subordination of a convention to the existing government. The justification for legislative restrictions on the convention is sought on the basis that the legislators are representatives of the people and, therefore, the restrictions sought to be placed upon the convention by the legislature become restrictions imposed by the people. But this would be true only when the convention is not directly elected by the people i.e. when the convention is called without consulting the people. It would be difficult to sustain the theory if the people have voted for delegates to a convention and also voted for their complete independence.[202] However, Borgeaud denies sovereignty to an American convention because such a convention has to submit its plans to the people. This requirement makes it lose its sovereignty and its position is reduced to a mere committee on the constitution.

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202. Dodd, W.F. op.cit.supra. p 75.

> "From the necessity in which the American Constitutional Convention is placed, of submitting its plans to the people, results the important characteristic which distinguishes it from most European Assemblies with which one might be attempted to compare it, viz. it is not sovereign. It is merely a committee on the constitution charged with the preparation of an instrument to which the approval of the people can alone give the force of supreme law."[203]

But Jameson thought that a convention might disregard the requirement of submitting its work to the people and he also thought that the legislative restrictions upon it must be "in harmony with the principles of the convention system, or rather, not inconsistent with the exercise by the convention, to some extent, of its essential and characteristic function."[204] As has been pointed out by Dodd,[205] this disproves his own thesis that a convention is absolutely subordinate to the legislature.[206] Dodd treads a middle path between the two extremes. According to him the convention is neither sovereign nor subordinate to the legislature, but independent within its proper sphere.[207]

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203. Borgeaud, C. op.cit.supra. p 183.

204. Jameson: op.cit.supra. p 364.

205. Dodd: op.cit.supra. p 73.

206. Jameson: op.cit. supra. pp 362-365, 494-495.

207. Dodd: op.cit.supra. p 80.

In any event, the problem still remains unsolved as to what is the "proper sphere" according to Dodd, or what is "essential and characteristic function" of a convention in Jameson's view. It is a question of some difficulty on which the precedents and authorities might throw light. Summarising the history of various conventions in the American states up to 1897, Jameson concluded:

> "Among all the wild assertions of power in the people ever made, it has never been contended that they can enact an ordinary statute at all, and it has never but once been contended that they can enact a constitution without the previous recommendation of the legislature acting under the express authorization of the existing constitution. The exception was in the case of the attempted revolution of the Dorr Party in Rhode Island in 1841."[208]

It is relevant here to state that in Rhode Island, the Dorr party intending to revise the constitution, called a people's convention which framed a constitution and was approved of by the people by majority. After this was done, the Dorr Party established its own de jure government against the already

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208. Jameson: op.cit.supra. p 581.

established state government. The question arose whether the new constitution was valid or not. The Supreme Court of the United States declined to assume jurisdiction in the case,[209] leaving the matter to the final authority of the state judiciary. Jameson stated the reasons for and against the validity of the new constitution. In his view the new constitution was not valid because the sovereignty of the people must have been expressed only through an organised body acting by its recognised organs. In the absence of these requirements, the entire population of a state could not constitutionally pass a law.[210]

Can a Convention pass an ordinary law?

As a rule, a convention is not supposed to assume legislative functions; its sole duty is to forge a constitution. But there is no escape from the conclusion that it can if it so wishes, pass an ordinary law under the cloak of the constitution.

> "A constitutional convention may not properly enact a law or ordinance abolishing the fellow-servant rule, but it may insert into the constitution a provision accomplishing the same purpose. By the insertion into new consitutions of matters really not fundamental in character

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209. Luther v. Borden, 7 How (U.S.) R.44.

210. Jameson: op.cit.supra. p 233.

constitutional conventions have come to exercise great powers of legislation."[211]

Procedure of a Convention

How the procedure of a constitutional convention becomes material and a matter of great controversy can be seen from the conflicting views on Art 5 of the Constitution of the United States. Art 5 provides for two alternative ways of amending the Constitution. Amendments may be proposed by a two-thirds vote of both Houses of Congress[212] or, by a convention called on the application of the legislatures of two-thirds of the states. Amendments proposed in either of the two ways have to be ratified either by the Legislatures of three-quarters of the states or by conventions in three-quarters of the states. It is the Congress which has to propose one or the other method of ratification.[213] Up to 1968, there have been twenty-five formal constitutional amendments pursuant to Art 5 but the conventional device for initiating the procedure of Art 5 has never been used[214] and it has been called a "dead letter" or only a "protest clause" for venting popular protest

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211. Dodd: op.cit.supra. p 116.
Dealey, J.Q. Our State Constitutions, 1907, p 9.

212. Two-thirds majority of the members present and voting assuming the presence of a quorum. 53.U.S.350.

213. U.S.v. Prague, 1931, 282.U.S.176.

214. Dixon, Robert G. Article 5: The camatose article of our living constitution? 1968, 66 Mich.L.Rev. p 931 at 944.

against the Congress refusing to initiate a given amendment. Senator Ervin has proposed a bill so that the conventional method of amending the consitution be implemented.[215] The occasion for the proposed bill arose because of the Supreme Court decisions in the reapportionment cases[216] in which it was held that the state legislatures should be apportioned on the basis of "one man - one vote". To get around the Supreme Court decision, 32 state legislatures (34 states make two-thirds of the total number of states) petitioned to Congress to call a convention to propose a constitutional amendment. Apart from the legal difficulties involved in calling such a convention, it is feared that the convention would act as a sovereign body and hence would have no limit to its powers.[217] No less is the fear that the procedure of the convention may frustrate all efforts at reaching democratic decisions.[218]

With this background, let us see whether the Constitution of India provides for a consitutional convention for amending any part of it. It is submitted that the founding fathers were well aware of the difficulties in the way of calling a constituent assembly and hence they specifically dispensed with it.

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215. Proposed bill is given in Ervin's article, proposed legislation to implement the convention Method of Amending the constitution, 1968, 66 Mich.L.Rev. 875 at 896.

216. Colorado case 377 U.S.713, 1964, Roman v. Sincock, 377 U.S. 695, 1964.

217. Carson, Ralph M. Disadvantages of a Federal Constitutional Convention, 1968, 66 Mich.L.Rev. 921.

218. Ibid. p 927.

Dr. Ambedkar made it clear when he said: "The Draft Constitution has eliminated the elaborate and difficult procedures such as a decision by a convention or a referendum."[219]

As a rule of constitutional interpretation, if the constitution provides its own mode of amendment, any other method of amendment would be void and unconstitutional. The Supreme Court of the U.S.A. held in George S. Hawke v. Harvey C. Smith,[220] that Art 5 of the Constitution of the United States provides for ratification by the state legislatures or by state conventions, therefore, a referendum for ratifying an amendment to the federal constitution was void. When Art 368 of the Indian constitution provides the mode of amendment, any other mode - a convention or referendum, would be void.

Assuming that Parliament is competent to convene a constituent assembly, a law is required for providing for the composition and duration, qualifications and disqualifications for membership of the constituent assembly. Its election, powers, privileges, salaries and allowances of members need to be specified and defined accurately. Its powers require to be duly specified and its procedure elaborately prescribed.

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219. Dr. Ambedkar: CAD.Vol.VII, pp 43-44.

220. (1919) 64 Law Ed. 871.

Supposing all this is done, the following possibilities cannot be ruled out:

(a) The constituent assembly may override the restrictions imposed by parliament on it. It may declare that it is a sovereign body and may by-pass the will of parliament.

(b) It may not reach any decision in regard to the proposed amendment or it may reject the proposal outright.

(c) Instead of confining itself to the proposed amendment, it may assume the responsibility of overhauling the whole constitution or alternatively think it proper to do so in order to effect the proposed amendment.

(d) It may start enacting ordinary laws if not directly, indirectly as pointed out by Dodd.[221] Thus it may function as a parallel legislature to parliament.[222] Since it was held in the Golak Nath case that a constitutional amendment is law, it is difficult to prevent it from enacting ordinary laws.

(e) It is possible that the deliberations of a constituent assembly may take unduly long time. Thus the required amendment may not be effected in time.

(f) The expenditure on the assembly may be a heavy burden on the exchequer.

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221. Dodd: op.cit.supra. p 116.

222. Prof. Subba Rao, G.C.V. The Mimansa interpretation Approach to the Indian Constitution, 1967, 11 S.C.J. 85.

(g) The validity of the amendment proposed by a constituent assembly may be challenged in a court of law. The assembly would be an authority within the definition of "authority" under Article 12. In case the amendment takes away or abridges the rights enshrined in Part III, it may be caught within the mischief of Art 13 (2), amendment being "law" to be hit by Art 13 (2).[223] Supposing the amendment is declared void by the Supreme Court, would not all the efforts of the assembly be put to nought?

(h) The amendment as suggested by the assembly may be unsuitable to parliament. In such a case what would be the fate of the proposal? Would the parliament be bound by it?

Assuming it is thought fit to convene a constituent assembly in spite of all these difficulties, would the result be better? Can a constituent assembly be based on a wider franchise than the parliament? If not, what, after all, is the special gain achieved by such an assembly? Will an assembly have a higher grade of persons to hammer out the proposed amendment? It is not to be ignored that in America, conventions have been successful only because of the fact that abler and wiser men are available for their membership.[224] There is no

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223. AIR 1967, S.C.1643.

224. Bryce: American Commonwealth, 1928, pp 667-670.
Jameson: op.cit.supra. p 561.

reason to expect that such a thing would happen in India.

It is submitted that it is not correct to assume that each and every thing, if done with the participation of the people, or democratically, is always better done. Democracy is not a panacea for every disease. Constitution-making or amendment of a constitution is a highly complicated task; it requires expertise rather than laymen for its better accomplishment.

In view of these factors, it is suggested that it would be a great error if a constituent assembly is convened to effect amendment of any part of the Indian Constitution. Short of a complete revision, Parliament is a competent and fit body to effect amendments to the Constitution. In case Parliament needs to revise the Constitution in toto, there is no constitutional bar against it. Art 368 arms it with all the necessary powers. But in view of the fact that Parliament has to be busy with its normal function of law-making, it would be a heavy task to take up constitution-making in addition to law-making. Therefore, it is suggested that Parliament would do better if it takes the help of a commission.

In the American states, it had been the practice to appoint commissions to submit a report on a required amendment. The commission could not do anything directly to affect the constitution; its work was subject to review and amendment by the

legislature.[225] It is to be noted that the legislature is not bound by the report of the commission but the legislature must make a serious endeavour to give effect to the report as far as possible; otherwise the benefit of the supposed superior wisdom and ability of the commission is lost.[226]

In the Indian circumstances, a commission comprising men of high calibre and integrity and possessing sufficient knowledge of constitutional law would be a far better agency for the task of the revision of the constitution, than a constituent assembly elected on adult franchise. Such a commission might be called periodically for reviewing the working of the constitution and for suggesting suitable amendment or other measures to work the constitution satisfactorily. In addition to its main function of reviewing the working of the constitution, it might be entrusted with the responsibility of looking into extra-legal factors such as political conditions, freedom-effects on the people etc. It might advise the government as to whether an emergency be continued or lifted; whether Presidential rule be prolonged or removed in a particular situation; whether provisions regarding preventive detention are being used unnecessarily; whether centre-state relations are being strained and whether the executive and the administrators are complying with the spirit of the constitution.

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225. c.f. Dodd: op.cit.supra. p 264.

226. Jameson, J.A. op.cit.supra. p 574.

The Reaction of Parliament to Golak Nath v. State of Punjab

Since in Golak Nath v. State of Punjab[227] the Supreme Court has ruled that Parliament is not competent to amend Part III of the Constitution so as to take away or abridge the rights, Mr. Nath Pai, the Socialist Party Leader, introduced a Bill in the Lok Sabha in order to restore the power of amendment to Parliament. In the statement of objects and reasons he characterised the issues raised in the decision as of "cardinal importance to the supremacy of Parliament."

The Bill has been debated for a considerable time and has provoked acute controversy. Though it was introduced as a private member's bill, it found support from the ruling party[228] and the Bill was referred to a joint committee which suggested drastic amendments to the Bill.

Originally, the Bill purported to assert the right of the Parliament to amend every provision of the constitution, including Part III. Therefore, Art 368 was sought to be amended with an additional clause in the beginning: "(i) Any provision of this

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227. AIR 1967, S.C.1643.

228. It is speculated that the Government is contemplating some radical economic reforms to check the growing concentration of wealth and means of production. It is expected that any constitutional hurdle to such measures would be overcome with the passage of the Bill.
See: Nafer: Fundamental Rights and Parliament, The Pioneer, 2nd December 1968.

constitution may be amended in accordance with the procedure hereafter provided in this article."[229] The present provision in Art 368 was intended to be Clause 2 with the substitution of "An amendment of this constitution" by the words "Any amendment of any such provision.

The Bill as reported by the Joint Committee seeks to effect changes not contemplated by the original Bill. For instance, the marginal note "procedure to amend the constitution" is sought to be replaced by the words: "Power to amend the constitution"; the first clause of Article 368 is to read as "(i) Parliament may by law amend any provision of this constitution in accordance with the procedure laid down in this article"; the proviso to Art 368 is to include "Part III" just before "Chapter IV of Part V" and the last clause of the Article is to run as: "Nothing contained in Article 13 shall apply to any law made in pursuance of this Article".[230]

Taking into consideration the political stand taken by the various parties it is thought that the Bill will not get through.[231]

It is submitted that the Bill as reported by the joint Committee is not only ineffective in attaining its objective but also undesirable. In any event, it fails to reach the heart of the matter. If it becomes law, it will not only

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229. Section 2 of Bill No.10 of 1967.

230. Bill No.10B of 1967.

231. Sathe, S.P. Amendability of Fundamental Rights: Golak Nath and the Proposed Amendments, 1969, SCJ Vol.I p 34 (38 & 39)

make the constitution more rigid but also make the situation worse than it is at present. Much of the criticism levelled against the Bill is without any substance. For instance, it is said that if the Bill is put on the statute book, it would enable a party in power having totalitarian leanings to subvert the constitution by abridging or taking away the fundamental rights, thus jeopardising democracy. It is totally forgotten that it is not a mere majority that can make amendment to Part III but an absolute majority of the total membership of each House of Parliament and also a two-thirds majority of the members present and voting. Any effort to prevent the special majority from making a law under a real or unreal fear that it may bring in a totalitarian regime, can be safely characterized as "undemocratic". If democracy means rule by majority, how can a measure taken by the special majority under Article 368, in accordance with the procedure laid down therein, be dubbed as "undemocratic"?

For the sake of argument, even if the special majority required to effect amendment to Part III becomes totalitarian in its outlook, can the denial of power to amend Part III prevent it from pursuing its policies? The answer is certainly in the negative. Therefore, the fear is entirely misconceived. It is submitted that the special majority required to amend Part III is not easy to attain. It has been easy in the past because of

the monolithic position of the Congress Party but in the future it would be difficult, if not impossible, to secure it. Hence, the proper check against the misuse of the power of amendment lies in the requirement of the special majority itself.

Neither the charge that Mr. Nath Pai's Bill seeks to "abridge or abrogate the authority of the Supreme Court"[232] nor the criticism that the Bill is a "threat" to minorities[233] is true. It seems to be a specious and spurious argument that the Supreme Court judgment in Golak Nath has commended itself to a body of opinion and is appropriate in the socio-economic conditions existing in India.[234]

Yet the Bill, in our view, is neither efficacious nor desirable. It is not efficacious because even if it is passed and the constitution is amended accordingly, it may not save an amendment to Part III from being struck down on the ground that it takes away or abridges the fundamental rights. If the process of reasoning adopted in the Golak Nath case is applied to such an amendment, it would be "law" and hence hit by Art 13 (2).

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232. The Mail (Madras) 11th December 1968.

233. Bid to amend Art 368, The Pioneer, 11th December 1968.

234. Srivastava, B.P. Fundamental Rights and their Amendability The Pioneer, 24th November 1968.

Therefore, if Golak Nath is strictly followed by the Supreme Court, the amendment fails to achieve the desired goal. If, however, the Supreme Court adopts a co-operative attitude it may hold the amendment valid. Our submission is that the Bill as such does not overcome the reasoning in Golak Nath.

The Bill is not desirable because it seeks to entrench Part III in the Proviso to Art 368. If Part III is entrenched, it would become unnecessarily so rigid as to be almost immutable and eternal. It is to be noticed that the provisions entrenched in the proviso are those which are pivotal in the centre-state relationship. Besides this, the important thing to be observed in the entrenchment is that flexibility has not been sacrificed at all. We have shown in our chapter on "Amendment of Federal Clauses" that the entrenchment does not foreclose the possibilities of moulding the entrenched provisions as and when required by the Parliament, without having resort to the process of amendment under Article 368.

Even after Golak Nath, an amendment to Part III which does not take away or abridge the rights but adds to them is feasible, if carried out by the special majority required by Art 368; no ratification is necessary. But after Part III is entrenched, an amendment to Part III even when it adds to it, would require ratification by at least half the state legislatures. Since

various political parties are emerging in power in the States, ratification is likely to become a great hurdle in the future. Therefore, the Bill makes the present position worse.

In our view, Parliament has two alternatives open to it. First it can pass Mr. Nath Pai's Bill in its original form. Of course, verbal changes can be added such as altering the marginal heading to "power to amend the constitution". In other words, the suggestion of entrenching Part III seems to be unnecessary and tends to do more harm than good. Though such a Bill should be passed after a good deal of discussion, it should not be prolonged in its passage. The way the present Bill is being considered is detrimental and injurious to the prestige of the Supreme Court. The Bill was introduced on 9th March 1967 and is still pending in the Lok Sabha. Since it is a private member's Bill, it is taken up for consideration on alternate Fridays for about two hours. In this way, the position of the Supreme Court is lowered and regard for the law is also being lowered. The Government, when it has patronized the Bill, should not have hesitated in introducing a Bill de novo to the same effect and passed it sooner, though after discussing it thoroughly.

Secondly, Parliament can wait and see what practical and insurmountable difficulties come in its way of enacting social legislation. In the first instance, every genuine endeavour

should be made to draft the law feared to be struck down so as not to affect Part III adversely. In case the law is very essential and the Golak Nath decision proves an impassable barrier, let the law be challenged in the Supreme Court and the Supreme Court should be persuaded to review its decision. Let us hope that the judges of the Supreme Court would rise to the occasion and act in the best interests of the country. The fundamental rights are important but more important than these is the fact that the progress of the country should not be held up. If the country's progress is checked by attaching too much importance to Part III, the fundamental rights would be robbed of their efficacy and role in the process of uplifting the masses of India. In any event,

> "The Court must not depart so far and so palpably from the text of the Constitution and from the accepted values and the acknowledged creed of the community that the government of the people begins to be replaced by the government of the judiciary and the finality of the legal decision-making begins to be misunderstood as the acknowledgment of ultimate political and social wisdom in the judicial wing of the government."[235]

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235. Tripathi, P.K. Mr. Justice Gajendragadkar and Constitutional Interpretation (1966) 8.JILI. p 480.

CHAPTER VIII

THE AMENDING PROCESS IN ACTION

After explaining theoretically the amending process in the Constitution of India, it is interesting and instructive to examine how the process has been worked and used. In this Chapter, an endeavour will be made to sketch broadly the factors which were responsible for the twenty-one amendments made to the Constitution up-to-date. The main purpose is to show the practical aspect of the amending machinery - how it is activised and used, so that the whole amending apparatus might be observed as it has been in action from time to time. The practical working of the amending machinery might suggest some improvement and supplement, if not supplant, its theory.

The First Amendment

The Constitution (First Amendment) Bill was introduced by the Prime Minister, Mr. Jawahar Lal Nehru, on 12th May 1951, and was referred to a select Committee consisting of twenty Members of Parliament on 16th May 1951. The opposition parties were fairly represented on the Select Committee. The Bill was discussed in the Lok Sabha for three days before the Select Committee started its deliberations which lasted for six days. The Select Committee submitted its Report on 25th May 1951,

which was taken up for consideration on 29th May. Amendments were proposed to circulate the Bill for the purpose of eliciting public opinion but these amendments were negatived.[1]

When reference of the Bill to a select committee was being considered, one Member rose to a point of order that Art 368 presupposes the existence of both Houses of Parliament and since at that time there was only one House i.e. the Provisional Parliament, the Bill was not in order.[2] Another member, however, pointed out that Art 379 cures this defect and the Chairman of the House further added that Art 368 had been adapted by the President long before and the adapted article allowed the Bill in question to be introduced and passed by the single House.[3]

The Constitution (First Amendment) Act, 1951, was passed on 18th June 1951. It amended the following provisions of the Constitution.

Art 15: A new clause (4) was added to Art 15. Its necessity was said to have arisen on account of the judgments of the Supreme Court in two cases, namely, State of Madras v. Smt. Champakam Devairajan[4] and Venkataram v. State of Madras.[5]

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1. Parl. Debates (1951) Vol.XII, May 16th Col.8856.
2. Mr. Babu Ramnaran Singh (Bihar) Parl Debates (1951) Vol.XII, Cols. 8882-8883.
3. Ibid. Col.8883.
4. AIR 1951 S.C.116.
5. AIR 1951 S.C.229.

In the first case, the communal G.O. of the Madras Government, fixing the proportion of students of each community to be admitted into the stateeeducational institutions was held as ultra vires of Art 29 (2); in the second case, it was held that the Madras communal G.O., reserving posts in the state services for different communities according to their race, caste, and religion, contravened Art 16 and was, accordingly, void. These two cases were viewed by the Government of India as impeding the educational advancement of the backward classes contemplated by Art 46 of the Constitution. Since every Hindu has a caste, it is impossible to make a reservation in favour of the backward classes without excluding some people who have got a caste.[6]

Art 19 (2): Clauses (2) and (6) of Art 19 were substituted by new clauses. In Clause (2) three new heads: (i) Relations with foreign states, (ii) public order, and (iii) incitement to offence were added. These additions were necessitated by two judgments of the Supreme Court in Romesh Thapar's case[7] and Brij Bushan's case.[8]

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6. Parl. Debates (of India) 1951, Vol.XII, Col.9007.

7. AIR 1950 S.C.124.

8. AIR 1950 S.C.129.

The head "public order" was added in order to arm the Legislature with authority to restrict utterances which provoke public disorders. Such authority was not felt to be lacking until the decision in Romesh Thappar v. State of Madras.[9] In this case, Section 9 (1-A) of the Madras Maintenance of Public Order Act 1949 which gave authority to the Provincial Government "for the purpose of securing the public safety or the maintenance of public order, to prohibit or regulate the entry into or the circulation, sale in ...", was challenged. The Madras Government acting under this section, had banned the entry into Madras of the Bombay weekly journal, Cross-Roads. The action of the Madras Government and section 9(1-A) of the Act were sought to be declared unconstitutional, being in contravention of Art 19 (1)(a), which provided for the fundamental right of free speech. The Supreme Court held that the right of free speech necessarily included freedom of circulation. The right to freedom of speech, as it stood in the Constitution of 1950, could be controlled by various factors specifically provided for under Art 19 (2); one of them was "the security of the state, or tends to overthrow the state". The question to be considered was whether the impugned Act could be validated under the head "security of the state". The Supreme

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9. AIR 1950 S.C.124.

Court held that the Constitution drew a distinction between serious and aggravated forms of public disorder which are calculated to endanger the security of the state and those relatively minor breaches of the peace of purely local significance. "Unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the state or the overthrow of it", such law could not come within the protection of Art 19 (2). The inclusion of "Public Order" in Clause 2 would enable the legislatures to enact laws to restrict freedom of speech for the preservation of the public order.

The insertion of the expression "incitement to offence" was justified on the ground that the decisions of the High Courts created a situation in which it was open to anybody to incited, encourage, tend to incite or encourage the commission of the offence of murder or any cognisable offence involving violence.[10] The Government intended to check this situation by legislation and the protective provision in the Constitution was necessary.

The expression "relations with foreign states" was added under the fear that the existing law dealing with friendly relations with foreign states might be declared ultra vires.[11]

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10. Dr. Ambedkar: Parl. Debates (of India) 1951, Vol.XII, Col.9008.

11. Ibid. Col.9015.

Most of the opposition members were apprehensive that under this category, they were going to be prevented from criticising the foreign policy of the Government. Dr. Ambedkar allayed this fear by making it clear that this was "a complete misunderstanding and misconception."[12]

Art 19 (6): This clause was amended in the light of the Allahabad High Court decision in the case of Motilal v. State of Uttar Pradesh.[13] In this case, a transport monopoly in favour of the state-operated bus service was struck down as unconstitutional because it deprived the citizen of his fundamental rights to carry on business under Article 19 (1)(g). It was realized by the Government that if Art 19 (1)(g) was not amended to counter this decision, nationalisation would not be possible.

It is to be noted that the wording of Art 19 (2) was improved by bringing in the expression "reasonable restrictions" into it. In fact, Clause (2) was brought into line with Clauses (3) to (6) which had already provided "reasonableness" as the touchstone of constitutional validity of the restrictions imposed under them. The change also enabled citizens to

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12. Dr. Ambedkar: Parl. Debates (of India) 1951, Vol.XII, Col.9016.

13. AIR 1951 All.257.

challenge any restriction imposed by law on their freedom of speech and expression as being "unreasonable".

Insertion of Art 31A: The purpose of inserting Art 31A was to save the various Zamindari Abolition Acts passed by the State Legislatures from being declared ultra vires. The High Court of Patna had held the Bihar legislation for abolition of Zamindari unconstitutional.[14] With a view to put an end to litigation, the Union Government amended Art 31 so that the Zamindari Abolition Acts were declared valid. A general provision in the form of Art 31A was inserted providing that no law affecting the rights of any proprietor or intermediate holder in any estate shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges the rights enshrined in Art 14, 19 and 31. Art 31A was made retrospective by using the words "deemed always to have been inserted",

Art 31B: Art 31B was added to save the laws passed by various state legislatures by listing them in the new Ninth Schedule. The members criticised this procedure as "very unusual". Since these laws were not scrutinised by the Parliament, the members wanted to know what these Acts were. Dr. Ambedkar informed the House that all these laws were laws which fell under Art 31A.

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14. Kameshwar Singh v. State of Bihar AIR 1951 Patna, 91.

Since the principle of Art 31A is that whenever a law is made for the acquisition of an estate, neither the principle of compensation nor the principle of discrimination shall stand in the way of its validity, the insertion of Art 31B could not be a matter of objection.

The Constitution (First Amendment) Act, 1951, made minor amendments to Art 85, 87, 174, 176, 372, and 376 of the Constitution. During the consideration of the Bill, the Speaker informed the House that, according to the requirements of Art 368, it was necessary to have voting by the division of the House. Mr. Hanumanthaiya felt that the word "passed" in Art 368 need not be construed as referring to every stage of the Bill. According to him, it referred to the final passing of the Bill.[15] If the word "passed" in Art 368 is construed as referring to every stage of the Bill, that is to say, the first reading, the second reading, and the third reading, then the special majority would be required at every stage. The Speaker replied that he had already consulted the Attorney-General on that point and he would not run the risk of leaving the whole legislation open to challenge in the courts. Therefore, he preferred to err on the safer side in having the division and the voting record on each stage of the Bill.[16]

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15. Parl. Debates (of India) 1951, Vol.XII, Col.9747.

16. Ibid. Col.9748.

The motion for taking the Bill into consideration was carried by a vote of 246 to 14 on 31st May 1951 after the motion had been discussed for three days. The Speaker felt that every proposed amendment to the clauses of the Bill should be put to vote by division of the House. But this would have taken a lot of time. The Home Minister thought that the voting on amendments to the clauses should be by voice only because the net result of an amendment in a particular clause would depend very much on the form which the clause ultimately took. On the other hand, if the amendments to a clause were voted by division, they might contradict one another because each amendment has its individual value but the totality of the clause would have to be voted upon in the form which it took after all the amendments were passed.[17]

Ultimately the Speaker ruled that the amendments proposed to the clauses of the Bill would be decided by voice. The members, while voting by voice, need not rise in their seats to mark their numbers. If someone chooses to challenge the decision of the Chair on some amendment, then it would be worth considering whether a division should or should not be granted. Ultimately any amendment that was accepted would again be voted on by the special majority of the House, when the clause as amended, was going to be put to the House.

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17. Parl. Debates (of India) 1951, Vol.XII, Col.9794.

The question whether all the clauses should be put together for voting by division was a bit controversial. The Speaker wanted to save time in the mechanical act of recording divisions, and therefore, he favoured the idea that all the clauses might be put to vote in one instalment. But the members were not agreeable to this proposition. Then the Speaker suggested that the important clauses might be voted on separately whereas non-controversial and formal clauses might be put together for the purpose of voting. He also referred to the practice of the House that in the case of clauses on which there is not much controversy or amendment, all the clauses are put together.

After the amendments to the clauses had been voted by voice, the Speaker put Clause 2 to vote and it was carried by 243 Ayes to 5 Noes.[18] Then clause 3 of the Bill (i.e. the amendment of Art 19) was taken up. The proposed amendments to clause 3 were put to vote by voice and then the clause was carried by 228 Ayes to 19 Noes.[19]

After this, clauses 4, 5 and 14 were taken up for discussion. The proposed amendments to these clauses, as usual, were decided by the voice vote. For the purpose of special majority, first,

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18. Parl. Debates (of India) 1951, Vol.XII, Col.9833.

19. Ibid. Col.9885.

Clause 4 as amended, was voted and carried by 239 Ayes to 6 Noes. Then Clause 5 was voted and carried by the special majority. Similarly Clause 14 was put to vote separately and carried by 233 Ayes to 7 Noes. Clauses 6 to 13 were taken up for discussion and were voted separately ahd carried by the special majority.[20] In the end, Clause1, the Title and the enacting formula were put to vote and carried by 234 Ayes to 12 Noes. At the third stage, the whole Bill as amended, was put to vote and passed by 228 Ayes to 20 Noes.

The Constitution (Second Amendment) Act, 1952

Objects and Reasons: The original article 81 (1) (a) provided for an absolute limit of 500 elected members in the House of the People. Art 81 (1)(b) provided that the States should be divided into territorial constituencies to be represented by members in such a way that there would be not less than 750,000 (7.5 lakhs) of the population and not more than one member for every 500,000 (5 lakhs) of the population. At first, seats were allotted in the House of the People to Part A and Part B states on the basis of one member for every 7.2 lakhs of the estimated population giving a total of 470 members to these states. To this effect, the President made an order under Art 387 which was to lapse on 25th January 1953. In the

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20. Parl. Debates (of India) 1951, Vol.XII, Col.10106.

1951 census, the population had increased by 13%. Since the overall limit of 500 members prescribed in Art 81 (1)(a) was not sought to be disturbed, it was thought fit to reduce the representation from one member for ever 5 lakhs to one member for every 7.5 lakhs of population. This figure of 7.5.lakhs was the maximum permissible under Art 81(1)(b) as it stood; but even so if the average population of a parliamentary Constituency in any state was to be 750,000 it was obvious that the population of some constituencies would exceed that figure. It was, therefore, deemed necessary that Art 81(1)(b) should be amended relaxing the limits prescribed therein so as to avoid a constitutional irregularity in delimiting the constituencies for the purpose of readjustment of representation in the House of the People as required under Art 81(3) of the Constitution.

The Constitution (Second Amendment) Bill, 1952, was introduced on 18th June 1952 in the Lok Sabha (House of the People) by the then Law Minister, Mr. Biswas. He expained that the result of the proposed amendment would be that the number of representatives in nine states would remain unaltered, Bombay would have three more representatives and Madras and Mysore one more each. Uttar Pradesh would have two less members and Bihar, Madhya Pradesh, Punjab and West Bengal one less each. At that time, there were special provisions for Part C states.

The members criticised the measure as smacking of "Bureaucratic rehash" and as treating the Constitution in a cavalier fashion. The opposition members questioned the sanctity of the number of 500, pointing out that the members of the House of Representatives in the United States increased from 65 to 435, that the number of the members in the House of Commons in the U.K. was 640 and in the House of Lords 746. It was argued that the people's right to representation had been curtailed by the enlargement of constituencies.[21] If the number of representatives was not increased with the increase in population, "the Parliament will become one of the most unrepresentative of representative institutions in the world."[22] In the Rajya Sabha also, examples of France and USSR were given, where the representatives were 627 and 682 respectively.[23]

It is to be noted that the original Bill sought to increase the upper limit to 850,000 and the lower limit to 650,000. In that case, there would have been a necessity of amending the Constitution after each census. The Select Committee reported that to avoid this inconvenience, the upper limit be removed and the lower limit be maintained as it was, on the pattern of Art 170.

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21. Parl. Debates, 1952, Vol.VI, Col.1951.

22. Parl. Debates, 1952, Vol.V, Col.344.

23. R.S. Debates, 1952, Vol.II, Col.2509.

The opposition members demanded that the Bill be circulated for the purpose of eliciting public opinion to which the government agreed and the period for this purpose was fixed up to 15th October 1952, i.e. over three months. Public opinion was, however, sought on the question whether the lower limit should be raised from 500,000 to 650,000 and the upper limit from 750,000 to 850,000 and not on the question whether the upper limit should be removed which was what was ultimately done. The public opinion was divided and was naturally of little use in determining the popular support for the amendment in question.

On 11th November 1952 the Bill was referred to a Select Committee consisting of 37 members of the Lok Sabha only. No member from the Rajya Sabha was included in the Select Committee and the members of the Rajya Sabha complained of this failing. We will see that in the succeeding Consitution Amendment Bills, the members of the Rajya Sabha were represented on the Select Committee.

It is of interest to note that when reference of the Bill to the Select Committee was being considered, some members wanted to widen the scope of the Bill to include Art 81(1)(a) along with Art 81(1)(b). The government, however, insisted that Art 81(1)(a) was not to be amended and, therefore, Art 81(1)(b) alone was considered by the Select Committee.

As a matter of fact, the whole problem related to the delimitation of constituencies and a Bill was introduced to that effect just after the introduction of the Constitution (Second Amendment) Bill.[24] The same select committee considered the Constitution (Second Amendment) Bill and also the Delimitation of Constituencies Bill. Objection was raised in the House that the one and same committee should not consider the both/Bills.

It seems that the increase in population did not call for a change in the constitutional provisions in Art 81. The increased population could be well covered within the prescribed limits. The sponsor of the Bill, Mr. Biswas, admitted in both the Houses that there was no difficulty and it was possible to keep within the existing limits but the administrative units would have to be disturbed.[25] The difficulty could have been easily got over by changing the limits of the constituencies. It is strange that when the members wanted to know which constituencies would have to be changed in the changed circumstances, the Law Minister had no statistics and he replied that the Delimitation of Constituencies Commission would go into the

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24. The Delimitation of Constituencies Bill was introduced in the Lok Sabha on 18th June 1952. L.S. Debates 1952 Part II, Vol.II, Col.2013.

25. L.S. Debates 1952, Vol.VI, Col.1939.

matter in detail. In the circumstances, the opposition members rightly criticised the government for amending the Constitution without thinking.[26] Some members even demanded that the first thing to be done in the matter was to have a report of the Commission and then, if it was necessary, the amendment Bill should be considered. As a matter of fact, to remove the upper limit was to give a free scope to the Delimitation Commission to delimit the constituencies with a certain amount of injustice because constituencies could be carved out in such a way that one constituency might have one representative for 5 lakhs and another for 7½ lakhs or even more. Thus, the Government could gerrymander constituencies to a great extent. The measure aroused fears in the minds of the members representing minorities because the amendment could be abused for suppressing political minorities, particularly in areas where minor language groups could be tagged on to dominating language groups.[27]

Moreover, the next census was to take place in 1961 and the second Lok Sabha elections were to take place in 1957, which could be held in accordance with the provisions of Art 81. Then what was the justification for amending the Constitution?

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26. R.S. Debates, 1952, Vol.II, Col.2462.
Parliament Debates, 1952, Col.369.

27. Example of Trancore Cochin was given by Mr. Abdul Razak-Rajya Sabha Debates 1952, Vol.II, Col.2495.

The only justification advanced by the Law Minister was that the Presidential order under Art 387 was only for three years; it was to expire on 25th January 1953. If some eventuality were to occur after that date requiring the holding of elections for any state legislature, there was no law. This difficulty could be easily met, as was pointed out by a learned member of the Rajya Sabha,[28] by asking the President to pass an ordinance.

The futility of the amendment was established in 1956 when the Constitution (Seventh Amendment) Act was passed, which amended the amended Art 81(1)(b) by substituting the principle of uniformity of representation among the States inter se as also among the territorial constituencies of the same state for the numerical minimum prescribed by the earlier clause (b) of Art 81.

The sponsor of the Bill piloted the Bill in both the Houses. The Bill was put to vote to fulfil the requirement of a special majority at the first reading stage, at the second reading and the third reading of the Bill. The proposed amendments to the Clauses of the Bill were voted by voice-vote and a division was called for Clause 2, and Clause 1, the Title and the enacting formula separately and these clauses were carried by the required majority under Art 368.

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28. Kunzru, H.N./R.S. Debates, 1952, Vol.II, Col.2475.

The Constitution (Third Amendment) Act, 1954.

Objects and Reasons: Art 369 empowered Parliament to legislate in respect of certain specified essential commodities, for a period of five years after which the whole Part XXI containing Art 369 was to lapse. The Government considered it advisable to have this power continued even after the expiry of this period. Therefore it decided to amend Entry 33 of the Concurrent List to amplify it so that it might include the powers provided in Art 369 and also a few other items. The amended entry 33 of the Concurrent List reads as follows:

> "Trade and commerce in, and the production, supply and distribution of: (a) the products of any industry where the control of such industry by the union is declared by parliament by law to be expedient in the public interest, and imported goods of the same kind as such products; (b) food stuffs including edible oil seeds and oils; (c) cattle fodder, including oil cakes and other concentrates; (d) raw cotton, whether ginned or ungrined, and cotton seeds; and (e) raw jute."

Importance of the Change: It is necessary to explain the significance of the change brought about by the substitution of this new entry 33 in List III. Under the original entry 33 the only matter specified was "trade and commerce, and the production, supply and distribution of the products of any industry where

the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest". Entry 52 of List I empowers Parliament to bring under its control such industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest. Therefore, Entry 52 of List I and the original Entry 33 of List III yield the result that only products of those controlled industries which are enumerated in Acts of Parliament passed under Entry 52 of List I, are brought into the concurrent sphere. In other words, inter-state trade and commerce, except in relation to the products of controlled industries, would be within the exclusive competence of the State Legislatures. Art 369 conferred powers on the Parliament to pass laws for a period of five years from the commencement of the Constitution, in relation to certain matters as if they were included in the concurrent list. The government sought the advice of an expert committee as to whether the continuance of controls in future was desirable. The committee strongly recommended that central regulation of the commodities specified in Art 369 was essential for an indefinite period not only in the interests of the proper distribution and supply of these commodities but also in the interest of the maintenance of these industries. The amendment vests the control of the controlled industries in the hands of the Union for ever, if it ever wishes

to exercise its concurrent power under Entry 33. Not only that, new matters such as imported goods similar in nature to the products specified, food stuffs, cattle fodder, raw cotton and raw jute, were also brought in.

Introduction of the Bill: The Constitution (Third Amendment) Bill was introduced in the Lok Sabha on 6th September 1954, by the Minister of Commerce and Industry, Shri T.T. Krishanamachar. On 10th September, he tabled the motion that the Bill be referred to a joint committee consisting of 36 members, 24 from the Lok Sabha and 12 from the Rajya Sabha.[29] The names of the members from the Lok Sabha were mentioned but those from the Rajya Sabha were to be included by that House. The quorum of the Joint Committee was fixed as one-third of the total number of members and the Committee was to report by 17th September.[30]

An objection was raised that since the Bill included "foodstuff and cattle fodder" the Food Minister should be present in the House but the sponsor replied that it was not necessary because the Cabinet has a collective responsiblity.[31] Mr. Moore suggested that Parliament should develop a convention that all amendments of the Constitution should be piloted by the Minister

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29. Later on one Member withdrew his name - Parl. Debates, 1954, Vol.VII, Col.1661.

30. L. S. Debates Part II, 1954, Vol.VI, Col.1355.

31. Parl. Debates, 1954, Vol.VI, Col.1388.

in charge of the Law Ministry. In other countries, the constitutional amendments are sponsored by the Minister in charge of the Legal Portfolio.[32]

The opposition members proposed that the Bill be circulated for the purpose of eliciting public opinion but the proposal was rejected.[33]

The report of the Joint Committee was presented on the table of the House by the Prime Minister on 20th September 1954.

The Joint Committee included members from opposition parties and these members expressed their dissent in the report. Some members of the Joint Committee were against the amendment. But they were told that they could not oppose the amendment at that stage because by accepting to serve on the committee, they had accepted the principle of the Bill.[34] However they expressed their view that the doctrine of "occupied field" introduced by the amendment would "progressively pulverise" State autonomy. They also suggested that if it was found necessary, the transitional period provided in Art 369 might be increased to ten years. A member fairly summarised the position when he said that all the arguments of the opposition centred around two points, namely, autonomy of states and democracy.[35]

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32. Parl. Debates, 1954, Vol.VI, Col.1400.

33. Ibid. Col.1662.

34. R.S. Debates, 1954, Vol.VII, Col.3565.

35. Shah, C.C. Parl. Debates, Vol.VII, 1954, Col.2847.

It is of interest to note that the members in both the Houses asked the Government whether the State legislatures had been consulted on the measure. As a matter of fact, all the States had not sent their replies to the Union. In the Rajya Sabha, Dr. Ambedkar reminded the Government that prior consultation was very necessary in the matter because ratification by the States was required to make the amendment effective.[36]

Was/Amendment Necessary? It seems that the amendment was not necessary at all. All that the government intended to achieve by the amendment could be easily done under the provisions of the Constitution. First, Art 249 could be used for transferring any matter lying in the state list into that of the centre list, though the power under Art 249 requires the periodical approval of the Rajya Sabha. Secondly, the sponsor of the Bill rightly pointed out that the amendment was not being introduced for a lack of power. He further added that Art 302 gives power to the Union Government to impose restrictions on the freedom of trade, commerce or intercourse between one state and another, in the public interest.[37] Again Entry 52 of List I also gives ample power to the Union and when the tea and coffee industries

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36. R.S. Debates, 1954, Vol.VII, Col.2298.

37. Parl. Debates Part II, 1954, Vol.VI, Col.1515.

were being regulated under that entry there was no reason why other industries could not be taken under it. The taxing powers[38] of the Union could also be employed to regulate the products of industries. In fact, the real reason for bringing forward the amending Bill was revealed by the sponsor of the Bill himself. In his view, the procedure in Art 249 was "cumbersome and unsatisfactory"[39] and acting under other provisions would entail "a certain amount of uncertainty".[40] Therefore, he wished that the area of doubt should be resolved. But was this alone a sufficient reason to amend the Constitution? No wonder, the Government was accused of having a "low regard for the Constitution".[41]

As usual, the Bill was put to vote by division of the House on the consideration stage, second reading and the third reading. But it is to be noted that Clauses 1 and 2, the enacting formula and the Title were put to vote together. The Speaker thought that, though there was more than one clause, the substance was one. Here was a departure from the past practice.

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38. Part XII of the Constitution.

39. Parl. Debates Part II, Vol.VI, Col.1515.

40. Ibid. Col.1515.

41. Dr. Ambedkar: R.S. Debates 1954, Col.2302.

The Constitution (Fourth Amendment) Act 1955.

Objects and Reasons: The Supreme Court held in the cases of State of West Bengal v. Subodh Gopal,[42] Dwarkadas Shrinivas v. Sholapur Spinning Co.[43] and Saghir Ahmed v. State of Uttar Pradesh[44] that the expressions "taken possession of " and "acquisition" occurring in Art 31 (2) conveyed the same meaning as the expression "deprivation" in Art 31 (1) and, therefore, both Clauses (1) and (2) of Art 31 dealt with one and the same subject matter. Even if the title to property is not vested in the State, it would require the payment of compensation. The net result of these decisions was to require compensation even in cases where property rights were affected by purely regulating laws or what is termed as the exercise of "police powers" by the state in America. The Government intended to pay compensation only in the cases of "acquisition or taking possession of the property" directly by the state - cases covered by "eminent domain" in America.

In order to get over this situation, Clause (2) was reworded taking in the words "compulsorily acquired or requisitioned".

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42. AIR 1954 S.C.92.

43. AIR 1954 S.C.119.

44. AIR 1954 S.C.728.

A new explanatory clause (2A) was added, making it clear that

> "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 notwithstanding that it deprives any person of his property."

A very important change was brought about by the Fourth Amendment by making the adequacy of compensation a non-justiciable issue. This amendment was made to circumvent the decision given by the Supreme Court in State of West Bengal v. Mrs. Bella Banerjee[45] where Chief Justice Patanjali Shastri observed:

> "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 should ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of."

Since it was held in the Bella Banerjee case that in all cases of compulsory acquisition of land and property, the government must pay full and fair compensation, it became necessary for

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45. AIR 1954 S.C. 170 at 172.

the government to amend Art 31 (2), otherwise its social and economic programmes could be held up.[46]

Saving of Laws: Art 31A was amended providing therein four new categories of legislation to be saved from challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Art 14, 19 or 31. These categories are:

(a) 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 its proper management;

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46. It is of interest to note that although it was specifically provided in Art 31 (2) that a law providing for compensation under Art 31 (2) shall not be called in question in any court on the ground that the compensation provided by it is not adequate, the Supreme Court ruled in Vajravelu Mudaliar v. Special Deputy Collector (AIR 1965 S.C.1017) that the Fourth Amendment did not affect the Bella Banerjee decision and that "compensation" must not be illusory. In the Metal Corporation (1967) I.S.C.R. 255 the Court held that a provision for compensation must provide for a "just equivalent" compensation. But the Metal Corporation case has been overruled by its ruling in State of Gujarat v. Shantical Mangaldas on January 13th, 1969, wherein it has been held that the adequacy of compensation (apart from compensation which is illusory or proceeds upon principles irrelevant to its determination) cannot be questioned in any court.
See The Journal of Parliamentary Information (1969) Vol.XV, No.1. Short notes p 47.

(b) 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;

(c) 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;

(d) 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.

The purpose of providing for these categories of laws is to enable the State to enact social welfare legislation and to save those laws from being attacked on the ground that they infringe the fundamental rights enshrined in Art 14, 19 or 31.

Section 4 of the Amendment Act amended Art 305 so that the laws passed by the state legislatures and Parliament to create state monopolies might be saved from being challenged either under Art 19 or Art 301 and 303.

The Fourth Amendment Bill was introduced by the Prime Minister, Mr. Jawahar Lal Nehru, in the Lok Sabha on 20th December 1954. On 14th March 1955 he moved that the Bill be referred to a Joint Committee of 45 members, 30 from the Lok Sabha and

15 from the Rajya Sabha. The Speaker requested the members to relax the convention of the House that the members of a joint select committee should not try to catch the eye of the Speaker. In regard to this particular amendment, the members of the joint select committee were also allowed to speak.[47]

The Bill was put to vote at the three stages, in accordance with the practice of the House. There was a difficulty in regard to the amendments to the clauses. The number of amendments was extremely large, as many as 120. The Speaker suggested that each clause might be taken up for discussion and all the amendments to it might be decided by voice. In this way, at the end, all the clauses might be put to vote together. Mr. Thakur Das Bhargava observed that putting all the clauses together would be tantamount to passing the motion at one stroke.[48] Ultimately, each clause was put to vote by division of the House and the amendments to the clauses were decided by the vote of voice, that is to say, the old practice was adhered to. It is to be noted that in the Rajya Sabha, the Bill was sponsored by Mr. Govind Vallabh Pant, the Home Minister.[49]

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47. L.S. Debates Part II, 1955, Vol.II, Col.1958.
48. L.S. Debates Part II, 1955, Vol.II, Col.4965.
49. R.S. Debates, 1955, 17th March 1955, Col.2226.

The Constitution (Fifth Amendment) Act, 1955.

The Constitution (Fifth Amendment) Act had a checquered history in getting through the process under Art 368. The sum and substance of the Bill was first introduced in the Lok Sabha in a Bill called the Constitution (Fifth Amendment) Bill,[50] which contained provisions regarding other matters also. But the government wanted that the matters covered by clauses 10 and 11 of that Bill be passed urgently and that the other provisions of the Bill might be passed afterwards. Therefore, Clauses 10 and 11 were incorporated in a separate Bill which was introduced as "The Constitution (Seventh Amendment) Bill"[51] on 28th November 1955 in the Lok Sabha. The Bill related to the amendment of one Article, i.e. Art 3 of the Constitution. It is interesting to note that the two Constitutional Amendment Bills, namely the Constitution (Fifth Amendment) Bill and the (Sixth Amendment) Bill were still pending for consideration in the Lok Sabha when the (Seventh Amendment) Bill was taken up for consideration and passed. Only four hours were allotted for all the stages of this one-clause Bill.[52] The Government was in such a hurry to rush through the measure that even the

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50. Clauses 10 and 11 of the Bill were introduced on 20th November 1955 in the Lok Sabha.

51. L.S. Debate Part II, Vol.IX, Col.659.

52. Ibid. Col.661.

reference to a select or joint committee was sought to be dispensed with; such a reference had been regularly made in respect of the Constitution Amendment Bills previously passed. But the Business Advisory Committee of the Lok Sabha thought it necessary to follow the old practice of having a reference to a select committee in case of a Constitution Amendment Bill. Accordingly, a motion was tabled on 1st December 1955, for the Bill to be referred to a select committee consisting of 21 members from the Lok Sabha only.

When this motion was put to vote, as usual, the bell was rung for two minutes after which the doors of the House were closed and the tellers started counting by heads. While the counting was going on, suspicion arose that the Government was lacking the special majority. Many points of order were raised as to the desirability of the practice of closing the doors of the House in case of a division, and as to the necessity of having a two-thirds majority of the members present and voting even in adopting a Bill - that is at that stage.[53] The result of the voting was declared as Ayes 246 and Noes 2. The total membership of the Lok Sabha at that time was 499.[54] However, certain seats

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53. L.S. Debates Part II (1955) Vol.IX, Col.883.
An Honourable Member thought that a bare majority was sufficient for all the intermediate stages of the Bill and special majority was required at the last stage only.
Ibid. Col.889.

54. L.S. Debates Part II (1955) Col.887.

were vacant so that the sitting members were less than 491. The Speaker informed the House that he was not clear as to what he should declare in regard to the passing of the Bill. The point to be considered was whether "absolute majority of the House" in Art 368 means the strength of the House for the time being or the total strength of the House as it should be. In this particular case, Rule 169 of the Rules of Procedure of the House was referred to, which provided that an Amendment Bill, at the stage of being referred to a select committee, requires an absolute majority of the total membership of the House and a two-thirds majority of the members present and voting. An objection was raised as to whether a rule can supersede, or add to the words of, the Constitution.[55] Ultimately, the Speaker declared that the motion was not carried in accordance with Rule 169 of the Rules of Procedure.[56] He also ruled that the doors of the House are closed only by convention and the word "present" in Art 368 means those present two minutes after the bells are rung and the doors are closed.

After the Constitution (Seventh Amendment) Bill was miscarried, the Government embodied practically the same matter in another bill introduced as the Constitution (Eighth Amendment) Bill on 8th December 1955 in the Lok Sabha by the Home Minister,

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55. L.S. Debates Part II (1955) Vol.IX, Col.890.

56. Ibid. Col.890.

Mr. G.B. Pant. This Bill was taken up for consideration on 12th December. This time the practice of referring the Bill to a select committee was intentionally dispensed with by ordering the suspension of a rule in this regard. When the Members insisted on having a select committee, it was agreed by the Government that the members could meet the Law Minister and the Home Minister after the consideration stage of the Bill and could have informal discussions but this would not be treated as a precedent in future.[57] Next day the Bill was passed by 377 Ayes and no Noes i.e. unanimously. It is to be noted that the Government had proposed an amendment to Clause 1 of the Bill to the effect that "Fifth" be substituted for "Eighth" and the Speaker ruled that the change sought was merely formal and he would do it himself in his discretionary power and, therefore, the amendment to Clause 1 was not moved at all. Clauses 1 and 2 were put to vote together.

Change brought about by the Amendment

The Fifth Amendment amended the proviso to Art 3 to the effect that the President would be able to prescribe a period within which the state had to express its views on the Bill. The whole purpose and object was that it would not be possible for any state to take up a non-co-operative attitude and thereby

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57. L.S. Debates Part II (1955) Vol.X, Col.2465.

impede implementation of the Bill for the formation of new states or for alteration of boundaries. The States Reorganisation Commission Report was sought to be implemented by the Government as expeditiously as possible and by the amendment states were prevented from adopting delaying tactics. After the prescribed period was over, the Parliament could take up a bill for consideration and pass it, notwithstanding the fact that some of the states were not able to express their views on the bill within the prescribed period. If the states feel that the period is short or inadequate, they can prevail upon the President to extend the period and if they succeed, they can have a longer period than what is prescribed.

The Constitution (Sixth Amendment) Act, 1955.

Objects and Reasons: The amendment was brought to remove the confusion regarding the scope and effect of the Explanation in Clauses 1 and 2 of Art 286. The Supreme Court expressed the view in State of Bombay v. United Motors (India) Ltd.[58] that the Explanation in Clause 1 of Art 286 prohibited the taxation of a sale involving inter-state elements by all states except the state in which the goods were delivered for the purpose of consumption therein. It was further held that Clause 2 did not

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58. AIR 1953 S.C.252

affect the power of that state to tax the inter-state sale even though Parliament had not made a law removing the ban imposed by the clause. The result of this decision was that dealers resident in one state were subjected to the sales tax jurisdiction and procedure of several other states with which they had dealings. After some time, the Supreme Court held that no state can impose or otherwise cause the imposition of any tax on sales or purchases of goods when such sales or purchases take place in the course of inter-state trade or commerce.[59]

Moreover, in pursuance of Clause 3 of Art 286, Parliament passed an Act in 1952 declaring a number of goods to be essential to the life of the community. Since this Act could not affect pre-existing state laws imposing sales tax on these goods, the result was a wide disparity from state to state in sales tax. The Taxation Enquiry Commission recommended that Art 286 (3) of the Constitution be amended to remove the existing exemption of articles essential to the life of the community from the scope of state sales taxes and that sales tax must essentially continue to be a state tax as a source of revenue and must continue to be levied and administered by state governments.

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59. Bengal Immunity Co. v. State of Bihar : AIR 1965 S.C.661.

Changes made by the Amendment

The Explanation in Clause 1 of Art 286 was omitted. For new clauses Clauses 2 and 3 of Art 286/were substituted enabling Parliament to formulate by law principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause 1. It was also provided that any state law providing for taxes on sales or purchases of goods declared by Parlieament by law to be of special importance in inter-state trade or commerce shall be subject to restrictions imposed by Parliament by law. A new Entry 92A in the Union List was added to give power to impose tax on sales or purchases of goods in inter-state trade or commerce. Entry 52 of List II was consequently amended. To the same effect, Art 269 was also amended.

Procedure in Enacting the Amendment

The Bill was introduced on 3rd May 1956 by the Minister of Revenue and Civil Expenditure. The Bill was referred to a joint committee consisting of 45 Members, 30 from the Lok Sabha and 15 from the Rajya Sabha.[60] The Report of the Committee was presented on 23rd May and taken up for consideration on 29th May. At this stage it was the Minister of Finance who piloted the Bill.[61] At the consideration stage, Clauses 2, 3, and 4 were put to vote together. The Constitution (Seventh Amendment) Bill was introduced as the "Tenth" Amendment Bill and the "Tenth" was substituted by "Seventh" by an amendment to

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60. L.S. Debates Part II (1956) Vol.IV, Col.7089.
61. L.S. Debates (1956) vol.V, Col.9875.

Clause 1 by the Government.[62] Clause 1 as amended, the Enacting Formula and the Title were added to the Bill and were not voted by division but by a bare majority. It is to be noted that in the Rajya Sabha, for the purposes of voting, Clauses 2, 3, and 4 were clubbed together and Clause 1, the Title and Enacting Formula were voted together.[63]

It is obvious that the Bill needed ratification by at least half the State Legislatures, as required by Art 368. The lists in the Seventh Schedule being entrenched in Art 368, and the Amendment seeking to amend the Union and State Lists, ratification was necessary.

The Constitution (Seventh Amendment) Act, 1956.

Objects and Reasons: When the Constitution was framed, the states were not organised on any rational basis except, of course, on the basis of administrative convenience. The states were not placed on an equal basis but were divided into Part A, B, and C states. Soon thereafter, pressures began to build up for a reconstruction of the states and for the elimination of the disparity between the different classes of states. The government appointed a Commission known as the State Reorganisation

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62. L.S. Debates (1956) Vol.V, Col.9972.

63. R.S. Debates (1956) Vol.XIII, Col.4190.

Commission which submitted a report in 1956. The Commission recommended a reconstitution of the states on linguistic, geographical and ethnic basis. To implement these recommendations the Constitution required to be amended and this was done by the Seventh Amendment Act.

By this Amendment Part B and Part C states were abolished and all the units of the Union were given the same status and character. The alteration in union Territories changed representation for states in Parliament. It provided that one and the same person can be appointed as the Governor of two or more states. Art 170 providing for the composition of Legislative Assemblies, was altered. It extended the jurisdiction of High Courts to Union territories and the establishment of a common High Court for two or more states was made possible. The duration of the Andhra Pradesh Legislative Assembly was extended by Section 24 of the Act. An important change was brought about by substituting Art 298 by a new Article which provided that the power of the Union and the State shall extend to carrying on trade or business and to the acquisition, holding and disposing of property and the making of contracts for any purpose. Entry 33 of List I and Entry 36 of List II and Entry 42 of List III of Schedule VII, were recast to make them comprise the seemingly simple formula for "acquisition and requisition of property".

Procedure under Art 368: The Seventh Amendment Bill was first introduced as the Constitution (Sixth Amendment) Bill but it was withdrawn on 18th April 1956 to embody many new provisions in it.[64] On the same day it was again introduced as the Constitution (Ninth Amendment) Bill by the Home Minister. The Bill was referred to a Joint Committee comprising 34 members from the Lok Sabha and 17 from the Rajya Sabha, making a total of 51[65] - the largest number till then taken for Committees on Constitutional Amendment Bills. The Report of the Committee was taken up for consideration on 4th September 1956. As usual the Bill was voted by division at the time it was referred to a Joint Committee, at the consideration stage and at the final stage. But it is to be noted that at the consideration stage, clauses were grouped for the purpose of voting, according to the subject-matter they contained. Clauses 2, 3 and 4 formed one group; Clauses 5, 6 and 7 another group. Clause 8 was voted separately whereas Clauses 9, 11, 12 and 13, 16 and 25 as amended were clubbed together and voted.[66] Clause 10 was put to vote separately. A larger group was made of Clauses 17 to 20, Clauses 18 to 23, Clauses 26 to 29 and the Schedule. Clause 24 was voted separately.

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64. L.S. Debates Part II (1956) Vol.IV.

65. L.S. Debates Part II (1956) Vol.IV, Col.6472.

66. L.S. Debates Part II. Vol.VIII, Col.5802 to 6063.

In the Rajya Sabha, the clauses were grouped differently. There were five divisions. Clauses 6, 18, 24 and Clause 1, the Title and the Enacting Formula were each voted separately. Clauses 2 to 5, 7 to 17, 19 to 23, 25 to 29 and the Schedule were put to vote together. This was the first time that so many clauses were clubbed together for the purpose of voting and the practice of having votes by division on each clause was deviated from.

The Constitution (Eighth Amendment) Act, 1960.

Objects and Reasons: This Amendment altered Art 334 so as to extend the operation of the said Article from ten to twenty years from the commencement of the Constitution. Art 334 provides for: (a) the reservation of seats for the Scheduled castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States; and (b) the representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination.

It is interesting to note that the Bill was objected to by a Member on the ground that it was ultra vires of Art 17.[67] His argument was that Art 17 forbids the practice of untouchability in any form. It specifically provides that the enforcement of any disability arising out of "untouchability" shall be

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67. L.S. Debates Second Series (1959) Vol.36, Col.2449.

an offence punishable in accordance with law. He further stated that the Government had prescribed an official criterion for designating persons belonging to the Scheduled Castes, viz. that they must, in addition to being backward, suffer from the tangible disability of untouchability. His point was that if the test for future election to the reserved seats was to be the tangible disability of untouchability, the Bill would become ultra vires of Art 17. When he was reminded that when Art 17 was framed, Art 333 and 334 were also framed, he pointed out that the Constituent Assembly had adopted a different criterion for determining the Scheduled Castes, viz. standard of education and certain social disabilities and not untouchability.[68] There seemed to be force in his argument but the objection was not accepted and the House proceeded with the Bill.

Action under Art 368: The Bill was sponsored by the Home Minister and it was considered on 30th November 1959 by the Lok Sabha.[69] It was not referred to a select or a joint committee. Some members proposed to get the Bill circulated for the purpose of eliciting public opinion but the proposal was not accepted by the Government.[70]

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68. L.S. Debates 2nd Series (1959) Vol.36, Col.2449.

69. L.S. Debates 2nd Series (1959) Vol.35, Col.2443.

70. Ibid, Col.2552.

The Government wanted to pass the Bill on the same day it was taken up for consideration. The time of voting was fixed as 5 o'clock in the evening. Actually, the voting started at 5.20 p.m. This time the House was fitted with electric apparatus for automatic recording of votes. The Members were requested to rise in their seats and press "Ayes" or "Noes" buttons as the case may be and record their votes accordingly. The members pressed their respective buttons and the indicator showed the result but some members complained that their machines did not work properly. The Speaker then asked the members to go into their respective lobbies and record their votes. But in the lobbies, there were no clerks and, therefore, there was a bit of confusion. The Speaker was requested to postpone the voting and he did so. The next day, many members raised points of order and asked why the motion was postponed when it was lost the day before.[71]

The irregularity in procedure was sought to be remedied by having a de novo consideration of the Bill. But the Speaker ruled that there was nothing wrong in having voting the next day. Then voting started and each clause was voted separately by division and the Bill was passed. The Rajya Sabha passed it on 7th December 1959.

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71. L.S. Debates 2nd Series (1959) Vol.36, Col.2700.

The Constitution (Ninth Amendment) Act, 1960.

Objects and Reasons: India and Pakistan entered into agreements dated 10th September 1958, 23rd October 1959 and 11th January 1960, collectively known as the Nehru-Noon Agreements) which settled certain boundary disputes relating to the borders of the States of Assam, Punjab and Benagal (West) and the Union Territory of Tripura. The agreements involved, among other matters, the cession of one half of the Berubari Union No.12 which was Indian territory to Pakistan and the exchange of old Cooch-Behar Enclaves in Pakistan and Pakistan Englaves in India. The Constitution (Ninth Amendment) Act, 1960, amended the Constitution to give effect to the transfer of these territories.

Advisory Opinion of the Supreme Court

The Government was doubtful whether the agreements were purely relating to boundary disputes or cession of territory and as to how the agreements could be implemented because the constitutional provisions relating to the matter were not clear. Therefore, the Supreme Court was asked by the President under Art 143 of the Constitution to express its opinion on the matter. The Court gave its opinion on the Reference[72] after hearing all the necessary parties. It held that Art 3 (c) of the Constitution does not

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72. In re Berubari (1960) 3 SCR 250 : AIR 1960 SC 845.

include the case of cession of national territory in favour of a foreign state as the diminution of the area of a State contemplated by Art 3 (c) is diminution following its addition to another State as a matter of internal adjustment of territories within the Indian Union. Therefore it was not competent to Parliament to implement the Agreement by making an ordinary law under Art 3 (c). Three possible ways of implementing the Agreements were suggested by the Court.

First, by amending Art 1 and consequentially the First Schedule. The Court observed:

> "We have already held that the Agreement amounts to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Art 1 and of the relevant part of the First Schedule to the constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made under Art 368."[73]

The second method was to amend Art 3 suitably so as to include cases of cession of territory and then implement the Agreement by an ordinary law since Art 2, 3 and 4 read together provide for

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73. (1960) 3 SCR at p 249.

such a legislation being enacted by an ordinary law. The Court said:

> "Parliament may, however, if it so chooses, pass a law amending Art 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign state. If such a law is passed then Parliament may be competent to make a law under the amended Art 3 to implement the Agreement in question. On the other hand, if the necessary law is passed under Art 368 itself that alone would be sufficient to implement the agreement."

It is to be noted that the third method suggested is in the last line of the paragraph just quoted, namely, "if the necessary law is passed under Art 368 itself that alone would be sufficient to implement the agreement." It is not clear what the court means by "necessary" law under Art 368. It is of interest to note that the Government did not act according to the first and second suggestions but in accordance with the third suggestion.

The first suggestion was not followed in enacting the Ninth Amendment Act because the Act amended only the First Schedule and did not amend Art 1.

The second suggestion was not thought fit to be followed and rightly so on two grounds. First, on the ground of principle, cession of national territory should not be provided

for in the Constitution because no Constitution in the world makes a provision for cession of national territory.[74] Secondly, it would have made it easier in future to transfer territory in favour of a foreign state because Art 3 requires a simple majority to pass a law under it and not a special majority as is required by Art 368.

Now the question to be considered is whether the Ninth Amendment Act is "necessary" law under Art 368 to give implementation to the agreement in question? The Supreme Court had held that, though the right to cede territory is an attribute of sovereignty, there being no provision in the Constitution empowering Parliament to cede national territory, Parliament was incompetent to do so.[75] The question arises, since such a power was not introduced in the Constitution and does not exist even today, from where did Parliament derive the power to amend the First Schedule so as to provide for the territories ceded or acquired in the Agreement? It is submitted that Art 368 does not bestow any inherent power upon Parliament; the power in Art 368 can be used by Parliament only by following the procedure prescribed in the Article itself. As the power

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74. Dr. Krishnaswami: L.S. Debates 2nd Series (1960) Vol.49, Col.6503.

75. Seervai takes the view that this power is to be found in Art 3 or the residuary power of the Union under Art 248 read with List 1, Item 97. Seervai: Constitutional Law of India, 1967, p 121.

to cede national territory was not there in the Constitution, Parliament should have acted first under Art 368 and amended the Constitution suitably to provide the required power and then passed the necessary law to give implementation to the Agreement.

Procedure under Art 368: The Bill was introduced by the Prime Minister, Mr. Jawahar Lal Nehru. At the introduction stage an objection was raised that the Nehru-Noon Agreement was not discussed in Parliament before ratification and, therefore, an amendment to give effect to the Agreement was improper[76] but the objection was ruled out. At the consideration stage the two Bills, namely, the Acquired Territories (Merger) Bill and the Constitution (Ninth Amendment) Bill were taken up for discussion simultaneously.[77] It is to be noted that the acquired territories were provided in the Acquired Territories (Merger) Bill and it was treated as an ordinary law, and therefore, was passed by an ordinary majority. This measure was criticised because the views of the West Bengal Legislature under Art 3 were not ascertained properly. The sponsor explained that the Presidential order prescribed one month as the period within which the State legislatures concerned were to express their

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76. L.S. Debates (1960) 2nd Series, Vol.49, Col.6012.

77. Ibid. Col.5982.

views. The papers were sent to them on 23rd September 1960. The West Bengal legislature demanded more time and so the period was extended up to 15th December. But the legislature did not send its views by that date. Parliament could not be expected to wait indefinitely and hence there was no substance in the argument. The Bill was considered on 16th December 1960. The exact changes in the territories ceded or acquired were not indicated in the two Bills. This lacuna was explained as owing to the fact that the Government had no legal authority to go into the disputed territories and demarcate them. After the Government had been clothed with necessary legal authority, it was possible to give the exact area of the territory ceded or acquired.[78] The proposal for circulating the Bill for the purpose of eliciting public opinion thereon was negatived.[79] It is to be noted that the Bill was not referred to a select or joint committee. But each clause was voted severally for the purpose of having special majority under Art 368. Even the schedules in the Bill were voted separately[80] in both the Houses. Since voting was by the automatic machines in the Lok Sabha many members complained that their machines did not work properly.

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78. L.S. Debates, 2nd Series, 1960, Vol.49, Col.6258.

79. Ibid. Col.6567.

80. L.S. Debates 2nd series, 1960, Vol.59, Col.6574 and 6610; Rajya Sabha Debates (1960) Vol.31, Col.3286.

The Constitution (Tenth Amendment) Act, 1961.

Objects and Reasons: In response to the request of the people of Free Dadra and Nagar Haveli, expressed through a Resolution adopted by their Varishta Panchayat on 12th June 1961, for integration of their territories with the Union of India, the Government of India decided that these territories should form part of India as a specific Union territory with effect from 11th August 1961. The Act makes amendments to the Constitution in order to absorb the territories into the Union of India.

Changes made: The First Schedule was amended so as to include an entry "Dadra and Nagar Haveli" under the heading "The Union Territories". Art 240 was amended so as to include an additional Clause (c).

Was the amendment under Art 368 necessary?

It is to be noted that it was held in Re Berubari[81] that no amendment of the Constitution under Art 368 is necessary in regard to acquisition of territories. But for cession of national territory in favour of a foreign state, legislation under Art 368 is necessary. So far as acquisition of territory is concerned, Art 4 (2) is quite clear; it can be done by an

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81. (1960) 3 SCR 250 : (1960) AIR S.C.845.

ordinary law. No doubt it is an amendment of the Constitution since the First Schedule has to be necessarily altered but Art 4 (2) says that such a law is not to be deemed to be an amendment of the Constitution for the purposes of Art 368. Therefore, in the case of acquisition of the territories of Dadra and Nagar Haveli it was not necessary at all to have acted under Art 368 as the Parliament did. It seems that Parliament acted as a matter of caution in this regard. Some members of the Lok Sabha also took the view that the procedure under Art 368 was not necessary.[82] The Law Minister explained that in the Berubari Reference the Supreme Court held that if acquisition is sought to be given effect to by alteration of the First Schedule, then a constitutional amendment was necessary.[83] It is submitted that this is a misinterpretation of the judgment. Moreover, it is to be noticed that in the Ninth Amendment Act, acquisition of territories was effected by an ordinary law, namely, the Acquisition of Territories (Merger) Act, 1960.

The real reason to act under Art 368 seems to be the amendment to Art 240, which the Government intended to effect by the same Bill. Since that amendment could not be covered by Art 4, action under Art 368 was essential. The Government should have

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82. L.S. Debates, 2nd Series (1961) Vol.56, Col.2092.

83. Ibid. Col.2149.

acted under Art 368 to amend Art 240 but not to amend the First Schedule.

Procedure under Art 368: The Bill was introduced by Shrimati Lakshmi Menon, the Deputy Minister for External Affairs, on 11th August 1961.[84] It was moved for being taken into consideration on 14th August 1961. No reference to a select committee or a joint committee was made. Clauses 2 and 3 were put to vote together. Clause 1, the Enacting Formula and the Title were voted together.[85]

The Constitution (Eleventh Amendment) Act, 1961.

Objects and Reasons: It was considered that the requirement of Art 66 (1) that members of the two Houses of Parliament should assemble at a joint sitting for the election of the Vice-President was totally unnecessary. Art 71 was sought to be amended because it was possible that the elections to the legislatures might not always be completed before the election of the President or Vice-President. The two proposals were given effect to by the Act.

Changes made: In Art 66 (1) the words "members of both Houses of Parliament assembled at a joint meeting" were substituted by the words "members of an electoral college consisting of members of both Houses of Parliament". In Art 71 a new Clause (4)

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84. L.S. Debates, 2nd Series (1961) Vol.56, Col.1658.

85. L.S. Debates, 2nd Series (1961) Vol.56, Col.2151.

was inserted to provide that "the election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him." Was the amendment necessary? To justify the first proposal, the sponsor mentioned a few difficulties such as the fact that under Art 324 the Chief Election Commissioner has to conduct all elections. If the Speaker or the Chairman of the Rajya Sabha is to conduct the proceedings of the joint committee, how can the Chief Election Commissioner conduct the election? Since the number of the members is large, filing of nomination, the scrutiny and withdrawal thereof and various other matters would have to be done outside the House.[86]

It is submitted that the words in Art 66 were "joint meeting" and not "joint sitting". Since it was not a sitting of Parliament, it was not necessary for the Speaker or the Chairman to preside and the Chief Election Commissioner could have conducted the meeting. The difficulties adumbrated were misconceived and without any substance. The second proposal was made to plug a lacuna brought out by the decision in Khare v. Election Commissioner.[87] In this case a point was made

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86. L.S. Debates, 2nd Series (1961) Vol60, Col.3267.

87. 1959 SCR 1081.

that for a valid election of the President all elections to the two Houses of Parliament should be completed before the date of the Presidential election. Though the Supreme Court did not express its opinion on the point, the Government thought it fit to take out the ground of challenge. But the amendment goes further than this. The sponsor of the Bill explained that elections in the hilly areas such as Himachal Pradesh cannot be held at the same time as in the plains as these areas are snow-bound at that time. Therefore, the amendment was brought. The amendment seems to be very simple but it has far-reaching consequences. First, though the prospective members from such areas are competent to contest the election for President,[88] they have been denied the right to vote in such an election. It was not proper to deprive them of this right. Secondly, Art 71 (1) provides that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be enquired into and decided by the Supreme Court whose decision shall be final. The amendment to Art 71 restricts the jurisdiction of the Supreme Court in that it removes one ground of challenge, namely the existence of any vacancy for whatever reason among the members of the electoral college. Thirdly, it was pointed

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88. Art 59 provides that the President shall not be a member of either House of Parliament.

out by a member of the Rajya Sabha that the amendment had made it very easy for the Government at the centre to advise the President to dissolve three, four or five legislative assemblies and get the President's election done when there was no member in these states.[89] The Law Minister who piloted the Bill admitted that the Bill was capable of allowing the elections of the President and Vice-President while the majority of the electoral college was vacant.[90] It was proper that instead of "whatever reason" specific reasons should have been mentioned.

The difficulty could be solved by holding the election in Himachal Pradesh three or four months ahead so that members from this area could avail of their rights. That much change could be effected in the Representation of the People Act. It seems that there was no need for this amendment of the Constitution.

Procedure: The Bill was introduced by the Law Minister, Mr. A.K. Sen. There was no reference to a select committee or a joint committee. Nor was the Bill circulated for eliciting public opinion. As usual, the special majority required by Art 368 was obtained at all three stages of the Bill. At the consideration stage, each clause was voted separately.[91] In

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89. R.S. Debates (1961) Vol.36, Col.2005.

90. L.S. Debates, 2nd Series, (1961) Vol.61, Col.3328.

91. L.S. Debates, 2nd Series 1961, Vol.61, Col.3338.
R.S. Debates (1961) Vol.36, Col.2053.

the Lok Sabha, voting was done with the help of automatic machines and many members complained that their machines did not work properly. The Speaker corrected the mistakes in voting but ruled that in future it would be a convention that members must suffer for their mistakes.[92]

The Constitution (Twelfth Amendment) Act, 1962.

Objects and Reasons: It was thought fit by the Government to include the former Portugues territories of Goa, Daman and Diu in the First Schedule to the Constitution under the heading "The Union Territories" after Entry 7. It was also considered that Clause (1) of Art 240 should be suitably amended to confer power on the President to make regulations for the peace, progress and good government of Goa, Daman and Diu. Therefore, the Act makes appropriate amendments to the Constitution.

Was the amendment necessary under Art 368? Whatever has been said about the Tenth Amendment in regard to its necessity or otherwise applies to this amendment also. For amending the First Schedule of the Constitution in order to include the territories of Goa, Daman and Diu, Parliament could safely act under Art 4 (2) and effect the required amendment by an ordinary law. But it seems that it was in order to amend Art 240 rather than to amend the First Schedule that Parliament

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92. L.S. Debates, 2nd Series (1961) Vol.61, Col3338.
R.S. Debates (1961) Vol.36, Col.2053.

proceeded under Art 368 so that the amendment of Art 240 might be saved from harsher criticism. As a matter of fact, if Parliament had amended the First Schedule by an ordinary law which was the right course according to the consitutional provisions, then the amendment of Art 240 under Art 368 would have drawn the attention of the critics of the Government. It is submitted that if the Government could adopt any other way of administering these territories than by the President under Art 240, a constitutional amendment under Art 368 was not necessary at all.

Procedure under Art 368: The Bill was introduced by the Prime Minister, Mr. Jawahar Lal Nehru, on March 12th, 1962.[93] It was taken up for consideration on 14th March and passed unanimously,[94] by a large number of members present and voting. The requirement of a special majority was fulfilled at each stage of the Bill. For the purpose of voting, Clauses 2 and 3 were put to vote together and Clause 1, the Enacting Formula and the Title were put as one clause. The Bill was presented to the Rajya Sabha on 15th March and it was passed by that House on 20th March.

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93. L.S. Debates 2nd Series (1962) Vol.61, Col.37.

94. L.S. Debates 2nd Series (1962) Vol.61, Col.312.
R.S. Debates, Vol.37, Col.801 (1962)

The Constitution (Thirteenth Amendment) Act, 1962.

Objects and Reasons: As a result of an agreement between the Government of India and the leaders of the Naga Peoples convention a separate state of Nagaland was sought to be created. To give effect to the agreement, the Constitution was amended suitably.

Changes Made: The title of Part XXI of the Constitution was changed from "Temporary and Transitional Provisions" to "Temporary, Transitional and Special Provisions". A new article, namely Art 371A was inserted containing special provisions with respect to the State of Nagaland. It is to be noted that Clauses 4 and 5 of the State of Nagaland Act 1962 respectively amended the First and Sixth Schedules of the Constitution. The State of Nagaland has been treated on a special footing. For instance, it has been provided that, notwithstanding anything in the Constitution, no Act of Parliament in respect of the specified matters shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides. It was further provided that the Tuensang district shall be administered by the Governor who has been clothed with powers by which he may repeal or amend with retrospective effect, if necessary, any Act of Parliament or any other law which is for the time being applicable to that district.[95]

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95. Art 371A (d).

Procedure under Art 368: The Bill was introduced by the Prime Minister, Mr. Jawahar Lal Nehru, on 21st August 1962. An objection was raised by an honourable member on the introduction of the Bill. He cited Rule 66 of the procedure of the House which says that a Bill which is dependent wholly or partly upon another Bill pending before the House, may be introduced in the House in anticipation of the passing of the Bill on which it is dependent. In his view, the Bill in question was dependent upon the State of Nagaland Bill and since the latter had not been introduced by that time and, therefore, was not pending before the House, the former could not be introduced.[96] In this connection, reference was made to the Seventh Amendment Act in which case the States Reorganisation Bill was passed first and then the Constitution was amended. The honourable Member thought that the Constitution could not be amended unless the State of Nagaland was constituted. But the Speaker observed that Nagaland could not be constituted unless the Constitution was first amended. He ruled that Rule 66 did not apply as the two Bills were interdependent and not dependent one on the other and hence the introduction of the Bill was in order. It is to be noted that the

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96. L.S. Debates 3rd Series (1962) Vol.7, Col.3179.

State of Nagaland Bill was also introduced on the same day. Both the Bills were moved together for being considered simultaneously.[97] In both Houses, the two Bills were discussed together. For the purpose of voting, the State of Nagaland Bill was passed by simple majority, it being an ordinary law whereas the Constitution (Thirteenth Amendment) Bill was passed under Art 368. As noted above, the State of Nagaland Bill amended the First and Sixth Schedules of the Constitution. An honourable member of the Rajya Sabha criticised the device of effecting constitutional amendments by an ordinary law. When the constitutional amendment Bill was also on the anvil, why were all the provisions relating to amendment of the Constitution not embodied in one and the same Bill and other provisions in the other Bill?[98] The sponsor of the Bill replied that Art 2, 3, and 4 of the Constitution allow this being done by an ordinary law and, therefore, it was not necessary that Clauses 4 and 5 of the State of Nagaland Bill should have found a place in the Constitution (Thirteenth Amendment) Bill.[99]

It is significant to note that a demand was made in the House that in accordance with Art 3, the views of the State of

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97. R.S. Debates (1962) Vol.40, Col.4686.

98. L.S. Debates 3rd Series (1962) Vol.7, Col.4498.

99. Ibid. Col.4714.

Assam should have been ascertained by the President and the same should have been made available to the members. The Speaker informed the House that the Assam legislature had already considered the matter and the proceedings of that House were available at the counter. About 18 members in the Legislative Assembly of Assam took part in the debate and as many as 16 opposed the bifurcation of the State.[100]

It is further to be observed that no reference to a select or joint committee was made. Nor was the Bill circulated for the purpose of eliciting public opinion on it. The special majority required by Art 368 was observed at the three stages of the Bill. Each clause of the Bill was voted separately in both the Houses.[101] As usual, amendments to clauses were decided by voice vote. In regard to two such amendments, the ruling of the Speaker was questioned and, therefore, a division was ordered in each case.[102]

The Constitution (Fourteenth Amendment) Act, 1962.

Objects and Reasons: As a result of the Indo-French Treaty of 16th August 1962, the French establishments of Pondicherry, Karikal, Mahe and Yanam became territories of the Indian Union.

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100. L.S. Debates 3rd Series (1962) Vol.7, Col.4538.

101. Ibid, Col4638; R.S. Debates (1962) Vol.40, Col.4718.

102. L.S. Debates 3rd series (1962) Vol.7, Cols.4627-4635.

The amendment provided for these territories being specified in the Constitution as a Union Territory called "Pondicherry". It was thought necessary to give representation to Pondicherry in both Houses of Parliament. Therefore, Art 81 was suitably amended. By inserting a new Art 239A, Parliament has been given necessary legislative power to enact laws for creating legislatures and councils of ministers in certain Union Territories.

Changes Made: In Art 81 (b)(1) the words "twenty members" were substituted by "twenty-five members" so that "Pondicherry" might have five representatives in the House of the People (Lok Sabha).

The First Schedule to the Constitution was amended to include the ninth entry under the heading the Union Territories. The most significant change brought about by the amendment is the insertion of a new Art 239A. It is to be noted that the provisions of Art 239A are applicable to the Union Territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry. Therefore, it was not an amendment purely relating to Pondicherry; it is in fact a constitution of the Union Territories. The Parliament was empowered to create by law (a) a body whether elected or partly nominated and partly elected, to function as a Legislature for a Union territory, or (b) a council of ministers, or both, with such constitution,

powers, and functions, in each case, as may be specified in the law.[103] Art 239A (2) provides that any such law as is referred to in Clause 1 shall not be deemed to be an amendment of the Constitution for the purpose of Art 368 notwithstanding that it contains any provision which amends or has the effect of amending the Constitution. This means that Parliament was given power to amend the provisions relating to the legislature or council of ministers for a Union Territory by ordinary law even when such amendment amends or has the effect of amending the Constitution. In reality, this provision robs Art 368 of its potency in relation to those provisions of the Constitution which happen to be affected by a law under Art 239A. In other words, Parliament has been relieved of the necessity of observing the special majority required by Art 368 at least in respect of one matter, viz. a law relating to the Constitution of the legislature or council of ministers or both for a Union Territory, though it may affect such provisions of the Constitution as are amendable by a special majority under Art 368. It is to be noted that though only one matter seems to have been saved from the operation of Art 368, in actuality other provisions of the Constitution may be affected e.g. the mode of election and nomination of a legislature under Art 239A (1)(a) might be

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103. Art 239A (1)(a) & (b).

different from what is prescribed for the state legislatures. The powers and functions of a legislature or council of ministers or both might not be at one with the corresponding provisions for the state legislatures. The wording of Art 239A has been so widely phrased that a different constitution for the Union Territories can be framed by Parliament by ordinary law containing provisions contrary to the Constitution of India.

When the Members criticised the Government on the insertion of Art 239A,[104] the sponsor explained that Art 239A (2) was bodily taken from Part VIII of the Constitution which had been repealed by the Seventh Amendment Act. The intendment of the Government was that the legislatures of the Union Territories should be empowered to legislate in regard to matters enumerated in the state and concurrent lists subject to the overriding legislative authority of Parliament. This would in effect entail an amendment of Art 246(4). Moreover, it was also intended that there might be a separate consolidated Fund for each Union Territory which might have a legislature and the revenues relatable to matters in the state and concurrent lists might be directly credited to the Consolidated Fund of India. For this, Article 266 would also have required amendment. Therefore an all-covering provision was made in Art 239A.

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104. L.S. Debates 3rd series (1962) Vol.8, Col.5940.

Art 240 (1) was amended to include "Pondicherry" with a proviso that when any body is created under Art 239A to function as the legislature for Goa, Daman and Diu or Pondicherry, the President shall not act under Art 240. The Fourth Schedule was amended to give one seat to Pondicherry in the Council of States. Section 7 of the Amendment Act provides that the amendment of the First Schedule (Section 3 of the Amending Act) and the amendment of Art 240 (1)(a) (Section 5 (a) of the Act) shall be deemed to have come into force on 16th August 1962 i.e. with retrospective effect.

Modus operandi under Art 368: The Bill was introduced by the Home Minister Mr. Lal Bahadur Shastri in the Lok Sabha on 30th August 1962. It was taken up for consideration on 4th September 1962. The special majority was observed at the three stages of the Bill. Each clause except Clause 1 was voted separately.[105] The Bill as passed by the Lok was sent to the Rajya Sabha on 5th September 1962. It was taken up for consideration on 7th September 1962. Many members complained that there was insufficient time to consider so many bills at the fag end of the session. The sponsor of the Bill himself admitted that the Bill did not come up in the Upper House in accordance with the rules of the House.[107] Each clause was voted separately

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105. L.S. Debates 3rd Series (1962) Vol.8, Col.5971.
106. R.S. Debates (1962) Vol.40, Col.5325.
107. R.S. Debates (1962) Vol.40, Col.5575.

for the purposes of Art 368 and a special majority was observed. It is submitted that S.3 and 6 of the Amendment Act could have been passed by ordinary majority under Art 2 and 3 because they amended the First Schedule and the Fourth Schedule respectively. By virtue of Art 4 (2) the amendment should not have gone through the procedure of Art 368. Of course, other sections of the Bill required the operation of Art 368. It was not because of mere constitutional recognition of Pondicherry that the Constitution was amended since that did not require any amendment of the Constitution under Art 368. In fact, it was for creating a special administrative machinery for the Union Territories that the Constitution was amended.

The Constitution (Fifteenth Amendment) Act, 1963.

Objects and Reasons: It was proposed to raise the age of retirement of High Court judges from sixty to sixty-two years. Therefore, Art 217 was amended. A further amendment to Art 217 and a consequential amendment to Art 124 were necessitated by the Case of Mitter J. of the Calcutta High Court, who contended that, contrary to the view of the Union Home Ministry, he was under sixty years of age and hence not due for retirement.

Since the Chief Justice refused to allocate work to him, Mitter J. filed a petition in the Calcutta High Court seeking a writ of mandamus against the Chief Justice.[108]

The Amendment Act also inserted a new clause (2) in Art 222 to provide for compensatory allowances to judges transferred from one High Court to another under Art 222 (1). Under that Article 226, as it stood originally, a petitioner intending to proceed against the Union Government could do so only in the Punjab High Court because the seat of the Union Government - Delhi - was within the jurisdiction of the Punjab High Court.[109] This caused inconvenience to residents living in distant parts of India. Therefore Art 226 was amended to make it possible to proceed against any Government or authority in the High Court within whose jurisdiction the cause of action arises, notwithstanding that the seat of such Government or authority or the residence of such person is not within the territory of the High Court. Articles 311, 297, 316 and Entry 78 of List I were also amended.

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108. Jyoti Prakash v. H.K. Bose C.J. AIR 1963 Col.483. On a preliminary objection, the High Court held that it was competent to issue a writ against the Chief Justice. The latter's appeal to the Supreme Court was dismissed. For a criticism of this provision, see Seervai: op.cit. supra. pp 1011-12.

109. Election Commission, India v. Saka Venkata Rao AIR 1953 S.C.210.

Changes Made: The Amendment Act made very significant changes in regard to the tenure and other matters relating to High Court and Supreme Court judges. The provision regarding the determination of age of a High Court judge is capable of being abused and, therefore, affect the independence of the judiciary in India. The Amendment of Art 226 was desirable and non-controversial. As a matter of fact, the Amendment Act contained many matters and touched important provisions of the Constitution. It was rightly characterised as a "legal and constitutional jumble sale,"[110] jumbling up all sorts of amendments of the Constitution. In the Rajya Sabha it was contended by a member that separate Bills should have been brought to amend the Constitution so that sufficient attention could be devoted to each matter sought to be provided for. But the Law Minister, who was piloting the Bill, replied that there was nothing in the Art 368 that requires that each separate provision should form the subject matter of a separate Bill and that, on the contrary, the Government had been telling both the Houses that the necessary constitutional amendments would be collected together to be incorporated in one consolidated Bill.[111]

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110. L.S. Debates 3rd series (1962) Vol.2, Col.5023 (8th December).

111. R.S. Debates (1963) Vol.43, Cols. 2587-88.

Modus operandi under Art 368: The Bill was introduced in the Lok Sabha on 8th December 1962 by the then Law Minister, Mr. A.K. Sen. On 11th December 1962, a motion was made to refer the Bill to a Joint Committee consisting of 45 members, 30 from the Lok Sabha and 15 from the Rajya Sabha. The Report of the Committee was to be submitted by the last day of the first week of the next session. However, the time for the presentation of the Report was extended. It is to be noted that the time fixed for the discussion on the reference motion in the Rajya Sabha was only half an hour and many members rightly felt that more time should have been given for the motion so that the Members of the Select Committee could know the criticisms and suggestions made by the other Members of the House.[112] Ultimately the Report was considered on 29th April 1963. The special majority was observed for the reference motion, the consideration and the third reading of the Bill. Each Clause was put to vote separately.[113] In the Rajya Sabha, the Chairman proposed putting clauses 7 to 9 together. An honourable Member objected to this being done. He observed that taking the clauses together for voting did not meet the requirements of the Constitution. Because it might be conceivable that a

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112. R.S. Debates (1962) Vol.41, Col.4009.

113. L.S. Debates 3rd series (1963) Vol.18, Col.13156.

member may not like to vote against a particular clause but would like to reverse his stand in regard to another clause. If all the clauses are lumped together and one vote is taken, he is denied the chance of making his choice.[114] The Chairman, therefore, put Clauses 7 to 9 also separately to vote. Since some of the provisions of the Amendment Act related to the entrenched provisions under Art 368 the Bill had to be ratified by at least half the State Legislatures before receiving the assent of the President on 5th October 1963.

The Constitution (Sixteenth Amendment) Act, 1963.

Objects and Reasons: The Committee on National Integration and Regionalism appointed by the National Integration Council recommended that Art 19 of the Constitution be so amended that adequate powers become available for the preservation and maintenance of the integrity and sovereignty of the Union. It was further proposed by the Committee that every candidate for membership of a State legislature or Parliament and every aspirant to and incumbent of public office should pledge himself to uphold the Constitution and to preserve the integrity and sovereignty of the Union.

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114. R.S. Debates (1963) Vol.43, Col.2756.

Changes Made: Clauses 2, 3 and 4 of Art 19 were amended to enable the State to make any law imposing reasonable restrictions on the exercise of the rights conferred by sub-clauses (a), (b) and (c) of Art 19 (1) in the interest of "the sovereignty and integrity" of India. Art 84 and 173 and the Third Schedule to the Constitution was amended so as to provide that every candidate for membership of Parliament and a State Legislature, Union and State Ministers, Members of Parliament and State Legislatures, Judges of the Supreme Court and of the High Courts and the Comptroller and Auditor-General of India should take an oath to uphold the sovereignty and integrity of India. The object of the amendment is so laudable that no-one can quarrel with it but this object could have been attained by other means than by amending the Constitution. So far as the forms of oath for candidates to the legislatures are concerned these could have been easily provided in the Representation of the People Act. It is to be noted that the President and the civil servants have been exempted from taking any such oath. As regards the President, the Law Minister was of the view that it was not necessary to include the President specifically because he is the protector of the Constitution, and therefore, he automatically comes in.[115] The measure was rightly criticised for placing

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115. L.S. Debates 3rd Series (1963) Vol.12, Col.5815.

restriction on the exercise of the Fundamental Right in Art 19 by employing expressions like "sovereignty and integrity which have not been tested anywhere in the context of curtailing the liberties of the people."[116] These expressions are, indeed, elusive and indefinite and carry with them, at the same time, a wide and varying coverage. These are capable of being abused and of inviting a host of legal wrangles. It remains unexplored whether the preservation of sovereignty and integrity of India cannot be achieved by enacting laws in the interest of the "security of the state" and "public purpose" under Art 19.

Modus operandi under Art 368: The Bill was introduced by the Law Minister on 21st January 1963. At the first reading stage, a motion was made for the Bill to be referred to the same Joint Committee to which the Constitution (Fifteenth Amendment) Bill had been referred. The Law Minister explained that the purpose of bringing together these two Amending Bills was that they might be considered by the House at the same time and voting be done on the same occasion instead of having to go through the procedure for constitutional amendment on two occasions.[117] The Joint Committee was already dealing with the Fifteenth Amendment Bill, examining witnesses and studying memoranda sent by various associations. When the Committee was so overworked,

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116. Mr. Narayan Rao, Research Officer Indian Law Institute, quoted in L.S. Debates (1963) Vol.18, Col.13412.

117. L.S. Debates 3rd Series (1963) Vol.12, Col.5769.

it was neither proper nor advisable to refer the two Bills to one and the same Committee, especially when the Fifteenth Amendment Bill was a comprehensive one. It is for the first time that two Constitution Amendment Bills were referred to the same Committee. This was a very bad precedent and ought not to be followed in future. However, the consideration of the two Bills was not taken up simultaneously as was intended by the sponsor of the Bills. The Bill was voted clause by clause for the purpose of a special majority under Art 368 in both the Houses of Parliament.[118]

The Constitution (Seventeenth Amendment) Act 1964

Objects and Reasons: The main object of the amendment was to amend Art 31A, particularly in regard to the definition of "estate". The expression "estate", as it stood before, was defined differently in different states and in different parts of the same state. Several state Acts relating to land reform were struck down on the ground that the provisions of those Acts were violative of Art 14, 19 and 31 of the Constitution and Art 31A could not protect them. Therefore, the definition of "estate" in Art 31A was amended so as to include lands held under ryotwari settlement and also other lands in respect of which provisions are normally made in land reform enactments.

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118. L.S. Debates 3rd Series (1963) Vol.18, Col.13476.
R.S. Debates (1963) Vol.43, Col.2892.

Certain State laws relating to land reform were sought to be protected by putting them in the Ninth Schedule.

Changes Made: In Art 31A a new proviso was added after the existing proviso:

> "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 shll 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 structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for compensation at a rate which shall not be less than the market value thereof."

In Clause 2 (a) of Art 31 the expression "estate" was given an inclusive definition. The Ninth Schedule to the Constitution was amended to include 124 State laws so as to protect them from the challenge of the fundamental rights in Part III. Commenting upon the Ninth Schedule device, it was pointed out by an eminent lawyer, that if there is inherent lack of legislative competence, no amount of incorporation in a Schedule to the Constitution will validate an enactment which is void.

Incorporation of any Act in the Ninth Schedule means that a challenge for invalidity on the ground of its being repugnant to the fundamental rights is no longer open, but that cannot validate a void law. It cannot cure the initial defect.[119] The amendment was a very contentious and controversial measure. It was argued that it would expropriate the holdings of poor peasantry. But it seems that the measure, in fact, did not deserve the harsh treatment meted out to it by its opponents. Since the amendment touched property rights, it provoked nation-wide controversy, which was reflected in the Lok Sabha.

Modus operandi under Art 368: The measure had a checquered history in Parliament; it had to undergo many ups and downs before being enacted. The Bill was moved by the Law Minister, Mr. A.K. Sen, on 18th September 1963 to be referred to a Joint Committee consisting of 45 members of whom 30 were to be taken from the Lok Sabha and 15 from the Rajya Sabha. The proposal for circulating the Bill to elicit public opinion was negatived.[120] It is to be noted that the reference motion was adopted by a simple majority i.e. no division was taken. When a member argued that voting should be by division, the Speaker ruled that it was not an amendment as yet.[121] The Committee presented its

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119. L.S. Debates 3rd Series (1964) Vol.32, Col.378.

120. L.S. Debates 3rd Series (1963) Vol.21, Col.7136.

121. Ibid. Col.7137.

Report on 25th March 1964 and the Lok Sabha took it into consideration on 31st March 1964. On 17th May 1964 the Bill was put to vote for taking into consideration. At the time the Bill was put to vote, many members of the ruling party were outside the House for the purpose of voting for various committees. The division bell was rung for two minutes and afterwards the doors of the House were closed. The voting was done by the automatic machine and the result was declared as 206 Ayes and 19 Noes. Many members of the majority party contended that the mechanical device failed to function and, therefore, there should be proper voting once again.[122] The Law Minister suggested that the Speaker should invoke his residuary power to allow proper voting. But the Speaker did not accede to his suggestion and he said, "Whatever has happened may be very unfortunate, but the facts are to be accepted, whatever the consequences. I am not prepared to sacrifice the traditions of Parliament."[123] There was then, no alternative for the Government except to introduce the Bill once again. The same Bill was introduced as the Constitution

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122. L.S. Debates 3rd Series, 1964, Vol.30, Col.13223.

123. Ibid. Col.13223.

(Nineteenth Amendment) Bill[124] in a special session of the Parliament on 27th May 1964 - a fateful day on which death laid its icy hands on the beloved Prime Minister Mr. Jawahar Lal Nehru. The Bill was pressed for consideration on 1st June 1964 by the care-taker Government headed by Mr. G.L. Nanda. This time also the motion for circulating the Bill for public opinion was negatived.[125] For the purpose of special majority all the clauses were voted separately but Clause 1 (short title) was adopted by ordinary majority. In this clause the word "Nineteenth" was substituted by "Seventeenth" on the motion of the sponsor. An honourable member rose on a point of order that there was no division on Clause 1 under Rule 155 but he was informed that Clause 1 was only a short title and could be adopted by a simple majority.[126] Another member asked the Speaker the time when

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124. It was numbered as "Nineteenth" because the Constitution (Eighteenth) Bill was pending in the Lok Sabha at that time. The object of that Bill was to amend the Constitution in such a way as to immunize the executive violations of the fundamental rights committed during the period of emergency. The Bill was vehemently criticised and opposed at the introduction stage. Ultimately the Government thought it better to withdraw the Bill and so the House was informed by the sponsor that the Government did not want to proceed with the Bill. It is to be noted that no leave to withdraw was requested and an honourable Member observed that the Minister should ask for leave to withdraw the Bill. The Speaker ruled that the Minister was not withdrawing the Bill; he was just not proceeding with the Bill. In fact, the result was the same; it was withdrawal. L.S. Debates 3rd Series, Vol.30, Col.12225.

125. L.S. Debates 3rd Series (1964) Vol.32, Col.445.

126. Ibid. Col.681.

voting would take place at the end of the third stage of the Bill. At this, another member rightly pointed out that it is not a very sound practice that members should come and vote without taking any interest in the discussion.[127] The Bill was passed in the Lok Sabha on 2nd June 1964. It was considered by the Rajya Sabha on 4th June 1964.[128] All clauses including Clause 1 (short title) were voted separately,[129] and the Bill was passed on 5th June 1964.

The Constitution (Eighteenth Amendment) Act, 1966.

Objects and Reasons: The Government acceded to the demand for forming a new state out of the Punjab state on the basis of language and, therefore, the old Punjab state was bifurcated into two states called Punjab and Haryana. It was intended to include some areas of Himachal Pradesh - a Union Territory, in the new Punjab state. There seemed to be a constitutional difficulty because Art 3 under which Parliament has power inter alia to unite two or more states, speaks of "states" and not "Union Territories". Before the Constitution (Seventh Amendment) Act, 1956. was enacted, the expression "states" occurring in Art 3 meant Part A, Part B and Part C states.

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127. L.S. Debates 3rd Series (1964) Vol.32, Col.685.

128. R.S. Debates (1964) Vol.48, Col.789.

129. Ibid, Col.1030-1047.

By the Seventh Amendment, the concept of "Union Territories" was introduced in the Constitution but Art 3 was not amended to include "Union Territories". Therefore, there was a doubt that if Art 3 was not amended so as to include "Union Territories" the merger of some Union Territory with the Punjab state would be unconstitutional.[130] The Eighteenth Amendment defines the word "state" as including "Union Territory" for the purposes of Clauses (a) to (e) of Art 3 but not including "Union Territory" for the purpose of the proviso to Art 3. It was also considered proper to make it clear that the power under Art 3 (a) includes power to form a new state or union territory by uniting a part of a state or union territory to another state or union territory.

Changes Made: Art 3 came to have an explanation to the effect that the word "state" includes "Union Territory" for the purposes of Clauses (a) to (e) of Art 3 but not for the purpose of the proviso to Art 3 which provides that a Bill under Art 3 can be introduced only after the President has referred the Bill to the States concerned for expressing their views on the Bill and the period prescribed by the President for expressing such views has expired. Since all the Union Territories do not have a

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130. L.S. Debates 3rd Series (1966) Vol.56, Col.17118.

legislature, such a procedure, even if Parliament was so minded, would not have been practicable for Union Territories. Of course, the formality is not of much importance because the Union Government is not bound by the views of the State Legislatures concerned. It has ignored such views in the past.[131] But it contains a good principle of consulting the will of the people in such matters.

It is to be noted that this Amendment would have been avoided if sufficient attention had been paid by the draftsmen of the Seventh Amendment Act by which Clauses 2 and 3 of Art 1 were amended so as to abolish the three categories of states and to convert the erstwhile Part C States into Union Territories. Had Art 3 been futher modified so that the word "state" might include "Union Territory", the Eighteenth Amendment would have been entirely unnecessary. The second Explanation added by the Amendment to Art 3 reads as follows:

> "The power conferred on Parliament by Clause (a) includes the power to form a new State or Union Territory by uniting a part of any State or Union Territory to any other State or Union Territory."

Modus operandi under Art 368: This Bill also had to undergo the vicissitude of the special majority required by Art 368.

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131. For example, in the case of Ninth Amendment, views of the West Bengal Assembly were not taken into account. Similarly in the state of Nagaland Bill 1962 (Act 27 of 1962) the views of the Assam Legislative Assembly were almost ignored.

It was introduced by the Minister of State on behalf of the Home Minister in the Lok Sabha on 9th May 1966 as the Constitution (Nineteenth Amendment) Bill.[132] When the Bill was moved for being taken into consideration, the requisite majority of the members was not there and consequently the Bill was not carried.[133]

It was reintroduced as the Constitution (Twentieth Amendment) Bill in the Lok Sabha by Mr. C.R. Pattabhi Raman, the Minister of State in the Ministry of Law, on 25th July 1966. It was taken up for consideration on 10th August 1966. The Law Minister, Mr. G.S. Pathak, piloted the Bill. An honourable member asked the Speaker to tell the time for voting so that Members might be informed to be present in the House at that time.[134] Though the practice was criticised as "wrong", the approximate time for voting was fixed. For the purposes of voting under Art 368 Clause 2 of the Bill was voted by division but Clause 1 (short title) was voted by simple majority. In Clause 1, the word "Twentieth" was substituted by the word "Eighteenth" by moving an amendment by the Law Minister. The Bill was passed by the Lok Sabha on 10th August 1966.[135]

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132. L.S. Debates 3rd Series 1966 vol.55 Col.15345.

133. L.S. Debates 3rd Series 1966 Vol.56 Col.17121.

134. L.S. Debates 3rd Series 1966 Vol.58 Col.3936.

135. Ibid. Col.3998.

The Constitution (Nineteenth Amendment) Act, 1966.

Objects and Reasons: Under Art 324 of the Consitution, there was provision for the appointment of election tribunals by the Election Commission to decide disputes arising out of elections to Parliament or to state legislatures.
The Government proposed that, instead of election tribunals High Courts be empowered to decide such disputes so that there might be expedition in the resolution of election disputes.
Changes Made: In Art 324 of the Constitution the words "including the appointment of election tribunal for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States" were omitted.
Modus operandi under Art 368: The Nineteenth Amendment Bill was introduced by the Law Minister, Mr. G.S. Pathak, on 29th August 1966 in the Lok Sabha. In fact it was introduced as the Constitution (Twenty-First Amendment) Bill and it was renumbered as "Nineteenth" at the stage of clause by clause consideration by moving an amendment to Clause 1.

The jurisdiction to try election disputes was conferred on the High Courts by an amendment of the Representation of the People Act 1951. This amendment and that of the Constitution were taken up for discussion together. An objection was taken

to these two Bills being discussed simultaneously.[136] It was argued that the Constitution should be amended first and then the Representation of People Act be amended because the latter Bill depended on the former Bill. An honourable Member observed that Art 324 was mandatory and, therefore, the constitutional amendment must be effected first. The Law Minister took the view that both the Bills were interdependent and that, in any case, mere voting cannot make a Bill an Act. Until and unless the President gives his assent a Bill does not become an Act. Ultimately the Speaker ruled that the two Bills should be discussed together but for the purposes of voting, the Constitution Amendment Bill would be passed first. The Bill was thoroughly discussed and was ready to be voted on but the requisite majority of the members was lacking. On 5th November 1966 the Government moved a motion to adjourn the debate because many Members had gone on Diwali Holidays to their constituencies. The opposition Members vehemently criticised the government for its ineptitude in organising the business of the House.[137] They argued that there should not be an adjournment merely for the sake of taking votes. The motion for adjournment was put to vote and was carried.[138] The Bill

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136. L.S. Debates 3rd Series (1966) Vol.60, Col.2169.

137. Ibid, Col.3026.

138. Ibid, Col.3037.

was passed in the next sitting. For the purposes of Art 368, a special majority was observed at the three effective stages of the Bill. It was signed by the President on 11th December 1966.

The Constitution (Twentieth Amendment) Act, 1966.

Objects and Reasons: The appointments of district judges in Uttar Pradesh and a few other States were rendered invalid and illegal by a judgment of the Supreme Court[139] on the ground that such appointments were not made in accordance with the provisions of Art 233. In another judgment the Supreme Court held that the power of posting a district judge under Art 233 does not include the power of transfer of such judges from one station to another; the power of transfer was covered under the word "control" in Art 235 and was, therefore, to be exercised by the High Court. In order to validate the judgements, decrees, orders and sentences passed or made by all such district judges in those States and also to validate the appointment, posting, promotion and transfer of such district judges barring those few who were not eligible for appointment under Art 233, the amendment was brought.

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139. Chandra Mohan v. State of Uttar Pradesh, AIR 1966 S.C.1987.

Changes brought about by the Amendment: After Art 233 another article 233A was inserted which reads as follows:

"233A notwithstanding any judgment, decree or order of any court .....

(a) (i) No appointment of any person already in the judicial service of a state or of any person who has been for not less than seven years an advocate or pleader, to be a district judge in that state, and

(ii) No posting, promotion or transfer of any such person as a district judge made at any time before the commencement of the Constitution (Twentieth Amendment) 1966 otherwise than in accordance with the provisions of article 233 or Art 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions;

(b) No jurisdiction exercised no judgment, decree, sentence or order passed or made and no other act or proceeding done or taken, before the commencement of the Constitution (Twentieth) Act, 1966, by or before any person appointed, posted, promoted or transferred as a district judge in any state otherwise than in

accordance with the provisions of Art 233 or Art 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions."

It is to be noted that the judgment of the Supreme Court was delivered on 8th June 1966 but the judges affected were not stopped from carrying on their duties. If the Government had determined not to amend the Constitution, only eleven judges would have been affected.[140] It is questionable whether it was proper for the government to have regularised and legalised the irregularities and illegalities committed by the executive, by amending the Constitution.

Modus operandi under Art 368: The Bill was introduced by the Minister of Home Affairs, Mr. Y.B. Chavan in the Lok Sabha, on 25th November 1966 under the title the Constitution (Twenty-Third Amendment) Bill. It was taken up for consideration on 3rd December 1966. The Bill came up for discussion at the fag end of the extended session. When an honourable Member asked the Speaker to fix the approximate time for voting, the Speaker

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140. L.S. Debates 3rd Series (1966) Vol.62, Col.7250.

fixed the time.[141] In observing the special majority under Art 368, the Bill was voted at the three stages, namely, adoption of the Bill, consideration, third reading; each clause was voted separately and in clause 2 the words "Twenty-third" were substituted by "Twentieth".[142]

The Constitution (Twenty-first Amendment) Act, 1967.

Objects and Reasons: About a million Sindhi people, who are residents of India, speak the Sindhi language. This language is well-developed and rich in cultural heritage. There is no specific area in which this language is spoken, because before partition Sindhis used to live in Sindh which is now within the territory of Pakistan. The Sindhi people sacrificed their identity for the sake of the freedom of India. Because of their patriotic contribution and the cultural heritage of the Sindhi language, Sindhi was included in the list of languages in the Eighth Schedule to the Constitution.

Changes brought about by the Amendment: In the Eighth Schedule Entries 12 to 14 were renumbered as entries 13 to 15 respectively, and Entry 12 now mentioned Sindhi.

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141. L.S. Debates 3rd Series Vol.62, Col.7233.

142. Ibid. Col.7333.

Modus operandi under Art 368: The Bill was first introduced in the Rajya Sabha in the month of November 1966. It was considered and passed by the House on 9th December. The Bill remained pending in the Lok Sabha, but it lapsed because of the dissolution of the Lok Sabha on 3rd March 1967. The Bill was again introduced in the Rajya Sabha on 20th March 1967 by the Home Minister, Mr. Y.B. Chavan.[143] It was taken up for consideration on 4th April 1967 by the Rajya Sabha. It was a non-controversial measure and was passed unanimously by the Rajya Sabha[144] and the Lok Sabha. The Lok Sabha passed it on 7th April 1967 and it was signed by the President on 10th April 1967.

It is of interest to note that this is the first amendment which originated in the Rajya Sabha.

A Review of the Amending Process at Work

The practical working of the procedure prescribed in Art 368 has presented a few difficulties which require consideration. It is proposed to state them and suggest how they can be removed.

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143. R.S. Debates (1967) Vol.59, Col.177.

144. Ibid, Col.2121; L.S. Debates 4th Series (1967) Vol.2, Col.3608.

1. Who should introduce and pilot the Bill?

According to Art 368 every member of the Lok Sabha or Rajya Sabha is competent to introduce a Bill seeking to amend the Constitution of India. But it is very rare for such a Private Member's Bill to be passed because it is impossible to gain the special majority required by Art 368 without the co-operation of the Government. When the Government intends to amend the Constitution, who should introduce and pilot the Bill? The practice so far established in this regard suggests that there is no particular consideration; some Bills have been moved by the Prime Minister, some by the Minister of Home Affairs and others by the Law Minister. The Third Amendment was piloted by the Minister of Trade and Commerce and the Sixth Amendment by the Minister of Finance. It is submitted that so far as the introduction of the Bill is concerned, it may be done by any Minister, but for the further stages of the Bill, it is the Law Minister who should pilot the Bill. Though there is no constitutional requirement that a particular Minister should discharge this duty, in view of the fact that the Constitution is an organic law and its amendment is a serious matter, the Law Minister is supposed to be the proper person to hammer out an amendment in a better way by reason of his vast knowledge of constitutional law. In America, Australia and Canada and in most of the countries

which have written constitutions it is the Minister in charge of the legal portfolio who pilots the Bill seeking to amend the Constitution. Therefore, it is better if in India a convention is established to the effect that constitutional amendment Bills are piloted by the Law Minister, except in very exceptional circumstances.

Appropriate time for introduction of Bill

It is submitted that a Constitution amending Bill may be introduced and considered at any time except at the fag end of the session. In India a few amending Bills have been introduced, considered and passed at the end of the session. The Members, being tired of debating, are not in a position to give as much consideration to the Bill as the constitutional amendment requires and deserves. It so happened in the case of the Twentieth Amendment that the Members of the Rajya Sabha were to consider five or six Bills in the same week along with the Amendment Bill and they rightly criticised the Government for hustling through a constitutional amendment.

Time allotted for the Bill

Since a constitutional amendment is a very important matter, the Business Advisory Committee of the Lok Sabha is supposed to allot adequate time to it and no amendment should be effected, without giving sufficient opportunity to the Members for expressing their views on it. It would be better if sufficient time is

allowed to pass between the introduction and the consideration of the Bill so that the Bill might be discussed in the press and the members might have assessed the public opinion on it and formed their own opinion after taking into consideration all the pros and cons of the measure.

Consideration of Amendment

For the consideration stage, it is suggested that, in case the constitutional amendment and the passing of or amendment of an ordinary law are related, it is better that the constitutional amendment is considered separately from the ordinary law. For instance the Nineteenth Amendment, and the amendment to the Representation of People Act, which were related, were moved and considered together. Though the matter was undoubtedly the same, constitutional propriety requires that the constitutional amendment should be considered separately and the constitutional change sought to be brought about should be discussed and considered in reference to its overall effect on the Constitution. It is important to examine how the amendment is going to affect other parts or provisions of the Constitution. It is submitted that when an ordinary law and the related constitutional amendment are considered together, the Constitution is relegated to the background and it fails to receive adequate attention from the Members.

Joint or Select Committee Stage

It is better to have a joint committee of both Houses to report on the amending Bill rather than a select committee of either or both Houses. The Second Amendment Bill was referred to a Select Committee of the Lok Sabha and when the Bill as reported by the Select Committee and passed by the Lok Sabha, went to the Rajya Sabha some members legitimately criticised the Government for not taking members on the Committee from that House. Since then, a Joint Committee has been constituted in most of the amendments and it is in the fitness of things that this practice be follwed.

The Joint Committee may consider the amending Bill and related ordinary law together but it is most inconvenient and inexpedient to refer two constitutional amending Bills to one Joint Committee. The Fifteenth and Sixteenth Amendment Bills were referred to one and the same Joint Committee and it was found that it was really jumbling too many matters together. In spite of the fact that extension of time was given to the Joint Committee, its Members felt that the task was too heavy. Therefore, in future the Government would do better if only one constitutional amending Bill is referred to a Joint Committee at a time. It is also necessary for good consideration that a constitutional amending Bill should not contain many matters. As far as possible, a separate Bill for each matter should be introduced.

Dependence of Bills

Rule 66 of the Rules of Procedure and Conduct of Business of the Lok Sabha, 1957, has caused a difficulty in regard to the Ninth and Twentieth Amendment Bills. Rule 66 provides that when a Bill dep ends upon another Bill, the dependent Bill may be introduced in anticipation of the passing of the Bill on which it depends but the dependent Bill shall be taken up for consideration and passing in the House only after the first Bill has been passed by both Houses and assented to by the President. When a Constitution amendment Bill and a related ordinary Bill are sought to be considered one after another, Rule 66 poses a difficulty. In the Ninth Amendment Bill, the Speaker ruled that the Bills were not such that one could be said to depend upon the other; they depended on each other and, hence, they were interdependent. Therefore, Rule 66 was not applicable to them. In the case of the Nineteenth Amendment Bill, it was contended that first the Constitution should be amended and then only the other Bill, namely, The Representation of People (Amendment) Bill 1967 should be passed. The Speaker ruled that the two Bills might be taken into consideration together and at the time of voting, the Constitution amendment Bill should be voted first. This difficulty can be got over in either of two ways: first, Rule 66 may be suspended under Rule 388 of the R.P.C.B. of the Lok Sabha; second, Rule 66 itself might be modified to the

effect that it shall not be applicable to Bills seeking to amend the Constitution; otherwise, a strict observance of Rule 66 might cause delay or even considerable difficulty in regard to the validity of the ordinary Act. The point can be illustrated by taking the example of the Constitution Nineteenth Amending Bill. This Bill sought to amend Art 324 of the Constitution so as to take away the jurisdiction of election tribunals in cases of doubts or disputes arising out of or in connection with elections. The Bill was accompanied by another Bill seeking to amend the Representation of People Act 1951, which, inter alia, provided that the jurisdiction vested in election tribunals under Art 324 shall be vested in the High Courts. If the Constitution Amendment Bill was passed first and then the Representation of People (Amendment) Bill was taken up for consideration in order to comply with Rule 66, there is a conceivable difficulty that if perchance the latter Bill is not carried, the power in Art 324 remains neither with the election tribunals nor with the election tribunals nor with the High Courts. In case the Representation of People Amendment Bill is passed, first its validity is questionable since it can be declared as unconstitutional because, at the time it is passed, it is in conflict with Art 324. It is submitted that the only way out of this dilemma is for the President to assent to both Bills simultaneously.

Fixing time for voting

Since an amending Bill requires a special majority at all three stages of its passage, Members have to be present at the times of voting. In order to inform the members to be present at the time of voting, the approximate time for voting is usually fixed. The practice of fixing time for voting, though convenient to the members, is detrimental to the very essence of the debate because some members are enabled to r emain away from the House until the time for voting. Thus it becomes possible that some members may come and vote without taking any interest in the discussion. It was rightly criticised by an honourable member that the practice of fixing time for voting is "wrong".[145] Therefore, it is better if this practice is dropped.

Voting clause by clause

Rule 155 of the R.P.C.B. in the Lok Sabha 1957 provides that for the purpose of the special majority required by Art 368 each clause or schedule or clause or schedule as amended shall be put to the vote of the House separately. However, the Speaker may, with the concurrence of the House, put such clauses and / or schedules together to the vote of the House. If any

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145. L.S. Debates 3rd series (1966) 10th August Col.3936.

member requests that any clause or schedule be put to vote separately, the Speaker shall be bound to put it to vote separately. This rule has been observed in the Lok Sabha. But in the Rajya Sabha it seems that there are no rules in this respect.[146] While the Constitution (Fifteenth Amendment) Bill was being voted in the Rajya Sabha, the Chairman intended to lump clauses 7 to 9 together and put them to vote. This procedure was objected to by an honourable Member and then the Chairman put each clause separately. It is submitted that each clause should be voted on separately unless the House concurs and no Member objects to certain clauses being clubbed together for the purposes of voting under Art 368; otherwise members are deprived of the chance of distributing their votes according to their choice. Supposing, three clauses are put to vote together and a certain member intends to vote "yes" with regard to one of them and "no" with regard to the other two, he cannot apportion his vote in this order. He would either have to vote "yes" or "no" for all of them.

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146. The Chairman observed in the Rajya Sabha that there are no rules of the House in regard to voting clause by clause.
R.S. Debates (1963) Vol.43, Col.2756.

Amendments by ordinary majority

Certain changes in regard to some of the provisions of the Constitution[147] can be effected by observing an ordinary majority and not a special majority under Art 368. It is submitted that a Bill bringing about such changes is undoubtedly a Bill which amends the Constitution, though such amendments are outside the purview of Art 368. Therefore, it is desirable that such a Bill is called a Constitution Amendment Bill, even though it requires a simple majority to pass it. In respect of these Bills, the necessity of observing a special majority has been obviated but nevertheless these are constitutional amendments and should go by their real name and not under the cover of an ordinary Act.

The procedure prescribed in Art 368 has been strictly observed in enacting all the twenty-one amendments to the Constitution up to date. The above suggestions, if observed, might go a step further in improving the amending process.

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147. Art 4, Art 169, Sch V, para 7, and Sch VI, para 21.

CHAPTER IX

CONCLUSIONS

It is clear from our study that there is a distinction between constituent law and ordinary law and the distinction is not based upon how each of them is enacted, though some difference of procedure is generally found, but it rests upon their respective nature. In case of written constitutions the distinction between the two types of laws is crystal clear. To know whether a law is "ordinary law" or "constituent law", one needs only to ascertain whether it is going to be a part of the constitution or not. If the answer is in the affirmative it is a "constituent law"; otherwise not. To make it clear, constituent law must emerge literally in the body of the written constitution. This is so because the demarcating line between the two is a mere matter of form. Applying this test, we have concluded that whatever is enacted by Parliament acting under Art 368, is nothing but "constituent law". Besides this, law made by Parliament under Art 4 (2), Art 169, Sch.V para 7, and Schedule Vi para 21 are of the nature of "constituent law" and, hence, these should be called as such.

An attempt has been made to remove the confusion in the minds of many authors and commentators on the Constitution of India, who regard a large number of articles of the Constitution[148] as

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148. In Chapter V these articles have been studied in the necessary details.

alterable by Parliament by ordinary legislation whereas the fact is that none of them is amendable by ordinary legislation. In other words, these articles are amendable only under Art 368 with or without ratification, as the case may be. No doubt certain changes can be effected in the operation of these provisions by ordinary legislation but it is totally wrong to characterise the changes as amendments of the Constitution. In fact, the mechanism underlying these provisions is subtle and defies description though we have attempted a description.

The analysis of Art 368 has revealed many significant points. We have attempted to answer the question whether Ar 368 includes the power to amend or merely contains the procedure for amendment. As a result of our enquiry, we would venture to say that it contains both power as well as procedure for amendment. Not only that, the question has been considered and it has been submitted that there are no express or implied limitations to the power of amendment provided in Art 368. The only limitation, if it can be called as such, is that the procedure prescribed in Art 368 must be complied with.

The problems raised by the Golak Nath decision, namely, whether Parliament has or has not power to amend Part III of the Constitution so as to take away or abridge the rights enshrined therein has been examined in detail and we have reached

the conclusion that each and every provision of the Constitution is amenable to amendment and there is no provision which can be said to be unamendable by Parliament acting under Art 368. Therefore, there is no need of calling a constituent assembly for Amending Part III even when the rights are abridged or taken away. Moreover the implications and risks of calling such an assembly prove and reinforce the view that the suggestion is not so good as it appears to be.

A layman may dislike the idea that the fundamental rights can be taken away or abridged by Parliament and, therefore, would tend to support the Golak Nath decision whole-heartedly. In our study, we have attempted to take into consideration a large number of arguments and counter-arguments and ultimately the propositions laid in Golak Nath turned out to be misconceived and hazardous. The view taken by the Supreme Court in the Sankari Prasad case in this regard is sound and must be reverted to in future. The efforts of the Parliament directed to circumvent the judicial pronouncement in Golak Nath by enacting Mr. Nath Pai's Bill into law are not only misdirected and ineffective but also undesirable. In case, Mr. Nath Pai's Bill is passed, it is likely to make the situation worse than what it is at present.

The study of the entrenched provisions has revealed a number of loop-holes in the entrenchment and these may attract

litigation in future. We have tried to offer suggestions to meet such an eventuality. Most probably, the Supreme Court will be called upon to play an effective role in moulding the operation of the proviso to Art 368 according to changing circumstances. The process of amendment is not easy and it will become all the more rigid when a large number of political parties assume power in the several states and the centre comes to have a coalition government or a government having just a bare majority. When the forces of regionalism and localism gain strength and the power tends to flow from the centre to the states, the Constitution will have to bear great stresses. Moreover, as the economic, political and social conditions undergo changes, the law in general and the Constitution in particular must bend and yield to the demands of the time. If the law or the Constitution fail to respond to the required changes they would gain nothing but disrespect and disregard. Therefore, it is but apt that the Supreme Court should come to the rescue of the Consitution and grant it a measure of flexibility as and when required. It is up to the genius and sagacity of the Judges of the Supreme Court to rise to the occasion and establish the prestige and regard of the Court by interpreting the Constitution according to the circumstances and conditions so that the country may make progress by leaps and

bounds in every sphere and be proud of its unity in diversity. If the futue can be prophesied at the moment, the Supreme Court will do well to remember Abraham Lincoln's words:

> "The dogmas of the quiet past are inadequate to the stormy present;.... As our case is new, so we must think anew and act anew. We must disenthrall ourselves."[149]

As our economic and political conditions indicate clearly that the future holds a lot of changes in store for the country, it does not require an astrologer to predict that the Constitution will be required to be amended time and again. Though the Constitution should command respect and regard from all, it should be amended if and when the nation needs to amend it. After all, the Constitution is not a rope to tie down the whole nation; it is a tie to keep the whole nation together while it is marching rapidly on the way to material progress, intellectual betterment and moral uplift. To worship the Constitution as an idol is to make it useless for the future generations. Amendment of the Constitution is

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149. Abraham Lincoln: Message to Congress, 1st December 1862.

necessary to keep it alive but, at the same time, there should be amendment only when it is needed in the interest of the whole country and, as far as possible, it should be amended rarely. In other words, an amendment should not be for the sake of amendment only. Samuel Johnson said:

> "Such is the state of life that none are happy but by the anticipation of change. The change itself is nothing. When we have made it the next wish is to change again."[150]

Therefore, such a wish should be avoided. Not only that, in case a genuine amendment is required, it should be hammered out after a good deal of thought and, in particular, its effects on other parts of the Constitution should be studied thoroughly. That is why we have reached the conclusion that a constitutional commission be constituted periodically and entrusted with the task of suggesting suitable amendments to the Constitution from time to time and, as we have pointed out, it may be asked to discharge other duties also.[151]

The amending procedure as put in action in effecting the twenty-one amendments to the Constitution has been reviewed

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150. Samuel Johnson: Rasselas, XLVII, 1759.

151. See Chapter VII supra.

and we have given a number of suggestions in regard to it. In addition to these, we would stress that in ratification, a procedure of sending direct communication from the Central secretariat to the Secretariats of the legislatures of the States should be followed instead of the present procedure of transmitting the amendments for ratification through the Ministry of Law. When the amendment is ratified, it would be beneficial if the names of those States who ratified the amendment should be published in the Gazette of India, so that the States which favoured or rejected the amendment can be ascertained. Since it is not expected in the near future that one and the same party will be in power at the Centre as well as in most of the States, ratification would be a difficult matter. Therefore, if a State legislature refuses to ratify an amendment, while the bulk of its population favour it, the people must be informed of it so that they may think twice before returning the party again in the next election.

At the end we would quote Walter Bagehot, who said:

> "Progress is only possible in those happy cases where the force of legality has gone far enough to bind the nation together but not far enough to kill out all varieties and destroy nature's perpetual tendency to change."[152].

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152. Walter Bagehot: Physics and Politics.

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