I. C. Golak Nath & Ors

Vs

State of Punjab & Anrs.

Writ Petition No. 153 of 1966

(K.Subba Rao CJ, K. N.Wanchoo, M.Hidayatullah, J. C.Shah, S. M. Sikri, R. S. Bachawat, V. Ramaswamy, J. M. Shelat, V. Bhargava, G. K. Mitter, C. A. Vaidialingam JJ)

27.02.1967

JUDGMENT

Subba rao, C.J.

These three writ petitions raise the important question of the validity of the Constitution (Seventeenth Amendment) Act, 1964.

Writ Petition No. 153 of 1966, is filed by the petitioners therein against the State of Punjab and the Financial Commissioner, Punjab. The petitioners are the son, daughter and grand-daughters of one Henry Golak Nath, who died on July 30, 1953. The Financial Commissioner, in revision against the order made by the Additional Commissioner, Jullundur Division, held by an order dated January 22, 1962 that an area of 418 standard acres and 9 1/4 units was surplus in the hands of the petitioners under the provisions of the Punjab Security of Land Tenures Act X of 1953, read with s. 10-B thereof. The petitioners, alleging that the relevant provisions of the said Act whereunder the said area was declared surplus were void on the ground that they infringed their rights under cls. (f) and (g) of Art. 19 and Art. 14 of the Constitution, filed a writ in this Court under Art. 32 of the Constitution for a direction that the Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, Constitution (Seventeenth Amendment) Act, 1964, insofar as they affected their fundamental rights were unconstitutional and inoperative and for a direction that s. 10-B of the said Act X of 1953 was void as violative of Arts. 14 and 19(1)(f) and (g) of the Constitution.

Writ Petitions Nos. 202 and 203 of 1966 were filed by different petitioners under Art. 32 of the Constitution for a declaration that the Mysore Land Reforms Act (Act 10 of 1962) as amended by Act 14 of 1965, which fixed ceilings on land holdings and conferred ownership of surplus lands on tenants infringed Arts. 14, 19 and 31 of the Constitution and, therefore, was unconstitutional and void.

The States of Punjab and Mysore, inter alia, contended that the said Acts were saved from attack on the ground that they infringed the fundamental rights of the petitioners by reason of the Constitution (Seventeenth Amendment) Act, 1964, which, by amending Art. 31-A of the Constitution and including the said two Acts in the 9th Schedule thereto, had placed them beyond attack.

In Writ Petition No. 153 of 1966, 7 parties intervened. In Writ Petition No. 202 of 1966 one party intervened. In addition, in the first petition, notice was given to the Advocates General of various

States. All the learned counsel appearing for the parties, the Advocates General appearing for the States and the learned counsel for the interveners have placed their respective viewpoints exhaustively before us. We are indebted to all of them for their thorough preparation and clear exposition of the difficult questions of law that were raised in the said petitions.

At the outset it would be convenient to place briefly the respective contentions under different heads : (1) The Constitution is intended to be permanent and, therefore, it cannot be amended in a way which would injure, maim or destroy its indestructible character. (2) The word "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 and it cannot be so construed as to enable the Parliament to destroy the permanent character of the Constitution. (3) The fundamental rights are a part of the basic structure of the Constitution and, therefore, the said power can be exercised only to preserve rather than destroy the essence of those rights. (4) The limits on the power to amend are implied in Art. 368, for the expression "amend" has a limited meaning. The wide phraseology used in the Constitution in other Articles, such as "repeal" and "re-enact" indicates that art. 368 only enables a modification of the Articles within the framework of the Constitution and not a destruction of them. (5) The debates in the Constituent Assembly, particularly the speech of Mr. Jawahar Lal Nehru, the first Prime Minister of India, and the reply of Dr. Ambedkar, who piloted the Bill disclose clearly that it was never the intention of the makers of the Constitution by putting in Art. 368 to enable the Parliament to repeal the fundamental rights; the circumstances under which the amendment moved by Mr. H. V. Kamath, one of the members of Constituent Assembly, was withdrawn and Art. 368 was finally adopted, support the contention that amendment of Part III is outside the scope of Art. 368. (6) Part III of the Constitution is a self-contained Code and its provisions are elastic enough to meet all reasonable requirements of changing situations. (7) The power to amend is sought to be derived from three sources, namely, (i) by implication under Art. 368 itself; the procedure to amend culminating in the amendment of the Constitution necessarily implies that power, (ii) the power and the limits of the power to amend are implied in the Articles sought to be amended, and (iii) Art. 368 only lays down the procedure to amend, but the power to amend is only the legislative power conferred on the Parliament under Arts. 245, 246 and 248 of the Constitution. (8) The definition of "law" in Art. 13(2) of the Constitution includes every branch of law, statutory, constitutional, etc., and therefore, the power to amend in whichever branch it may be classified, if it takes away or abridges fundamental rights would be void thereunder. (9) The impugned amendment detracts from the jurisdiction of the High Court under Art. 226 of the Constitution and also the legislative powers of the States and therefore it falls within the scope of the proviso to Art. 368.

The said summary, though not exhaustive, broadly gives the various nuances of the contentions raised by the learned counsel, who question the validity of the 17th Amendment. We have not noticed the other arguments of Mr. Nambiar, which are peculiar to the Writ Petition No. 153 of 1966 as those questions do not arise for decision, in the view we are taking on the common questions.

On behalf of the Union and the States the following points were pressed : (1) A Constitutional amendment is made is exercise of the sovereign power and not legislative power of Parliament and, therefore, it partakes the quality and character of the Constitution itself. (2) The real distinction is between a rigid and a flexible Constitution. The distinction is based upon the express limits of the amending power. (3) The provisions of Art. 368 are clear and unequivocal and there is no scope for invoking implied limitations on that power : further the doctrine of implied power has been rejected by the American courts and jurists. (4) The object of the amending clause in a flexible Constitution is to enable the Parliament to amend the Constitution in order to express the will of the people

according to the changing course of events and if amending power is restricted by implied limitations, the Constitution itself might be destroyed by revolution. Indeed, it is a safety valve and an alternative for a violent change by revolution. (5) There are no basic and non-basic features of the Constitution; everything in the Constitution is basic and it can be amended in order to help the future growth and progress of the country. (6) Debates in the Constituent Assembly cannot be relied upon for construing Art. 368 of the Constitution and even if they can be, there is nothing in the debates to prove positively that fundamental rights were excluded from amendment. (7) Most of the amendments are made out of political necessity : they involve questions, such as, how to exercise power, how to make the lot of the citizens better and the like and, therefore, not being judicial questions, they are outside the court's jurisdiction. (8) The language of Art. 368 is clear, categorical, imperative and universal; on the other hand, the language of Art. 13(2) is such as to admit qualifications or limitations and, therefore, the Court must construe them in such a manner as that Article could not control Art. 368. (9) In order to enforce the Directive Principles the Constitution was amended from time to time and the great fabric of the Indian Union has been built since 1950 on the basis that the Constitution could be amended and, therefore, any reversal of the previous decisions would introduce economic chaos in our country and that, therefore, the burden is very heavy upon the petitioners to establish that the fundamental rights cannot be amended under Art. 368 of the Constitution. (10) Art. 31-A and the 9th Schedule do not affect the power of the High Court under Art. 226 or the legislative power of the States though the area of their operation is limited and, therefore, they do not fall within the scope of the proviso to Art. 368.

The aforesaid contentions only represent a brief summary of the elaborate arguments advanced by learned counsel. We shall deal in appropriate context with the other points mooted before us.

It will be convenient to read the material provisions of the Constitution at this stage.

> Article 13(1) . . . . .
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> (2) 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.
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> (3) In this article, unless the context otherwise requires, -
>
> (a) "law" includes any Ordinance, order, bye-law, rule regulation, notification, custom or usage having in the territory of India the force of law.
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> Article 31-A(1). Notwithstanding anything contained in article 13, no law providing for,
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> (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights,
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> #. . . .##

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31.

> (2) (a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to

land tenure in force in that area and shall also include,

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(i) any land held under ryotwari settlement,

(ii) any land held or let for purposes of agriculture or for purposes ancillary thereto.....

Article 31-B. Without prejudice to the generality of the provisions contained in article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become, void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

In the Ninth Schedule to the Constitution the Mysore Land Reforms Act, 1961, (Mysore Act 10 of 1962) is included as item 51 and the Punjab Security of Land Tenures Act, 1953 (Punjab Act 10 of 1953) is included as item 54. The definition of "estate" was amended and the Ninth Schedule was amended by including therein the said two Acts by the Constitution (Seventeenth Amendment) Act, 1964.

The result of the said amendments is that both the said Acts dealing with estates, within their wide definition introduced by the Constitution (Seventeenth Amendment) Act, 1964, having been included in the Ninth Schedule, are placed beyond any attack on the ground that their provisions are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. It is common case that if the Constitution (Seventeenth Amendment) Act, 1964, was constitutionally valid, the said Acts could not be impugned on any of the said grounds.

The question of the amendability of the fundamental rights was considered by this Court earlier in two decisions, namely, Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar ([1952] S.C.R. 89, 105) and in Sajjan Singh v. State of Rajasthan ([1965] 1 S.C.R. 933, 946, 950, 959, 961, 963).

In the former the validity of the Constitution (First Amendment) Act, 1951, which inserted, inter alia, Arts. 31-A and 31-B in the Constitution, was questioned. That amendment was made under Art. 368 of the Constitution by the Provisional Parliament. This Court held that Parliament had power to amend Part III of the Constitution. The Court came to that conclusion on two grounds, namely, (1) the word "law" in Art. 13(2) was one made in exercise of legislative power and not constitutional law made in exercise of constituent power; and (ii) there were two articles (Arts. 13(2) and 368) each of which was widely phrased and, therefore, harmonious construction required that one should be so read as to be controlled and qualified by the other, and having regard to the circumstances mentioned in the judgment Art. 13 must be read subject to Art. 368. A careful perusal of the judgment indicates that the whole decision turned upon an assumption that the expression "law" in Art. 13(2) does not include constitutional law and on that assumption an attempt was made to harmonise Article 13(2) and 368 of the Constitution.

The decision in Sajjan Singh's case (1965] 1 S.C.R. 933, 946, 950, 959, 961, 963) was given in the

context of the question of the validity of the Constitution (Seventeenth Amendment) Act, 1964. Two questions arose in that case : (1) Whether the amendment Act insofar it purported to take away or abridge the rights conferred by Part III of the Constitution fell within the prohibition of Art. 13(2) and (2). Whether Articles 31-A and 31-B sought to make changes in Arts. 132, 136 or 226 or in any of the lists in the Seventh Schedule and therefore the requirements of the proviso to Article 368 had to be satisfied. Both the Chief Justice and Mudholkar, J., made it clear that the first contention was not raised before the Court. The learned counsel appearing for both the parties accepted the correctness of the decision in Sankari Prasad's case ([1952] S.C.R. 89, 105) in that regard. Yet Gajendragadkar, C.J. speaking for the majority agreed with the reasons given in Sankari Prasad's case ([1952] S.C.R. 89) on the first question and Hidayatullah and Mudholkar, JJ. expressed their dissent from the said view. But all of them agreed, though for different reasons on the second question. Gajendragadkar, C.J. speaking for himself, Wanchoo and Raghubar Dayal, JJ. rejected the contention that Art. 368 did not confer power on Parliament to take away the fundamental rights guaranteed by Part III. When a suggestion was made that the decision in the aforesaid case should be reconsidered and reviewed, the learned Chief Justice though he conceded that in a case where a decision had a significant impact on the fundamental rights of citizens, the Court would be inclined to review its earlier decision in the interests of the public good, he did not find considerations of substantial and compelling character to do so in that case. But after referring to the reasoning given in Sankari Prasad's case ([1952] S.C.R.] 89) the learned Chief Justice observed :

> "In our opinion, the expression "amendment of the Constitution" plainly and unambiguously means amendment of all the provisions of the Constitution".

Referring to Art. 13(2), he restated the same reasoning found in the earlier decision and added that if it was the intention of the Constitution-makers to save fundamental rights from the amending process they should have taken the precaution of making a clear provision in that regard. In short, the majority, speaking through Gajendragadkar, C.J. agreed that no case had been made out for reviewing the earlier decision and practically accepted the reasons given in the earlier decision. Hidayatullah J., speaking for himself, observed :

> "But I make it clear that I must not be understood to have subscribed to the view that the word "law" in Art. 13(2) does not control constitutional amendments. I reserve my opinion on that case for I apprehend that it depends on how wide is the word "law" in that Article".

After giving his reasons for doubting the correctness of the reasoning given in Sankari Prasad's case ([1952] S.C.R. 89), the learned Judge concluded thus :

> "I would require stronger reasons than those given in Sankari Prasad's case ([1952] S.C.R 89) to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the States".

The learned Judge continued :

> "The Constitution gives so many assurances in Part III that it would be difficult to think that they were the playthings of a special majority".

Mudholkar, J. was positive that the result of a legislative action of a legislature could not be other

than "law" and, therefore, it seemed to him that the fact that the legislation dealt with the amendment of a provision of the Constitution would not make its results anytheless a "law". He further pointed out that Art. 368 did not say that whenever Parliament made an amendment to the Constitution it assumed a different capacity from that of a constituent body. He also brought out other defects in the line of reasoning adopted in Sankari Prasad's case ([1952] S.C.R. 89). It will, therefore, be seen that the correctness of the decision in Sankari Prasad's case ([1952] S.C.R.) was not questioned in Sajjan Singh's case ([1965] 1 S.C.R. 933). Though it was not questioned, three of the learned Judges agreed with the view expressed therein, but two learned Judges were inclined to take a different view. But, as that question was not raised, the minority agreed with the conclusion arrived at by the majority on the question whether the Seventeenth Amendment Act was covered by the proviso to Art. 368 of the Constitution. The conflict between the majority and the minority in Sajjan Singh's case ([1965] 1 S.C.R. 933) falls to be resolved in this case. The said conflict and the great importance of the question raised is the justification for the Constitution of the larger Bench. The decision in Sankari Prasad's case ([1952] S.C.R. 89) was assumed to be correct in subsequent decisions of this Court. See S. Krishnan v. State of Madras ([1951] S.C.R. 621 at page 652). The State of West Bengal v. Anwar Ali Sarkar ([1952] S.C.R. 284, 366) and Basheshar Nath v. The Commissioner of Income-tax, Delhi and Rajasthan ([1959] Supp. 1 S.C.R. 528, 563). But nothing turns upon that fact, as the correctness of the decision was not questioned in those cases.

A correct appreciation of the scope and the place of fundamental rights in our Constitution will give us the right perspective for solving the problem presented before us. Its scope cannot be appreciated unless we have a conspectus of the Constitution, its objects and its machinery to achieve those objects. The objective sought to be achieved by the Constitution is declared in sonorous terms in its preamble which reads :

> "We the people of India having solemnly resolved to constitute India into a Sovereign, Democratic, Republic and secure to all its citizens justice.... liberty.... equality..... and fraternity...."

It contains in a nutshell, its ideals and its aspirations. The preamble is not a platitude but the mode of its realisation is worked out in detail in the Constitution. The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. I demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function with the spheres allotted to them. Some powers overlap and some are superseded during emergencies. The mode of resolution of conflicts and conditions for supersession are also prescribed. In short, the scope of the power and the manner of its exercise are regulated by law. No authority created under the Constitution is supreme; the Constitution is supreme; and all the authorities function under the supreme law of the land. The rule of law under the Constitution has a glorious content. It embodies the modern concept of law evolved over the centuries. It empowers the Legislatures to make laws in respect of matters enumerated in the 3 Lists annexed to Schedule VII. In Part IV of the Constitution, the Directive Principles of State Policy are laid down. It enjoins it to bring about a social order in which justice, social, economic and political - shall inform all the institutions of national life. It directs it to work for an egalitarian society where there is no concentration of wealth, where there is plenty, where there is equal opportunity for all, to education, to work, to livelihood, and where there is social justice. But having regard to the past history of our country, it could not implicitly believe the representatives of the people, for uncontrolled and unrestricted power might lead to an authoritarian State. It, therefore, preserves the natural rights against the State encroachment and constitutes the higher judiciary of

the State as the sentinel of the said rights and the balancing wheel between the rights, subject to social control. In short, the fundamental rights, subject to social control, have been incorporated in the rule of law. That is brought about by an interesting process. In the implementation of the Directive Principles, Parliament or the Legislature of a State makes laws in respect of matter or matters allotted to it. But the higher Judiciary tests their validity on certain objective criteria, namely, (i) whether the appropriate Legislature has the legislative competency to make the law; (ii) whether the said law infringes any of the fundamental rights; (iii) even if it infringes the freedoms under Art. 19, whether the infringement only amounts to "reasonable restriction" on such rights in "public interest". By this process of scrutiny, the court maintains the validity of only such laws as keep a just balance between freedoms and social control. The duty of reconciling fundamental rights in Art. 19 and the laws of social control is cast upon the courts and the touchstone or the standard is contained in the said two expressions. The standard is an elastic one; it varies with time, space and condition. What is reasonable under certain circumstances may not be so under different circumstances. The constitutional philosophy of law is reflected in Parts III and IV of the Constitution. The rule of law under the Constitution serves the needs of the people without unduly infringing their rights. It recognizes the social reality and tries to adjust itself to it from time to time avoiding the authoritarian path. Every institution or political party that functions under the Constitution must accept it; otherwise it has no place under the Constitution.

Now, what are the fundamental rights ? They are embodied in Part III of the Constitution and they may be classified thus : (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. They are the rights of the people preserved by our Constitution. "Fundamental rights" are the modern name for what have been traditionally known as "natural rights". As one author puts : "they are moral rights which every human being everywhere at all times ought to have simply because of the fact that in contradistinction with other beings, he is rational and moral". They are the primordial rights necessary for the development of human personality. They are the rights which enable a man to chalk out his own life in the manner he likes best. Our Constitution, in addition to the well-known fundamental rights, also included the rights of the minorities, untouchables and other backward communities, in such rights.

After having declared the fundamental rights, our Constitution says that all laws in force in the territory of India immediately before the commencement of the Constitution, insofar as they are inconsistent with the said rights, are, to the extent of such inconsistency, void. The Constitution also enjoins the State not to make any law which takes away or abridges the said rights and declares such laws, to the extent of such inconsistency, to be void. As we have stated earlier, the only limitation on the freedom enshrined in Art. 19 of the Constitution is that imposed by a valid law operating as a reasonable restriction in the interests of the public.

It will, therefore, be seen that fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament. At the same time Parts III and IV constituted an integrated scheme forming a self-contained code. The scheme is made so elastic that all the Directive Principles of State Policy can reasonably be enforced without taking away or abridging the fundamental rights. While recognizing the immutability of fundamental rights, subject to social control, the Constitution itself provides for the suspension or the modification of fundamental rights under specific circumstances, for instance, Art. 33 empowers Parliament to modify the rights conferred by Part III in their application to the members of the armed forces, Art. 34 enables it to impose restrictions on the rights conferred by the said parts while martial law is in force in an area, Art. 35 confers the power on it to make laws with respect to any of the matters

which under clause (3) of Art. 16, Clause (3) of Art. 32, Art. 33 and Art. 34 may be provided for by law. The non-obstante clause with which the last article opens makes it clear that all the other provisions of the Constitution are subject to this provision. Article 32 makes the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by the said Parts a guaranteed right. Even during grave emergencies Art. 358 only suspends the provision of Art. 19; and Art. 359 enables the President by order to declare the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in that order to be suspended; that is to say, even during emergency, only Art. 19 is suspended temporarily and all other rights are untouched except those specifically suspended by the President.

In the Book "Indian Constitution - Cornerstone of a Nation" by Granville Austin, the scope, origin and the object of fundamental rights have been graphically stated. Therein the learned author says :

> "..... the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution".

Adverting to the necessity for incorporating fundamental rights in a Constitution, the learned author says :

> "That a declaration of rights had assumed such importance was not surprising; India was a land of communities, of minorities, racial, religious, linguistic, social and caste. For India to become a state, these minorities had to agree to be governed both at the centre and in the provinces by fellow Indian-members, perhaps, of another minority - and not by a mediatory third power, the British. On both psychological and political grounds, therefore, the demand for written rights - since rights would provide tangible safeguards, against oppression - proved overwhelming".

Motilal Nehru, who presided over the Committee called for by the Madras Congress resolution, in May, 1928 observed in his 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..... Another reason why great importance attached to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not, better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the Constitution".

Pandit Jawaharlal Nehru, on April 30, 1947 in proposing for the adoption of the Interim Report on Fundamental Rights, said thus :

> "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. The other matter should be looked upon - however important it might be - not from this permanent and fundamental point of view, but from the more temporary point of view".

Pandit Jawaharlal Nehru, who was Prime Minister at that time and who must have had an effective

voice in the framing of the Constitution, made this distinction between fundamental rights and other provisions of the Constitution, namely, the former were permanent and the latter were amendable. On September 18, 1949 Dr. Ambedkar in speaking on the amendment proposed by Mr. Kamath to Art. 304 of the Draft Constitution corresponding to the present Art. 368, namely, "Any provision of this Constitution may be amended, whether by way of variation, addition or repeal, in the manner provided in this article", said thus :

> "Now, what is it we do ? We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. 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 two-thirds majority. Then they can amend it".

Therefore, in Dr. Ambedkar's view the fundamental rights were so important that they could not be amended in the manner provided by Art. 304 of the Draft Constitution, which corresponds to the present Art. 368.

We have referred to the speeches of Pandit Jawaharlal Nehru and Dr. Ambedkar not with a view to interpret the provisions of Art. 368, which we propose to do on its own terms, but only to notice the transcendental character given to the fundamental rights by two of the important architects of the Constitution.

This Court also noticed the paramountcy of the fundamental rights in many decisions. In A. K. Gopalan v. State of Madras ([1950] S.C.R. 88, 198) they are described as "paramount", in State of Madras v. Smt. Champakam Dorairajan ([1951] S.C.R. 525) as "sacro-sanci", in Pandit M. S. M. Sharma v. Shri Sri Krishna Sinha ([1959] Supp. 1 S.C.R. 806) as "rights reserved by the people", in Smt. Ujjam Bai v. State of Uttar Pradesh ([1963] 1 S.C.R. 778) as "inalienable and inviolable" and in other cases as "transcendental". The minorities regarded them as the bedrock of their political existence and the majority considered them as a guarantee for their way of life. This, however, does not mean that the problem is one of mere dialectics. The Constitution has given by its scheme a place of permanence to the fundamental freedoms. In giving to themselves the Constitution, the people have reserved the fundamental freedoms to themselves. Article 13 merely incorporates that reservation. That Article is however not the source of the protection of fundamental rights but the expression of the reservation. The importance attached to the fundamental freedoms is so transcendental that a bill enacted by a unanimous vote of all the members of both the Houses is ineffective to derogate from its guaranteed exercise. It is not what the Parliament regards at a given moment as conducive to the public benefit, but what Part III declares protected, which determines the ambit of the freedom. The incapacity of the Parliament therefore in exercise of its amending power to modify, restrict or impair fundamental freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms.

Briefly stated, the Constitution declares certain rights as fundamental rights, makes all the laws infringing the said rights void, preserves only the laws of social control infringing the said rights and expressly confers power on Parliament and the President to amend or suspend them in specified circumstances; if the decisions in Sankari Prasad's case ([1952] S.C.R. 89, 105) and Sajjan Singh's case ([1965] S.C.R. 933) laid down the correct law, it enables the same Parliament to abrogate them with one stroke, provided the party in power singly or in combination with other parties commands the necessary majority. While articles of less significance would require consent of the majority of

the States, fundamental rights can be dropped without such consent. While a single fundamental right cannot be abridged or taken away by the entire Parliament unanimously voting to that effect, a two-thirds' majority can do away with all the fundamental rights. The entire super structure built with precision and high ideals may crumble at one false step. Such a conclusion would attribute unreasonableness to the makers of the Constitution, for, in that event would be speaking in two voices. Such an intention cannot be attributed to the makers of the Constitution unless the provisions of the Constitution compel us to do so.

With this background let us proceed to consider the provisions of Art. 368, vis-a-vis Art. 13(2) of the Constitution.

The first question is whether amendment of the Constitution under Art. 368 is "law" within the meaning of Art. 13(2). The marginal note to Art. 368 describes that article as one prescribing the procedure for amendment. The article in terms only prescribes various procedural steps in the matter of amendment : it shall be initiated by the introduction of a bill in either House of Parliament; it shall be passed by the prescribed majority in both the Houses; it shall then be presented to the President for his assent; and upon such assent the Constitution shall stand amended. The article assumes the power to amend found elsewhere and says that it shall be exercised in the manner laid down therein. The argument that the completion of the procedural steps culminates in the exercise of the power to amend may be subtle but does not carry conviction. If that was the intention of the provisions, nothing prevented the makers of the Constitution from stating that the Constitution may be amended in the manner suggested. Indeed, whenever the Constitution sought to confer a special power to amend on any authority it expressly said so : (See Arts. 4 and 392). The alternative contention that the said power shall be implied either from Art. 368 or from the nature of the articles sought to be amended cannot be accepted, for the simple reason that the doctrine of necessary implication cannot be invoked if there is an express provision or unless but for such implication the article will become otiose or nugatory. There is no necessity to imply any such power, as Parliament has the plenary power to make any law, including the law to amend the Constitution subject to the limitations laid down therein.

Uninfluenced by any foreign doctrines let us look at the provisions of our Constitution. Under Art. 245, "subject to the provisions of the Constitution. Parliament may make laws for the whole or any part of the territory of India...." Article 246 demarcates the matters in respect of which Parliament and State Legislatures may make laws. In the field reserved for Parliament there is Entry 97 which empowers it to make laws in respect of "any other matter not enumerated in Lists II and III including any tax not mentioned in either of those lists". Article 248 expressly states that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. It is, therefore, clear that the residuary power of legislation is vested in Parliament. Subject to the argument based upon the alleged nature of the amending power as understood by jurists in other countries, which we shall consider at a later stage, it cannot be contended, and indeed, it was not contended, that the Constituent Assembly, if it were so minded, could not have conferred an express legislative power on Parliament to amend the Constitution by ordinary legislative process. Articles 4 and 169, and para 7 of the 5th Schedule and para 21 of the 6th Schedule have expressly conferred such power. There is, therefore, no inherent inconsistency between legislative process and the amending one. Whether in the field of a constitutional law or statutory law amendment can be brought about only by law. The residuary power of Parliament, unless there is anything contrary in the Constitution, certainly takes in the power to amend the Constitution. It is said that two Articles indicate the contrary intention. As Art. 245, the argument proceeds, is subject to the provisions of the Constitution, every law of amendment will necessarily

be inconsistent with the articles sought to be amended. This is an argument in a circle. 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 a 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. The second criticism is based upon Art. 392 of the Constitution. That provision confers power on the President to remove difficulties; in the circumstances mentioned in that provision, he can by order direct that the Constitution shall during such period as may be specified in that order have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient. The argument is that the President's power, though confined to a temporary period, is co-extensive with legislative power and if the power to amend is a legislative power it would have to be held that the President can amend the Constitution in terms of Art. 368. Apart from the limited scope of Art. 392, which is intended only for the purpose of removing difficulties and for bringing about a smooth transition, an order made by the President cannot attract Act. 368, as the amendment contemplated by that provision can be initiated only by the introduction of a bill in the Parliament. There is no force in either of the two criticisms.

Further, there is internal evidence in the Constitution itself which indicates that amendment to the Constitution is a "law" within the meaning of Art. 245. Now, what is "law" under the Constitution ? It is not denied that in its comprehensive sense it includes constitutional law and the law amending the Constitution is constitutional law. But Art. 13(2) for the purpose of that Article gives an inclusive definition. It does not exclude Constitutional law. It prima facie takes in constitutional law. Article 368 itself gives the necessary clue to the problem. The amendment can be initiated by the introduction of a bill; it shall be passed by the two Houses; it shall receive the assent of the President. These are well-known procedural steps in the process of law-making : Indeed this Court in Sankari Prasad's case ([1952] S.C.R. 89) brought out this idea in clear terms. It said in the first place, it is provided that the amendment must be initiated by the introduction of a "bill in either House of Parliament" a familiar feature of Parliament procedure (of Article 107(1) which says "A bill may originate in either House of Parliament"). Then, the bill must be "passed in each House," - just what Parliament does when it is called upon to exercise its normal legislative function [Article 107(2)]; and finally, the bill thus passed must be "presented to the President" for his "assent", again a parliamentary process through which every bill must pass before it can reach the statute-book, (Article 111). We thus find that each of the component units of Parliament is to play its allotted part in bringing about an amendment to the Constitution. We have already seen that Parliament effects amendments of the first class mentioned above by going through the same three-fold procedure but with a simple majority. The fact that a different majority in the same body is required for effecting the second and third categories of amendments make the amending agency a different body".

In the same decision it is pointed out that Art. 368 is not a complete code in respect of the procedure. This Court said "There are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. Having provided for the Constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (Article 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as they may be applicable consistently with the express provision of Art. 368, when they have entrusted to it the power of amending the Constitution". The House of the People made rules providing procedure for amendments, the same as for other Bills with the addition of certain special provisions viz., Rules 155, 156, 157 and 158. If amendment is intended to be

something other than law, the constitutional insistence on the said legislative process is unnecessary. In short, amendment cannot be made otherwise than by following the legislative process. The fact that there are other conditions, such as, a larger majority and in the case of articles mentioned in the proviso a ratification by Legislatures is provided, does not make the amendment anytheless a law. The imposition of further conditions is only a safeguard against hasty action or a protection to the States, but does not change the Legislative character of the amendment.

This conclusion is reinforced by the other articles of the Constitution. Article 3 enables Parliament by law to form new States and alter areas, boundaries or the names of existing States. The proviso to that Article imposed two further conditions, namely, (i) the recommendation of the President, and (ii) in the circumstances mentioned therein, the views expressed by the Legislatures. Notwithstanding the said conditions it cannot be suggested that the expression "law" under the said Article is not one made by the Legislative process. Under Art. 4, such a law can contain provisions for amendment of Schedules I and IV indicating thereby that amendments are only made by Legislative process. What is more, cl. (2) thereof introduces a fiction to the affect that such a law shall not be deemed to be an amendment to the Constitution. This shows that the amendment is law and that but for the fiction it would be an amendment within the meaning of Art. 368. Article 169 which empowers Parliament by law to abolish or create Legislative Councils in States, para 7 of the 5th Schedule and para 21 of the 6th Schedule which enable Parliament by law to amend the said Schedules, also bring out the two ideas that the amendment is law made by legislative process and that but for the fiction introduced it would attract Article 368. That apart amendments under the said provisions can be made by the Union Parliament by simple majority. That an amendment is made only by legislative process with or without conditions will be clear if two decisions of the Privy Council are considered in juxta-position. They are McCawley v. The King ([1920] A.C. 691) and The Bribery Commissioner v. Pedrick Ranasinghe ([1964] 2 W.L.R. 1301).

The facts in McCawley v. The King ([1920] A.C. 691) were these : In 1859 Queensland had been granted a Constitution in the terms of an Order in Council made on June 6 of that year under powers derived by Her Majesty from the Imperial Statute, 18 & 19 Vict. c. 54. The Order in Council had set up a legislature for the territory, consisting of the Queen, a Legislative Council and a Legislative Assembly, and the law-making power was vested in Her Majesty acting with the advice and consent of the Council and Assembly. Any laws could be made for the "peace, welfare and good government of the Colony". The said legislature of Queensland in the year 1867 passed the Constitution Act of that year. Under that Act power was given to the said legislature to make laws for "peace, welfare and good Government of the Colony in all cases whatsoever". But, under s. 9 thereof a two-thirds majority of the Council and of the Assembly was required as a condition precedent to the validity of legislation altering the constitution of the Council. The Legislature, therefore, had, except in the case covered by s. 9 of the Act, an unrestricted power to make laws. The Legislature passed a law which conflicted with one of the existing terms of the Constitution Act. Lord Birkenhead, L.C., upheld the law, as the Constitution Act conferred an absolute power upon the legislature to pass any law by majority even though it, in substance, amended the terms of the Constitution Act.

In The Bribery Commissioner v. Pedrick Ranasinghe ([1964] 2 W.L.R. 1301), the facts are these : By section 29 of the Ceylon (Constitution) Order in Council, 1946, Parliament shall have power to make laws for the "peace, order and good government" of the Island and in the exercise of its power under the said section it may amend or repeal any of the provisions of the Order in its application to the Island. The proviso to that section says that no Bill for the amendment or repeal of any of the provisions of the Order shall be presented for the Royal assent unless it has endorsed on it a

certificate under the hand 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. Under s. 55 of the said Order the appointment of Judicial Officers was vested in the Judicial Service Commission. But the Parliament under s. 41 of the Bribery Amendment Act, 1958, provided for the appointment of the personnel of the Bribery Tribunals by the Governor-General on the advice of the Minister of Justice. The said Amendment Act was in conflict with the said s. 55 of the Order and it was passed without complying with the terms of the proviso to s. 29 of the Order. The Privy Council held that the amendment Act was void. Lord Pearce, after considering McCawley's case ([1920] A.C. 691) made the following observations, at p. 1310 :

> "..... 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. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled", as the Board held the Constitution of Queensland to be. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with ....."

It will be seen from the said judgments that an amendment of the Constitution is made only by legislative process with ordinary majority or with special majority, as the case may be. Therefore, amendments either under Art. 368 or under other Articles are made only by Parliament by following the legislative process adopted by it in making other law. In the premises, an amendment of the Constitution can be nothing but "law".

A comparative study of other Constitutions indicates that no particular pattern is followed. All the Constitutions confer an express power to amend, most of them provide for legislative procedure with special majority, referendum, convention, etc., and a few with simple majority. Indeed, Parliament of England, which is a supreme body, can amend the constitution like any other statute. As none of the Constitutions contains provisions similar to Art. 368 and Art. 13(2), neither the said Constitutions nor the decisions given by courts thereon would be of any assistance in construing the scope of Art. 368 of our Constitution.

A brief survey of the nature of the amending process adopted by various constitutions will bring out the futility of any attempt to draw inspiration from the said opinions or decisions on the said constitutions. The nature of the amending power in different constitutions generally depends on the nature of the polity created by the constitution, namely, whether it is federal or unitary constitution or on the fact whether it is a written or an unwritten constitution or on the circumstances whether it is a rigid or a flexible constitution. Particularly the difference can be traced to the "spirit and genius of the nation in which a particular constitution has its birth". The following articles of the Constitution of the different countries are brought to our notice by one or other of the counsel that appeared before us. Art. 5 of the Constitution of the united States of America, Arts. 125 and 128 of the Commonwealth of Australia Constitution Act, Art. 92(1) of the British North American Act, s. 152 of the South African Act, Art. 217 of the Constitution of the United States of Brazil, Section 46 of the Constitution of Ireland, 1937, Arts. 207, 208 and 209 of the Constitution of the Union of Burma, Art. 88 of the Constitution of the Kingdom of Denmark Act, Art. 90 of the Constitution of the French Republic, 1954, Art. 135 of the united States of Mexico, Art. 96 of the Constitution of Japan, Art. 112 of the Constitution of Norway, Art. 85 of the Constitution of the Kingdom of Sweden, Arts. 118, 119, 120, 121, 122 and 123 of the Constitution of the Swiss Federation, Arts. 140, 141 and 142 of the Constitution of Venezuela, and Art. 146 of the Constitution of the Union of

Soviet Socialist Republics, 1936 and s. 29(4) of Ceylon Constitution Order in Council, 1946.

Broadly speaking amendments can be made by four methods : (i) by ordinary legislative process with or without restriction, (ii) by the people through referendum, (iii) by majority of all the units of a federal State; and (iv) by a special convention. The first method can be in four different ways, namely, (i) by the ordinary course of legislation by absolute majority or by special majority, (See Section 92(1) of the British North America Act, sub-section 152 South African Act, whereunder except sections 35, 137 and 152, other provisions could be amended by ordinary legislative process by absolute majority. Many constitutions provide for special majorities.); (ii) by a fixed quorum of members for the consideration of the proposed amendment and a special majority for its passage; (see the defunct Constitution of Rumania), (iii) by dissolution and general election on a particular issue; (see the Constitutions of Belgium, Holland, Denmark and Norway), and (iv) by a majority of two Houses of Parliament in joint session as in the Constitution of the South Africa. The second method demands a popular vote, referendum or plebiscite as in Switzerland, Australia, Ireland, Italy, France and Denmark. The third method is by an agreement in some form or other of either of the majority or of all the federating units as in Switzerland, Australia and the United States of America. The fourth method is generally by creation of a special body ad hoc for the purpose of constitution revision as in Latin America. Lastly, some constitutions impose express limitation on the power to amend. (See Art. 5 of the United States Constitution and the Constitution of the Fourth French Republic). A more elaborate discussion of this topic may be found in the American political Constitution by strong. It will, therefore, be seen that the power to amend and the procedure to amend radically differ from State to State; it is left to the constitution-makers to prescribe the scope of the power and the method of amendment having regard to the requirements of the particular State. There is no article in any of the constitutions referred to us similar to article 13(2) of our Constitution. India adopted a different system altogether : it empowered the Parliament to amend the Constitution by the legislative process subject to fundamental rights. The Indian Constitution has made the amending process comparatively flexible, but it is made subject to fundamental rights.

Now let us consider the argument that the power to amend is a sovereign power, that the said power is supreme to the legislative power, that it does not permit any implied limitations and that amendments made in exercise of that power involve political questions and that, therefore, they are outside judicial review. The wide proposition is sought to be supported on the basis of opinions of jurists and judicial decisions. Long extracts have been read to us from the book "The Amending of the Federal Constitution (1942)" by Lester Bernhardt Orfield, and particular reference was made to the following passages :

> "At the point it may be well to note that when the Congress is engaged in the amending process it is not legislating. It is exercising a peculiar power bestowed upon it by Article Five. This Article for the most part controls the process; and other provisions of the Constitution, such as those relating to the passage of legislation, having but little bearing".

Adverting to the Bill of Rights, the learned author remarks that they may be repealed just as any other amendment and that they are no more sacred from a legal standpoint than any other part of the Constitution. Dealing with the doctrine of implied limitations, he says that it is clearly untenable. Posing the question "Is there a law about the amending power of the Constitution ?", he answers, "there is none". He would even go to the extent of saying that the sovereignty, if it can be said to exist at all, is located in the amending body. The author is certainly a strong advocate of the supremacy of the amending power and an oponent of the doctrine of implied limitations. His

opinion is based upon the terms of Art. 5 of the Constitution of the United States of America and his interpretation of the decisions of the Supreme Court of America. Even such an extreme exponent of the doctrine does not say that a particular constitution cannot expressly impore restrictions on the power to amend or that a court cannot reconcile the articles couched in unlimited phraseology. Indeed Art. 5 of the American Constitution imposes express limitations on the amending power. Some passages from the book "Political Science and Government" by James Wilford Garner are cited. Garner points out :

> "An unamendable constitution, said Mulford, is the "worst tyranny of time, or rather the very tyranny of time"."

But he also notices :

> "The provision for amendment should be neither so rigid as to make needed changes practically impossible nor so flexible as to encourage frequent and unnecessary changes and thereby lower the authority of the Constitution".

Munro in his book "The Government of the United States", 5th Edition, uses strong words when he says :

> "..... it is impossible to conceive of an unamendable constitution as anything but a contradiction in terms".

The learned author says that such a constitution would constitute "government by the graveyards". Hugh Evander Willis in his book "Constitutional Law of the United States" avers that the doctrine of amendability of the Constitution is grounded in the doctrine of the sovereignty of the people and that it has no such implied limitations as that an amendment shall not contain a new grant of power or change the dual form of government or change the protection of the Bill of Rights, or make any other change in the Constitution. Herman Finer in his book "The Theory and Practice of Modern Government" defines "constitution" as its process of amendment, for, in his view, to amend is to deconstitute and reconstitute. The learned author concludes that the amending clause is so fundamental to a constitution that he is tempted to call it the constitution itself. But the learned author recognizes that difficulty in amendment certainly products circumstances and makes impossible the surreptitious abrogation of rights guaranteed in the constitution. William S. Livingston in "Federalism and Constitutional Change" says :

> "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".

But there are equally eminent authors who express a different view. In "American Jurisprudence", 2nd Edition, Vol. 16, it is stated that a statute and a constitution though of unequal dignity are both laws. Another calls the constitution of a State as one of the laws of the State. Cooley in his book on "Constitutional Law" opines that changes in the fundamental laws of the State must be indicated by the people themselves. He further implies limitations to the amending power from the belief in the constitution itself, such as, the republican form of Government cannot be abolished as it would be revolutionary in its character. In the same book it is further said that the power to amend the constitution by legislative action does not confer the power to break it any more than it confers the power to legislate on any other subject contrary to the prohibitions. C. F. Strong in his book

"Modern Political Constitutions", 1963 edition, does not accept the theory of absolute sovereignty of the amending power which does not brook any limitations, for he says :

> "In short, it attempts to arrange for the re-creation of a constituent assembly whenever such matters are in future to be considered, even though that assembly be nothing more than the ordinary legislature acting under certain restrictions. At the same time, there may be some elements of the constitution which the constituent assembly wants to remain unalterable by the action of any authority whatsoever. These elements are to be distinguished from the rest, and generally come under the heading of fundamental law. Thus, for example, the American Constitution, the oldest of the existing Constitutions, asserts that by no process of amendment shall any State, without its own consent, be deprived of its equal suffrage in the Senate, while among the Constitutions more recently promulgated, those of the Republics of France and Italy, each containing a clause stating that the republican form of government cannot be the subject of an amending proposal".

It is not necessary to multiply citations from text-books.

A catena of American decisions have been cited before us in support of the contention that the amending power is a supreme power or that it involves political issues which are not justiciable. It would be futile to consider them at length, for after going through them carefully we find that there are no considered judgments of the American Courts, which would have a persuasive effect in that regard. In the Constitution of the United States of America, prepared by Edwards S. Corwin, Legislative Reference Service, Library of Congress, (1953 edn.), the following summary under the heading "Judicial Review under Article V" is given :

> "Prior to 1939, the Supreme Court had taken cognizance of a number of diverse objections to the validity of specific amendments. Apart from holding that official notice of ratification by the several States was conclusive upon the Courts, it had treated these questions as justiciable, although it had uniformly rejected them on the merits. In that year, however, the whole subject was thrown into confusion by the inconclusive decision in Coleman v. Miller. This case came up on a writ of certiorari to the Supreme Court of Kansas to review the denial of a writ of mandamus to compel the Secretary of the Kansas Senate to erase an endorsement on a resolution ratifying the proposed child labour amendment to the Constitution to the effect that it had been adopted by the Kansas Senate. The attempted ratification was assailed on three grounds : (1) that the amendment had been previously rejected by the State Legislature; (2) that it was no longer open to ratification because an unreasonable period of time, thirteen years, had elapsed since its submission to the States, and (3) that the lieutenant governor had no right to cast the deciding vote in the Senate in favour of ratification. Four opinions were written in the Supreme Court, no one of which commanded the support of more than four members of the Court. The majority ruled that the plaintiffs, members of the Kansas State Senate, had a sufficient interest in the controversy to give the federal courts jurisdiction to review the case. Without agreement as to the grounds for their decision, a different majority affirmed the judgment of the Kansas court denying the relief sought. Four members who concurred in the result had voted to dismiss the writ on the ground that the amending process "is political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or

> interference at any point". Whether the contention that the lieutenant governor should have been permitted to cast the deciding vote in favour of ratification presented a justiciable controversy was left undecided, the court being equally divided on the point. In an opinion reported as "the opinion of the Court" but in which it appears that only three Justices concurred, Chief Justice Hughes declared that the writ of mandamus was properly denied because the question as to the effect of the previous rejection of the amendment and the lapse of time since it was submitted to the States were political questions which should be left to Congress. On the same day, the Court dismissed a writ of certiorari to review a decision of the Kentucky Court of Appeals declaring the action of the Kentucky General Assembly purporting to ratifying the child labour amendment illegal and void. Inasmuch as the governor had forwarded the certified copy of the resolution to the Secretary of State before being served with a copy of the restraining order issued by the State Court, the Supreme Court found that there was no longer a controversy susceptible of judicial determination".

This passage, in our view, correctly summarises the American law on the subject. It will be clear therefrom that prior to 1939 the Supreme Court of America had treated the objections to the validity of specific amendments as justiciable and that only in 1939 it rejected them in an inconclusive judgment without discussion. In this state of affairs we cannot usefully draw much from the judicial wisdom of the Judges of the Supreme Court of America.

One need not cavil at the description of an amending power as sovereign power, for it is sovereign only within the scope of the power conferred by a particular constitution. All the authors also agree, that a particular constitution can expressly limit the power of amendment, both substantive and procedural. The only conflict lies in the fact that some authors do not permit implied limitations when the power of amendment is expressed in general words. But others countenance such limitations by construction or otherwise. But none of the authors goes to the extent of saying, which is the problem before us, that when there are conflicting articles couched in widest terms, the court has no jurisdiction to construe and harmonize them. If some of the authors meant to say that - in our view, they did not - we cannot agree with them, for, in that event this Court would not be discharging its duty.

Nor can we appreciate the arguments repeated before us by learned counsel for the respondents that the amending process involves political questions which are, outside the scope of judicial review. When a matter comes before the Court, its jurisdiction does not depend upon the nature of the question raised but on the question whether the said matter is expressly or by necessary implication excluded from its jurisdiction. Secondly, it is not possible to define what is a political question and what is not. The character of a question depends upon the circumstances and the nature of a political society. To put it differently, the court does not decide any political question at all in the ordinary sense of the term, but only ascertains whether Parliament is acting within the scope of the amending power. It may be that Parliament seeks to amend the Constitution for political reasons, but the court in denying that power will not be deciding on political questions, but will only be holding that Parliament has no power to amend particular articles of the Constitution for any purpose whatsoever, be it political or otherwise. We, therefore, hold that there is nothing in the nature of the amending power which enables Parliament to override all the express or implied limitations imposed on that power. As we have pointed out earlier, our Constitution adopted a novel method in the sense that Parliament makes the amendment by legislative process subject to certain restrictions and that the amendment so made being "law" is subject to Art. 13(2).

The next argument is based upon the expression "amendment" in Art. 368 of the Constitution and it is contended that the said expression has a positive and a negative content and that in exercise of the power of amendment Parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument for its better effectuation. If the fundamentals would be amenable to the ordinary process of amendment with a special majority, the argument proceeds, the institutions of the President can be abolished, the parliamentary executive can be removed, the fundamental rights can be abrogated, the concept of federalism can be obliterated and in short the sovereign democratic republic can be converted into a totalitarian system of government. There is considerable force in this argument. Learned and lengthy arguments are advanced to sustain it or to reject it. But we are relieved of the necessity to express out opinion on this all important question as, so far as the fundamental rights are concerned, the question raised can be answered on a narrower basis. This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in the provisions other than in Part III of the Constitution. We do not, therefore, propose to express our opinion in that regard.

In the view we have taken on the scope of Art. 368 vis-a-vis the fundamental rights, it is also unnecessary to express our opinion on the question whether the amendment of the fundamental rights is covered by the proviso to Art. 368.

The result is that the Constitution (Seventeenth Amendment) Act, 1964, inasmuch as it takes away or abridges the fundamental rights is void under Art. 13(2) of the Constitution.

The next question is whether our decision should be given retrospective operation. During the period between 1950 and 1967 i.e., 17 years, as many as 20 amendments were made in our Constitution. But in the context of the present petitions it would be enough if we notice the amendments affecting fundamental right to property. The Constitution came into force on January 26, 1950. The Constitution (First Amendment) Act, 1951, amended Arts. 15 and 19, and Arts. 31-A and 31-B were inserted with retrospective effect. The object of the amendment was said to be to validate the acquisition of zamindaries or the abolition of permanent settlement without interference from courts. The occasion for the amendment was that the High Court of Patna in Kameshwar Singh v. State of Bihar (A.I.R. 1951 Patna 91) held that the Bihar Land Reforms Act (30 of 1950) passed by the State of Bihar was unconstitutional, while the High Courts of Allahabad and Nagpur upheld the validity of corresponding legislations in Uttar Pradesh and Madhya Pradesh respectively. The amendment was made when the appeals from those decisions were pending in the Supreme Court. In Sankari Prasad's case ([1952] S.C.R. 89, 105) the constitutionality of the said amendment was questioned but the amendment was upheld. It may be noticed that the said amendment was not made on the basis of the power to amend fundamental rights recognized by this Court, but only in view of the conflicting decisions of High Courts and without waiting for the final decision from this Court. Article 31-A was again amended by the Constitution (Fourth Amendment) Act, 1955. Under that amendment cl. (2) of Art. 31 was amended and cl. (2-A) was inserted therein. While in the original article 31-A the general expression "any provisions of his Part" was found, in the amended article the scope was restricted only to the violation of Arts. 14, 19 and 31 and 4 other clauses were included, namely, clauses providing for (a) taking over the management of any property by the State for a limited period; (b) amalgamation of two or more corporations; (c) extinguishment or modification of rights of persons interested in corporations; and (d) extinguishment or modification of rights accruing under any agreement, lease or licence relating to minerals, and the definition of "estate" was enlarged in order to include the interests of raiyats and under-raiyats. The expressed object of the amendment was to carry out important social welfare legislations on the desired lines,

to improve the national economy of the State and to avoid serious difficulties raised by courts in that regard. Article 31-A had further been amended by the Constitution (Fourth Amendment) Act, 1955. By the said amendment in the Ninth Schedule to the Constitution entries 14 to 20 were added. The main objects of this amending Act was to distinguish the power of compulsory acquisition or requisitioning of private property and the deprivation of property and to extend the scope of Art. 31-A to cover different categories of social welfare legislations and to enable monopolies in particular trade or business to be created in favour of the State. Amended Art. 31(2) makes the adequacy of compensation not justiciable. It may be said that the Constitution (Fourth Amendment) Act, 1955 was made by Parliament as this Court recognized the power of Parliament to amend Part III of the Constitution; but it can also be said with some plausibility that, as Parliament had exercised the power even before the decision of this Court in Sankari Prasad's case ([1952] S.C.R. 89, 105), it would have amended the Constitution even if the said decision was not given by this Court. The Seventeenth Amendment Act was made on June 20, 1964. The occasion for this amendment was the decision of this Court in Karimbil Kunhikoman v. State of Kerala ([1962] Supp. 1 S.C.R. 829), which struck down the Kerala Agrarian Relations Act IV of 1961 relating to ryotwari lands. Under that amendment the definition of the expression "estate" was enlarged so as to take in any land under ryotwari settlement and any held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans. In the Ninth Schedule the amendment included items 21 to 65. In the objects and reasons it was stated that the definition "estate" was not wide enough, that the courts had struck down many land reform Acts and that, therefore, in order to give them protection the amendment was made. The validity of the Seventeenth Amendment Act was questioned in this Court and was held to be valid in Sajjan Singh's case ([1965] 1 S.C.R. 933). From the history of these amendments, two things appear, namely unconstitutional laws were made and they were protected by the amendment of the Constitution or the amendments were made in order to protect the future laws which would be void but for the amendments. But the fact remains that this Court held as early as in 1951 that Parliament had power to amend the fundamental rights. It may, therefore, be said that the Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, were based upon the scope of the power to amend recognized by this Court. Further the Seventeenth Amendment Act was also approved by this Court.

Between 1950 and 1967 the Legislatures of various States made laws bringing about an agrarian revolution in our country - zamindaries, inams and other intermediary estates were abolished, vested rights were created in tenants, consolidation of holdings of villages was made, ceilings were fixed and the surplus lands transferred to tenants. All these were done on the basis of the correctness of the decisions in Sankari Prasad's case ([1952] S.C.R 89) and Sajjan Singh's case ([1965] 1 S.C.R. 933), namely, that Parliament had the power to amend the fundamental rights and that Acts in regard to estates were outside judicial scrutiny on the ground they infringed the said rights. The agrarian structure of our country has been revolutionised on the basis of the said laws. Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequences Parliament had power to take away fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule. Learned counsel for the petitioners as well as those for the respondents placed us on the horns of this dilemma, for they have taken extreme positions - learned counsel for the petitioners want us to reach the logical position by holding that all the said laws are void and the learned counsel for the respondents persuade us to hold that Parliament has unlimited power and, if it chooses, it can do away with fundamental rights. We do not think that this Court is so helpless. As

the highest Court in the land we must evolve some reasonable principle to meet this extraordinary situation. There is an essential distinction between Constitution and statutes. Comparatively speaking, Constitution is permanent; it is an organic statute; it grows by its own inherent force. The constitutional concepts are couched in elastic terms. Courts are expected to and indeed should interpret, its terms without doing violence to the language to suit the expanding needs of the society. In this process and in a real sense they make laws. Though it is not admitted, the said role of this Court is effective and cannot be ignored. Even in the realm of ordinary statutes, the subtle working of the process is apparent though the approach is more conservative and inhibitive. In the constitutional field therefore, to meet the present extraordinary situation that may be caused by our decision, we must evolve some doctrine which has roots in reason and precedents so that the past may be preserved and the future protected.

There are two doctrines familiar to American Jurisprudence, one is described as Blackstonian theory and the other as "prospective over-ruling", which may have some relevance to the present enquiry. Blackstone in his Commentaries, 69 (15th edn., 1809) stated the common law rule that the duty of the Court was "not to pronounce a new rule but to maintain and expound the old one". It means the Judge does not make law but only discovers or finds the true law. The law has always been the same. If a subsequent decision changes the earlier one, the latter decision does not make law but only discovers the correct principle of law. The result of this view is that it is necessarily retrospective operation. But Jurists, George F. Canfield, Robert Hill Freeman, John Henry Wigmore and Cardozo, have expounded the doctrine of "prospective over-ruling" and suggested it as "a useful judicial tool". In the words of Canfield the said expression means :

> "..... a court should recognize a duty to announce a new and better rule for future transactions whenever the court has reached the conviction that an old rule (as established by the precedents) is unsound even though feeling compelled by stare decisis to apply the old and condemned rule to the instant case and to transactions which had already taken place".

Cardozo, before he became a Judge of the Supreme Court of the United States of America, when he was the Chief Justice of New York State addressing the Bar Association said thus :

The rule (the Blackstonian rule) that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We hive notice however that any one trusting to it hereafter will do at his peril".

The Supreme Court of the United States of America, in the year 1932, after cardozo became an Associate Justice of that Court in Great Northern Railway v. Sunburst Oil & Ref. Co., ([1932] 287 U.S. 358, 366 : 77 L.Ed. 360) applied the said doctrine to the facts of that case. In that case the Montana Court had adhered to its previous construction of the statute in question but had announced that interpretation would not be followed in the future. It was contended before the Supreme Court of the United States of America that a decision of a court over-ruling earlier decision and not giving its ruling retro-active operation violated the due process clause of the 14th Amendment. Rejecting that plea, Cardozo said :

> "This is not a case where a Court in overruling an earlier decision has come to the new ruling of retro-active dealing and thereby has made invalid what was followed in the doing. Even that may often be done though litigants not infrequently have argued

> to the contrary..... This is a case where a Court has refused to make its ruling retro-active, and the novel stand is taken that the Constitution of the United States is infringed by the refusal. We think that the Federal Constitution has no voice upon the subject. A state in defining the elements of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may be so that the decision of the highest courts, though later over-ruled, was law nonetheless for intermediate transactions..... On the other hand, it may hold to the ancient dogma that the law declared by its Courts had a platonic or ideal existence before the act of declaration, in which event, the discredited declaration will be viewed as if it had never been and to reconsider declaration as law from the beginning..... The choice for any state may be determined by the juristic philosophy of the Judges of her Courts, their considerations of law, its origin and nature".

The opinion of Cardozo tried to harmonize the doctrine of prospective over-ruling with that of stare decisis.

In 1940, Hughes, C.J., in Chicot County Drainage District v. Baxter State Bank ([1940] 308 U.S. 371) sated thus :

> "The law prior to the determination of unconstitutionality is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration".

In Griffin v. Illionis ([1956] 351 U.S. 12, 2) the Supreme Court of America reaffirmed the doctrine laid down in Sunburst's case ([1932] 287 U.S. 358, 366 : 77 L.Ed. 360). There, a statute required defendants to submit bills of exceptions as a pre-requisite to an appeal from a conviction; the Act was held unconstitutional in that it provided no means whereby indigent defendants could secure a copy of the record for this purpose. Frankfurter, J., in that context observed :

> "..... in arriving at a new principle, the judicial process is not important to define its scope and limits. Adjudication is not a mechanical exercise nor does it compel 'either/or' determination".

In Wolf v. Colorado ([1948-49] 338 U.S. 25 : 193 L.Ed. 872) a majority of the Supreme Court held that in a prosecution in a State Court for a state crime, the 14th Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. But in Mapp. v. Ohio ([1966] 367 U.S. 643 : 6 L.Ed. (2nd Edn.) 1081) the Supreme Court reversed that decision and held that all evidence obtained by searches and seizure in violation of the 4th Amendment of the Federal Constitution was, by virtue of the due process clause of the 14th Amendment guaranteeing the right to privacy free from unreasonable State instrusion, inadmissible in a State Court. In Linkletter v. Walker ([1965] 381 U.S. 618) the question arose whether the exclusion of the rule enunciated in Mapp v. Ohio ([1966] 367 U.S. 643 : 6 L.Ed. (2nd Edn.) 1081) did not apply to State Court convictions which had become final before the date of that judgment. Mr. Justice Clarke, speaking for the majority observed :

> "We believe that the existence of the Wolf doctrine prior to Mapp is 'an operative' fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration".

> "Mapp had as its prima purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights .....
>
> We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved..... On the other hand, the States relied on Wolf and followed its command. Final judgments of conviction were entered prior to Mapp. Again and again the Court refused to reconsider Wolf and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the Wolf doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims".
>
> "Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witness available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice".

This case has reaffirmed the doctrine of prospective overruling and has taken a pragmatic approach in refusing to give it retroactivity. In short, in America the doctrine of prospective overruling is now accepted in all branches of law, including constitutional law. But the carving of the limits of retrospectivity of the new rule is left to courts to be done, having regard to the requirements of justice. Even in England the Blackstonian theory was criticized by Bentham and Austin. In Austin's Jurisprudence, 4th Ed., at page 65, the learned author says :

> "What hindered Blackstone was 'the childish fiction' employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made, by nobody, existing, I suppose, from eternity, and merely declared from time to time by the Judges".

Though English Courts in the past-accepted the Blackstonian theory and though the House of Lords strictly adhered to the doctrine of 'precedent' in the earlier years, both the doctrines were practically given up by the "Practice Statement (Judicial Precedent)" issued by the House of Lords recorded in (1966) 1 W.L.R. 1234. Lord Gardiner L.C., speaking for the House of Lords made the following observations :

> "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so".

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the

especial need for certainty as to the criminal law".

This announcement is not intended to affect the use of precedent elsewhere than in this House".

It will be seen from this passage that the House of Lords hereafter in appropriate cases may depart from its previous decision when it appears right to do so and in so departing will bear in mind the danger of giving effect to the said decision retroactivity. We consider that what the House of Lords means by this statement is that in differing from the precedents it will do so only without interefering with the transactions that had taken place on the basis of earlier decisions. This decision, to a large extent, modifies the Blackstonian theory and accepts, though not expressly but by necessary implication the doctrine of "prospective overruling".

Let us now consider some of the objections to this doctrine. The objections are : (1) the doctrine involved legislation by courts; (2) it would not encourage parties to prefer appeals as they would not get any benefit therefrom; (3) the declaration for the future would only be obiter; (4) it is not a desirable change; and (5) the doctrine of retroactivity serves as a brake on courts which otherwise might be tempted to be so fascile in overruling. But in our view, these objections are not insurmountable. If a court can over-rule its earlier decision - there cannot be any dispute now that the court can do so - there cannot be any valid reason why it should not restrict its ruling to the future and not to the past. Even if the party filing an appeal may not be benefited by it, in similar appeals which he may file after the change in the law he will have the benefit. The decision cannot be obiter for what the court in effect does is to declare the law but on the basis of another doctrine restricts its scope. Stability in law does not mean that injustice shall be perpetuated. An illuminating article on the subject is found in Pennsylvania Law Review [Vol. 110 p. 650].

It is a modern doctrine suitable for a fast moving society. It does not do away with the doctrine of stare decisis, but confines it to past transactions. It is true that in one sense the court only declares the law, either customary or statutory or personal law. While in strict theory it may be said that the doctrine involves making of law, what the court really does is to declare the law but refuses to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make law. It finds law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on the past transactions. It is left to the discretion of the court to prescribe the limits of the retroactivity and thereby it enables it to mould the relief to meet the ends of justice.

In India there is no statutory prohibition against the court refusing to give retroactivity to the law declared by it. Indeed, the doctrine of res judicata precludes any scope for retroactivity in respect of a subject-matter that has been finally decided between the parties. Further, Indian court by interpretation reject retroactivity to statutory provisions though couched in general terms on the ground that they affect vested rights. The present case only attempts a further extension of the said rule against retroactivity.

Our Constitution does not expressly or by necessary implication speak against the doctrine of prospective over-ruling. Indeed, Arts. 32, 141 and 142 are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice. The only limitation thereon is reason, restraint and injustice. Under Art. 32, for the enforcement of the fundamental rights the Supreme Court has the power to issue suitable directions or orders or writs. Article 141 says that the law declared by the Supreme Court shall be binding on all courts; and Art. 142 enables it in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing

complete justice in any cause or matter pending before it. These articles are designedly made comprehensive to enable the Supreme Court to declare law and to give such directions or pass such orders as are necessary to do complete justice. The expression "declared" is wider than the words "found or made". To declare is to announce opinion. Indeed, the latter involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law. The law declared by the Supreme Court is the law of the land. If so, we do not see any acceptable reason why it, in declaring the law in supersession of the law declared by it earlier, could not restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise that were effected on the basis of the earlier law. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds law but does to make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country.

As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions : (1) The doctrine of prospective over-ruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.

We have arrived at two conclusions, namely, (1) Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights; and (2) this is a fit case to invoke and apply the doctrine of prospective overruling. What then is the effect of our conclusion on the instant case ? Having regard to the history of the amendments, their impact on the social and economic affairs of our country and the chaotic situation that may be brought about by the sudden withdrawal at this stage of the amendments from the Constitution, we think that considerable judicial restraint is called for. We, therefore, declare that our decisions will not affect the validity of the constitution (Seventeenth Amendment) Act, 1964, or other amendments made to the Constitution taking away or abridging the fundamental rights. We further declare that in future Parliament will have no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights. In this case we do not propose to express our opinion on the question of the scope of the amendability of the provisions of the Constitution other than the fundamental rights, as it does not arise for consideration before us. Nor are we called upon to express out opinion on the question regarding the scope of the amendability of Part III of the Constitution otherwise than by taking away or abridging the fundamental rights. We will not also indicate our view one way or other whether any of the Acts questioned can be sustained under the provisions of the Constitution without the aid of Arts. 31A, 31B and the 9th Schedule.

The aforesaid discussion leads to the following results :

(1) The power of the Parliament to amend the Constitution is derived from Arts. 245, 246 and 248 of the Constitution and not from Art. 368 thereof which only deals with procedure. Amendment is a legislative process.

(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, 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 this Court, they were valid.

(4) On the application of the doctrine of 'prospective over-ruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions 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 holds the filed, the validity of the two impugned Acts, namely, the Punjab Security of Land Tenures Act X of 1953, and the Mysore Land Reforms 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.

Before we close, it would be necessary to advert to an argument advanced on emotional plane. It was said that if the provisions of the Constitution could not be amended it would lead to revolution. We have not said that the provisions of the Constitution cannot be amended but what we have said is that they cannot be amended so as to take away or abridge the fundamental rights. Nor can we appreciate the argument that all the agrarian reforms which the Parliament in power wants to effectuate cannot be brought about without amending the fundamental rights. It was exactly to prevent this attitude and to project the rights of the people that the fundamental rights were inserted in the Constitution. If it is the duty of the Parliament to enforce the directive principles, it is equally its duty to enforce them without infringing the fundamental rights. The Constitution-makers thought that it could be done and we also think that the directive principles can reasonably be enforced with the self-regulatory machinery provided by Part III. Indeed both Parts III and IV of the Constitution form an integrated scheme and is elastic enough to respond to the changing needs of the society. The verdict of the Parliament on the scope of the law of social control of fundamental rights is not final, but justiciable. If not so, the whole scheme of the Constitution will break. What we cannot understand is how the enforcement of the provisions of the Constitution can bring about a revolution. History shows that revolutions are brought about not by the majorities but by the minorities and some time by military coups. The existence of an all comprehensive amending power cannot prevent revolutions, if there is chaos in the country brought about by mis-rule or abuse of power. On the other hand, such a restrictive power gives stability to the country and prevents it from passing under a totalitarian or dictatorial regime. We cannot obviously base our decision on such hypothetical or extraordinary situations which may be brought about with or without amendments. Indeed, a Constitution is only permanent and not eternal. There is nothing to choose between destruction by amendment or by revolution, the former is brought about by totalitarian rule, which cannot brook constitutional checks and the other by the discontentment brought about by mis-rule. If either happens, the constitution will be a scrap of paper. Such considerations are out of place in construing the provisions of the Constitution by a court of law.

Nor are we impressed by the argument that if the power of amendment is not all comprehensive there will be no way to change the structure of our Constitution or abridge the fundamental rights even if the whole country demands for such a change. Firstly, this visualizes an extremely

unforeseeable and extravagant demand; but even if such a contingency arises, the residuary power of the parliament may be relied upon to call for a Constituent Assembly for making a new Constitution of radically changing it. The recent Act providing for a poll in Goa, Daman and Diu is an instance of analogous exercise of such residuary power by the Parliament. We do not express our final opinion on this important question.

A final appeal is made to us that we shall not take a different view as the decision in Sankari Prasad's case ([1952] S.C.R. 89, 105) held the field for many years. While ordinarily this Court will be reluctant to reverse its previous decision, it is its duty in the constitutional field to correct itself as early as possible, for otherwise the future progress of the country and the happiness of the people will be at stake. As we are convinced that the decision in Sankari Prasad's case ([1952] S.C.R. 89, 105) is wrong, it is pre-eminently a typical case where this Court should over-rule it. The longer it holds the field the greater will be the scope for erosion of fundamental rights. As it contains the seeds of destruction of the cherished rights of the people the sooner it is over-ruled the better for the country.

This argument is answered by the remarks made by this Court in the recent judgment in The Superintendent and Legal Remembrancer State of West Bengal v. The Corporation of Calcutta ([1967] 2 S.C.R. 170, 176).

> "The third contention need not detain us for it has been rejected by this Court in The Bengal Immunity Company Limited v. The State of Bihar ([1955] 2 S.C.R. 603). There a Bench of 7 Judges unanimously held that there was nothing in the Constitution that prevented the Supreme Court from departing from a previous decision of its own it was satisfied of its error and of its baneful effect on the general interest of the public. If the aforesaid rule of construction accepted by this Court is inconsistent with the legal philosophy of our Constitution, it is our duty to correct ourselves and lay down the right rule. In constitutional matters which affect the evolution of our polity, we must more readily do so than in other branches of law, as perpetuation of a mistake will be harmful to public interests. While continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviation will retard its growth. In this case, as we are satisfied that the said rule of construction is inconsistent with our republican polity and, if accepted, bristles with anomalies, we have no hesitation to reconsider our earlier decision".

In the result the petitions are dismissed, but in the circumstances without costs.

Wanchoo, J. This Special Bench of eleven Judges of this Court has been constituted to consider the correctness of the decision of this Court in Sri Sankari Prasad Singh Deo v. Union of India ([1952] S.C.R. 89) which was accepted as correct by the majority in Sajjan Singh v. State of Rajasthan ([1965] 1 C.S.R. 933).

The reference has been made in three petitions challenging the constitutionality of the Seventeenth Amendment to the Constitution. In one of the petitions, the inclusion of the Punjab Security of Land Tenures Act, (No. X of 1953) in the Ninth Schedule, which makes it immune from attack under any provisions contained in Part III of the Constitution, has been attacked on the ground that the Seventeenth Amendment is in itself unconstitutional. In the other two petitions, the inclusion of the Mysore Land Reforms Act. (No. 10 of 1962) has been attacked on the same grounds. It is not necessary to set out the facts in the three petitions for present purposes. The main argument in all

the three petitions has been as to the scope and effect of Art. 368 of the Constitution and the power conferred thereby to amend the Constitution.

Before we come to the specific points raised in the present petitions, we may indicate the circumstances in which Sankari Prasad's case ([1952] S.C.R. 89) as well as Sajjan Singh's case ([1965] 1 S.C.R. 933) came to be decided and what they actually decided. The Constitution came into force on January 26, 1950. It provides in Part III for certain fundamental rights. Article 31 which is in Part III, as it originally stood, provided for compulsory acquisition of property. By clause (1) it provided that "no person shall be deprived of his property save by authority of law". Clause (2) thereof provided that any law authorising taking of possession or acquisition of property must provide for compensation therefor and either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation was to be determined and paid. Clause (4) made a special provision to the effect that if any Bill pending at the commencement of the Constitution on the Legislature of a State had, after it had been passed by such Legislature, been reserved for the consideration of the President and had received his assent, then such law would not be called in question though it contravened the provisions of cl. (2) relating to compensation. Clause (6) provided that any law of the State enacted not more than eighteen months before the Constitution might be submitted to the President for his certification, and if so certified, it could not be called in question on the ground that it contravened the provisions of cl. (2) of Art. 31 relating to compensation.

These two clauses of Art. 31 were meant to safeguard legislation which either had been passed by Provincial or State legislatures or which was on the anvil of State legislatures for the purpose of agrarian reforms. One such piece of legislation was the Bihar Land Reforms Act, which was passed in 1950. That Act received the assent of the President as required under cl. (6) of Art. 31. It was however challenged before the Patna High Court and was struck down by that court on the ground that it violated Art. 14 of the Constitution. Then there was an appeal before this Court, but while that appeal was pending, the First Amendment to the Constitution was made.

We may briefly refer to what the First Amendment provided for. It was the First Amendment which was challenged and was upheld in Sankari Prasad's case ([1952] S.C.R. 89). The First Amendment contained a number of provisions; but it is necessary for present purposes only to refer to those provisions which made changes in Part III of the Constitution. These changes related to Arts. 15 and 19 and in addition, provided for insertion of two Articles numbered 31-A and 31-B in Part III. Article 31-A provided that no law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall be deemed to be void on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by any provision in part III. The word "estate" was also defined for the purpose of Art. 31-A. Further Article 31-B, provided for validation of certain Acts and Regulations and specified such Acts and Regulations in the Ninth Schedule, which was for the first time added to the Constitution. The ninth Schedule then contained 13 Acts, all relating to estates, passed by various legislatures of the Provinces or States. It laid down that those Acts and Regulations would not be deemed to be void or ever to have become void, on the ground that they were inconsistent with or took away or abridged any of the rights conferred by any provision of Part III. It further provided that notwithstanding any judgment, decree or order of any court or tribunal to the contrary, all such Acts and Regulations subject to the power of any competent legislature to repeal or amend them, continue in force.

This amendment, and in particular Arts. 31-A and 31-B were immediately challenged by various writ petitions in this Court and these came to be decided on October 5, 1951 in Sankari Prasad's case

([1952] S.C.R. 89). The attack on the validity of the First Amendment was made on various grounds; but three main grounds which were taken were, firstly, that amendments to the Constitution made under Art. 368 were liable to be tested under Art. 13(2); secondly that in any case as Arts. 31-A and 31-B inserted in the Constitution by the First Amendment affected the power of the High Court under Art. 226 and of this Court under Articles 132 and 136, the amendment required ratification under the proviso to Art. 368; and, thirdly, that Arts. 31-A and 31-B were invalid on the ground that they related to matters covered by the State List, namely, item 18 of List II, and could not therefore be passed by Parliament. This Court rejected all the three contentions. It held that although "law" would ordinarily include constitutional law, there was a clear demarcation between ordinary law made in the exercise of legislative power and constitutional law made in the exercise of constituent power, and in the context of Art. 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power; in consequence Art. 13(2) did not affect amendments made under Art. 368. It further held that Arts. 31-A and 31-B did not curtail the power of the High Court under Art. 226 or of this court under Arts. 132 and 136 and did not require ratification under the proviso contained in Art. 368. Finally, it was held that Arts. 31-A and 31-B were essentially amendments to the Constitution and Parliament as such had the power to enact such amendments. In consequence, the First Amendment to the Constitution was upheld as valid.

After this decision, there followed sixteen more amendments to the Constitution till we come to the Seventeenth Amendment, which was passed on June 20, 1964. There does not seem to have been challenge to any amendment up to the Sixteenth Amendment, even though two of them, namely, the Fourth Amendment and the Sixteenth Amendment, contained changes in the provisions of Part III of the Constitution. Further the nature of these amendments was to add to, or alter or delete various other provisions of the Constitution contained in Part III thereof. On December 5, 1961, came the decision of this Court by which the Kerala Agrarain Reforms Act (No. 4 of 1961), passed by the Kerala legislature, was struck down, among other grounds, for the reason that ryotwari lands in South India were not estates within the meaning of Art. 31-A and therefore acquisition of ryotwari land was not protected under Art. 31-A of the Constitution : [see Karimbil Kunhikoman v. State of Kerala ([1962] Supp. 1 S.C.R. 829)]. This decision was followed by the Seventeenth Amendment on June 20, 1964. By this amendment, changes were made in Art. 31-A of the Constitution and 44 Acts were included in the Ninth Schedule to give them complete protection from attack under any provision of Part III of the Constitution. Practically all these Acts related to land tenures and were concerned with agrarian reforms. This amendment was challenged before this Court in Sajjan Singh's case ([1965] 1 S.C.R. 933). The points then urged were that as Art. 226 was likely to be affected by the Seventeenth Amendment, it required ratification under the proviso to Art. 368 and that the decision in Sankari Prasad's case ([1952] S.C.R. 89) which had negatived this contention required reconsideration. It was also urged that the Seventeenth Amendment was legislation with respect to land and Parliament had no right to legislate in that behalf, and further that as the Seventeenth Amendment provided that the Acts put in the Ninth Schedule would be valid in spite of the decision of the Courts, it was unconstitutional. This Court by majority of 3 to 2 upheld the correctness of the decision in Sankari Prasad's case ([1952] S.C.R 89). It further held unanimously that the Seventeenth Amendment did not require ratification under the proviso to Art. 368 because of its indirect effect on Art. 226, and that Parliament in enacting the Amendment was not legislating with respect to land and that it was open to Parliament to validate legislation which had been declared invalid by courts. Finally this Court held by majority that the power conferred by Art. 368 included the power to take away fundamental rights guaranteed by Part III and that the power to amend was a very wide power and could not be controlled by the literal dictionary meaning of the

word "amend", and that the word "law" in Art. 13(2) did not include an amendment of the Constitution made in pursuance of Art. 368. The minority however doubted the correctness of the view taken in Sankari Prasad's case ([1952] S.C.R. 89) to the effect that the word "law" in Art. 13(2) did not include amendment to the Constitution made under Art. 368 and therefore doubted the competence of Parliament to make any amendment to Part III of the Constitution. One of the learned Judges further doubted whether making a change in the basic features of the Constitution could be regarded merely as an amendment or would, in effect, be re-writing a part of the Constitution, and if so, whether it could be done under Art. 368. It was because of this doubt thrown on the correctness of the view taken in Sankari Prasad's case ([1952] S.C.R. 89) that the present reference has been made to this Special Bench.

As the question referred to this Bench is of great constitutional importance and affected legislation passed by various States, notice was issued to the Advocates General of all States and they have appeared and intervened before us. Further a number of persons who were also affected by the Seventeenth Amendment have been permitted to intervene. The arguments on behalf of the petitioners and the interveners who support them may now be briefly summarised.

It is urged that Art. 368 when it provides for the amendment of the Constitution merely contains the procedure for doing so and that the power to make amendment has to be found in Art. 248 read with item 97 of List I. It is further urged that the word "amendment" in Art. 368 means that the provisions in the Constitution can be changed so as to improve upon them and that this power is of a limited character and does not authorise Parliament to make any addition to, alteration of or deletion of any provision of the Constitution, including the provision contained in Part III. So Art. 368 authorise only those amendments which have the effect of improving the Constitution. Then it is urged that amendment permissible under Art. 368 is subject to certain implied limitations and these limitations are that basic features of the Constitution cannot be amended at all. An attempt was made to indicate some of these basic features, as, for example, the provisions in Part III, the federal structure, the republican character of the State, elected Parliament and State Legislatures on the basis of adult suffrage, control by the judiciary and so on, and it is said that an amendment under Art. 368 is subject to the implied limitations that these basic features and others of the kind cannot be changed. Thus in effect the argument is that there is a very limited power of amendment under the Constitution.

It is further urged that apart from these implied limitations, there is an express limitation under Art. 13(2) and the word "law" in that Article includes an amendment of the Constitution. The argument thus in the alternative is that as the word "law" in Art. 13(2) includes a constitutional amendment, no amendment can be made in Part III under Art. 368 which would actually take away or abridge the rights guaranteed under that Part. In effect, it is said that even if there are no implied limitations to amend the Constitution under Art. 368, Art. 13(2) is an express limitation insofar as the power to amend Part III is concerned and by virtue of Art. 13(2) the rights guaranteed under Part III cannot be taken away or abridged under Art. 368, though it is conceded that Part III may be amended by way of enlarging the rights contained therein.

Another line of argument is that in any case it was necessary to take action under the proviso to Art. 368 and as that was not done the Seventeenth Amendment is not valid. It is urged that Art. 226 is seriously affected by the provisions contained in the Seventeenth Amendment and that amounts to an amendment of Art. 226 and in consequence action under the proviso was necessary. It is also urged that Art. 245 was equally affected by the addition of a number of Acts in the Ninth Schedule read with Art. 13(2) and therefore also it was necessary to take action under the proviso. It is further

urged that it was not competent for Parliament to amend the Constitution by putting a large number of Acts in the Ninth Schedule as the power to legislate with respect to land is solely within the competence of State Legislatures and that is another reason why the addition to the Ninth Schedule read with Art. 31-B should be struck down.

Lastly an argument had been advanced, which we may call the argument of fear. It is said that if Art. 368 is held to confer full power to amend each and every part of the Constitution as has been held in Sankari Prasad's case ([1952] S.C.R. 89). Parliament may do all kinds of things, which were never intended, under this unfettered power and may, for example, abolish elected legislatures, abolish the President or change the present form of Government into a Presidential type like the United States Constitution or do away with the federal structure altogether. So it is urged that we should interpret Art. 368 in such a way that Parliament may not be able to do all these things. In effect this argument of fear has been put forward to reinforce the contention that this Court should hold that there are some implied limitations on the amending power and these implied limitations should be that there is no power any where in the Constitution to change the basic features of the Constitution to which reference has already been made. This is in brief the submission on behalf of the petitioners and the interveners who support them.

The submission on behalf of the Union of India and the States may now be summarised. It is urged that Art. 368 not only provides procedure for amendment but also contains in it the power to amend the Constitution. It is further urged that the word "amendment" in law does not merely mean making such changes in the Constitution as would improve it but includes the power to make any addition to the Constitution, any alteration of any of the existing provisions and its substitution by another provision, and any deletion of any particular provision of the Constitution. In effect, it is urged that even if the word "amendment" used in Art. 368 does not take in the power to abrogate the entire Constitution and replace it by another new Constitution, it certainly means that any provisions of the Constitution may be changed and this change can be in the form of addition to, alteration of or deletion of any provision of the Constitution. So long therefore as the Constitution is not entirely abrogated and replaced by a new Constitution at one stroke, the power of amendment would enable Parliament to make all changes in the existing Constitution by addition, alteration or deletion. Subject only to complete repeal being not possible, the power of amendment contained in Art. 368 is unfettered. It is further urged that there can be no implied limitations on the power to amend and the limitations if any on this power must be found in express terms in the Article providing for amendment. It is conceded that there may be an express limitation not merely in the Article providing for amendment but in some other part of the Constitution. But it is said that if that is so, there must be a clear provision to that effect. In the absence of express limitations, therefore, there can be no implied limitations on the power to amend the Constitution contained in Art. 368 and that power will take in all changes whether by way of addition, alteration or deletion, subject only to this that the power of amendment may not contain the power to abrogate and repeal the entire Constitution and substitute it with a new one.

It is then urged that there is no express provision in Art. 368 itself so far as any amendment relating to the substance of the amending power is concerned; the only limitations in Art. 368 are as to procedure and courts can only see that the procedure as indicated in Art. 368 is followed before an amendment can be said to be valid. It is further urged that the word "law" in Art. 13 does not include an amendment of the Constitution and only means law as made under the legislative provisions contained in Chapter I of Part XI read with Chapters II and III of Part V of the Constitution and Chapters III and V of Part VI thereof. In effect it is a law which is made under the Constitution which is included in the word "law" in Art. 13(2) and not an amendment to the

Constitution under Art. 368.

As to Articles 226 and 245 and the necessity of taking action under the proviso to Art. 368, it is urged that there is no change in Arts. 226 and 245 on account of any provision in the Seventeenth Amendment and therefore no action under the proviso was necessary. It is only direct change in Arts. 226 and 245 which would require following the procedure as to ratification or at any rate such change in other Articles which would have the effect of directly compelling change in Arts. 226 and 245 and that in the present case no such direct compulsion arises.

Lastly as to the argument of fear it is urged that there is always a provision with respect to amendment in written federal Constitutions. Such a provision may be rigid or flexible. In our Constitution Art. 368 provides for a comparatively flexible provision for amendment and there is no reason to make it rigid by implying any limitations on that power. Further there is no reason to suppose that all those things will be done by Parliament which are being urged to deny the power under Art. 368 which flows naturally from its terms.

Besides the above, reliance is also placed on behalf of the Union of India and the States on the doctrine of stare decisis. It is urged that since the decision of this Court in Sankari Prasad's case ([1952] S.C.R. 89), sixteen further amendments have been made by Parliament on the faith of that decision involving over 200 Articles of the Constitution. The amendments relating to Part III have been mainly with respect to agrarian reforms resulting in transfers of title of millions of acres of land in favour of millions of people. Therefore, even though Sankari Prasad's case ([1952] S.C.R. 89) has stood only for fifteen years there has been a vast agrarian revolution effected on the faith of that decision and this Court should not now go back on what was decided in that case. Further, besides the argument based on state decisis, it is urged on the basis of certain decisions of this Court that the unanimous decision in Sankari Prasad's case ([1952] S.C.R. 89) which had stood practically unchallenged for about 15 years till the decision in Sajjan Singh's case ([1965] 1 S.C.R. 933), should not be over-ruled unless it is found to be incorrect by a large majority of the Judges constituting this Special Bench. It is urged that if the present Bench is more or less evenly divided it should not over-rule, the unanimous decision in Sankari Prasad's case ([1952] S.C.R. 89) __by a majority of one.

We shall first take Art. 368. It is found in Part XX of the Constitution which is headed "Amendment of the Constitution" and is the only Article in that Part. That Part thus provides specifically for the amendment of the Constitution, and the first question that arises is whether it provides power for the amendment of the Constitution as well as the procedure for doing so. It is not disputed that the procedure for amendment of the Constitution is to be found in Art. 368, but what is in dispute is whether Art. 368 confers power also in that behalf. Now the procedure for the amendment of the Constitution is this. The amendment is initiated by the introduction of a Bill in either House of Parliament. The Bill has to be passed in each House by a majority of the total membership of that House and by a majority of not less two-third of the members of that House present and voting. After it is so passed, it has to be presented to the President for his assent. On such presentation if the President sents to the Bill, Art. 368 provides that the Constitution shall stand amended in accordance with the terms of the Bill. Further there is a proviso for ratification with respect to certain Articles and other provisions of the Constitution including Art. 368, and those matters can only be amended if the Bill passed by the two Houses by necessary majority is ratified by the legislatures of not less than one-half of the States by resolutions to that effect. In such a case the Bill cannot be presented for his assent to the President until necessary ratification is available. But when the necessary ratification has been made, the Bill with respect to these matters is then presented to

the President and on his assent being given, the Constitution stands amended in accordance with the terms of the Bill.

The argument is that there is no express provision in terms in Art. 368 conferring power on Parliament to amend the Constitution, and in this connection our attention has been invited to an analogous provision in the Constitution of Ireland in Art. 46, where cl. 1 provides that any provision of the Constitution may be amended in the manner provided in that Article, and then follows the procedure for amendment in clauses 2 to 5. Reference is also made to similar provisions in other constitution, but it is unnecessary to refer to them. It is urged that as Art. 368 has nothing comparable to cl. 1 of Art. 46 of the Irish Constitution, the power to amend the Constitution is not in Art. 368 and must be found elsewhere. We are prepared to accept this argument. The fact that Art. 368 is not in two parts, the first part indicating that the Constitution shall be amended in the manner provided thereafter, and the second part indicating the procedure for amendment, does not mean that the power to amend the Constitution is not contained in Art. 368 itself. The very fact that a separate Part has been devoted in the Constitution for amendment thereof and there is only one Article in that Part shows that both the power to amend and the procedure for amendment are to be found in Art. 368. Besides, the words "the Constitution shall stand amended in accordance with the terms of the Bill" in Art. 368 clearly in our opinion provide for the power to amend after the procedure has been followed. It appears that our Constitution-makers were apparently thinking of economy of words and elegance of language in enacting Art. 368 in the terms in which it appears and that is why it is not in two parts on the model of Art. 46 of the Irish Constitution. But there can in our opinion be no doubt, when a separate Part was provided headed "Amendment of the Constitution" that the power to amend the Constitution must also be contained in Art. 368 which is the only Article in that Part. If there was any doubt about the matter, that doubt in our opinion is resolved by the words to which we have already referred, namely, "the Constitution shall stand amended in accordance with the terms of the Bill". These words can only mean that the power is there to amend the Constitution after the procedure has been followed.

It is however urged that the power to amend the Constitution is not to be found in Art. 368 but is contained in the residuary power of Parliament in Art. 248 read with item 97 of List I. It is true that Art. 248 read with item 97 of List I, insofar as it provides for residuary power of legislation, is very wide in its scope, and the argument that the power to amend the Constitution is contained in this provision appears prima facie attractive in view of the width of the residuary power. But we fail to see why when there is a whole Part devoted to the amendment of the Constitution the power to amend should not be found in that Part, if it can be reasonably found there and why Art. 368 should only be confined to providing for procedure for amendment. It is true that the marginal note to Art. 368 is "procedure for amendment of the Constitution", but the marginal note cannot control the meaning of the words in the Article itself, 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. If we were to compare the language of cls. 2 to 5 of Art. 46 of the Irish Constitution which prescribes the procedure for amendment, we find no words therein comparable to these words in Art. 368. These words clearly are comparable to cl. 1 of Art. 46 of the Irish Constitution and must be read as conferring power on Parliament to amend the Constitution. Besides it is remarkable in contrast that Art. 248 read with List I does not in terms mention the amendment of the Constitution. While therefore there is a whole Part devoted to the amendment of the Constitution, we do not find any specific mention of the amendment of the Constitution in Art. 248 or in any entry of List I. It would in the circumstances be more appropriate to read the power in Art. 368 in view of the words which we have already referred to than in Art. 248 read with item 97 of List I. Besides it is a historical fact to which we can refer that originally the intention was to vest

residuary power in States, and if that intention had been eventually carried out, it would have been impossible for any one to argue that the power to amend the Constitution was to be found in the residuary power if it had been vested in the States and not in the Union. The mere fact that during the passage of the Constitution by the Constituent Assembly, residuary power was finally vested in the Union would not therefore mean that it includes the power to amend the Constitution. On a comparison of the scheme of the words in Art. 368 and the scheme of the words in Art. 248 read with item 97 of List I, therefore, there is no doubt in our mind that both the procedure and power to amend the Constitution are to be found in Art. 368 and they are not to be found in Art. 248 read with item 97 of List I which provides for residuary legislative power of Parliament.

There is in our opinion another reason why the power to amend the Constitution cannot be found in Art. 248 read with item 97 of List I. The Constitution is the fundamental law and no law passed under mere legislative power conferred by the Constitution can affect any change in the Constitution unless there is an express power to that effect given in the Constitution itself. But subject to such express power given by the Constitution itself the fundamental law, namely the Constitution, cannot be changed by a law passed under the legislative provisions contained in the Constitution as all legislative acts passed under the power conferred by the Constitution must conform to the Constitution can make no change therein. There are a number of Article in the Constitution, which expressly provide for amendment by law, as, for example, 3, 4, 10, 59(3), 65(3), 73(2), 97, 98(3), 106, 120(2), 135, 137, 142(1), 146(2), 148(3), 149, 169, 171(2), 186, 187(3), 189(3), 194(3), 195, 210(2), 221(2), 225, 229(2), 239(1), 241(3), 283(1) and (2), 285(2), 287, 300(1), 313, 345, 373, Sch. V. cl. 7 and Sch. VI cl. 21; and so far as these Articles are concerned they can be amended by parliament by ordinary law-making process. But so far as the other Articles are concerned they can only be amended by amendment of the Constitution under Art. 368. Now Art. 245 which gives power to make law for the whole or any part of the territory of India by Parliament is "subject to the provisions of this Constitution" and any law made by Parliament whether under Art. 246 read with List I or under Art. 248 read with item 97 of List I must be subject to the provisions of the Constitution. If therefore the power to amend the Constitution is contained in Art. 248 read with item 97 List I, that power has to be exercised subject to the provisions of the Constitution and cannot be used to change the fundamental law (namely, the Constitution) itself. But it is argued that Art. 368 which provides a special procedure for amendment of the Constitution should be read along with Arts. 245 and 248, and so read it would be open to amend any provisions of the Constitution by law passed under Art. 248 on the ground that Art. 248 is subject to Art. 368 and therefore the two together give power to Parliament to pass a law under Art. 248 which will amend even those provisions of the Constitution which are not expressly made amendable by law passed under the legislative power of Parliament. This in our opinion is arguing in a circle. If the fundamental law (i.e. the Constitution) cannot be changed by any law passed under the legislative power contained therein, for legislation so passed must conform to the fundamental law, we fail to see how a law passed under the residuary power, which is nothing more than legislative power conferred on Parliament under the Constitution, can change the Constitution (namely, the fundamental law) itself.

We may in this connection refer to the following passage in The Law and the Constitution by W. Ivor Jennings (1933 Ed.) at p. 51 onwards :-

> "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".

It is because of this difference between the fundamental law (namely, the Constitution) and the law passed under the legislative provisions of the Constitution that it is not possible in the absence of an express provision to that effect in the fundamental law to change the fundamental law by ordinary legislation passed thereunder, for such ordinary legislation must always conform to the fundamental law (i.e. the Constitution). If the power to amend the Constitution is to be found in Art. 248 read with item 97 of List I, it will mean that ordinary legislation passed under the fundamental law would amend that law and this cannot be done unless there is express provision as in Art. 3 etc. to that effect. In the absence of such express provision any law passed under the legislative powers granted under the fundamental law cannot amend it. So if we were to hold that the power to amend the Constitution is comprised in Art. 248, that would mean that no amendment of the Constitution would be possible at all except to the extent expressly provided in various Articles to which we have referred already, for the power to legislate under Art. 245 read with Art. 248 is itself subject to the Constitution. Therefore, reading Art. 368 and considering the scheme of the legislative powers conferred by Articles 245 and 248 read with item 97 of List I, this to our mind is clear, firstly that the power to amend the Constitution is to be found in Art. 368 itself, and secondly, that the power to amend the Constitution can never reside in Art. 245 and Art. 248 read with item 97 of List I, for that would make any amendment of the Constitution impossible except with respect to express provisions contained in certain Articles thereof for amendment by law.

We may in this connection add that all this argument that power to amend the Constitution is to be found in Art. 245 and Art. 248 read with item 97 of List I has been based on one accidental circumstance, and that accidental circumstance is that the procedure for amendment of the Constitution contained in Art. 368 is more or less assimilated to the procedure for making ordinary laws under the Constitution. The argument is that constitutional amendment is also passed by the two Houses of Parliament, and is assented to by the President like ordinary legislation, with this difference that a special majority is required for certain purposes and a special majority plus ratification is required for certain other purposes. It may be admitted that the procedure for amendment under Art. 368 is somewhat similar to the procedure for passing ordinary legislation under the Constitution. Even so, as pointed out by Sir Ivor Jennings under in the passage already quoted, there is a clear separation between constitutional law and the rest of the law and that must never be forgotten. An amendment to the Constitution is a constitutional law and as observed in Sankari Prasad's case ([1952] S.C.R. 89) is in exercise of constituent power; passing of ordinary law is in exercise of ordinary legislative power and is clearly different from the power to amend the Constitution. We may in this connection refer, for example, to Art. V of the U.S. Constitution, which provides for the amendment thereof. It will be clearly seen that the power contained in Art. V of the U.S. Constitution is not ordinary legislative power and no one can possibly call it ordinary legislative power, because the procedure provided for the amendment of the Constitution in Art. V differs radically from the procedure provided for ordinary legislation, for example, the President's assent is not required for constitutional amendment under Art. V of the U.S. Constitution. Now if Art. 368 also had made a similar departure from the procedure provided for ordinary legislation, it could never have been said that Art. 368 merely contained the procedure for amendment and that what emerges after that procedure is followed is ordinary law of the same quality and nature as emerges after following the procedure for passing ordinary law. If, for example, the assent of the President which is to be found in Art. 368 had not been there and the Constitution would have stood amended after the Bill had been passed by the two Houses by necessary majority and after ratification by not less than one-half of the States where so required, it could never have been

argued that the power to amend the Constitution was contained in Arts. 245 and 248 read with item 97 of List I and Art. 368 merely contained the procedure.

We are however of opinion that we should look at the quality and nature of what is done under Art. 368 and not lay so much stress on the similarity of the procedure contained in Art. 368 with the procedure for ordinary law-making. If we thus look at the quality and nature of what is done under Art. 368, we find that it is the exercise of constituent power for the purpose of amending the Constitution itself and is very different from the exercise of ordinary legislative power for passing laws which must be in conformity with the Constitution and cannot go against any provision thereof, unless there is express provision to that effect to which we have already referred. If we thus refer to the nature and quality of what is done under Art. 368, we immediately see that what emerges after the procedure in Art. 368 is gone through is not ordinary law which emerges after the legislative procedure contained in the Constitution is gone through. Thus Art. 368 provides for the coming into existence of what may be called the fundamental law in the form of an amendment of the Constitution and therefore what emerges after the procedure under Art. 368 is gone through is not ordinary legislation but an amendment of the Constitution which becomes a part of the fundamental law itself, by virtue of the words contained in Art. 368 to the effect that the Constitution shall stand amended in accordance with the terms of the Bill.

It is urged in this connection on behalf of the Union of India that even though the assent of the President is required under Art. 368, the President must assent thereto and cannot withhold his assent as is possible in the case of ordinary law in view of Art. 111 of the Constitution, for the word "that he withholds assent therefrom" found in Art. 111 are not to be found in Art. 368. It is however difficult to accept the argument on behalf of the Union that the President cannot withhold his assent when a Bill for amendment of the Constitution is presented to him. Article 368 provides that a Bill for the amendment of the Constitution shall be presented to the President for his assent. It further provides that upon such assent by the President, the Constitution shall stand amended. That in our opinion postulates that if assent is not given, the Constitution cannot be amended. Whether a President will ever withhold his assent in our form of Government is a different matter altogether, but as we read Art. 368 we cannot hold that the President is bound to assent and cannot withhold his assent when a Bill for amendment of the Constitution is presented to him. We are of opinion that the President can refuse to give his assent when a Bill for amendment of the Constitution is presented to him, the result being that the Bill altogether falls, for there is no specific provision for anything further to be done about the Bill in Art. 368 as there is in Art. 111. We may in this connection refer to the different language used in cl. 5 of Art. 46 of the Irish Constitution which says that "a Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof". It will be seen therefore that if the intention under Art. 368 had been that the President cannot withhold his assent, we would have found language similar in terms to that in cl. 5 of Art. 46 of the Irish Constitution.

We thus see that in one respect at any rate Art. 368 even on its present terms differs from the power of the President in connection with ordinary legislation under the Constitution and that is if the President withholds his assent the Bill for amendment of the Constitution immediately falls. We cannot accept that the procedure provided under the proviso to Art. 111 can apply in such a case, for this much cannot be disputed that so far as the procedure provided for amendment of the Constitution is concerned we must look to Art. 368 only and nothing else. In any case the mere fact that the procedure in Art. 368 is very much assimilated to the procedure for passing ordinary legislation is no reason for holding that what emerges after the procedure under Art. 368 is followed

is ordinary law and no more. We repeat that we must look at the quality and nature of what is done under Art. 368, and that is, the amendment of the Constitution. If we look at that we must hold that what emerges is not ordinary law passed under the Constitution but something which has the effect of amending the fundamental law itself which could not be done by ordinary legislative process under the Constitution unless there is express provision to that effect. We have already referred to such express provisions in various Articles, but Art. 368 cannot be treated as such an Article, for it deals specifically with the amendment of the Constitution as a whole.

It is also remarkable to note in this connection that the word "law" which has been used in so many Articles of the Constitution has been avoided apparently with great care in Art. 368. We again refer to the concluding words of the main part of Art. 368 which says that the "Constitution shall stand amended in accordance with the terms of the Bill". Now it is well-known that in the case of ordinary legislation as soon as the Bill is passed by both Houses and has received the assent of the President it becomes an Act. But Art. 368 provides that as soon as the Bill for amendment of the Constitution has been passed in accordance with the procedure provided therein the Constitution shall stand amended in accordance with the terms of the Bill. These words in our opinion have significance of their own. It is also remarkable that these words clearly show the difference between the quality of what emerges after the procedure under Art. 368 is followed and what happens when ordinary law-making procedure is followed. Under Art. 111, in the case of ordinary law-making when a Bill is passed by the two Houses of Parliament it is presented to the President and the President shall declare either that he assents to the Bill or that he withholds assent therefrom. But it is remarkable that Art. 111 does not provide that when the Bill has been assented to by the President it becomes an Act. The reason for this is that the Bill assented to by the President though it may become law is still not declared by Art. 111 to be a law, for such law is open to challenge in courts on various grounds, namely, on the ground that it violates any fundamental rights, or on the ground that parliament was not competent to pass it or on the ground that it is in breach of any provision of the Constitution. On the other hand we find that when a Bill for the amendment of the Constitution is passed by requisite majority and assented to by the President, the Constitution itself declares that the Constitution shall stand amended in accordance with the terms of the Bill. Thereafter what courts can see is whether the procedure provided in Art. 368 has been followed, for if that is not done, the Constitution cannot stand amended in accordance with the terms of the Bill. But if the procedure has been followed, the Constitution stands amended, and there is no question of testing the amendment of the Constitution thereafter on the anvil of fundamental rights or in any other way as in the case of ordinary legislation. In view of all this we have no doubt that even though by accident the procedure provided in the Constitution for amendment thereof is very akin to the procedure for passing ordinary legislation, the power contained in Art. 368 is still not ordinary legislative power but constituent power for the specific purpose of amendment of the Constitution; and it is the quality of that power which determines the nature of what emerges after the procedure in Art. 368 has been followed and what thus emerges is not ordinary legislation but fundamental law which cannot be tested, for example, under Art. 13(2) of the Constitution or under any other provision of the Constitution.

We may briefly refer to an argument on behalf of the Union of India that the amending power contained in Art. 368 is the same sovereign power which was possessed by the Constituent Assembly when it made the Constitution and therefore it is not subject to any fetters of any kind. We do not think it necessary to enter into the academic question as to where sovereignty resides and whether legal sovereignty is in the people and political sovereignty in the body which has the power to amend the Constitution and vice versa. In our view the words of Art. 368 clearly confer the power to amend the Constitution and also provide the procedure for doing so, and that in our

opinion is enough for the purpose of deciding whether the Seventeenth Amendment is valid or not. Further as we have already stated, 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 conferred on Parliament by various other provisions in the Constitution. So long as this distinction is kept in mind Parliament would have the power under Art. 368 to amend the Constitution and what Parliament does under Art. 368 is not ordinary law-making which is subject to Art. 13(2) or any other Article of the Constitution. What is the extent of the power conferred on Parliament and whether there are any limitations on it - express or implied - will be considered by us presently. But we have no doubt, without entering into the question of sovereignty and of whether Art. 368 confers the same sovereign power on Parliament as the Constituent Assembly had when framing the Constitution, that Art. 368 does confer power on Parliament subject to the procedure provided therein for amendment of any provision of the Constitution.

This bring us to the scope and extent of the power conferred for amendment under Art. 368. It is urged that Art. 368 only gives power to amend the Constitution. Recourse is had on behalf of the petitioners to the dictionary meaning of the word "amendment". It is said that amendment implies and means improvement in detail and cannot take in any change in the basic features of the Constitution. Reference in this connection may be made to the following meaning of the word "amend" in the Oxford English Dictionary, namely, "to make professed improvements in a measure before Parliament; formally, to alter in detail, though practically it may be to alter its principle, so as to thwart it". This meaning at any rate does not support the case of the petitioners that amendment merely means such change as results in improvement in detail. It shows that in law, though amendment may professedly be intended to make improvements and to alter only in detail, in reality, it may make a radical change in the provision which is amended. In any case, as was pointed out in Sajjan Singh's ([1965] 1 S.C.R. 933) case the word "amend" or "amendment" is well understood in law and will certainly include any change whether by way of addition or alteration or deletion of any provision in the Constitution. There is no reason to suppose that when the word "amendment" of the Constitution was being used in Art. 368, the intention was to give any meaning less than what we have stated above. To say that "amendment" in law only 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. It is therefore in our opinion impossible to introduce in the concept of amendment as used in Art. 368 any idea of improvement as to details of the Constitution. The word "amendment" used in Art. 368 must therefore be given its full meaning as used in law and that means that by amendment an existing Constitution or law can be changed, and this change can take the form either of addition to the existing provisions, or alteration of existing provisions and their substitution by others or deletion of certain provisions altogether. In this connection reference has been made to contrast certain other provisions of the Constitution, where, for example, the word "amend" has been followed by such words as "by way of addition, variance or repeal" (see Sixth Schedule, paragraph 21) and more or less similar expressions in other Articles of the Constitution. It is very difficult to say why this was done. But the fact that no such words appear in Art. 368 does not in our mind make any difference, for the meaning of the word "amendment" in law is clearly as indicated above by us and the presence or absence of explanatory words of the nature indicated above do not in our opinion make any difference.

The question whether the power of amendment given by Art. 368 also includes the power to abrogate the Constitution completely and to replace it by an entire new Constitution, does not really arise in the present case, for the Seventeenth Amendment has not done any such thing and need not be considered. It is enough to say that it may be open to doubt whether the power of amendment

contained in Art. 368 goes to the extent of completely abrogating the present Constitution and substituting it by an entirely new one. But short of that, we are of opinion that the power to amend includes the power to add any provision to the Constitution, to alter any provision and substitute any other provision in its place and to delete any provision. The Seventeenth Amendment is merely in exercise of the power of amendment as indicated above and cannot be struck down on the ground that it goes beyond the power conferred on Parliament to amend the Constitution by Art. 368.

The next question that arises is whether there is any limitation on the power of amendment as explained by us above. Limitations may be of two kinds, namely, express or implied. So far as express limitations are concerned, there are none such in Art. 368. When it speaks of the "amendment of this Constitution" it obviously and clearly refers to amendment of any provision thereof, including the provisions contained in Part III relating to fundamental rights. Whether Art. 13(2) is an express limitation on the power of amendment will be considered by us later, but so far as Art. 368 is concerned there are no limitations whatsoever in the matter of substance on the amending power and any provision of the Constitution, be it in Part III and any other Part, can be amended under Art. 368.

The next question is whether there are any implied limitations on the power of amendment contained in Art. 368, and this brings us to the argument and there are certain basic features of the Constitution which cannot be amended at all and there is an implied limitation on the power of amendment contained in Art. 368 so far as these basic features are concerned. We may in this connection refer to the view prevailing amongst jurists in the United States of America as to whether there are any implied limitations on the power of amendment contained in Art. V of the U.S. Constitution. There are two lines of thought in this matter in the United States. Some jurists take the view that there are certain implied limitations on the power to amend contained in Art. V of the U.S. Constitution. These are said to be with respect to certain basic features, like, the republican character of Government, the federal structure etc. On the other hand, it appears that the more prevalent view amongst jurists in the United States is that there are no implied limitations on the scope of the amending power in Art. V of the U.S. Constitution. Willis on the Constitutional Law of the United States of America (1936 Edition) says that probably the correct position is that the amending power embraces everything; in other words there are no legal limitations whatever on the power of amendment, except what is expressly provided in Art. V : (see discussion on pp. 122 to 127). Even with respect to these express limitations. Munro in The Government of the United States (Fifth Edition) at p. 77 says that even these express limitations can be removed and one of the ways of doing so is "to remove the exception by a preliminary amendment and thus clear the way for further action". Besides, as a matter of fact there is no decision of the Supreme Court of the United States holding that there are implied limitations on the power of amendment contained in Art. V of the U.S. Constitution and all amendments so far made in the United States have been upheld by the Supreme Court there in the few cases that have been taken to it for testing the validity of the amendments.

We have given careful consideration to the argument that certain basic features of our Constitution cannot be amended under Art. 368 and have come to the conclusion that no limitations can be and should be implied upon the power of amendment under Art. 368. One reason for coming to this conclusion is that if we were to accept that certain basic features of the Constitution cannot be amended under Art. 368, it will lead to the position that any amendment made to any Article of the Constitution would be liable to challenge before courts on the ground that it amounts to amendment of a basic feature. Parliament would thus never be able to know what amendments it can make in the Constitution and what it cannot; for, till a complete catalogue of basic features of the

Constitution is available, it would be impossible to make any amendment under Art. 368 with any certainty that it would be upheld by courts. If such an implied limitation were to be put on the power of amendment contained in Art. 368, it would only be the court which would have the power to decide what are basic features of the Constitution and then to declare whether a particular amendment is valid or not on the ground that it amends a particular basic feature or not. 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. The power to amend being a constituent power cannot in our opinion for these reasons be held subject to any implied limitations thereon on the ground that certain basic features of the Constitution cannot be amended. We fail to see why if there was any intention to make any part of the Constitution unamendable, the Constituent Assembly failed to indicate it expressly in Art. 368. If, for example, the Constitution-makers intended certain provisions in the Constitution, and Part III in particular, to be not amendable, we can see no reason why it was not so stated in Art. 368. On the clear words of Art. 368 which provides for amendment of the Constitution which means any provision thereof, we cannot infer any implied limitations on the power of amendment of any provision of the Constitution, be it basic or otherwise. Our conclusion is that constituent power, like that contained in Art. 368, can only be subject to express limitations and not to any implied limitations so far as substance of the amendments are concerned and in the absence of anything in Art. 368 making any provision of the Constitution unamendable, it must be held that the power to amend in Art. 368 reaches every provision of the Constitution and can be used to amend any provision thereof, provided the procedure indicated in Art. 368 is followed.

Copious reference were made during the course of arguments to debates in Parliament and it is urged that it is open to this Court to look into the debates in order to interpret Art. 368 to find out the intention of the Constitution-makers. We are of opinion that we cannot and should not look into the debates that took place in the Constituent Assembly to determine the interpretation of Art. 368 and the scope and extent of the provision contained therein. It may be conceded that historical background and perhaps what was accepted or what was rejected by the Constituent Assembly while the Constitution was being framed, may be taken into account in finding out the scope and extent of Art. 368. But we have no doubt that what was spoken in the debates in the Constituent Assembly cannot and should not be looked into in order to interpret Art. 368. Craies on Statute Law (Sixth Edition) at p. 128 says that "it is not permissible in discussing the meaning of an obscure enactment, to refer to 'parliamentary history' of a statute, in the sense of the debates which took place in Parliament when the statute was under consideration", and support his view with reference to a large number of English cases. The same is the view in Maxwell on Interpretation of Statutes, (11th Edition) p. 26. Crawford on Statutory Construction (1940 Edition) at p. 340 says that resort may not be had to debates to ascertain legislative intent, though historical background in which the legislation came to be passed, can be taken into consideration.

In Administrator General of Bengal v. Prem Lal Mullick ([1895] 22 I.A.107), the Privy Council held that "proceedings of the legislature cannot be referred to as legitimate aids to the construction of the Act in which they result".

In Baxter v. Commissioner of Taxation ([1907] 4 C.L.R. 1087), it was said that reference to historical facts can be made in order to interpret a statute. There was however no reference to the debates in order to arrive at the meaning of a particular provision of the Constitution there in dispute.

In A. K. Gopalan v. the State of Madras ([1950] S.C.R. 88), Kania C.J. referring to the debates and

reports of the Drafting Committee of the Constituent Assembly in respect of the words of Art. 21 observed at p. 110 that they might not be read to control the meaning of the Article. In that case all that was accepted was that "due process of law" which was a term used in the U.S. Constitution, was not accepted for the purpose of Art. 21 which used the word "the procedure established by law". Patanjali Sastri J. (at p. 202) also refused to look at the debates and particularly the speeches made in order to determine the meaning of Art. 21. Fazl Ali, J. (at p. 158) was of opinion that the proceedings and discussions in the Constituent Assembly were not relevant for the purpose of construing the expressions used in Art. 21.

Again in The Automobile Transport (Rajasthan) Limited v. the State of Rajasthan ([1963] 1 S.C.R. 491), this Court looked into the historical background but refused to look into the debates in order to determine the meaning of the provisions of the Constitution in dispute in that case.

We are therefore of opinion that it is not possible to read the speeches made in the Constituent Assembly in order to interpret Art. 368 or to define its extent and scope and to determine what it takes in and what it does not. As to the historical facts, namely, what was accepted or what was avoided in the Constituent Assembly in connection with Art. 368, it is enough to say that we have not been able to find any help from the material relating to this. There were proposals for restricting the power of amendment under Art. 368 and making fundamental rights immune therefrom and there were counter proposals before the Constituent Assembly for making the power of amendment all-embracing. They were all either dropped or negatived and in the circumstances are of no help in determining the interpretation of Art. 368 which must be interpreted on the words thereof as they finally found place in the Constitution, and on those words we have no doubt that there are no implied limitations of any kind on the power to amend given therein.

An argument is also raised that limitations on the power to amend the Constitution can be found in the preamble to the Constitution. As to that we may refer only to in re : the Berubari Union and Exchange of Enclaves ([1960] 3 S.C.R. 251) with respect to the value of the preamble to the Constitution and its importance therein. It was observed in that case unanimously by a Bench of nine Judges that "although it may be correct to describe the preamble as a key to the mind of the Constitution-makers, it forms no part of the Constitution and cannot be regarded as the source of any substantive power which the body of the Constitution alone can confer on the Government, expressly or by implication. This is equally true to prohibitions and limitations". The Court there was considering whether the preamble could in any way limit the power of Parliament to cede any part of the national territory and held that it was not correct to say that "the preamble could in any way limit the power of Parliament to cede parts of the national territory". On a parity of reasoning we are of opinion that the preamble cannot prohibit or control in any way or impose any implied prohibitions or limitations on the power to amend the Constitution contained in Art. 368.

This brings us to the question whether the word "law" in Art. 13(2) includes an amendment of the Constitution, and therefore, there is an express provision in Art. 13(2) which at least limits the power of amendment under Art. 368 to this extent that by such amendment fundamental rights guaranteed by Part III cannot be taken away or abridged. We have already pointed out that in Sankari Prasad's case ([1952] S.C.R. 89) as well as Sajjan Singh's case ([1965] 1 S.C.R. 933), it has already been held, in one case unanimously and in the other by majority, that the word "law" in Art. 13(2) does not include an amendment of the Constitution, and it is the correctness of this view which is being impugned before this Bench, Article 13 is in three parts. The first part lays down that "all laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this Part, shall, to the extent of

such inconsistency, be void". Further all previous constitutional provisions were repealed by Art. 395 which provided that "the Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed". Thus it is clear that the word "law" in Art. 13(1), does not include any law in the nature of a constitutional provision, for no such law remained after the repeal in Art. 395.

Then comes the second part of Art. 13, which says that "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 third part defines the word "law" for the purpose of Art. 13; the definition is inclusive and not exhaustive. It is because of the definition in cl. (3) of Art. 13 being inclusive that it is urged that the word "law" in Art. 13(2) includes an amendment of the Constitution also. Now we see no reason why if the word "law" in Art. 13(1) relating to past laws does not include any constitutional provision the word "law" in cl. (2) would take in an amendment of the Constitution, for it would be reasonable to read the word "law" in Art. 13(2) includes an amendment of the 13. But apart from this consideration, we are of opinion that the word "law" in Art. 13(2) could never have been intended to take in an amendment of the Constitution. What Art. 13(2) means is that a law made under the constitutional provisions would be tested on the anvil of Part III and if it takes away or abridges rights conferred by Part III it would be void to the extent of the contravention. There are many Articles in the Constitution which provides directly for making law in addition to Articles 245, 246, 248, etc. and the three Lists and Art. 13(2) prohibits the State from making any law under these provisions. We see no difficulty in the circumstances in holding that Art. 13(2) when it talks of the State making any law, refers to the law made under the provisions contained in Ch. I of Part XI of the Constitution beginning with Art. 245 and also other provisions already referred to earlier. Article 246 provides that Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. Article 246(1) gives exclusive power to Parliament to make laws with respect to subjects enumerated in List I. Article 246(3) gives exclusive power to State legislatures to make laws with respect to List II. Article 248(1) gives exclusive power to Parliament to make laws with respect to any matter nor enumerated in the Concurrent List or the State List. We are referring to these provisions merely to show that the various provisions in Chapter I of Part XI provide for making laws, and these laws are all laws which are made under the legislative power conferred on Parliament or on the State legislatures under the Constitution. Therefore when in Art. 13(2) it is said that the State shall not make any law (State there including Parliament and legislature of each State), its meaning could only take in laws made by Parliament and State legislatures under the powers conferred under Chapter I Part XI and also other provisions already referred to earlier. We have already held that the power to amend the Constitution is to be found in Art. 368 along with the procedure and that such power is not to be found in Art. 248 read item 97 of List I. Therefore an amendment of the Constitution is not an ordinary law made under the powers conferred under Chapter I of Part XI of the Constitution and cannot be subject to Art. 13(2) where the word "law" must be read as meaning law made under the ordinary legislative power. We have already referred to a larger number of Articles where Parliament is given the power to make law with respect to those Articles. So far as this power of Parliament is concerned it is ordinary legislative power and it will certainly be subject to Art. 13(2). But there can in our opinion be no doubt that 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.

We have already pointed out that there are no implied limitations on the power to amend under Art. 368 and it is open to Parliament under that Article to amend any part of the Constitution, including Part III. It is worth remembering that a whole Part XX is devoted by the Constitution-makers to the subject of amendment of the Constitution. If it was their intention that Part III of the Constitution will not be liable to amendment by way of abridgement or abrogation under the amending power contained in Art. 368 we see no reason why an express provision to that effect was not made in Art. 368. We cannot see what prevented the Constituent Assembly from making that clear by an express provision in Art. 368. It is however said that it was not necessary to say so in Art. 368, because the provision was already made in Art. 13(2). We are unable to accept this contention, for we have no doubt that Art. 13(2), when it refers to making of laws is only referring to the ordinary legislative power and not to the constituent power which results in amendment of the Constitution. In any case it seems to us somewhat contradictory that in Art. 368 power should have been given to amend any provision of the Constitution without any limitations but indirectly that power is limited by using words of doubtful import in Art. 13(2). It is remarkable that in Art. 13(2) there is no express provision that amendment of the Constitution, under Art. 368, would be subject thereto. It seems strange indeed that no express provision was made in Part XX in this matter and even in Art. 13(2) no express provision is made to this effect, and in both places the matter is left in a state of uncertainty. It is also remarkable that in Art. 368 the word "law", which we find so often used in so many Articles of the Constitution is conspicuously avoided, and it is specifically provided that after the procedure has been gone through the Constitution shall stand amended in accordance with the terms of the Bill. This language of Art. 368 is very significant and clearly makes a distinction between a constitutional Amendment and an ordinary law passed as an Amending Act. The validity of law has to be determined at the time when the Bill actually matures into an Act and not at the stage while it is still a Bill. The provision in Art. 368 has the effect that when a Bill amending the Constitution receives the assent of the President, the Constitution stands amended in accordance with the terms of the Bill. The Constitution thus stands amended in terms of the Bill if the Bill has been introduced, passed and assented to by the President in accordance with the procedure laid down in Art. 368 and not as a result of the Bill becoming an Amendment Act introducing amendment in the Constitution. The provision that the Constitution shall stand amended in terms of the Bill was thus clearly intended to indicate that the amendment of the Constitution is not dependent on the Bill being treated as a law or an Act duly passed by Parliament. Thus it is clear that by indicating that the Constitution is to stand amended in accordance with the terms of the Bill, Art. 368 clearly envisages that the power of amendment of the Constitution stands on an entirely different footing from an ordinary law made by Parliament in exercise of its legislative power.

If we keep in mind this difference between a constitutional amendment or constitutional law and an ordinary amending Act or law, it should not be difficult to hold that when Art 13(2) speaks of the State making a law, it is referring to ordinary law made under the powers conferred by Art. 245 etc. reads with various Lists and various provisions of the Constitution where express provision to that effect has been made and is not referring to the amendment of the Constitution which is made under the constituent power. Once it is held that the power to amend is found in Art. 368 and is not to be found in Art. 248 read with item 97 of List I, it must follow that the power to amend the Constitution under Art. 368 is a different power (namely, constituent power) and when Art. 13(2) speaks of making law, it can only refer to making ordinary law, particularly when we compare the words of Art. 13(2) (namely, the State shall not make any law) and the words of Arts. 245, 248, and 250 (which all speak of Parliament making law, State-legislatures making law, and so on).

Lastly, as the power to amend is in Art. 368 and of the words, as they stand in that Article, that power is unfettered and includes the power to amend Part III, it is strange that power should be

limited by putting an interpretation on the word "law" in Art. 13(2), which would include constitutional law also. There is nothing to suggest this even in the inclusive definition of the words "law" and "laws in force" in Art. 13(3). Besides it is conceded on behalf of the petitioners that Art. 368 gives power to amend Part III, but that power is only to amend one way, namely, towards enlargement of the rights contained therein, and not the other way, namely, for abridging or taking away the rights contained therein. We must say that it would require a very clear provision in the Constitution to read the power to amend the Constitution relating to Part III in this manner. We cannot find that clear provision in Art. 13(2). We repeat that what the Constituent Assembly was taking the trouble of providing a whole Part for amendment of the Constitution and when the words in Art. 368 clearly give the power to amend the Constitution and are subject to no implied limitations and contain no express unitations, it is strange indeed that it should have omitted to provide in that very Article that Part III is not liable to amendment thereunder. In any case if the power of amendment conferred to the words of Art. 368 is unfettered, we must avoid any inconsistency between that power and the provision contained in Art. 13(2). We avoid that in keeping with the unfettered power in Art. 368 by reading the word "law" in Art. 13(2) as meaning law passed under ordinary legislative power and thus not including an amendment of the Constitution therein. The words in Art. 13(2) are in our opinion not specific and clear enough to take in the power of amendment under Art. 368 and must be confined only to the power of ordinary law-making contained in Arts. 245 etc., and other provisions of the Constitution read with various Lists. We have therefore no hesitation in agreeing with the view taken in Sankari Prasad's case ([1952] S.C.R. 89) which was upheld by the majority in Sajjan Singh's case ([1965] 1 S.C.R. 933).

The next argument is that action under the proviso to Art. 368 is necessary as the Seventeenth Amendment affects the power of the High Court contained in Art. 226. It is said that by including various Acts in the Ninth Schedule and making them immune from challenge under the provisions contained in Part III, the power of the High Court under Art. 226 is affected inasmuch as the High Court cannot strike down any of the Acts included in the Ninth Schedule on the ground that they take away or abridge the rights conferred by Part III. So it is said that there has been a change in Art. 226 and it was necessary that the Seventeenth Amendment should have been ratified by more than half the States under the proviso. A similar argument was raised in Sankari Prasad's case ([1952] S.C.R. 89) and was turned down unanimously. The same argument was again raised in Sajjan Singh's case ([1965] 1 S.C.R. 933) and was also turned down. Now ratification is required under the proviso if the amendment seeks to make any change in various provisions mentioned therein and one such provision is Art. 226. The question therefore is whether the Seventeenth Amendment makes any change in Art. 226 and whether this change has to be a direct change in the words of Art. 226 or whether merely because there may be some effect by the Seventeenth Amendment on the content of the power in Art. 226 it will amount to change in Art. 226. We are of opinion that when the proviso lays down that there must be ratification when there is any change in the entrenched provisions, including Art. 226, it means that there must be actual change in the terms of the provision concerned. If there is no actual change directly in the entrenched provision, no ratification is required, even if any amendment of any other provision of the Constitution may have some effect Indirectly on the entrenched provisions mentioned in the proviso. But it is urged that there may be such a change in some other provision as would seriously affect an entrenched provision, and in such a case ratification should be necessary. This argument was also dealt with in the majority judgment in Sajjan Singh's case ([1965] 1 S.C.R. 933) where the doctrine of pith and substance was applied and it was held that where the amendment in any other Article so affects the entrenched Article as to amount to an amendment therein, then ratification may be necessary, even though the entrenched Article may not be directly touched. Perhaps the use of the doctrine of pith

and substance in such a case is not quite apt. But what was meant in Sajjan Singh's case ([1965] 1 S.C.R. 933) was that if there is such an amendment of an unentrenched Article that it will directly affect an entrenched Article and necessitate a change therein, then recourse must be had to ratification under the proviso. We may illustrate this by two examples. Article 226 lays down inter alia that the High Court shall have power to issue writs for the enforcement of any of the rights conferred by Part III and for any other purpose. Now assume that Part III is completely deleted by amendment of the Constitution. If that takes place, it will necessitate an amendment of Art. 226 also and deletion therefrom of the words "for the enforcement of any of the rights conferred, by Part III". We have no doubt that if such a contingency ever happens and Part III is completely deleted, Parliament will amend Art. 226 also and that will necessitate ratification under the proviso. But suppose Parliament merely deletes Part III and does not make the necessary consequential amendment in Art. 226, it can then be said that deletion of Part III necessitates change in Art. 226 also, and therefore in such a case ratification is necessary, even though Parliament may not have in fact provided for amendment of Art. 226.

Take another example. Article 54 is an entrenched Article and provides for the election of the President. So is Art. 55 which provides for the manner of election. Article 52 which lays down that there shall be a President is on the other hand not an entrenched Article. It is said that Art. 52 may be altered and something else may be substituted in its place and that would not require ratification in terms as Art. 52 is not among the entrenched Articles. But we are of opinion that if Parliament amends Art. 52, it is bound to make consequential amendments in Arts. 54 and 55 which deal with the election of the President and the manner thereof and if it is so the entire amendment must be submitted for ratification. But suppose Parliament merely amends Art. 52 and makes no change in Arts. 54 and 55 (a supposition which is impossible to visualise). In that case it would in our opinion be right to hold that Art. 52 could not be altered by abolition of the office of the President without necessitating a change in Arts. 54 and 55 and in such a case if Art. 52 alone is altered by Parliament, to abolish the office of President, it will require ratification.

These two examples will show where alteration or deletion of an unentrenched Article would necessitate amendment of an entrenched Article, and in such a case if Parliament takes the incredible course of amending only the unentrenched Article and not amending the entrenched Article, courts can say that ratification is necessary even for amending the unentrenched Article, for it directly necessitates a change in an entrenched Article. But short of that we are of opinion that merely because there is some effect indirectly on an entrenched Article by amendment of an unentrenched Article it is not necessary that there should be ratification in such circumstances also.

Besides, let us consider what would happen if the argument on behalf of the petitioners is accepted that ratification necessary whenever there is even indirect effect on an entrenched Article by amending an unentrenched Article. Take the case of Art. 226 itself. It gives power to the High Court not only to issue writs for the enforcement of fundamental rights but to issue them for any other purpose. Writs have thus been issued by High Courts for enforcing other rights conferred by ordinary laws as well as under other provisions of the Constitution, like Arts. 301 and 311. On this argument if any change is made in Arts. 301 and 311 there is bound to be an effect on Art. 226 and therefore ratification would be necessary, even though both Arts. 301 and 311 are not entrenched in the proviso. Further, take an ordinary law which confers certain rights and it is amended and those rights are taken away. Article 226 would be clearly affected. Before the amendment those rights may be enforced through Art. 226 while after the amendment the rights having disappeared there can be no enforcement thereof. Therefore, on this argument even if there is amendment of ordinary law there would be an effect on Art. 226 and it must therefore be amended every time even when

ordinary law is changed and the entire procedure under Art. 368 must be gone through including ratification under the proviso. It is however said that when ordinary law is amended, rights disappear and therefore there is no question of enforcement thereof; if that is correct with respect to ordinary law, it is in our opinion equally correct with respect to the amendment of an unentrenched provision of the Constitution. The answer given in Sankari Prasad's case ([1922] S.C.R. 89) to this argument was that Art. 226 remained just the same as it was before, and only a certain class of cases had 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 would be no occasion thereafter for the exercise of their power in such cases. We respectfully agree with these observations and are of opinion that merely because there is some indirect effect on Art. 226 it was not necessary that the Seventeenth Amendment should have been ratified by more than one half of the States. It is only in the extreme case, the examples of which we have given above, that an amendment of an unentrenched Article without amendment of entrenched Article might be had for want of ratification, and this is what was intended by the majority judgment in Sajjan Singh's case (1965] 1 S.C.R. 933), when it applied the doctrine of pith and substance in these circumstances. The argument that ratification is necessary as Art. 226 is indirectly affected has therefore no force and must be rejected. This is equally true with respect to the power of this Court under Arts. 132 and 136.

Then it is urged that Art. 245 is enlarged by the Seventeenth Amendment inasmuch as State legislatures and Parliament were freed from the control of Part III in the matter of certain laws affecting, for example, ryotwari lands, and therefore as Art. 245 is an entrenched Article there should have been ratification under the proviso. The argument in our opinion is of the same type as the argument with respect to the effect on Art. 226 and our answer is the same, namely, that there is no direct effect on Art. 245 by the amendment and the indirect effect, if any, does not require that there should have been ratification in the present case.

It is then urged that ratification is necessary as Art. 31-B deals with State legislation and in any case Parliament cannot make any law with respect to Acts which were put in the Ninth Schedule and therefore Parliament could not amend the Constitution in the manner in which it was done by making additions in the Ninth Schedule, both for want of ratification and for want of legislative competence. The answer to this argument was given in Sankari Prasad's case ([1952] S.C.R. 89) and it was observed there that -

> "Article 31-A and 31-B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of Art. 13 read with other relevant Articles of Part III. The new Articles being thus essentially amendments of the Constitution, Parliament had the power of enacting them. That laws thus saved relate to matters covered by List II does not in any way affect the position. It was said that Parliament could not validate a law which it had no power to enact. The proposition holds good where the validity of the impugned provision turns on whether the subject-matter, falls within or without the jurisdiction of the legislature which passed it. But to make a law which contravenes the Constitution, constitutionally valid is a matter of constitutional amendment and as such it falls within the exclusive power of Parliament".

We respectfully agree with these observations. They succinctly put the legal and constitutional position with respect to the validity of Arts. 31-A and 31-B. It seems to us that Art. 31-B in particular is a legislative drafting device which compendiously puts in one place amendments which

would otherwise have been added to the Constitution under various Articles in Part III. The laws in the Ninth Schedule have by the device of Art. 31-B been excepted from the various provisions in Part III, which affected them and this exception could only be made by Parliament. The infirmity in the Acts put in the Ninth Schedule was apprehended to be a constitutional infirmity on the ground that those laws might take away or abridge rights conferred by Part III. Such a constitutional infirmity could not be cured by State legislatures in any way and could only be cured by Parliament by constitutional amendment. What Parliament in fact did by including various Acts in the Ninth Schedule read with Art. 31-B was to amend the various provisions in Part III, which affected these Acts by making them an exception to those provisions in Part III. This could only be done by Parliament under the constituent power it had under Art. 368 and there was no question of the application of the proviso in such a case, for Parliament was amending Part III only with respect to these laws. The laws had already been passed by State legislatures and it was their constitutional infirmity, if any, which was being cured by the device adopted in Art. 31-B read with the Ninth Schedule, the amendment being only of the relevant provisions of Part III which was compendiously put in one place in Art. 31-B. Parliament could alone do it under Art. 368 and there was no necessity for any ratification under the proviso, for amendment of Part III is not entrenched in the proviso.

Nor is there any force in the argument that Parliament could not validate those laws by curing the constitutional infirmity because they dealt with land which is in List II of the Seventh Schedule to the Constitution over which State Legislatures have exclusive legislative power. The laws had already been passed by State legislatures under their exclusive powers; what has been done by the Seventeenth Amendment is to cure the constitutional infirmity, if any, in these laws in relation to Part III. That could only be done by Parliament and in so doing Parliament was not encroaching on the exclusive legislative power of the State. The States had already passed the laws and all that was done by the Seventeenth Amendment was to cure any constitutional infirmity in the laws by including them in the Ninth Schedule read with Art. 31-B. We must therefore reject the argument that the Seventeenth Amendment required ratification because laws put in the Ninth Schedule were State laws. We must equally reject the argument that as these laws dealt with land, which in the exclusive legislative power of State legislature. Parliament could not cure the constitutional infirmity, if any, in these laws by putting them in the Ninth Schedule.

We now come to what may be called the argument of fear. It is urged that if Art. 368 confers complete power to amend each and every provision of the Constitution - as we have held that it does - frightful consequences will follow on such an interpretation. If Parliament is clothed with such a power to amend the Constitution it may proceed to do away with fundamental rights altogether, it may abolish elected legislatures, it may change the present form of Government, it may do away with the federal structure and create a unitary state instead, and so on. It is therefore argued that we should give a limited interpretation to the power of amendment contained in Art. 368, as otherwise we shall be giving power to Parliament to destroy the Constitution itself.

This argument is really a political argument and cannot be taken into account in interpreting Art. 368 when its meaning to our mind is clear. But as the argument was urged with a good deal of force on behalf of the petitioners and was met with equal force on behalf of the Union and the States, we propose to deal with it briefly. Now, if this argument means that Parliament may abuse its power of amendment conferred by Art. 368, all that need be said in reply is that mere possibility of abuse cannot result in courts withholding the power if the Constitution grants it. It is well-settled so far as ordinary laws are concerned that mere possibility of abuse will not induce courts to hold that the power is not there, if the law is valid and its terms clearly confer the power. The same principle in

our opinion applies to the Constitution. If the Constitution gives a certain power and its terms are clear, there is no reason why that power should be withheld simply because of possibility of abuse. If we may say so, possibility of abuse of any power granted to any authority is always there; and if possibility of abuse is a reason for withholding the power, no power whatever can ever be conferred on any authority, be it executive, legislative or even judicial. Therefore, the so-called fear of frightful consequences, which has been urged on behalf of the petitioners (if we hold, as we do, that the power to amend the Constitution is unfettered by any implied limitations), is no ground for withholding the power, for we have no reason to suppose that Parliament on whom such power is conferred will abuse it. Further even if it abuses the power of constitutional amendment under Art. 368 the check in such circumstances is not in courts but is in the people who elect members of Parliament. The argument for giving a limited meaning to Art. 368 because of possibility of abuse must therefore be rejected.

The other aspect of this argument of fear is that we should not make the Constitution too flexible so that it may be open to the requisite majority with the requisite ratification to make changes too frequently in the Constitution. It is said that the Constitution is an organic document for the governance of the country and it is expected to endure and give stability to the institution which it provides. That is undoubtedly so and this is very true of a written federal Constitution. But a perusal of various Constitutions of the world shows that there are usually provisions for amendment of the Constitution in the Constitution itself. This power to amend a Constitution may be rigid or flexible in varying degrees. Jurists have felt that where the power to amend the Constitution is made too rigid and the people outgrow a particular Constitution and feel that it should be amended but cannot do so because of the rigidity of the Constitution, they break the Constitution, and this breaking is more often than not by violent revolution. It is admitted by even those writers on the United States Constitution who are of the view that there are certain basic features which cannot be amended and who would thus make the U.S. Constitution even more rigid than it is, that howsoever rigid the Constitution may be its rigidity will not stop the people from breaking it if they have outgrown it and this breaking is, generally speaking, by violent revolution. So, making our Constitution rigid by putting the interpretation which the petitioners want us to put on it will not stop the frightfulness which is conjured up before us on behalf of the petitioners. If any thing, an interpretation which will make our Constitution rigid in the manner in which the petitioner want the amending power in Art. 368 to be interpreted will make a violent revolution, followed by frightfulness of which the petitioners are afraid, a nearer possibility than an interpretation which will make it flexible.

It is clear that our Constitution-makers wanted to avoid making the Constitution too rigid. It is equally clear that they did not want to make an amendment of the Constitution too easy. They preferred an intermediate course which would make the Constitution flexible and would still not allow it to be amended too easily. That is why Art. 368 provides for special majorities of the two Houses for the purpose of amendment of the Constitution. Besides it also provides for ratification by more than half the States in case of entrenched provisions in the proviso. Subject to these limitations, the Constitution has been made moderately flexible to allow any change when the people feel that change is necessary. The necessity for special majorities in each House separately and the necessity for ratification by more than half the States in certain cases appear to us to be sufficient safeguards to prevent too easy change in the Constitution without making it too rigid. But it is said that in the last sixteen years, a large number of amendments have been made to the Constitution and that shows that the power to amend is much too easy and should be restricted by judicial interpretation. Now, judicial interpretation cannot restrict the power on the basis of a political argument. It has to interpret the Constitution as it finds it on the basis of well-known canons of construction and on the terms of Art. 368 in particular. If on those terms it is clear - as we

think it is - that power to amend is subject to no limitations except those to be expressly found in the Constitution, courts must give effect to that. The fact that in the last sixteen years a large number of amendments could be made and have been made is in our opinion due to the accident that one party has been returned by electors in sufficient strength to be able to command the special majorities which are required under Art. 368, not only at the Centre but also in all the States. It is because of this circumstance that we have had so many amendments in the course of the last sixteen years. But that in our opinion is no ground for limiting the clear words of Art. 368.

The power of amendment contained in a written federal Constitution is a safety valve which to a large extent provides for stable growth and makes violent revolution more or less unnecessary. It has been said by text-book writers that the power of amendment, though it allows for change, also makes a Constitution long-lived and stable and serves the needs of the people from time to time. If this power to amend is made too rigid it loses its value as a safety valve. The more rigid a Constitution the more likely it is that people will outgrow it and throw it over-board violently. On the other hand, if the Constitution is flexible (though it may not be made too easy to modify it) the power of amendment provides for stability of the Constitution itself and for ordered progress of the nation. If therefore there had to be a choice between giving an interpretation to Art. 368 which would make our Constitution rigid and giving an interpretation which would make it flexible, we would prefer to make it flexible, so that it may endure for a long period of time and may, if necessary, be amended from time to time in accordance with the progress in the ideas of the people for whom it is meant. But we feel that it is not necessary to go to this extent, for that would be entering into the field of politics. As we see the terms of Art. 368, we are clearly of opinion that the Constitution-makers wanted to make our Constitution reasonably flexible and that the interpretation that we have given to Art. 368 is in consonance with the terms thereof and the intention of those who made it. We therefore reject the argument of fear altogether.

This brings us to the argument of stare decisis raised on behalf of the Union of India and the States. The argument is put thus. After the decision of the Patna High Court invalidating the Bihar Land Reforms Act, 1950, Parliament passed the First Amendment to the Constitution. That Amendment was challenged in this Court by a number of writ petitions and was upheld in Sankari Prasad's case ([1952] S.C.R. 89) in 1951. That case practically stood unchallenged till Sajjan Singh's case ([1965] 1 S.C.R. 933) in 1964 after the Seventeenth Amendment was passed. Thus in the course of these fifteen years or so a large number of State Acts were passed on the basis of the First Amendment by which in particular Arts. 31-A and 31-B were introduced in the Constitution. It is said that though Sankari Prasad's case ([1952] S.C.R. 89) has stood for less than 15 years there have been so many laws dealing with agrarian reforms passed on the basis of the First Amendment which was upheld by this Court that the short period for which that case has stood should not stand in the way of this Court acting on the principle of stare decisis. The reason for this is that an agrarian revolution has taken place all over the country after the First Amendment by State laws passed on the faith of the decision of this Court in Sankari Prasad's case ([1952] S.C.R. 89). This agrarian revolution has led to millions of acres of land having changed hands and millions of new titles having been created. So it is urged that the unanimous decision in Sankari Prasad's case ([1952] S.C.R. 89), which was challenged when the Seventeenth Amendment was passed and was upheld by majority in Sajjan Singh's case ([1965] 1 S.C.R. 933) should not now be disturbed as its disturbance would create chaos in the country, particularly in the agrarian sector which constitutes the vast majority of the population in this country.

We are of opinion that there is force in this argument. Though the period for which Sankari Prasad's case ([1952] S.C.R. 89) has stood unchallenged is not long, the effects which have followed in the

passing of State laws on the faith of that decision, are so overwhelming that we should not disturb the decision in that case. It is not disputed that millions of acres of land have changed hands and millions of new titles in agricultural lands have been created and the State laws dealing with agricultural lands have been passed in the course of the last fifteen years after the decision in Sankari Prasad's case ([1952] S.C.R. 89) have brought about an agrarian revolution. Agricultural population constitutes a vast majority of the population in this country. In these circumstances it would in our opinion be wrong to hold now that Sankari Prasad's case ([1952] S.C.R. 89) was not correctly decided and thus disturb all that has been done during the last fifteen years and create chaos into the lives of millions of our countrymen who have benefited by these laws relating to agrarian reforms. We would in the circumstances accept the argument on behalf of the Union of India and the States that this is the fittest possible case in which the principle of stare decisis should be applied. On this basis also, apart from our vies that Sankari Prasad's case ([1952] S.C.R. 89) was in fact rightly decided, we would not interfere with that decision now.

But it is urged that instead of following the principle of stare decisis which would make the decision in Sankari Prasad's case ([1952] S.C.R. 89) good for all times, we should follow the doctrine of prospective over-ruling, which has been evolved by some United States courts so that everything that has been done up to now, including the Seventeenth Amendment would be held good but in future it would not be open to Parliament to amend Part III by taking away or abridging any of the rights conferred thereby and, if the argument as to implied limitations on the power to amend is accepted, further limit the power of Parliament to amend what may be called basic features of the Constitution. We must say that we are not prepared to accept the doctrine of prospective over-ruling. We do not know whether this doctrine which it is urged should be applied to constitutional amendment would also be applied to amendments of ordinary laws. We find it difficult to visualise what would be the effect of this doctrine if it is applied to amendment of ordinary laws. We have so far been following in this country the well-known doctrine that courts declare law and that a declaration made by a court is the law of the land and takes effect from the date the law came into force. We would on principle be loath to change that well-known doctrine and supersede it by the doctrine of prospective over-ruling. Further it seems to us that in view of the provisions of Art. 13(2) it would be impossible to apply the doctrine of prospective over-ruling in our country, particularly where a law infringes fundamental rights. Article 13(2) lays down that all laws taking away or abridging fundamental rights would be void to the extent of contravention. It has been held by this Court in Deep Chand v. The State of Uttar Pradesh ([1959] Supp. 2 S.C.R. 8) that a law made after the Constitution came into force which infringes fundamental rights is a still-born law and that the prohibition contained in Art. 13(2) went to the root of the State power of legislation and any law made in contravention of that provision was void ab initio. This case has been followed in Mehendra Lal Jaini v. The State of Uttar Pradesh ([1963] Supp. 1 S.C.R. 912). In the face of these decisions it is impossible to apply the principle of prospective over-ruling in this country so far as ordinary laws are concerned. Further, if the word "law" in Art. 13(2) includes an amendment of the Constitution, the same principle will apply, for that amendment would be still-born if it infringes any fundamental rights contained in Part III. In these circumstances, it would be impossible to apply the principle of prospective over-ruling to constitutional amendments also. On the other hand, the word "law" in Art. 13(2) does not include an amendment of the Constitution, then there is no necessity of applying the principle of prospective over-ruling, for in that case unless some limitations on the power of amendment of the Constitution are implied the amendment under Art. 368 would not be liable to be tested under Art. 13(2). We are therefore unable to apply the doctrine of prospective over-ruling in the circumstances. Further as we are of opinion that this is the fittest possible case in which the principle of stare decisis applies, we must uphold Sankari Prasad's case

([1952] S.C.R. 89) for this reason also.

Lastly we would refer to the following observations in Sajjan Singh's case ([1965] 1 S.C.R. 933) (at pp. 947-48) with respect to over-ruling earlier judgments of this Court and specially those which are unanimous, like Sankari Prasad's case ([1952] S.C.R. 89) :-

> "It is true that the Constitution does not place any restriction on our powers to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decision of constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of public good..... Even so, the normal principle that "judgments pronounced by this Court would be final, cannot be ignored and unless considerations of a substantial and compelling character make it necessary to do so, we should be slow to doubt the correctness of previous decisions or to depart from them.
>
> "It is universally recognised that in regard to a large number of constitutional problems which are brought before this Court for its decision, complex and difficult questions arise and on many of such questions two views are possible. Therefore, if one view has been taken by this Court after mature deliberation, the fact that another Bench is inclined to take a different view may not justify the Court in reconsidering the earlier decision or in departing from it..... Even so, the Court should be reluctant to accede to the suggestion that its earlier decisions should be light-heartedly reviewed and departed from. In such a case the test should be : is it absolutely necessary and essential that the question already decided should be reopened ? The answer to this question would depend on the nature of the infirmity alleged in the earlier decision, its impact on public good, and the validity and compelling character of the considerations urged in support of the contrary view. If the said decision has been followed in a large number of cases, that again is a factor which must be taken into account".

A similar view was taken in the Keshav Mills Company Limited v. Commissioner of Income-tax ([1965] 2 S.C.R. 908), where it was observed that -

> ".....before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified".

These principles were applied in Sajjan Singh's case ([1965] 1 S.C.R. 933) and it was observed that if Sankari Prasad's case ([1952] S.C.R 89) were to be overruled, "it would lead to the inevitable consequence that the amendments made in the Constitution both in 1951 and 1955 would be rendered invalid and a large number of decisions dealing with the validity of the Acts included in the Ninth Schedule which have been pronounced by different High Courts ever since the decision of this Court in Sankari Prasad's case ([1952] S.C.R. 89) was declared, would also be exposed to serious jeopardy".

The majority in that case therefore was not in favour of reviewing Sankari Prasad's case ([1952] S.C.R. 89) even so in view of the argument raised and the importance of the question it considered the arguments against that decision and came to the conclusion itself that case was rightly decided.

We may add that besides so many cases in the High Courts there have been a large number of cases in this Court to which it is unnecessary to refer where on the faith of various amendments made in the Constitution, particularly the First, the Fourth and the Sixteenth, amending fundamental rights, this Court has upheld the validity of various Acts on the basis of these amendments. Further we would be very reluctant to over-rule the unanimous decision in Sankari Prasad's case ([1952] S.C.R. 89) or any other unanimous decision by the slender majority of one in a larger Bench constituted for the purpose. We say this with great respect and would hold that apart from the principle of stare decisis we should not say that the unanimous judgment in Sankari Prasad's case ([1952] S.C.R. 89) was wrongly decided by such a slender majority in this Special Bench.

We therefore hold that Sankari Prasad's case ([1952] S.C.R. 89) was correctly decided and that the majority in Sajjan Singh's case ([1965] 1 S.C.R. 933) was correct in following that decision. We would follow the decision in Sankari Prasad's case ([1952] S.C.R. 89) even now as in our opinion it was correctly decided. Following that decision we hold that the Seventeenth Amendment is good.

In view of this decision it is unnecessary to refer to other arguments raised with respect to the two petitions challenging the Mysore Land Reforms Act.

In our view therefore all the three petitions should fail and we would dismiss them. In the circumstances we would pass no order as to costs.

HIDAYATULLAH, J.

In these three writ petitions, the facts of which appear in the two judgments just delivered, the validity of the Punjab Security of Land Tenures Act, 1953 and the Mysore Land Reforms Act, 1953, is principally involved. Since these Acts are protected by the Constitution (Seventeenth Amendment) Act, 1964, the validity of the constitutional amendment is also questioned. Therefore, a much larger field must be traversed because of the claim of the State that no part of the Constitution from the Preamble to the Ninth Schedule, is beyond the provision for amendment contained in Art. 368. The article forms the Twentieth Part of the Constitution and is said to be a code by itself in which reposes a sovereign power, transcending anything elsewhere in the Constitution. The State submits that (except as stated in the article) there are no limitations on the amending power and denies that there are any implied restrictions. It claims, therefore, that an amendment of the Constitution or of any of its part can never be a justiciable issue if the procedure for amendment has been duly followed. In this claim no exception is made - the Preamble, the Fundamental Rights, the guaranteed remedy to uphold them all of them severally and together are said to be capable of being partially or wholly abrogated by an amendment. Looked at from this point of view the Seventeenth Amendment Act not only must be valid but also beyond the power of the courts to question. The petitioners, on the other hand, contend that this is to deny the real importance and inviolability of the Fundamental Rights which the Constitution itself, through certain articles, has made paramount even to Art. 368. It is these questions which fall for consideration, before we can decide whether the two State Acts are valid or not.

The same questions were before this Court on two earlier occasions. They arose for the first time immediately after the Constitution (First Amendment) Act, 1951 was adopted and became the subject of a decision of this Court reported in Sri Sankari Prasad Singh Deo v. Union of India ([1952] S.C.R. 89). There Patanjali Sastri J. speaking for Harilal Kania C.J., Mukherjea. Das and Chandrasekhara Aiyar, JJ. and himself upholds the First Amendment on the grounds that the power conferred by Part XX is constituent, paramount and sovereign and is, therefore, not subject to Art.

13(2) which prohibits the making of ordinary laws tending to abridge or take away Fundamental Rights. The questions were again before the Court in Sajjan Singh v. State of Rajasthan ([1965] 1 S.C.R. 933) when the Seventeenth Amendment was impugned. The authority of Sankari Prasad's case ([1952] S.C.R. 89) was the mainstay of the argument in support of the validity of the new amendment. This time the Court was not unanimous although the Court as a whole did not strike down the Act. Three opinions were delivered : by Gajendragadkar, C.J. on behalf of Wanchoo and Raghubar Dayal, JJ. and himself, by Mudholkar, J. and by me. I found the reasoning in Sankari Prasad's case ([1952] S.C.R. 89) to be unacceptable, although for reasons which I shall give, I refrained from expressing a final opinion. Mudholkar, J. in his opinion supported me with additional and forceful reasons but he also did not express himself finally on the broader question. I closed my opinion with the following observations :-

> "I would require stronger reasons than those given in Sankari Prasad's case ([1952] S.C.R. 89) to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without the concurrence of the States. No doubt Art. 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 changes and progress but at the same time it preserves the individual rights. There is hardly any measure of reform which cannot be introduced reasonably, the guarantee of individual liberty notwithstanding. Even the agrarian reforms could have been partly carried out without Article 31-A and 31-B but they would have cost more to the public exchequer. The rights of society are made paramount and they are placed above those of the individual.

This is as it should be. But restricting the Fundamental Rights by resort to cls. 2 to 6 of Art. 19 is one thing and removing the rights from the Constitution or debilitating them by an amendment is quite another. This is the implication of Sankari Prasad's case ([1952] S.C.R. 89). It is true that such things would never be, but one is concerned to know if such a doing would be possible".

> #. . . . .##

> "The Constitution gives so many assurances in Part III that it would be difficult to think that they were the playthings of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other provision and even on a less firm ground than one on which the articles mentioned in the proviso stand. The anomaly that Art. 226 should be somewhat protected but not Art. 32 must give us pause. Article 32 does not erect a shield against private conduct but against state conduct including the legislatures (See Art. 12). Can the legislature take away this shield ? Perhaps by adopting a liberal construction of Art. 368 one can say that. But I am not inclined to play a grammarian's role. As at present advised I can only say that the power to make amendments ought not ordinarily to be a means of escape from absolute constitutional restrictions".

My opposition (lest one misunderstands its veridical character) appears to be cautious and even timid but this was because it was attended by an uneasy feeling that I might have missed some immanent truth beyond what was said in Sankari Prasad's case ([1952] S.C.R. 89). The arguments then were extremely brief. After hearing full arguments in this case, which have not added to the

reasoning of the earlier cases, I am not satisfied that the reasons are cogent enough for me to accept them. I say it with respect that I felt then, as I do so even more strongly now, that in the two earlier cases, the result was reached by a mechanical jurisprudence in which harmonious construction was taken to mean that unless Art. 368 itself made an exception the existence of any other provision indicative of an implied limitation on the amending power, could not be considered. This was really to refuse to consider any argument which did not square with the a priori view of the omnicompetence of Art. 368. Such reasoning appears to me to be a kind of doctrinaire conceptualism based on an arid textual approach supplemented by one concept that an amendment of the Constitution is not an exercise of legislative power but of constituent power and, therefore, an amendment of the Constitution is not law at all as contemplated by Art. 13(2). I am reminded of the words of Justice Holmes that "we must think things and not words". The true principle is that if there are two provisions in the Constitution which seem to be hostile, juridical hermeneutics requires the Court to interpret them by combining them and not by destroying one with the aid of the other. No part in a Constitution is superior to another part unless the Constitution itself says so and there is no accession of strength to any provision by calling it a code. Portalis, the great French Jurist (who helped in the making of the Code Napoleon) supplied the correct principle when he said that it is the context of the legal provisions which serves to illustrate the meaning of the different parts, so that among them and between them there should be correspondence and harmony.

We have two provisions to reconcile. Article 368 which says that the Constitution may be amended by following this and this procedure, and Art. 13(2) which says, the State shall not make any law which takes away or abridges the rights conferred by Part III and that any law made in contravention of the clause shall, to the extent of the contravention, be void. The question, therefore, is : does this create any limitation upon the amending process ? On the answer to this question depends the solution of all the problems in this case.

It is an error to view our Constitution as if it were a mere organisational document by which the people established the structure and the mechanism of their Government. Our Constitution is intended to be much more because it aims at being a social document in which the relationship of society to the individual and of Government to both and the rights of the minorities and the backward classes are clearly laid down. This social document is headed by a Preamble (PREAMBLE -WF, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure all its citizens; JUSTICE, social, economical and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all; FRATERNITY assuring the dignity of the individual and the unity of Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION"). which epitomizes the principles on which the Government is intended to function and these principles are later expanded into Fundamental Rights in Part III and the Directive Principles of Policy in Part IV. The former are protected but the latter are not. The former represent the limits of State action and the latter are the obligations and the duties of the Government as a good and social Government.

Why was it necessary to have the Fundamental Rights at all and make them justiciable ? As we seem to be forgetting our own history so soon let me say that the answer lies there. The Nationalist Movement and the birth of the Indian National Congress in 1885 were the direct result of the discriminatory treatment of the Indians in their own country. The demand for the guarantee of Fundamental Rights had unfortunately to be made then to a foreign rule and it appeared in the Constitution of India Bill framed by the Indian National Congress ten years later. All that is valuable

to an Individual in civilized society, including free speech, imprisonment only by a competent authority, free state education, etc. were claimed therein. Resolutions of the Congress since then reiterated this demand and the securing of Fundamental Rights in any future Constitution became one of the articles of faith. To cut the narration short, the main steps may only be mentioned. Mrs. Besant's Commonwealth of India Bill 1925 with its seven fundamental rights (the precursor of Art. 19), the Madras Congress Resolution of 1927 - "a constitution on the basis of declaration of rights" - the Nehru Report - "it is obvious that our first care should be to have the Fundamental Rights guaranteed in a manner which will not permit their withdrawal in any circumstances" - the draft article in the Nehru Constitution - "No person shall be deprived of his liberty, nor shall his dwelling or property be entered, requisitioned or confiscated save in accordance with law" - the Independence Resolution of 26th January, 1930 - "We believe that it is the inalienable right of the Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth" - the Karachi Resolution on Fundamental Rights, Economic and Social Change (1931), the Sapru Report (1945) which for the first time distinguished between justiciable and non-justiciable rights, the suggestion of the Cabinet Mission for the constitution of an Advisory Committee on Fundamental and Minority Rights, and, lastly the Committee on Fundamental Rights of the Constituent Assembly, are just a few of the steps to be remembered. The Fundamental Rights and the Directive Principles were the result.

Fundamental laws are needed to make a Government of laws and not of men and the Directive Principles are needed to lay down the objectives of a good Government. Our Constitution was not "the cause but the result of political and personal freedom". Since Dicey had said that "the proclamation in a Constitution or Charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence", (Dicey : "Law of the Constitution" 10th Edn. p.207) provision had to be made for guaranteeing them and to make them justiciable and enforceable. This result is reached by means of Arts. 12, 13, 32, 136, 141, 144 and 226. The High Courts and finally this Court have been made the Judges of whether any legislative or executive action on the part of the State considered as comprehensively as is possible, offends the Fundamental Rights and Art. 13(2) declares that legislation which so offends is to be deemed to be void. It is thus that Parliament cannot today abridge or take away a single Fundamental Right even by a unanimous vote in both the Chambers. But on the argument of the State it has only to change the title of the same Act to an Amendment of the Constitution Act and then a majority of the total strength and a 2/3 rds majority of the members present and voting in each House may remove not only any of the Fundamental Rights but the whole Chapter giving them. And this is said to be possible because of Art. 368 and its general language which, it is claimed, makes no exception in its text and, therefore, no exception can be implied. It is obvious that if an Act amending the Constitution is treated as a law it must also be subject to the provisions of Art. 13(2). Since the definition of the word 'law', makes no exception a strenuous effort is made on the basis of argument and authority to establish that a constituent power does not result in a law in the ordinary sense. Distinction is thus made between laws made ordinarily that is to say, from day to day by ordinary majority and laws made occasionally for the amendment of the Constitution by a slightly enhanced majority. In our Constitution this distinction is not valid in the eye of Art. 13(2).

It is not essential, of course, that a difference must always exist in the procedure for the exercise of constituent and ordinary legislative power. One has not to go far to find the example of a country in which constitutional law as such may be made by the same agency which makes ordinary laws. The most outstanding example is that of England about which de Tocqueville observed :"

"the Parliament has an acknowledged right to modify the Constitution; as, therefore,

> the Constitution may undergo perpetual changes, it does not in reality exist; the Parliament is at once a legislative and a constituent assembly :" (Introduction to the Study of Law of the Constitution by A. V. Dicey, Tenth Edn. p. 88 quoting from O'Euvres completes (14th ed., 1864) Vol. I (Democratie en Amerique), pp. 166, 167).

Of course, the dictum of de Tocqueville that the English Constitution "elle n'existe point" (it does not exist) is far from accurate. There is a vast body of constitutional laws in England which is written and statutory but it is not all found in one place and arranged as a written Constitution usually is. 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 Peoples Acts of 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 setting up different ministries are examples of what will pass for constitutional law under our system (The list is taken from K. C. Wheare's : The Statute of Westminster and Dominion Status" (4th Edn) p. 8. Dicey and others give different list). The Bill of Rights (1689) lays down the fundamental rule in England that taxation may not be levied without the consent of Parliament which in our Constitution has its counterpart in Art. 265. In our Constitution also the laws relating to delimitation of constituencies or allotment of seats to such constituencies made or purporting to be made under Art. 327 or Art. 328, by reason of the exclusion of the powers of the courts to question them, are rendered constitutional instruments. Other examples of constitutions which, in addition to constitution proper, contain certain ordinary legislation having constitutional qualities, also exist. (See constitutions of Austria, Honduras, Nicaragua, Peru, Spain and Sweden among others. The Constitution of Spain in particular is in several Instruments. The Constitution of Austria (Art. 149) makes special mention of these constitutional instruments).

What then is the real distinction between ordinary law and the law made in the exercise of constituent power ? I would say under the scheme of our Constitution none at all. This distinction has been attempted to be worked out by several authors. It is not necessary to quote them. Taking the results obtained by Willoughby (Tagore Law Lectures (1924) p. 83) it may be said that the fact that a Constitution is written as a Constitution is no distinction because in Britain constitutional law is of both kinds and both parts co-exist. The test that the Constitution requires a different kind of procedure for amendment, also fails because in Britain Parliament by a simple majority makes laws and also amends constitutional statutes. In our Constitution too, in spite of the claim that Art. 368 is a code (whatever is meant by the word "code" here), Arts. 4, 11 and 169 show that the amendment of the Constitution can be by the ordinary law making procedure. By this method one of the legislative limbs in a State can be removed or created. This destroys at one stroke the claim that Art. 368 is a code and also that any special method of amendment of the Constitution is fundamentally necessary.

The next test that the courts must apply the Constitution in preference to the ordinary law may also be rejected on the analogy of the British practice. There, every statute has equal standing. Therefore, the only difference can be said to arise from the fact that constitutional laws are generally amendable under a process which in varying degrees, is more difficult or elaborate. This may give a distinct character to the law of the Constitution but it does not serve to distinguish it from the other laws of the land for purposes of Art. 13(2). Another difference is that in the written constitutions the form and power of Government alone are to be found and not rules of private law as is the case with ordinary laws. But this is also not an invariable rule. The American Constitution and our

Constitution itself are outstanding examples. There are certain other differences of degree, such as that ordinary legislation may be tentative or temporary, more detailed or secondary, while the Constitution is intended to be permanent, general and primary. Because it creates limitations on the ordinary legislative power, constitutional law in a sense is fundamental law, 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 ? On the whole, therefore, as observed in the American Jurisprudence -

> "It should be noticed however that a statute and a constitution, though of unequal dignity are both laws and each rests on the will of the people. . . . . ." (American Jurisprudence Vol. 11 Section 3)

A Constitution is law which is intended to be for all time and is difficult to change so that it may not be subject to "impulses of majority" "temporary excitement and popular caprice or passion". (Amendment is expressly called a legislative process in the Constitutions of Colombia, Costa Rica, Hungary, Panama and Peru. In Portugal the ordinary legislatures enjoy constituent powers every 10 years).

I agree with the authors cited before us that the power of amendment must be possessed by the State. I do not take a narrow view of the word "amendment" as including only minor changes within the general framework. By an amendment new matter may be added, old matter removed or altered. I also concede that the reason for the amendment of the Constitution is a political matter although I do not go as far as some Justices of the Supreme Court of the United States did in Coleman v. Miller (307 U.S. 443 [83 L.Ed. 1385]), that the whole process is "political in its entirely from submission until an amendment becomes part of the Constitution and is not subject to judicial guidance, control or interference at any point". There are fundamental differences between our Constitution and the Constitution of the United States of America. Indeed this dictum of the four Justices based upon the case of Luther v. Borden (7 How. 1 [12 L.Ed. 58]) has lost some of its force after Baker v. Carr (369 U.S. 186 [7 L.Ed. 2d 633]).

A Republic must, as says Story (Commentaries on the Constitution of the United States (1883) Vol. III pp. 686-687), possess the means for altering and improving the fabric of the Government so as to promote the happiness and safety of the people. The power is also needed to disarm opposition and prevent factions over the Constitution. The power, however, is not intended to be used for experiments or as an escape from restrictions against undue state action enacted in the Constitution itself. Nor is the power of amendment available for the purpose of removing express or implied restrictions against the State.

Here I make a difference between Government and State which I shall explain presently. As Willoughby (Tagore Law Lectures, p. 84) points out constitutional law ordinarily limits Government but not the State because a constitutional law is the creation of the State for its own purpose. But there is nothing to prevent the State from limiting itself. The rights and duties of the individual and the manner in which such rights are to be exercised and enforced are ordinarily to be found in the laws though some of the Constitutions also fix them. It is now customary to have such rights guaranteed in the Constitution. Peaslee, (Constitutions of Nations, Vol. I (2nd Edn.) p.7.) writing in 1956 says that about 88% of the national Constitutions contain clauses respecting individual liberty and fair legal process; 83% respecting freedom of speech and the press; 82% respecting property right; 80% respecting rights of assembly and association; 80% respecting rights of conscience and religion; 79% respecting secrecy of correspondence and inviolability of domicile; 78% respecting

education; 73% respecting equality; 64% respecting right to petition; 56% respecting labour; 51% respecting social security; 47% respecting rights of movement within, and to and from the nation; 47% respecting health and motherhood; and 35% respecting the non-retroactivity of laws. In some of the Constitutions there is an attempt to put a restriction against the State seeking to whittle down the rights conferred on the individuals. Our Constitution is the most outstanding example of this restriction which is to be found in Art. 13(2). 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 (In the Constitution of Honduras, partial amendment only is possible. For a complete amendment a Constituent Assembly has to be convoked. In the Constitution of Brazil, the Constitution cannot be amended when there is a state of seige (our emergency). In turkey an amendment of Article I cannot even be proposed). Examples of this exist in several Constitutions of the world : see Art. 5 of the American Constitution; Art. 95 of the Constitution of France; Art. 95 of the Constitution of Finland; Art. 97 of the Constitution of Cambodia; Art. 183 of the Constitution of Greece Art. 97 of the Japanese Constitution; Art. 139 of the Italian Constitution, to mention only a few.

When this happens the ordinary procedure of amendment ceases to apply. The unlimited competence (the kompetenz-kompetenz of the Germans) does not flow from the amendatory process. Amendment can then be by a fresh constituent body. To attempt to do this otherwise is to attempt a revolution. I do not know why the word "revolution", which I have used before, should evoke in some persons an image of violence and subversion. The whole American Constitution was the result of a bloodless revolution and in a sense so was ours. The adoption of the whole Constitution and the adoption of an amendment to the Constitution have much in common. An amendment of the Constitution has been aptly called a Constitution in little and the same question arises whether it is by a legal process or by revolution. There is no third alternative. An amendment, which repeals the earlier Constitution, unless legal, is achieved by revolution. As stated in the American Jurisprudence :

> "An attempt by the majority to change the fundamental law in violation of self-imposed restrictions is unconstitutional and revolutionary" (Vol. 12, Section 25 pp. 629-630).

There are illegal and violent revolutions and illegal and peaceful revolutions. Modification of Constitution can only be by the operation of a certain number of will acting on other wills. The pressure runs through a broad spectrum, harsh at one end and gentle at the other. But whatever the pressure may be, kind or cruel, the revolution is always there if the change is not legal. The difference is one of method, not of kind. Political thinking starts from the few at the top and works downward more often than in the reverse direction. It is wrong to think that masses alone, called "the people" after Mazini, or "the proletariate" after Marx, begin a revolutionary change. Political changes are always preceded by changes in thought in a few. They may be outside the Government or in it. It is a revolution nevertheless, if an attempt is made to alter the will of the people in an illegal manner. A revolution is successful only if there is consent and acquiescence and a failure if there is not. Courts can interfere to nullify the revolutionary change because in all cases of revolution there is infraction of existing legality. It is wrong to classify as revolution some thing coming from outside the Government and an illegality committed by the Government against the Constitution as evolution. I am mindful of the observations of Justice Holmes that -

> "We need education in the obvious to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution, by the orderly change of law" (The Mind and Faith of Justice Holmes p. 390).

But the problem we are faced with is not an orderly change of law but of a claim to a revolutionary change against the vitals of the Constitution. In such a case the apprehension is that democracy may be lost if there is no liberty based on law and law based on equality. The protection of the Fundamental Rights is necessary so that we may not walk in fear of democracy itself.

Having assumed the distinction between Government and State let me now explain what I mean by that distinction and what the force of Art. 13(2) in that context is. I shall begin first by reading the pertinent article. Article 13(2), which I quoted earlier, may again be read here :

> #"13. . . . . .##
>
> (2) 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 contravention, be void".

The definition of the State in Art. 12 reads :

> "12. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India".

The State is the sum total of all the agencies which are also individually mentioned in Art. 12 and by the definition all the parts severally are also included in the prohibition. Now see how 'law' is defined :

> (3) In this article, unless the context otherwise requires, -
>
> (a) "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law :"

In Sajjan Singh's case ([1965] 1 S.C.R. 933) I said that if amendments of the Constitution were meant to be excluded from the word "law" it was the easiest thing to add to the definition the further word "but shall not include an amendment of the Constitution". It is argued now before us that this was not necessary because Art. 368 does not make any exception. This argument came at all stages like a refrain and is the real cause of the obfuscation in the opposite view. Those who entertain this thought do not pause to consider : why make a prohibition against the State ? As Cooley said :

> "there never was a republican Constitution which delegated to functionaries all the latent powers which lie dormant in every nation and are boundless in extent and incapable of definition".

If the State wields more power than the functionaries there must be a difference between the State and its agencies such as Government, Parliament, the Legislatures of the States and the local and other authorities. Obviously, the State means more than any of these or all of them put together. By making the State subject to Fundamental Rights it is clearly stated in Art. 13(2) that any of the

agencies acting alone or all the agencies acting together are not above the Fundamental Rights. Therefore, when the House of the People or the Council of States introduces a Bill for the abridgement of the Fundamental Rights, it ignores the injunction against it and even if the two Houses pass the Bill the injunction is next operative against the President since the expression "Government of India" in the General Clauses Act means the President of India. This is equally true of ordinary laws and laws seeking to amend the Constitution. The meaning of the word "State" will become clear if I draw attention at this stage to Art. 325 of the Constitution of Nicargua, which reads as follows :-

> "325. The agencies of the Government, jointly or separately, are forbidden to suspend the Constitution or to restrict the rights granted by it, except in the cases provided therein".

In our Constitution the agencies of the State are controlled jointly and separately and the prohibition is against the whole force of the State acting either in its executive or legislative capacity. The control of the Executive is more important than even the Legislature. In modern politics run on parliamentary democracy the Cabinet attains a position of dominance over the Legislature. The Executive, therefore, can use the Legislature as a means of securing changes in the laws which it desires. It happened in Germany under Hitler. The fact has been noticed by numerous writers for example, Wade and Philips (Constitutional Law, 6th Edn. p. 27), Sir Ivor Jennings (Parliament [1957] pp. 11-12), Dawson (Government of Canada [1952] Chapter XIX), Keith (An Introduction to British Constitutional Law [1931] p. 48) and Ramsay Muir (How Britain is Governed p. 5, 6). Dawson in particular said that a Cabinet is no longer responsible to the Commons but the Commons has become instead responsible to the Government. Ivor Jennings added that if a Government had majority it could always secure the legislation. The others pointed out that the position of the Cabinet towards Parliament tends to assume more or less dictatorial powers and that was why people blamed Government, this to say, the Cabinet rather than Parliament for ineffective and harsh laws.

This is true of our country also regarding administration and legislation. Fortunately, this is avoided at least in so far as the Fundamental Rights are concerned. Absolute, arbitrary power in defiance of Fundamental Rights exist nowhere under our Constitution, not even in the largest majority. The people's representatives have, of course, inalienable and undisputable right to alter, reform or abolish the Government in any manner they think fit, but the declarations of the Fundamental Rights of the citizens are the inalienable rights of the people. The extent of the power of the rulers at any time is measured by the Fundamental Rights. It is wrong to think of them as rights within the Parliament's giving or taking. Our Constitution enables an individual to oppose successfully the whole community and the State and claim his rights. This is because the Fundamental Rights are so safe-guarded that within the limits set by the Constitution they are inviolate. The Constitution has itself said what protection has been created round the person and property of the citizens and to what extent this protection may give way to the general good. It is wrong to invoke the Directive Principles as if there is some antinomy between them and the Fundamental Rights. The Directive Principles lay down the routes of State action but such action must avoid the restrictions stated in the Fundamental Rights. Prof. Anderson (Changing Law in Developing Countries, pp. 88, 89) taking the constitutional amendments, as they have been in our country, considered the Directive Principles to be more potent-than the Fundamental Rights. That they are not, is clear when one takes the Fundamental Rights with the guaranteed remedies. The Directive Principles are not justiciable but the Fundamental Rights are made justiciable. This gives a judicial control and check over State action even within the four corners of the Directive Principles. It cannot be conceived that in

following the Directive Principles the Fundamental Rights (say for example, the equality clause) can be ignored. If it is attempted, then the action is capable of being struck down. In the same way, if an amendment of the Constitution is law, for the reasons explained by me, such an amendment is also open to challenge under Art. 32, if it offends against the Fundamental Rights by abridging or taking them away. Of course, it is always open to better Fundamental Rights. A law or amendment of the Constitution would offend the Fundamental Rights only when it attempts to abridge or take them away.

The importance of Fundamental Rights in the world of today cannot be lost sight of. On December 10, 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights without a dissent. This draft was made after the Third Committee of the United Nations had devoted 85 meetings to it. The Declaration represents the civil, political and religious liberties for which men have struggled through the centuries and those new social and economic rights of the Individual which the Nations are increasingly recognising in their Constitutions. Some of these were proclaimed during the French Revolution and are included in the declarations of Nations taking pride in the dignity and liberty of the Individual. They are epitomized in the Preamble, and more fully expressed in Parts III and IV of our Constitution. These Declarations wherever found are intended to give a key to social progress by envisaging rights to work, to education and to social insurance.

The Nations of the world are now in the second stage, where Covenants are being signed on the part of the States to respect such rights. United Nations Human Rights Commission has worked to produce two drafts - one dealing with civil and political rights and the other with economic, social and cultural rights. The third stage is still in its infancy in which it is hoped to provide for the enforcement of these rights on an international basis. The Regional Charter of the Human Rights under which there is established already a European Commission of Human Rights to investigate and report on violations of Human Rights, is a significant step in that direction. After 1955 the European Commission has become competent to receive complaints from individuals although the enforceability of Human Rights on an international basis is still far from being achieved. If one compares the Universal Declaration with Parts III and IV of our Constitution one finds remarkable similarity in the two. It is significant that our Committee on Fundamental Rights was deliberating when the Third Committee of the United Nations was deliberating on the Universal Declaration of Human Rights. Both are manifestos of man's inviolable and fundamental freedoms.

While the world is anxious to secure Fundamental Rights internationally, it is a little surprising that some intellectuals in our country, whom we may call "classes non classes" after Hegel, think of the Directive Principles in our Constitution as if they were superior to Fundamental Rights. As a modern philosopher (Benedetto Croce) said such people 'do lip service' to freedom thinking all the time in terms of social justice "with 'freedom' as a by-product". Therefore, in their scheme of things Fundamental Rights become only an epitheton ornans. One does not know what they believe in : the communistic millennium of Marx or the individualistic Utopia of Bastiat. To them an amendment of the Fundamental Rights is permissible if it can be said to be within a scheme of a supposed socio-economic reform, however, much the danger to liberty, dignity and freedom of the Individual. There are others who hold to liberty and freedom of the Individual under all conditions. Compare the attitude of Middleton Murray who would have Communism provided "there was universal freedom of speech, of association, of elections and of Parliament" ! To such the liberty and dignity of the Individual are inviolable. Of course, the liberty of the individual under our Constitution, though meant to be fundamental, is subject to such restrictions as the needs of society dictate. These are expressly mentioned in the Constitution itself in the hope that no further limitations would require to

be imposed at any time.

I do not for a moment suggest that the question about reasonableness, expediency or desirability of the amendments of the Constitution from a political angle is to be considered by the courts. But what I do say is that the possession of the necessary majority does not put any party above the constitutional limitations implicit in the Constitution. It is obvious that the Constituent Assembly in making the Fundamental Rights justiciable was not satisfied with reliance on the sense of self-restraint or public opinion (Sir Robert Peel calls it "that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy and newspaper paragraphs!") on which the majority in Sajjan Singh's case ([1965] 1 S.C.R. 933) does. This is not an argument of fear. The question to ask is : can a party, which enjoys 2/3rds majority today, before it loses it, amend Art. 368 in such wise that a simple majority would be sufficient for the future amendments of the Constitution ? Suppose it did so, would there be any difference between the constitutional and the ordinary laws made thereafter ?

The liberty of the Individual has to be fundamental and it has been so declared by the people. Parliament today is not the constituent body as the Constituent Assembly was, but is a constituted body which must bear true allegiance to the Constitution as by law established. To change the Fundamental part of the Individual's liberty is a usurpation of constituent functions because they have been placed outside the scope of the power of constituted Parliament. It is obvious that Parliament need not now legislate at all. It has spread the umbrella of Art. 31-B and has only to add a clause that all legislation involving Fundamental Rights would be deemed to be within that protection hereafter. Thus the only palladium against legislative dictatorship may be removed by a 2/3rds majority not only in praesanti but defuturo. This can hardly be open to a constituted Parliament.

Having established that there is no difference between the ordinary legislative and the amending processes in so far as cl. (2) of Art. 13 is concerned, because both being laws in their true character, come within the prohibition created by that clause against the State and that the Directive Principles cannot be invoked to destroy Fundamental Rights, I proceed now to examine whether the English and American precedents lay down any principle applicable to amendments of our Constitution. In Britain the question whether a constitutional amendment is valid or not cannot arise because the courts are powerless. Parliamentary Sovereignty under the English Constitution means that Parliament enjoys the right to make or unmake any law whatever and no person or body has any right to question the legislation. The utmost and absolute despotic power belongs to Parliament. It can "make, confirm, enlarge, restrain, abrogate, repeal, revise and expand law concerning matters of all possible denominations". What Parliament does, no authority on earth can undo. The Queen, each House of Parliament, the constituencies and the law courts have in the past claimed independent legislative powers but these claims are unfounded. It is impossible to compare the Indian Parliament with the British Parliament as the former concededly in the ordinary legislation, is subject to judicial review, both on the ground of competence arising from a federal structure and the existence of Fundamental Rights. The question of competence in the matter of amendment of the Constitution depends upon, firstly, compliance with the procedure laid down in Art. 368 and, secondly, upon the question whether the process is in any manner restricted by the Fundamental Rights. Such questions cannot obviously arise in the British Parliament (Dicey gives three supposed limitations on the power of Parliament. Of these one that language has been used in Acts of Parliament which implies that one Parliament can make laws which cannot be touched by any subsequent Parliament, is not true. The best examples are Act of treaties with Scotland and Ireland but these same Acts have been amended later. Francis Bacon found this claim to be untenable. See

Dicey 'The Law of Constitution' pp. 64, 65).

The example of the Constitution of the United States cannot also serve any purpose although the greatest amount of support was sought to be derived from the decisions of the Supreme Court and the institutional writings in the United States. The power of amendment in the United States Constitution flows from Art. V. (Article V. The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall cal a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; that no State, without its consent, shall be deprived of its equal suffrage in the Senate"). It must be noticed that the power is clearly not made equal to ordinary legislative process. One salient point of difference is that the President is nowhere in this scheme because his negative does not run (Hollingsworth v. Virginia 3 Dall. 378). The amendment is thus not of the same quality as ordinary legislation.

The Supreme Court of the United States has no doubt brushed aside objections to amendments of the Constitution on the score of incompetence, but has refrained from giving any reasons. In the most important of them, which questioned the 18th Amendment, the Court only stated its conclusions. After recalling the texts of the Article under which Amendments may be made and of the 18th Amendment proposed by the Congress in 1917 and proclaimed as ratified by the States in 1919, the Court announced :

> "4. The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the 18th amendment, is within the power to amend reserved by Art. 5 of the Constitution"(National Prohibition Cases, 253 U.S. 350).

One would have very much liked to know why this proposition was laid down in the terms emphasised above if the effective exercise of the power depended upon a particular procedure which was immaculately followed. The silence of the Court about its reasons has been noticed in the same judgment by Mr. Justice Mokenna. In Leser v. Garnett (258 U.S. 130) the Court was hardly more expressive. The only question considered by the Court was :-

> "The first contention is that the power of amendment conferred by the Federal Constitution, and sought to be exercised, does not extend to this Amendment, because of its character".

This was repelled by Brandeis, J. on behalf of the unanimous court on the ground that the Amendment was in character and phraseology similar to the 15th Amendment and was adopted by following the same method. As the 15th Amendment had been accepted for half a century the suggestion that it was not in accordance with law, but as a war measure validated by acquiescence was not accepted.

It is significant, however, that at the time of the 18th Amendment, the arguments were (a) that 'amendment' was limited to the correction of error in the framing of the Constitution, (b) Article V did not comprehend the adoption of additional or supplementary provisions, (c) ordinary legislation

could not be embodied in the constitutional amendment, and (d) Congress could not propose amendment which pared the sovereign power of the States. None of these arguments was accepted. At the time of the 19th Amendment, which increased the franchise in the States, the narrow ground was that a State which had not ratified the Amendment would be deprived of its equal suffrage in the Senate because its representatives in that body would be persons not of its choosing, i.e. persons chosen by voters whom the State itself had not authorised to vote for Senators. This argument was rejected. However, in Dillion v. Gloss (256 U.S. 368) the Supreme Court held that Congress had the power to impose a time limit for ratification because Art. V implied that "ratification must be within some reasonable time after the proposal". The fixation of 7 years was held by the Court to be reasonable.

In 1939 came the case of Coleman v. Miller (307 U.S. 443) which dealt with the Child Labour Amendment. Such a law was earlier rejected by the Kansas Legislature. Later the State ratified the amendment after a lapse of 13 years by the casting vote of the Lt. Governor. Mandamus was asked against the Secretary of Kansas Senate to erase the endorsement of ratification from its record and it was denied. The Supreme Court of Kansas refused to review this denial on certiorari. The Supreme Court of the United States in an opinion, in which not more than 4 Justices took any particular view, declined to interfere. Majority affirmed the decision of Supreme Court of Kansas. Four Justices considered that the question was political from start to finish and three Justices that the previous rejection of the law and the extraordinary time taken to ratify were political questions.

Although the Supreme Court has scrupulously refrained from passing on the ambit of Art. V it has nowhere said that it will not take jurisdiction in any case involving the amending process. (See Rottschaeffer : Handbook of American Constitutional Law (1939) pp. 397, 398, though the author's opinion is that it will deny jurisdiction). In Hollingsworth v. Virginia (3 Dall. 378) the Supreme Court assumed that the question was legal. The Attorney-General did not even raised an objection. In Luther v. Borden (12 L.Ed. 58) the matter was finally held to be political which opinion prevailed unimpaired till some doubts have arisen after Baker v. Carr (369 U.S. 186). In the case the Court remarked -

> "We conclude ..... that the non-justiciability of claims resting on the guarantee clause which arises from the embodiment of questions that were thought 'political' can have no bearing upon the justiciability of the equal protection claim presented in this case..... We emphasise that it is the involvement in guarantee clause claims of the elements thought to define "political questions" and no other feature, which could render them non-justiciable. Specifically, we have said that such claims are not held non-justiciable because they touch matters of State Government organisation ....."

It would appear that the Equal Protection Clause was held to supply a guide for examination of apportionment methods better than the Guarantee Clause.

Although there is no clear pronouncement, a great controversy exists whether questions of substance can ever come before the Court and whether there are any implied limitations upon the amendatory power. In the cases above noted, the other articles (particularly the Bill of Rights) were not read as limitations and no limitation outside the amending clause was implied. In the two cases in which the express limitation of Equal Suffrage Clause was involved the Court did not enter the question. Thus the 15th and, on its strength, the 19th Amendments were upheld. In Coleman v. Miller (307 U.S. 443) the political question doctrine brought the support of only four Justices and in Baker v. Carr (369 U.S. 186) the Federal Courts were held to have jurisdiction to scrutinise the fairness of

legislative apportionment, under the 14th Amendment and to take steps to assure that serious inequities were wiped out. The courts have thus entered the 'political thicket'. The question of delimitation of constituencies cannot, of course, arise before courts under our Constitution because of Art. 329.

Baker v. Carr (369 U.S. 186) makes the Court sit in judgment over the possession and distribution of political power which is an essential part of a Constitution. The magical formula of "political question" is losing ground and it is to be hoped that a change may be soon coming. Many of the attacks on the amendments were the result of a misunderstanding that the Constitution was a compact between States and that the allocation of powers was not to be changed at all. This was finally decided by Texas v. White (Wall. 700) as far back as 1869.

The main question of implied limitations has evoked a spate of writings. Bryce (The American Commonwealth Vol. I), Weaver (The Constitutional Law and its Administration (1936), Mathews (American Constitutional System (2nd Edn.) p. 43-45), Burdick (The Law of the American Constitution 7th Imp.) p. 45), Willoughby (Tagore Law Lectures [1924]), Willis (Constitutional Law of United States [1936]), Rottshaefer (Handbook of American Constitutional Law), Orfield (The Amending of the Federal Constitution) (to name only a few) are of the opinion that there are no implied limitations, although, as Cooley points out, "it is sometimes expressly declared - what indeed is implied without the declaration - that everything in the declaration of rights contained is excepted out of the general powers of Government, and all laws contrary thereto shall be void (Constitutional Limitations Vol. I, 8th Edn. pp. 95, 96)". Express checks there are only three. Two temporary checks were operative till 1808 and dealt with interference with importation of slaves and the levying of a direct tax without apportionment among the States, according to population Permanent check that now remains is equality of representation of States in the Senate. Some writers suggest that this check may also be removed in two moves. By the first the Article can be amended and by the second the equality removed. When this happens it will be seen whether the Supreme Court invokes any doctrine such as achieving indirectly what cannot be done directly.

It will, of course, be completely out of place in a judgment to discuss the views of the several writers and so I shall confine myself to the observation of Orfield to whom again and again counsel for the State turned either for support or inspiration. According to him, there are no implied limitations unless the Courts adopt that view and therefore no limitations on the substance of the amendments except the Equality Clause. His view is that when Congress is engaged in the amending process it is not legislating but exercising a peculiar power bestowed by Art. V. I have already shown that under our Constitution the amending process is a legislative process, the only difference being a special majority and the existence of Art. 13(2). Orfield brushes aside the argument that this would destroy the very concept of the Union which, as Chief Justice Marshall had said, was indestructible. Orfield faces boldly the question whether the whole Constitution can be overthrown by an amendment and answers yes. But he says that the amendment must not be in violation of the Equality Clause. This seems to be a great concession. He makes this exception but Munro (The Government of the United States (5th Edn.) p. 77), who finds it difficult to conceive of an unamendable constitution suggests that it should be possible to begin with that clause and then the door to amendments would be wide open. Of course, the Supreme Court has not yet faced an amendment of this character and it has not yet denied jurisdiction to itself. In the United States the Constitution works because, as observed by Willis, the Supreme Court is allowed to do "the work of remolding the Constitution to keep it abreast with new conditions and new times, and to allow the agencies expressly endowed with the amending process to act only in extraordinary emergencies or when the general opinion disagrees with the opinion of the Supreme Court". In our country

amendments so far have been made only with the object of negativing the Supreme Court decisions, but more of it later.

I have referred to Orfield although there are greater names than his expounding the same views. I have refrained from referring to the opposite view which in the words of Willoughby has been "strenuously argued by reputable writers" although Willis discourteously referred to them in his book. My reason for not doing so is plainly this. The process of amendment in the United States is clearly not a legislative process and there is no provision like Art. 13(2) under which "laws" abridging or taking away Fundamental Rights can be declared void. Our liberal Constitution has given to the Individual all that he should have - freedom of speech, of association, of assembly, of religion, of motion and locomotion, of property and trade and profession. In addition it has made the State incapable of abridging or taking away these rights to the extent guaranteed, and has itself shown how far the enjoyment of those rights can be curtailed. It has given a guaranteed right to the person affected to move the Court. The guarantee is worthless if the rights are capable of being taken away. This makes our Constitution unique and the American precedents cannot be of much assistance.

The Advocate General of Madras relied upon Vedel (Mannual Elementaire da Droit Constitutional (Sirey) p. 117). According to Vedel, a prohibition in the Constitution against its own amendment has a political but not juridical value, and from the juridical point of view, a declaration of absolute constitutional immutability cannot be imagined. The constituent power being supreme, the State cannot be fettered even by itself. He notices, however, that the Constitution of 1791 limited the power of amendment (revision) for a certain time and that of 1875 prohibited the alteration of the Republican form of Government. He thinks that this hindrance can be removed by a two step amendment. He concludes that the constituent of today cannot bind the nation of tomorrow and no Constitution can prohibit its amendment in all aspects.

Of course, the French have experimented with over a dozen Constitutions, all very much alike, while the British have slowly changed their entire structure from a monarchical executive to an executive from Parliament and have reduced the power of the House of Lords. Cambell-Bannerman, former Prime Minister of England summed up the difference to Ambassador M. de Fleurian thus :

> ".....Quand nous faisons une Revolution, nous ne detruisons pas notre maison, nous en conservons avec soin la facade, et, derriere cette facade, nous reconstruisons une nouvelle maison. Vous, Francais, agissez autrement; vous jetez bas le vieil edifice et vous reconstruisez la meme maison avec une autre facade et sous un nom different". (When we make a Revolution we do not destroy an house, we save with care the facade and behind construct a new house. You, Frenchmen, act differently. You throw down the old edifice and you reconstruct the same house with a different facade and under a different name).

M. de Fleurian agreed that there was a lot of truth in it (Il ya du vrai dans cette boutade) (Recounted by M. de Fleuriau in the Preface to J. Magnan de Bornier, L'Empire Britannique, son evolution politique et constitutionnelle p. 6, quoted in whereas : The Statute of Westminster and Dominion Status, p. 9-10).

But of course to a Frenchman brought up in a legal system in which the Courts do not declare even an ordinary statute to be invalid, the idea of the unconstitutionality of a constitutional amendment does not even occur. France and Belgium have created no machinery for questioning legislation and

rely on moral and political sanctions. Even an English lawyer and less so an American lawyer find it difficult to understand how the legality of an amendment of the Constitution can ever be questioned. It appears to them that the procedure for the amendment being gone through there is no one to question and what emerges is the Constitution as valid as the old Constitution and just as binding. The matter, however, has to be looked at in this way. Where the Constitution is overthrown and the Courts lose their position under the old Constitution, they may not be able to pass on the validity of the new Constitution. This is the result of a revolution pure and simple. Where the new Constitution is not accepted and the people have not acquiesced in the change and the courts under the old Constitution function, the courts can declare the new Constitution to be void. Perhaps even when the people acquiesce and a new Government comes into being, the courts may still declare the new Constitution to be invalid but only if moved to do so. It is only when the courts begin to function under the new Constitution that they cannot consider the vires of that Constitution because then they owe their existence to it. I agree with Orfield in these observations taken from his book. He, however, does not include amendments of the Constitution in these remarks and expressly omits them. His opinion seems to indicate that in the case of amendments courts are completely free to see that the prescribed constitutional mode of alteration is complied with and the alteration is within the permissive limits to which the Constitution wishes the amendments to go. This is true of all amendments but particularly of an amendment seeking to repeal the courts' decision and being small in dimension, leaves the courts free to consider its validity. The courts derive the power from the existing terms of the Constitution and the amendment fails if it seeks to overbear some existing restriction on legislation.

What I have said does not mean that Fundamental Rights are not subject to change or modification. In the most inalienable of such rights a distinction must be made between possession of a right and its exercise. The first is fixed and the latter controlled by justice and necessity. Take for example Art. 21 :

> "No person shall be deprived of his life or personal liberty except according to procedure established by law".

Of all the rights, the right to one's life is the most valuable. This article of the Constitution, therefore, makes the right fundamental. But the inalienable right is curtailed by a murderer's conduct as viewed under law. The deprivation, when it takes place, is not of the right which was immutable but of the continued exercise of the right. Take a Directive Principle which is not enforceable at law but where the same result is reached. The right to employment is a directive principle. Some countries even view it as a Fundamental Right. The exercise, however, of that right must depend upon the capacity of Society to afford employment to all and sundry. The possession of this right also cannot be confused with its exercise. One right here is positive and can be enforced although its exercise can be curtailed or taken away, the other is a right which the State must try to give but which cannot be enforced. The Constitution permits a curtailment of the exercise of most of the Fundamental Rights by stating the limits of that curtailment. But this power does not permit the State itself, to take away or abridge the right beyond the limits set by the Constitution. It must also be remembered that the rights of one individual are often opposed by the rights of another individual and thus also become limitative. The Constitution in this way permits the Fundamental Rights to be controlled in their exercise but prohibits their erasure.

It is argued that such approach makes Society static and robs the State of its sovereignty. It is submitted that it leaves revolution as the only alternative if change is necessary. This is not right. The whole Constitution is open to amendment. Only two dozen articles are outside the reach of Art.

368. That too because the Constitution has made them fundamental. What is being suggested by the counsel for the State is itself a revolution because as things are that method of amendment is illegal. There is a legal method. Parliament must act in a different way to reach the Fundamental Rights. The State must reproduce the power which it has chosen to put under a restraint. Just as the French or the Japanese etc. cannot change the articles of their Constitution which are made free from the power of amendment and must call a convention or a constituent body, so also we in India cannot abridge or take away the Fundamental Rights by the ordinary amending process. Parliament must amend Art. 368 to convoke another Constituent Assembly, pass a law under item 97 of the First List of Schedule VII to call a Constituent Assembly and then that assembly may be able to abridge or take away the Fundamental Rights if desired. It cannot be done otherwise. The majority in Sajjan Singh's case ([1965] 1 S.C.R. 933) suggested bringing Art. 32 under the Proviso to improve protection to the Fundamental Rights. Article 32 does not stand in need of this protection. To abridge or take away that article (and the same is true of all other Fundamental Rights) a constituent body and not a constituted body is required. Parliament today is a constituted body with powers of legislation which include amendments of the Constitution by a special majority but only so far as Art. 13(2) allows. To bring into existence a constituent body is not impossible as I had ventured to suggest during the hearing and which I have now more fully explained here. It may be said that this is not necessary because Art. 368 can be amended by Parliament to confer on itself constituent powers over the Fundamental Rights. This would be wrong and against Art. 13(2). Parliament cannot increase its powers in this way and do indirectly which it is intended not to do directly. The State does not lose its sovereignty but as it has chosen to create self-imposed restrictions through one constituent body, those restrictions cannot be ignored by a constituted body which makes laws. Laws so made can affect those parts of the Constitution which are outside the restriction in Art. 13(2) but any law (legislative or amendatory) passed by such a body must conform to that article. To be able to abridge or take away the Fundamental Rights which give so many assurances and guarantees a fresh Constituent Assembly must be convoked. Without such action the protection of the Fundamental Rights must remain immutable and any attempt to abridge or take them away in any other way must be regarded as revolutionary.

I shall now consider the amendments of the Fundamental Rights made since the adoption of the Constitution, with a view to illustrating my meaning. Part III is divided under different headings. They are (a) General (b) Right to Equality (c) Right to Freedom (d) Right against exploitation (e) Right to Freedom of Religion (f) Cultural and Educational Rights (g) Right to Property (h) Right to Constitutional Remedies. I shall first deal with amendments of topics other than the topic (g) - Right to Property. The articles which are amended in the past are Arts. 15 and 19 by the 1st Amendment (18th June 1951) and Art. 16 by the 7th Amendment (19th October 1956). The 16th Amendment added the words "the sovereignty and integrity of India" to some clauses. As that does not abridge or take away any Fundamental Right, I shall not refer to the 16th Amendment hereafter. That Amendment was valid. The changes so made may be summarized. In Art. 15, which deals with prohibition of discrimination on the ground of religion, race, caste, sex or place of birth, clause (3) allowed the State to make special provision for women and children. A new clause was added which reads :

> "(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".

It is argued by counsel for the State that by lifting the ban to make special provision for backward classes of citizens, there is discrimination against the higher classes. This is the view which classes

in a privileged position who had discriminated against the backward classes for centuries, might indeed take. But I cannot accept this contention. The Constitution is intended to secure to all citizens "Justice, social, economic and political" and Equality of status and opportunity" (vide the Preamble) and the Directive Principles include Art. 38 which provides :

> "38. The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life".

To remove the effect of centuries of discriminatory treatment and to raise the down-trodden to an equal status cannot be regarded as discriminatory against any one. It is no doubt true that in State of Madras v. Champakam ([1951] S.C.R. 525) the reservation of seats for Backward Classes, Scheduled Castes and Tribes in public educational institutions was considered invalid. Articles 16(4) and 340 had already provided for special treatment for these backward classes and Art. 46 had provided that the State shall promote with special care their educational and economic interests. With all due respects the question of discrimination hardly arose because in view of these provisions any reasonable attempt to raise the status of the backward classes could have been upheld on the principle of classification. In any event, the inclusion of this clause to Art. 16 does not abridge or take away any one's Fundamental Rights unless the view be taken that the backward classes for ever must remain backward.

By the First Amendment the second and the sixth clauses of Art. 19 were also amended. The original cl. (2) was substituted by a new clause and certain words were added in clause (6). The changes may be seen by comparing the unamended and the amended clauses side by side :

> "19(1) All citizens shall have the right -
>
> (a) to freedom of speech and expression;
>
> #. . . . .(2) (Before Amendment) (After Amendment)Nothing in sub-clause (a) of Nothing in sub-clause (a) ofclause (1) shall affect the clause shall affect theoperation of any existing operation of any existinglaw in so far as it relates law, or prevent the State fromto, or prevent the State making any law, in so far asfrom making any law relating such law imposes reasonableto libel, slander, defamation, restrictions on the exercisecontempt of Court or any of the right conferred by thematter which offends against said sub-clause in the interestdecency or morality or which of the.....security of theundermines the security of, State, friendly relations withor tends to overthrow, the foreign States, public order,State. decency or morality, or in relation to contempt of court, defamation or incitement to an offence. . . . . ."##

The amendment was necessary because in Romesh Thapar v. State of Madras ([1950] S.C.R. 594) it was held that disturbances of public tranquallity did not come within the expression "undermines the security of the State". Later the Supreme Court itself observed in the State of Bihar v. Shailabala Devi ([1952] S.C.R. 654) that this Court did not intend to lay down that an offence against public order could not in any case come within that expression. The changes related to (a) "friendly relations with foreign States", (b) "public order" and (c) "incitement to an offence" and the words "undermines the security of the State or tends to overthrow the State" were replaced by the words "in the interests of the security of the State". This change could be made in view of the existing provisions of the clause as the later decision of this Court above cited clearly show that "public

order" and "incitement to offence" were already comprehended. The amendment was within the permissible limits as it did not abridge or take away any Fundamental Right.

The Amending Act passed by Parliament also included a sub-section which read :

> "(2) No law in force in the territory of India immediately before the commencement of the Constitution which is consistent with the provisions of article 19 of the Constitution as amended by sub-section (1) of this section shall be deemed to be void, or ever to have become void, on the ground only that, being a law which takes away or abridges the right conferred by sub-clause (a) of clause (1) of the said article, its operation was not saved by clause (2) of that article as originally enacted.
>
> Explanation. - In this sub-section, the expression "law in force" has the same meaning as in clause (1) of article 13 of this Constitution".

This sub-section was not included in the Constitution. That device was followed in respect of certain State statutes dealing with property rights by including them in a new Schedule. It did not then occur to Parliament that the laws could be placed under a special umbrella of constitutional protection. Perhaps it was not considered necessary because Art. 19(2) was retrospectively changed, and the enactment of this sub-section was an ordinary legislative action. If the amendment had failed, the second sub-section of section 3 would not have availed at all.

Turning now to clause (6), we may read the original and the amended clause side by side :

> "19(1) All citizens shall have the right -
>
> .. .. ..
>
> (g) to practise any profession, or to carry on any occupation, trade or business.
>
> .. .. ..
>
> (6) (Before Amendment)

Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular nothing in the said sub-clause, shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

(After Amendment)

Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, -

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

The first change is in the verbiage and is not one of substance. It only removes some unnecessary words. The new sub-clause is innocuous except where it provides for the exclusion of citizens. It enables nationalisation of industries and trade. Sub-clause (g) (to the generality of which the original clause (6) created some exceptions) allowed the State to make laws imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the sub-clause. A law creating restrictions can, of course, be made outside the Constitution or inside it. If it was considered that this right in the state was required in the interests of the general public, then the exercise of the right to practise profession or to carry on an occupation, trade or business could be suitably curtailed. It cannot be said that nationalisation is never in the interest of he general public. This amendment was thus within the provision for restricting the exercise of the Fundamental Right in sub-cl. (g) and was perfectly in order.

The Seventh Amendment introduced certain words in Art. 16(3). The clauses may be compared :

"16. . . . .

(3) (Before Amendment)

Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within the State prior to such employment or appointment.

(After Amendment)

Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment".

The change is necessary to include a reference to Union territory. It has not bearing upon Fundamental Rights and neither abridges nor takes away any of them. In the result non of the amendments of the articles in parts other than that dealing with Right to Property is outside the amending process because Art. 13(2) is in no manner breached.

This brings me to the main question in this case. It is : whether the amendments of the part to Property in Part III of the Constitution were legally made or not. To understand this part f the case I must first begin by discussing what property rights mean and how they were safeguarded by the Constitution as i was originally framed. "Right to Property" in Part III was originally the subject of one article, namely, Art. 31. Today there are three articles 31, 31-A and 31-B and the Ninth Schedule. The original thirty-first article read :

"31. Compulsory acquisition of property.

(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

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

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

(5) Nothing in clause (2) shall affect -

(a) the provisions of any existing law other than a law to which the provisions of clause (a) apply, or

(b) the provisions of any law which the State may hereafter make -

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted nor more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification no certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India, Act, 1935".

The provisions of this article are intended to be read with Art. 19(1) (f) which reads :

"19(1) All citizens shall have the right -

#.....##

(f) to acquire, hold and dispose of property".

Article 19(1)(f) is subject to clause (6) which I have already set out elsewhere and considered. Ownership and exchange of property are thus recognised by the article. The word "property" is not defined and I shall presently consider what may be included in 'property'. Whatever the nature of property, it is clear that by the first clause of Art. 31 the right to property may be taken away under authority of law. This was subject t one condition under the original Art. 31, namely, that the law must either fix the compensation for the deprivation of specify the principles on which and the manner in which compensation was to be determined and given. This was the heard of the institution of property as understood by the Constituent Assembly. The rest of the article only gave constitutional support against the second clause, to legislation already on foot in the State. This created a Fundamental Right in asked : why was it necessary to make such a Fundamental Right at all ?

There is no natural right in property and a Burke said in his Reflections, Government is not made in virtue of natural rights, which may and do exist in total independence of it. Natural rights embrace activity outside the status of citizen. Legal rights are required for free existence as a social being and the State undertakes to protect them. Fundamental Rights re those rights which the State enforces against itself. Looking at the matter briefly but historically, it may be said that the Greeks were not aware of the distinctions for a Gierke (Das Deutsches Genossenschaftrecht (III, 10) points out they did not distinguish between personality as a citizen and personality as a human being. For them the Individual was merged in the citizen and the citizen in the State. There was personal liberty and private law but there was no sharp division between the different kinds of laws. The Romans evolved this gradually, not when the Roman Republic existed, but when the notion of a Fiscus developed in the Empire and the legal personality of the Individual was separated from his membership of the State. It was then that the State began to recognize the rights of the Individual in his dealings with the State. It was Cicero (De Off. (The Offices) II Ch. XXI (Everyman) p.105) who was the first to declare that the primary duty of the Governor of a State was to secure to each individual in the possession of his property. Here we may see recognition of the ownership of property as a Fundamental Right. This idea was so engrained in early social philosophy that we find Locke opening in his 'Civil Government' (Ch. 7) that "Government has no other end but the preservation of property". The Concepts of liberty, equality and religious freedom were well-known. To them was added the concept of property rights. Later the list included :equalitas, libertas ius securitatis, ius defensionis and ius puniendi. The concept of property right gained further support from Bentham and Spencer and Kant and Hegel (W. Friedman : Legal Theory (4th Edn.) See pp. 373-376). The term property in its pristine meaning embraced only land but it soon came to mean much more. According to Noyes (The Institution of Property (1936) p. 436) -

> "Property is any protected right or bundle of rights (interest or thing) with direct or indirect regard to any external object (i.e. other than the person himself) which is material or quasi material (i.e. a protected process) and which the then and there organisation of Society permits to be either private or public, which is connoted by the legal concepts of occupying, possession or using".

The right is enforced by excluding entry or interference by a person not legally entitled. The position of the State vis-a-vis the individual is the subject of Arts. 19 and 31, 31-A and 31-B.

Now in the enjoyment, the ultimate right may be an interest which is connected to the object through a series of intermediaries in which each 'holder' from the last to the first 'holds of' 'the holder' before him. Time was when there was a lot of 'free property' which was open for appropriation. As Noyes (The Institution of Property (1936) p. 438) puts it, "all physical

manifestations capable of being detected, localised and identified" can be the objects of property. One exception now made by all civilized nations is that human beings are no longer appropriable. If any free property was available then it could be brought into possession and ownership by mere taking. It has been very aptly said that all private property is a system of monopolies and the right to monopolise lies at the foundation of the institution of property. Pound (Reading; p. 420) in classifying right in rem puts private property along with personal integrity [right against injury to life, body and health (body or mental), personal liberty (free motion and locomotion)], Society and control of one's family and dependents. An extremely valuable definition of ownership is to be found in the Restatement of the Law of Property where it is said :

> "It is the totality of rights as to any specific objects which are accorded by law, at any time and place, after deducting social reservations".

This is the core from which some rights may be detached but to which they must return when liberated.

The right to property in its primordial meaning involved the acquisition of a free object by possession and conversion of this possession into ownership by the protection of State or the ability to exclude interference. As the notion of a State grew, the right of property was strong or weak according to the force of political opinion backing it or the legislative support of the State. The English considered the right as the foundation of society. Blackstone (Commentaries) explained it on religious and social grounds claiming universality for it and called it the right of the English people. William Paley (Moral Philosophy), although he thought the institution paradoxical and unnatural, found it full of advantages and Mackintosh in his famous diatribe against the French Revolution described it as the "sheet-anchor of society". This institution appeared in the Magna Carta, in the American Declaration of Independence and the French Declaration of Rights of Man. Later we find it in many Constitutions described as Fundamental, general and guaranteed (Under the Constitution of Norway the rights (Odels and Asaete rights) cannot be abolished but if the State requires the owner must surrender the property and he is compensated).

Our Constitution accepted the theory that Right of Property is a fundamental right. In my opinion it was an error to place it in that category. Like the original Art. 16 of the Draft Bill of the Constitution which assured freedom of trade, commerce and intercourse within the territory of India as a fundamental right but was later removed, the right of property should have been placed in a different chapter. Of all the fundamental rights it is the weakest. Even in the most democratic of Constitutions, (namely, the West German Constitution of 1949) there was a provision that lands, minerals and means of production might be socialised or subjected to control. Art. 31, if it contemplated socialization in the same way in India should not have insisted so plainly upon payment of compensation. Several speakers warned Pandit Nehru and others of the danger of the second clause of Art. 31, but it seems that the Constituent Assembly was quite content that under it the Judiciary would have no say in the matter of compensation. Perhaps the dead hand of s. 299 of the Constitution Act of 1935 was upon the Constituent Assembly. Ignored were the resolutions passed by the National Planning Committee of the Congress (1941) which had advocated the co-operative principle for exploitation of land, the Resolution of 1947 that land with its mineral resources and all other means of production as well as distribution and exchange must belong to and be regulated by the Community, and the warning of Mahatma Gandhi that if compensation had to be paid we would have to rob Peter to pay Paul (Gandhi : Constituent Assembly Debates Vol. IX pp. 1204-06) ! In the Constituent Assembly, the Congress (which wielded the majority then, as it does today) was satisfied with the Report of the Congress Agrarian Reforms Committee 1949 which

declared itself in favour of the elimination of all intermediaries between the State and the tiller and imposition of prohibition against subletting. The Abolition Bills were the result. Obviously the Sardar Patel Committee on Fundamental Rights was not prepared to go far. In the debates that followed, many amendments and suggestions to alter the draft article protecting property, failed. The attitude was summed up by Sardar Patel. He conceded that land would be required for public purposes but hopefully added : "not only land but so many other things may have to be acquired. And the State will acquire them after paying compensation and not expropriate them". (Patel : Constituent Assembly Debates Vol. I p. 517).

What was then the theory about Right to Property accepted by the Constituent Assembly ? Again I can only describe it historically. Grotius (Grotius : De jure Belli ac Pacis. II c. 2 * 2 (5) * 6. I c. 1 & 6 and II c. 14 * * 7 and 8) had treated the right as an acquired right (ius quaesitum) and ownership (dominium) as either serving individual interests (vulgare) or for the public good (eminens). According to him, the acquired right had to give way to eminent domain (ex vi auper-eminentis domini) but there must be public interest (publicautilitas) and if possible compensation. In the social contract theory also the contract included protection of property with recognition of the power of the rule to act in the public interest and emergency. Our constitutional theory treated property rights as inviolable except through law for public good and on payment of compensation. Our Constitution saw the matter in the way of Grotius but overlooked the possibility that just compensation may not be possible. It follows almost literally the German jurist Ulrich Zasius (except in one respect) : Princeps non potest auferee mihi rem mean sive iure gentium, sive civile sit facta mea.

All would have been well if the Courts had construed Article 31 differently. However, the decisions of the High Courts and the Supreme Court, interpreting and expounding this philosophy took a different view of compensation. I shall refer only to some of them. First the Patna High Court in Kameshwar v. Bihar (A.I.R. 1951 Patna 91) applied Art. 14 to strike down the Reforms Act in Bihar holding it to be discriminatory. This need not have occasioned an amendment because the matter could have been righted, and indeed it was, by an appeal to the Supreme Court [see State of Bihar v. Kameshwar ([1952] S.C.R. 889)]. The Constitution (First Amendment) Act, 1951 followed. It left Art. 31 intact but added two fresh articles, Arts. 31-A and 31-B which are respectively headed "saving of laws providing for acquisition of estates etc." and "Validation of certain Acts and Regulations" and added a schedule (Ninth) to be read with Art. 31-B naming therein thirteen Acts of the State Legislatures. Article 31-A was deemed always to have been inserted and Art. 31-B wiped out retrospectively all decisions of the courts which had declared any of the scheduled Acts to be invalid. The texts of these new articles may now be seen :

> "31-A. Saving of laws providing for acquisition of estates, etc. -
>
> (1) Notwithstanding anything in foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part :
>
> Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.
>
> (2) In this article, -

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, inam or muafi or other similar grant;

(b) the expression "right" in relation to an estate shall include any rights vesting in a proprietor, sub-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue".

"31-B. Validation of certain Acts and Regulations.

Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provision of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force".

Article 31-A has been a Protean article. It has changed its face many times. Article 31-b has remained the same till today but the Ninth Schedule has grown. The Constitution (Fourth Amendment) Act, 1955, took the number of the Scheduled statutes to 20 and the Constitution (Seventeenth Amendment) Act, 1964 to 64 and a so-called explanation which saved the application of the Proviso in Art. 31-A, was also added. The device [approved by Sankari Prasad's case ([1952] S.C.R. 89)] was found so attractive that many more Acts were sought to be included but were dropped on second thoughts. Even so, one wonders how the Railway Companies (Emergency Provisions) Act, 1951, The West Bengal Land Development and Planning Act and some others could have been thought of in this connection. By this device, which can be extended easily to other spheres, the Fundamental Rights can be completely emasculated by a 2/3 majority, even though they cannot be touched in the ordinary way by a unanimous vote of the same body of men ! The State Legislatures may drive a coach and pair through the Fundamental Rights and the Parliament by 2/3 majority will then put them outside the jurisdiction of the courts. Was it really intended that the restriction against the State in Arts. 13(2) might be overcome by the two agencies acting hand in hand ?

Article 31-A dealt with the acquisition by the State of an 'estate' or of any rights therein or the extinguishment or modification of any such rights. A law of the State could do these with the President's assent, although it took away or abridged any of the rights conferred by any provisions of Part III. The words 'estate' and 'rights in relation to an estate' were defined. The constitutional amendment was challenged in Sankari Prasad's case ([1952] S.C.R. 89) on various grounds but was upheld mainly on two grounds to which I objected in Sajjan Singh's case ([1965] 1 S.C.R. 933). I have shown in this judgment, for reasons which I need not repeat and which must be read in addition to what I said on the earlier occasion, that I disagree respectfully but strongly with the view of the Court in those two cases. This touches the first part of the amendment which created Art. 31-A. I do not and cannot question Art. 31-A because (a) it was not considered at the hearing of this case, and (b) it has stood for a long time as part of the Constitution under the decision of this Court and has been acquiesced in by the people. If I was free I should say that the amendment was not legal and certainly not justified by the reasons given in the earlier cases of this Court. Under the

original Art. 31, compensation had to be paid for acquisition by the State. This was the minimum requirement of Art. 31(1) and (2) and no amendment could be made by a constituted Parliament to avoid compensation. A law made by a constituted Parliament had to conform to Art. 13(2) and Art. 31 could not be ignored.

In 1954 the Supreme Court in a series of cases drew the distinction between Art. 19(1)(f) and Art. 31, particularly in West Bengal v. Subodh Gopal ([1954] S.C.R. 587), Dwarkadas Srinivas v. Sholapur Spinning Co. ([1954] S.C.R. 558) In State of West Bengal v. Mrs. Bela Banerjee and Others ([1954] S.C.R. 587), this Court held that compensation in Art. 31(2) meant just equivalent, i.e. 'full and fair money equivalent' thus making the adequacy of compensation justiciable.

The Constitution (Fourth Amendment) Act, 1955 then amended both Art. 31 and Art. 31-A. Clause (2) of Art. 31 was substituted by -

> "(2) No property shall be compulsorily acquired or requisitioned save for public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate".

The opening words of the former second clause were modified to make them more effective but the muzzling of courts in the matter of adequacy of the compensation was the important move. As Basu says :

> "It is evident that the 1955 amendment of clause (2) eats into the vitals of the constitutional mandate to pay compensation and demonstrate a drift from the moorings of the American concept of private property and judicial review to which our Constitution was hitherto tied, to that of socialism". (Basu : Commentaries on the Constitution of India (5th Edn.) Vol. 2 p. 230).

It is appropriate to recall here that as expounded by Professor Beard (An Economic Interpretation of the United States Constitution) (whose views offended Holmes and the Times of New York but which are now being recognised after his further explanation (See Laski : The American Democracy; Weaver : Constitutional Law, Brown : Charles Beard and the Constitution : Willis Constitutional Law) the Constitution of the United States is an economic document prepared by men who were wealthy or allied with property rights, that it is based on the concept that the fundamental rights of property are anterior to Government and morally beyond the reach of popular majorities and that the Supreme Court of the United States preserved the property rights till the New Deal era. The threat at that time was to enlarge the Supreme Court but not to amend the Constitution. It appears that the Indian Socialists charged with the idea of Marx, the Webbs, Green, Laski and others viewed property rights in a different way. Pandit Nehru once said that he had no property sense, meaning that he did not value property at all. The Constitution seems to have changed its property sense significantly. In addition to avoiding the concept of just compensation, the amendment added a new clause (2A) as follows :-

> "(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or

requisitioning of property, notwithstanding that it deprives any person of his property".

This narrowed the field in which compensation was payable. In addition to this, clause (1) of Art. 31-A was substituted and was deemed to be always substituted by a new clause which provided :

"(1) Notwithstanding anything contained in article 13, no law providing for -

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporation, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease of licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14, article 19 or article 31 :

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent".

In clause (2) (a) after the word 'grant', the words "and in any State of Madras and Travancore Cochin, any Janmam right" were inserted and deemed always to have been inserted; and in clause (2)(b) after the words 'tenure-holder' the words "raiyat, under raiyat" were inserted and deemed always to have been inserted. Once again the reach of the State towards private property was made longer and curiously enough he was done retrospectively from the time of the Constituent Assembly and, so to speak in its name. As to the retrospective operation of these constitutional amendments I entertain considerable doubt. A Constituent Assembly makes a new Constitution for itself. Parliament is not even a Constituent Assembly and to abridge fundamental rights in the name of the Constituent Assembly appears anomalous. I am reminded of the conversation between Napoleon and Abe Sieyes, the great jurist whose ability to draw up one Constitution after another has been recognised and none of whose efforts lasted for long. When Napoleon asked him "what has survived ?" Abe Sieyes answered "I have survived". I wonder if the Constituent Assembly will be able to say the same thing ! What it had written on the subject of property rights, appears to have been written on water. The Fourth Amendment served to do away with the distinction made by this Court between Arts. 19 and 31 and the theory of just compensation. The Fourth Amendment has not been challenged before us. Nor was it challenged at any time before. For the reasons for which I have

declined to consider the First Amendment. I refrain from considering the validity of the Fourth Amendment. It may, however, be stated here that if I was free to consider it, I would have found great difficulty in accepting that the constitutional guarantee could be abridged in this way.

I may say here that the method I have followed in not reconsidering an amendment which has stood for a long time, was also invoked by the Supreme Court of United States in Leser v. Garnett ([1922] 258 U.S. 130). A constitution works only because of universal recognition. This recognition may be voluntary or forced where people have lost liberty of speech. But the acquiescence of the people is necessary for the working of the Constitution. The examples of our neighbours, of Germany, of Rhodesia and others illustrates the recognition of Constitutions by acquiescence. It is obvious that it is good sense and sound policy for the Courts to decline to take up an amendment for consideration after a considerable lapse of time when it was not challenged before, or was sustained on an earlier occasion after challenge.

It is necessary to pause here and see what the property rights have become under the repeated and retrospective amendments of the Constitution. I have already said that the Constitution started with the concept of which Grotius may be said to be the author, although his name is not particularly famous for theories of constitutional or municipal laws. The socialistic tendencies which the amendments now manifest take into consideration some later theories about the institution of property. When the original Art. 31 was moved by Pandit Jawaharlal Nehru, he had described it as a compromise between various approaches to the question and said that it did justice and equality not only to the individual but also to the community. He accepted the principle of compensation but compensation as determined by the Legislature and not the Judiciary. His words were :

> "The law should do it. Parliament should do it. There is not reference in this to any judiciary coming into the picture. Much thought has been given to it and there has been much debate as to where the judiciary comes in. Eminent lawyers have told us that on a proper construction of this clause, normally speaking the judiciary should not come in. Parliament fixes either the compensation itself or the principle governing that compensation and they should not be challenged except for one reason, where it is thought that there has bee a gross abuse of the law, where, in fact, there has been a fraud on the Constitution. Naturally the judiciary comes in to see if there has been a fraud on the Constitution or not". (Constituent Assembly Debates Vol. IX pp. 1193-1195).

He traced the evolution of property and observed that property was becoming a question of credit, of monopolies, that there were two approaches, the approach of the Individual and the approach of the community. He expressed himself for protection of the individual's rights. (Constituent Assembly Debates Vol. IX p. 1135). The attitude changed at the time of the First Amendment. Pandit Nehru prophesied that the basic problem would come before the House from time to time. That it has, there is no doubt, just as there is no doubt that each time the individual's rights have suffered.

Of course, the growth of collectivist theories have made else-where considerable inroads into the right of property. In Russia there is no private ownership of land and even in the Federal Capital Territory of Australia, the ownership of land is with the Crown and the individual can get a leasehold right only. Justification for this is found in the fact that the State must benefit from the rise in the value of land. The paucity of land and of dwelling house have led to the control of urban properties and creation of statutory tenancies. In our country a ceiling is put on agricultural land

held by an individual. The Supreme Court, in spite of this, has not frustrated any genuine legislation for agrarian re-form. It has upheld that laws by which the lands from latifundia have been distributed among the landless. It seems that as the Constitutions of Peru, Brazil, Poland, Latvia, Lethuania and Mexico contain provisions for such reforms, mainly without payment of compensation, our Parliament has taken the same road. Of course, the modern theory regards the institution of property on a functional basis (See G. W. Paton : Text Book of Jurisprudence (1964) pp. 484-485) which means that property to be productive must be properly distributed. As many writers have said property is now a duty more than a right and ownership of property entails a social obligation. Although Duguit (Transformations du droit prive), who is ahead of others, things that the institution of property has undergone a revolution, the rights of the Individual are not quite gone, except where Communism is firmly entrenched. The rights are qualified but property belongs still to the owner. The Seventeenth Amendment, however, seems to take us far away from even this qualified concept, at least in so far as "estates" as defined by Art. 31-A. This is the culmination of a process.

Previous to the Constitution (Seventeenth Amendment) Act the Constitution (Seventh Amendment) Act, 1956 had given power indirectly by altering entry No. 42 in List III. The entries may be read side by side :

> #"42. (Before Amendment) (After Amendment)Principles on which compensation for Acquisition and requisitioningproperty acquired or requisitioned of property.for the purposes of the Union or ofa State or for any other publicpurpose is to be determined, andthe form and the manner in whichsuch compensation is to be given".##

This removed the last reference to compensation in respect of acquisition and requisition. What this amendment began, the Constitution (Seventeenth Amendment) Act, 1964 achieved in full. The Fourth Amendment had added to the comprehensive definition of 'right in relation to an estate, the rights of raiyats and under-raiyats. This time the expression 'estate' in Art. 31-A was amended retrospectively by a new definition which reads :

> "the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include -
>
> (i) any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any janmam right;
>
> (ii) any land held under ryotwari settlement;
>
> (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;"

The only saving of compensation is now to be found in the second proviso added to clause (1) of the article which reads :-

> "Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of

such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof".

There is also the provision for compensation introduced indirectly in an Explanation at the end of the Ninth Schedule, in respect of the Rajasthan Tenancy Act, 1955. By this Explanation the provisions of this Tenancy Act in conflict with the proviso last quoted are declared to be void.

The sum total of this amendment is that except for land within ceiling, all other land can be acquired or rights therein extinguished or modified without compensation and no challenge to the law can be made under Arts. 14, 19 or 31 of the Constitution. The same is also true of the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or the amalgamation of two or more companies, or the extinguishment or modification of any rights of managing agents, secretaries, treasurers, managing directors, directors or managers, of corporations or of any voting right, of shareholders thereof or of any rights by virtue of any agreement, lease, or licence for the purpose of searching for, or winning, any mineral or mineral oil, or of the premature termination or cancellation of any such agreement, lease or licence.

It will be noticed further that deprivation of property of any person is not to be regarded as acquisition or requisition unless the benefit of the transfer of the ownership or right to possession goes to the State or to a corporation owned or controlled by the State. Acquisition or requisition in this limited sense alone requires that it should be or public purpose and under authority of law which fixes the compensation or lays down the principles on which and the manner in which compensation is to be determined and given and the adequacy of the compensation cannot be any ground of attack. Further still acquisition of estates and of rights therein and the taking over of property, amalgamation of corporations, extinguishment or modification of rights in companies and mines may be made regardless of Arts. 14, 19 and 31. In addition 64 State Acts are given special protection from the courts regardless of their contents which may be in derogation of the Fundamental Rights.

This is the kind of amendment which has been upheld in Sajjan Singh ([1965] 1 S.C.R. 933) case on the theory of the omnipotence of Art. 368. The State had bound itself not to enact any law in derogation of Fundamental Rights. Is the Seventeenth Amendment a law ? To this question my answer is a categoric yes. It is no answer to say that this is an amendment and, therefore, not a law, or that it is passed by a special power of voting. It is the action of the State all the same. The State had put restraints on itself in law-making whether the laws were made without or within the Constitution. It is also no answer to say that this Court in a Bench of five Judges on one occasion and by a majority of 3 to 2 on another, has said the same thing. In a matter of the interpretation of the Constitution this Court must look at the functioning of the Constitution as a whole. The rules of res judicata and stare decisis are not always appropriate in interpreting a Constitution, particularly when Art. 13(2) itself declares a law to be void. The sanctity of a former judgment is for the matter then decided. In Plessy v. Fergusson (163 U.S. 537), Harlan, J. alone dissented against the "separate but equal" doctrine uttering the memorable words that there was no caste and that the Constitution of the United States was 'colour blind'. This dissent made some Southern Senators to oppose his grandson (Mr. Justice John Marshall Harlan) in 1954. It took fifty-eight years for the words of Harlan, J.'s lone dissent (8 to 1) to become the law of the United States at least in respect of

segregation in the public schools [see Brown v. Board of Education ([1954] 347 U.S. 483)]. As Mark Twain said very truly - "Loyalty to a petrified opinion never yet broke a chain or freed a human soul !"

I am apprehensive that the erosion of the right to property may be practised against other Fundamental Rights. If a halt is to be called, we must declare the right of Parliament to abridge or take away Fundamental Rights. Small inroads lead to larger inroads and become as habitual as before our freedom was won. The history of freedom is not only how freedom is achieved but how it is preserved. I am of opinion that an attempt to abridge or take away Fundamental Rights by a constituted Parliament even through an amendment of the Constitution can be declared void. This Court has the power and jurisdiction to make the declaration. I dissent from the opposite view expressed in Sajjan Singh's ([1965] 1 S.C.R. 933) case and I overrule that decision.

It remains to consider what is the extent of contravention. Here I must make it clear that since the First, Fourth and Seventh Amendments are not before me and I have not, therefore, questioned them, I must start with the provisions of Arts. 31, 31-A, 31-B, List III and the Ninth Schedule as they were immediately preceding the Seventeenth Amendment. I have elsewhere given a summary of the inroads made into property rights of individuals and Corporations by these earlier amendments. By this amendment the definition of 'estate' was repeated for the most part but was extended to include :

> "(ii) any land held under ryotwari settlement;
>
> (iii) any land held or let for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans".

Further reach of acquisition or requisition without adequate compensation and without a challenge under Arts. 14, 19 and 31 has now been made possible. There is no kind of agricultural estate or land which cannot be acquired by the State even though it pays an illusory compensation. The only exception is the second proviso added to Art. 31-A(1) by which, lands within the ceiling limit applicable for the time being to a person personally cultivating his land, may be acquired only on paying compensation at a rate which shall not be less than the market value. This may prove to be an illusory protection. The ceiling may be lowered by legislation. The State may leave the person an owner in name and acquire all his other rights. The latter question did come before this Court in two cases - Ajit Singh v. State of Punjab ([1967] 2 S.C.R. 143) and Bhagat Ram and Ors. v. State of Punjab and Ors. ([1965] 1 S.C.R. 933) decided on December 2, 1966. My brother Shelat and I described the device as a fraud upon this proviso but it is obvious that a law lowering the ceiling to almost nothing cannot be declared a fraud on the Constitution. In other words, the agricultural landholders hold land as tenants-at-will. To achieve this a large number of Acts of the State Legislatures have been added to the Ninth Schedule to bring them under the umbrella of Art. 31-B. This list may grow.

In my opinion the extension of the definition of 'estate' to include ryotwari and agricultural lands is an inroad into the Fundamental Rights but it cannot be questioned in view of the existence of Art. 31-A(1)(a) as already amended. The constitutional amendment is a law and Art. 31(1) permits the deprivation of property by authority of law. The law may be made outside the Constitution or within it. The word 'law' in this clause includes both ordinary law or an amendment of the Constitution. Since "no law providing for the acquisition by the State of any estate or of any rights therein or the

extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14, Art. 19 or Art. 31", the Seventeenth Amendment when it gives a new definition of the word 'estate' cannot be questioned by reason of the Constitution as it exists. The new definition of estate introduced by the amendment is beyond the reach of the courts not because it is not law but because it is "law" and falls within that word in Art. 31(1)(2) (2-A) and Art. 31-A(1). I, therefore, sustain the new definition, not on the erroneous reasoning in Sajjan Singh's case ([1965] 1 S.C.R. 933) but on the true construction of the word 'law' as used in Arts. 13(2), 31(1)(2-A) and 31-A(1). The above reason applies a fortiori to the inclusion of the proviso which preserves (for the time being) the notion of compensation for deprivation of agricultural property. The proviso at least saves something. It prevents the agricultural lands below the ceiling from being appropriated without payment of proper compensation. It is clear that the proviso at least cannot be held to abridge or take away fundamental rights. In the result I uphold the second section of the Constitution (Seventeenth Amendment) Act, 1964.

This brings me to the third section of the Act. That does no more than add 44 State Acts to the Ninth Schedule. The object of Art. 31-B, when it was enacted, was to save certain State Acts notwithstanding judicial decision to the contrary. These Acts were already protected by Art. 31. One can with difficulty understand such a provision. Now the Schedule is being used to give advance protection to legislation which is known or apprehended to derogate from the Fundamental Rights. The power under Art. 368, whatever it may be, was given to amend the Constitution. Giving protection to statutes of State Legislatures which offend the Constitution in its most fundamental part, can hardly merit the description amendment of the Constitution. In fact in some cases it is not even known whether the statutes in question stand in need of such aid. The intent is to silence the courts and not to amend the Constitution. If these Acts were not included in the Schedule they would have to face the Fundamental Rights and rely on Arts. 31 and 31-A to save them. By this device protection far in excess of these articles is afforded to them. This in my judgment is not a matter of amendment at all. The power which is given is for the specific purpose of amending the Constitution and not to confer validity on State Acts against the rest of the Constitution. If the President's assent did not do this, no more would this section. I consider s. 3 of the Act to be invalid as an illegitimate exercise of the powers of amendment however generous. Ours is the only Constitution in the world which carries a long list of ordinary laws which it protects against itself. In the result I declare s. 3 to be ultra vires the amending process.

As stated by me in Sajjan Singh's case ([1965] 1 S.C.R. 933) Art. 368 outlines a process, which, if followed strictly, results in the amendment of the Constitution. The article gives power to no particular person or persons. All the named authorities have to act according to the letter of the article to achieve the result. The procedure of amendment, if it can be called a power at all is a legislative power but it is sui generis and outside the three lists in Schedule 7 of the Constitution. It does not have to depend upon any entry in the lists.

Ordinarily there would be no limit to the extent of the amendatory legislation but the Constitution itself makes distinctions. It states three methods and places certain bars. For some amendments an ordinary majority is sufficient; for some others a 2/3rd majority of the members present and voting with a majority of the total members, in each House is necessary; and for some others in addition to the second requirement, ratification by at least one half of the legislatures of the States must be forthcoming. Besides these methods, Art. 13(2) puts an embargo on the legislative power of the State and consequently upon the agencies of the State. By its means the boundaries of legislative action of any kind including legislation to amend the Constitution have been marked out.

I have attempted to show here that under our Constitution revolution is not the only alternative to change of Constitution under Art. 368. A Constitution can be changed by consent or revolution. Rodee, Anderson and Christol (Introduction to Political Science, p. 32 et seq.) have shown the sovereignty of the People is either electoral or constituent. When the People elect the Parliament and the Legislatures they exercise their electoral sovereignty. It includes some constituent sovereignty also but only in so far as conceded. The remaining constituent sovereignty which is contained in the Preamble and Part III is in abeyance because of the curb placed by the People on the State under Art. 13(2). It is this power which can be reproduced. I have indicated the method. Watson (Constitution, its History, Application and Construction Vol. II (1910) p. 1301) (quoting Ames - On Amendments p. 1 note 2) points out that the idea that provision should be made in the instrument of Government itself for the method of its amendment is peculiarly American. But even in the Constitution of the United States of America some matters were kept away from the amendatory process either temporarily or permanently. Our Constitution has done the same. Our Constitution provides for minorities, religions, socially and educationally backward peoples, for ameliorating the condition of depressed classes, for removing class distinctions, titles, etc. This reservation was made so that in the words of Mandison (Federalist No. 10), men of factious tempers, of local prejudices, or sinister designs may not by intrigue, by corruption, or other means, first obtain the suffrages and then betray the interests of the people. It was to plug the loophole such as existed in s. 48 of the Weimar Constitution (See Louis L. Snyder : The Weimar Constitution, p. 42 et seq) that Art. 13(2) was adopted. Of course, as Story (Commentaries on the Constitution of the United States (1833) Vol. II. p. 687) says, an amendment process is a safety valve to let off all temporary effervescence and excitement, as an effective instrument to control and adjust the movements of the machinery when out of order or in danger of self-destruction but is not an open valve to let out even that which was intended to be retained. In the words of Wheare (K. C. Wheare : Modern Constitutions, p. 78) the people or a Constituent Assembly acting on their behalf, has authority to enact a Constitution and by the same token a portion of the Constitution placed outside the amendatory process by one Constituent body can only be amended by another Constituent body. In the Commonwealth of Australia Act the provisions of the last paragraph of s. 128 have been regarded as mandatory and held to be clear limitations of the power of amendment. Dr. Jethro Brown considered that the amendment of the paragraph was logically impossible even by a two step amendment. Similarly, s. 105-A has been judicially considered in the Garnishee case (46 C.L.R. 155) to be an exception to the power of amendment in s. 128 although Wynes (Legislative, Executive and Judicial Powers in Australia pp. 695-698) does not agree. I prefer the judicial view to that of Wynes. The same position obtains under our Constitution in Art. 35 where the opening words are more than a non-obstante clause. They exclude Art. 368 and even amendment of that article under the proviso. It is, therefore, a grave error to think of Art. 368 as a code or as omnicompetent. 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.

My conclusions are :

(i) that the Fundamental Rights are outside the amendatory process if the amendment seeks to abridge or take away any of the rights;

(ii) that Sankari Prasad's case (and Sajjan Singh's case which followed it) conceded the power of amendment over Part III of the Constitution on an erroneous view of Art. 13(2) and 368;

(iii) that the First, Fourth and Seventh Amendments being part of the Constitution by

acquiescence for a long time, cannot now be challenged and they contain authority for the Seventeenth Amendment;

(iv) that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in Art. 368, any further inroad into these rights as they exist today will be illegal and unconstitutional unless it complies with Part III in general and Art. 13(2) in particular;

(v) that for abridging or taking away Fundamental Rights, a Constituent body will have to be convoked; and

(vi) that the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1953 (X of 1953) and the Mysore Land Reforms Act, 1961 (X of 1962) as amended by Act XIV of 1965 are valid under the Constitution not because they are included in Schedule 9 of the Constitution but because they are protected by Art. 31-A, and the President's assent.

In view of my decision the several petitions will be dismissed, but without costs. The State Acts Nos. 21-64 in the Ninth Schedule will have to be tested under Part III with such protection as Arts. 31 and 31-A give to them.

Before parting with this case I only hope that the Fundamental Rights will be able to withstand the pressure of textual readings by "the depth and toughness of their roots".

BACHAWAT, J.

The constitutionality of the Constitution First, Fourth and Seventeenth Amendment Acts is challenged on the ground that the fundamental rights conferred by Part III are inviolable and immune from amendment. It is said that art. 368 does not give any power of amendment and, in any event, the amending power is limited expressly by art. 13(2) and impliedly by the language of art. 368 and other articles as also the preamble. It is then said that the power of amendment is abused and should be subject to restrictions. The Acts are attacked also on the ground that they made changes in arts. 226 and 245 and such changes could not be made without complying with the proviso to art. 368. Article 31-B is subjected to attack on several other grounds.

The constitutionality of the First Amendment was upheld in Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar ([1952] S.C.R. 89), and that of the Seventeenth amendment, in Sajjan Singh v. State of Rajasthan ([1965] 1 S.C.R. 933). The contention is that these cases were wrongly decided.

Part XX of the Constitution specifically provides for its amendment. It consists of a single article. Part XX is as follows :-

"PART XX.

Amendment of the Constitution

Procedure for amendment of the Constitution

368. 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 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, 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 :

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 contention that article 368 prescribes only the procedure of amendment cannot be accepted. The article not only prescribes the procedure but also gives the power of amendment. If the procedure of art. 368 is followed, the Constitution "shall stand amended" in accordance with the terms of the bill. It is because the power to amend is given by the article that the Constitution stands amended. The proviso is enacted on the assumption that the several articles mentioned in it are amendable. The object of the proviso is to lay down a stricter procedure for amendment of the articles which would otherwise have been amendable under the easier procedure of the main part. There is no other provision in the Constitution under which these articles can be amended.

Articles 4, 169, Fifth Schedule Part D, and Sixth Schedule Para 21 empower the Parliament to pass laws amending the provisions of the First, Fourth, Fifth and Sixth Schedules and making amendments of the Constitution consequential on the abolition of creation of the legislative councils in States, and by express provisions no such law is deemed to be an amendment of the Constitution for the purposes of art. 368. All other provisions of the Constitution can be amended by recourse to art. 368 only. No other article confers the power of amending the Constitution.

Some articles are expressed to continue until provision is made by law [see articles 59(3), 65(3), 73(2), 97, 98(3), 106, 135, 142(1), 148(3), 149, 171(2), 186, 187(3), 189(3), 194(3), 195, 221(2), 283(1) and (2), 285, 313, 345, 372(1), 373]. Some articles continue unless provision is made otherwise by law [see articles 120(2), 133(3), 210(2) and some continue save as otherwise provided by law [see articles 239(1), 287]. Some articles are subject to the provisions of any law to be made [see articles 137, 146(2), 225, 229(2), 241(3), 300(1), 309], and some are expressed not to derogate from the power of making laws [see articles 5 to 11, 289(2)]. All these articles are transitory in nature and cease to operate when provision is made by law on the subject. None of them can be regarded as conferring the power of amendment of the Constitution. Most of these articles continue until provision is made by law made by the Parliament. But some of them continue until or unless provision is made by the State Legislature (see articles 189(3), 194(3), 195, 210(2), 229(2), 300(1),

345) or by the appropriate legislature (see articles 225, 241(3); these articles do not confer a power of amendment, for the State legislature cannot amend the Constitution. Many of the above-mentioned articles and also other articles (see articles 22(7), 32(3), 33 to 35, 139, 140, 239A, 241, 245 to 250, 252, 253, 258(2), 286(2), 302, 307, 315(2), 327, 369 delegate powers of making laws to the legislature. None of these articles gives the power of amending the Constitution.

It is said that art. 248 List 1 item 97 of the 7th Schedule read with art. 246 give the Parliament the power of amending the Constitution. This argument does not bear scrutiny. Art. 248 and List I item 97 vest the residual power of legislation in the Parliament. Like other powers of legislation, the residual power of the Parliament to make laws is by virtue of art. 245 subject to the provisions of the Constitution. No law made under the residual power can derogate from the Constitution or amend it. If such a law purports to amend the Constitution, it will be void. Under the residual power of legislation, the Parliament has no power to make any law with respect to any matter enumerated in Lists II and III of the 7th Schedule but under art. 368 even Lists II and III can be amended. The procedure for constitutional amendments under art. 368 is different from the legislative procedure for passing laws under the residual power of legislation. If a constitutional amendment could be made by recourse to the residual power of legislation and the ordinarily legislative procedure, art. 368 would be meaningless. The power of amending the Constitution is to be found in art. 368 and not in art. 248 and List I item 97. Like other Constitutions, our Constitution makes express provisions for amending the Constitution.

The heading of art. 368 shows that it is a provision for amendment of the Constitution, the marginal note refers to the procedure for amendment and the body shows that if the procedure is followed, the Constitution shall stand amended by the power of the article.

Chapter VIII of the Australian Constitution consists of a single section (S. 128). The heading is "Alteration of the Constitution". The marginal note is "Mode of altering the Constitution". The body lays down the procedure for alteration. The opening words are : "This Constitution shall not be altered except in the following manner". Nobody has doubted that the section gives the power of amending the Constitution. Wynes in his book on Legislative Executive and Judicial Powers in Australia, third edition, p. 695. stated "The power of amendment extends to alteration of 'this Constitution' which includes S. 128 itself. It is true that S. 128 is negative in form, but the power is implied by the terms of the section".

Article 5 of the United States Constitution provides that a proposal for amendment of the Constitution by the Congress on being ratified by three-fourths of the States "shall be valid to all intents and purposes as part of this Constitution". The accepted view is that "power to amend the Constitution was reserved by article 5" per Van Devanter, J. in Rhode Island v. Palmer (253 U.S. 350 : 64 L.E.D. 946). Art. 368 uses stronger words. On the passing of the bill for amendment under art. 368, "the Constitution shall stand amended in accordance with the terms of the bill".

Article 368 gives the power of amending "this Constitution". This Constitution means any of the provisions of the Constitution. No limitation on the amending power can be gathered from the language of this article. Unless this power is restricted by some other provision of the Constitution, each and every part of the Constitution may be amended under art. 368. All the articles mentioned in the proviso are necessarily within this amending power. From time to time major amendments have been made in the articles mentioned in the proviso (see articles 80 to 82, 124 (2A), 131, 214, 217(3), 222(2), 224A, 226(1A), 230, 231, 241 and Seventh Schedule) and other articles (see articles 1, 3, 66, 71, 85, 153, 158, 170, 174, 239, 239A, 240, 258A, 269, 280, 286, 290A, 291, 298, 305,

311, 316, 350A, 350B, 371, 371A, 372A, 376, 379 to 391, the first, third and fourth schedules), and minor amendments have been made in innumerable articles. No one has doubted so far that these articles are amendable. Part III is a part of the Constitution and is equally amendable.

It is argued that a Constitution Amendment Act is a law and therefore the power of amendment given by art. 368 is limited by art. 13(2). Art. 13(2) is in these terms :-

> #"13(1) . . . . . .##
>
> (2) 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".

Now art. 368 gives the power of amending each and every provision of the Constitution. Art. 13(2) is a part of the Constitution and is within the reach of the amending power. In other words art. 13(2) is subject to the overriding power of art. 368 and is controlled by it. Art. 368 is not controlled by art. 13(2) and the prohibitory injunction in art. 13(2) is not directed against the amending power. Looked at from this broad angle, art. 13(2) does not forbid the making of a constitutional amendment abridging or taking away any right conferred by Part III.

Let us now view the matter from a narrower angle. The contention is that a constitutional amendment under art. 368 is a law within the meaning of art. 13. I am inclined to think that this narrow contention must also be rejected.

In art. 13 unless the context otherwise provides 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of india the force of law [article 13(3)(a)]. The inclusive definition of law in art. 13(3)(c) neither expressly excludes nor expressly includes the Constitution or a constitutional amendment.

Now the term 'law' in its widest and generic sense includes the Constitution and a constitutional amendment. But in the Constitution this term is employed to designate an ordinary statue or legislative act in contradistinction to the Constitution or a constitutional amendment. The Constitution is the basic law providing the framework of government and creating the organs for the marking of the laws. The distinction between the Constitution and the laws is so fundamental that the Constitution is not regarded as a law or a legislative act. The Constitution means the Constitution as amended. An amendment in conformity with art. 368 is a part of the Constitution and is likewise not a law.

The basic theory of our Constitution is that it cannot be changed by a law or legislative Act. It is because special provision is made by articles 4, 1969, Fifth Schedule Part D and Sixth Schedule para 21 that some parts of the Constitution are amendable by ordinary laws. But by express provision no such law is deemed to be a constitutional amendment. Save as expressly provided in articles 4, 169, Fifth Schedule Part D and Sixth Schedule para 21, no law can amend the Constitution, and a law which purports to make such an amendment is void.

In Marbury v. Madison ([1803] 1 Cranch 137, 177 : 2 L. Ed. 60, 73), Marshall, C.J., said :

> "It is a proposition too plain to be contested, that the Constitution controls any legislative Act repugnant to it; or, that the legislature may alter the Constitution by an ordinary Act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, 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.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an Act of the Legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society".

It is because a Constitution Amendment Act can amend the Constitution and is not a law that art. 368 avoids all reference to law making by the Parliament. As soon as a bill is passed in conformity with art. 368 the Constitution stands amended in accordance with the terms of the bill.

The power of amending the Constitution is not an ordinary law making power. It is to be found in art. 368 and not in articles 245, 246 and 248 and the Seventh Schedule.

Nor is the procedure for amending the Constitution under art. 368 an ordinary law making procedure. The common feature of the amending process under art. 368 and the legislative procedure is that a bill must be passed by each House of Parliament and assented to by the President. In other respects the amending process under art. 368 is very different from the ordinary legislative process. A constitution amendment Act must be initiated by a bill introduced for that purpose in either House of Parliament. The bill must be passed in each House by not less than two thirds of the members present and voting, the requisite quorum in each House being a majority of its total membership; and in cases coming under the proviso, the amendment must be ratified by the legislature of not less than one half of the States. Upon the bill so passed being assented to by the President, the Constitution stands amended in accordance with the terms of the bill. The ordinary legislative process is much easier. A bill initiating a law may be passed by a majority of the members present and voting at a sitting of each House or at a joint sitting of the Houses, the quorum for the meeting of either House being one tenth of the total number of members of the House. The bill so passed on being assented to by the President becomes a law. A bill though passed by all the members of both Houses cannot take effect as a Constitution amendment Act unless it is initiated for the express purpose of amending the Constitution.

The essence of a written Constitution is that it cannot be changed by an ordinary law. But most written Constitutions provide for their organic growth by constitutional amendments. The main method of constitutional amendments are (1) by the ordinary legislature but under certain restrictions, (2) by the people through a referendum, (3) by a majority of all the units of a Federal State; (4) by a special convocation see C.F. Strong Modern Political Institutions, 5th Edition, pp. 133-4, 146. Our Constitution has by article 368 chosen the first and a combination of the first and the third methods.

The special attributes of constitutional amendment under art. 368 indicate that it is not a law or a legislative act. Moreover it will be seen presently that the Constitution makers could not have intended that the term "law" in art. 13(2) would include a constitutional amendment under art. 368.

If a constitutional amendment creating a new fundamental right and incorporating it in Part III were a law, it would not be open to the Parliament by a subsequent constitutional amendment to abrogate the new fundamental right for such an amendment would be repugnant to Part III. But the conclusion is absurd for the body which created the right can surely take it away by the same process.

Shri A. K. Sen relied upon a decision of the Oklahoma Supreme Court in Riley v. Carter (88 A.L.R. 1008) where it was held that for some purposes the Constitution of a State was one of the laws of the State. But even in America, the term "law" does not ordinarily include the Constitution or a constitutional amendment. In this connection, I will read the following passage in Corpus Juris Secundum, Vol. XVI Title Constitutional Law Art. 1, p.20 :

The term `constitution' is ordinarily employed to designate the organic law in contradistinction to the term `law', which is generally used to designate statutes or legislative enactments. Accordingly, the term `law' under this distinction does not include a constitutional amendment. However, the term `law' may, in accordance with the context in which it is used, comprehend or included the constitution or a constitutional provision or amendment. A statute and a constitution, although of unequal dignity, are both `laws', and rest on the will of the people".

In our Constitution, the expression "law" does not include either the constitution or a constitutional amendment. For all these reasons we must hold that a constitutional amendment under art. 368 is not a law within the meaning of art. 13(2).

I find no conflict between articles 13(2) and 368. The two articles operate in different fields. Art. 13(2) operates on laws; it makes no express exception regarding a constitutional amendment, because a constitutional amendment is not a law and is outside its purview. Art. 368 occupies the field of constitutional amendments. It does not particularly refer to the articles in Part III and many other articles, but on its true construction it gives the power of amending each and every provision of the Constitution and necessarily takes in Part III. Moreover, art. 368 gives the power of amending itself, and if express power for amending the provisions of Part III were needed, such a power could be taken by an amendment of the article.

It is said that the non-obstante clause in art. 35 shows that the article is not amendable. No one has amended art. 35 and the point does not arise. Moreover, the non-obstante clause is to be found in articles 258(1), 364, 369, 370 and 371A. No one has suggested that these articles are not amendable.

The next contention is that there are implied limitations on the amending power. It is said that apart from art. 13(2) there are expressions in Part III. which indicate that the amending power cannot touch Part III. Part III is headed "fundamental rights". The right to move the Supreme Court for enforcement of the rights conferred by this Part is guaranteed by art. 32 and cannot be suspended except as otherwise provided for by the Constitution -(art. 32(4)). It is said that the terms "fundamental" and "guarantee" indicate that the rights conferred by Part III are not amendable. The argument overlooks the dynamic character of the Constitution. While the Constitution is static, it is the fundamental law of the country, the rights conferred by Part III are fundamental, the right under art. 32 is guaranteed, and the principles of State policy enshrined in Part IV are fundamental in the governance of the country. But the Constitution is never at rest; it changes with the progress of time. Art. 368 provides the means for the dynamic changes in the Constitution. The scale of values embodied in Parts III and IV is not immortal. Parts III and IV being parts of the Constitution are not immune form amendment under art. 368.

Demands for safeguards of the rights embodied in Part III and IV may be traced to the Constitution of India Bill 1895, the Congress Resolutions between 1917 and 1919, Mrs. Beasant's Commonwealth of India Bill of 1925, the Report of the Nehru Committee set up under the Congress Resolution in 1927, the Congress Resolution of March 1931 and the Sapru Report of 1945. The american bill of rights, the constitutions of other countries, the declaration of human rights by the United Nations and other declarations and charters gave impetus to the demand. In this back-ground the Constituent Assembly embodied in preamble to the Constitution the resolution to secure to all citizens social, economic and political justice, liberty of thought, expression, belief, faith and worship, equality of status and opportunity and fraternity assuring the dignity of the individual and the unity of the nation and incorporated safeguards as to some human rights in Parts III and IV of the Constitution after separating them into two parts on the Irish model. Part III contains the passive obligations of the State. It enshrines the right of life, personal liberty, expression, assembly, movement, residence, avocation, property, culture and education, constitutional remedies, and protection against exploitation and obnoxious penal laws. The State shall not deny these rights save as provided in the Constitution. Part IV contains the active obligations of the State shall secure a social order in which social, economic and political justice shall inform all the institutions of national life. Wealth and its source of production shall not be concentrated in the hands of the few but shall be distributed so as to subserve the common good, and there shall be adequate means of livelihood for all and equal pay for equal work. The State shall endeavour to secure the health and strength of workers, the right to work, to education and to assistance in cases of want, just and humane conditions of work, a living wage for workers, a uniform civil code, free and compulsory education for children. The State shall take steps to organize village panchayats, promote the educational and economic interests of the weaker sections of the people, raise the level of nutrition and standard of living, improve public health, organize agricultural and animal husbandry separate the judiciary from executive and promote international peace and security.

The active obligations of the State under Part IV are not justiciable. If a law made by the state in accordance with the fundamental directives of Part IV comes in conflict with the fundamental rights embodied in Part III, the law to the extent of repugnancy is void. Soon after the Constitution came into force, it became apparent that laws for agrarian and other reforms for implementing the directives of Part IV were liable to be struck down as they infringed the provisions of Part III. From time to time constitutional amendments were proposed with the professed object of validating these laws, superseding certain judicial interpretations of the Constitution and curing defects in the original Constitution. The First, Fourth, Sixteenth and Seventeenth Amendments made important changes in the fundamental rights. The First amendment introduced cl. (4) in art. 15 enabling the State to make special provisions for the benefit of the socially and educationally backward class of citizens, the scheduled castes and the scheduled tribes in derogation of articles 15 and 29(2) with a view to implement art. 46 and to supersede the decision in State of Madras v. Champakam ([1951] S.C.R. 525), substituted a new cl.(2) in art. 19 with retrospective effect chiefly with a view to bring in public order within the permissible restrictions and to supersede the decisions in Romesh Thappar v. State of Madras ([1950] S.C.R. 605), Brij Bhushan v. State of Delhi ([1952] S.C.R. 654), amended cl. (6) of art. 19 with a view to free state trading monopoly from the test of reasonableness and to supersede the decision in Moti Lal v. Government of State of Uttar Pradesh (I.L.R. [1951] 1 All. 269). Under the stress of the First amendment it is now suggested that Champakam's case ([1951] S.C.R. 525), Romesh Thappar's case ([1950] S.C.R. 605) and Motilal's case (I.L.R. [1951] 1 All. 269) were wrongly decided, and the amendments of articles 15 and 19 were in harmony with the original Constitution and made no real change in it. It is to be noticed however that before the First amendment no attempt was made to overrule these case, and but for the amendments, these

judicial interpretations of the Constitution would have continued to be the law of the land. The Zamindari Abolition Acts were the subject of bitter attack by the zamindars. The Bihar Act though protected by cl. 6 of art. 31 from attack under art. 31 was struck down as violative of art. 14 by the Patna High Court (see State of Bihar v. Maharajadhiraj Sri Kameshwar Singh ([1952] S.C.R. 389 [A.I.R. 1951 Pat. 91]), while the Uttar Pradesh Act (see Raja Surya Pal Singh v. The State of U.P.) ([1952] S.C.R. 1056 [A.I.R. 1961 All. 674]) and the Madhya Pradesh, Act (see Vishweshwar Rao v. State of Madhya Pradesh ([1952] S.C.R. 1020), though upheld by the High Courts were under challenge in this Court. The First amendment therefore introduced art. 31A, 31B and the Ninth Schedule with a view to give effect to the policy of agrarian reforms, to secure distribution of large blocks of land in the hands of the zamindars in conformity with art. 39, and to immunize specially 13 State Acts form attack under Part III. The validity of the First Amendment was upheld in Sri Sankari Prasad Singh Deo's case ([1952] S.C.R. 89). The Fourth amendment changed art. 31(2) with a view to supersede the decision in State of West Bengal v. Bela Banerjee ([1954] S.C.R. 558) and to provide that the adequacy of compensation for property compulsorily acquired would not be justiciable, inserted Cl. (2A) in art. 31 with a view to supersede the decisions in the State of West Bengal v. Subodh Gopal Bose ([1954] S.C.R. 587), Dwarka Das Shrinivas v. Sholapur Spinning and Weaving Co., Ltd., ([1954] S.C.R. 674) Saghir Ahmad v. The State of Uttar Pradesh ([1954] S.C.R. 1218), and to make it clear that clauses (1) and (2) of art. 31 relate to different subject-matters and deprivation of property short of transference of ownership or with to possession to the State should not be treated as compulsory acquisition of property. The Fourth amendment also amended art 31A with a view to protect certain laws other than agrarian laws and to give effect to the policy of fixing ceiling limits on land holdings and included seven more Acts in the Ninth Schedule. One of the Acts (item 17) though upheld in Jupiter General Insurance Co. v. Rajgopalan (A.I.R. 1952 Pun. 9) was the subject of criticism in Dwarka Das's case ([1954] S.C.R. 674, 706). The Sixteenth amendment amended clauses (2), (3) and (4) of art. 19 to enable the imposition of reasonable restrictions in the interest of the sovereignty and integrity of India. The Seventeenth amendment amended the definition of estate in art. 31A with a view to supersede the decisions in Karimbil Kunhikoman v. State of Kerala ([1962] Supp. 1 S.C.R. 829) and A. P. Krishnaswami Naidu v. State of Madras ([1964] 7 S.C.R. 82) and added a proviso to art. 31A and included 44 more Acts in the Ninth Schedule, as some of the Acts had been struck down as unconstitutional. The validity of the Seventeenth amendment was upheld in Sajjan Singh's case ([1965] 1 S.C.R. 933). Since 1951, numerous decisions of this Court have recognised the validity of the First, Fourth and Seventeenth amendments. If the rights conferred by Part III cannot be abridged or taken away by constitutional amendments, all these amendments would be invalid. The Constitution makers could not have intended that the rights conferred by Part III could not be altered for giving effect to the policy of Part IV. Nor was it intended that defects in Part III could not be cured or that possible errors in judicial interpretations of Part III could not be rectified by constitutional amendments.

There are other indications in the Constitution that the fundamental rights are not intended to be inviolable. Some of the articles make express provision for abridgement of some of the fundamental rights by law (see articles 16(3), 19(1) to (6), 22(3), 23(2), 25(2), 28(2), 31(4) to (6), 33, 34). Articles 358 and 359 enable the suspension of fundamental rights during emergency. Likewise, art. 368 enables amendment of the Constitution including all the provisions of Part III.

It is argued that the preamble secures the liberties grouped together in Part III and as the preamble cannot be amended, Part III is not amendable. The argument overlooks that the preamble is mirrored in the entire Constitution., If the rest of the Constitution is amendable, Part III cannot stand on a higher footing. The objective of the preamble is secured not only by Part III but also by Part IV and art. 368. The dynamic character of Part IV may require drastic amendments of Part III

by recourse to art. 368. Moreover the preamble cannot control the unambiguous language of the articles of the Constitution, see Wynes, Legislative Executive and Judicial Powers in Australia, third edition, pp. 694-5; in Re Berubari Union & exchange of Enclaves ([1960] 3 S.C.R. 250, 261-2, 281). The last case decided that the Parliament can under art. 368 amend art. 1 of the Constitution so as to enable the cession of a part of the national territory to a foreign power. The Court brushed aside the argument that "in the transfer of the areas of Berubari to Pakistan the fundamental rights of thousands of persons are involved". The case is an authority for the proposition that the Parliament can lawfully make a constitutional amendment under art. 368 authorising cession of a part of the national territory and thereby destroying the fundamental rights of the citizens of the affected territory, and this power under art. 368 is not limited by the preamble.

It is next argued that the people of India in exercise of their sovereign power have placed the fundamental rights beyond the reach of the amending power. Reliance is placed on the following passage in the judgment of Patanjali Sastri, J., in A. K. Gopalan v. The State of Madras ([1950] S.C.R. 88, 98) :

> There can be no doubt that the people of India have, in exercise if their sovereign will as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the Legislature the executive and the Judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so-called, I apprehend, because they have been retained by the people and made paramount to the delegated powers, as in the American Model".

I find nothing in the passage contrary to the view unequivocally expressed by the same learned Judge in Sri Sankari Prasad Singh Deo's case ([1952] S.C.R. 89) that the fundamental rights are amendable. The power to frame the Constitution was vested in the Constituent Assembly by s. 8(1) of the Indian Independence Act, 1947. The Constitution though legal in its origin was revolutionary in character and accordingly the Constituent Assembly exercised its powers of framing the Constitution in the name of the people. The objective resolution of the Assembly passed on January 22, 1947, solemnly declared that all power and authority of severing independent India, its constituent parts, and organs and the Government were derived from the people. The permeable to the Constitution declares that the people of India adopts, enacts and gives to themselves the Constitution. In form and in substance the Constitution emanates from the people. By the Constitution the people constituted themselves into a republic. Under the Republic all public is derived from the people and is exercised by functionaries chosen either directly or indirectly by the people. The Parliament can exercise only such powers as are delegated to it under the Constitution. The people acting through the Constituent Assembly reserved for themselves certain rights and liberties and ordained that they shall not be curtailed by ordinary legislation. But the people by the same Constitution also authorised the Parliament to make amendments to the Constitution. In the exercise of the amending power the Parliament has ample authority to abridge or take away the fundamental right under Par III.

It is urged that the word 'amend' imposes the limitation that an amendment must be an improvement of the Constitution. Reliance is placed on the dictum in Livermore v. E. C. Waite (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". Now an attack on the eighteenth amendment of the U.S.

Constitution based on this passage was brushed aside by the U.S. Supreme Court in the decision in the National Prohibition (Rhode Island v. Palmer - 253 U.S. 350 : 64 L.Ed. 947, 960, 978) case. The decision totally negatived the contention that "an amendment must be confined in its scope to an alteration or improvement of that which is already contained in the Constitution and cannot change its basic structure, include new grants of power to the federal Government nor relinquish in the State those which already have been granted to it", see Cooley on Constitutional Law, Chapter III, Art. 5. pp. 46 & 47. I may also read a passage from Corpus Juris Secundum Vol. XVI, title 'Constitutional Law, p. 26 thus : "The term 'amendment' as used in the constitutional article giving Congress a power of proposal includes additions to as well as corrections of, matters already treated, and there is nothing there which suggests that it is used in a restricted sense".

Article 368 Indicates that the term "amend" means "change". The proviso is expressed to apply to amendments which seek to make any "change" in certain articles. The main part of art. 368 thus gives the power to amend or to make changes in the Constitution. A change is not necessarily an improvement. Normally the change is made with the object of making an improvement, but the experiment may fail to achieve the purpose. Even the plain dictionary meaning of the word "amend" does not support the contention that an amendment must take an improvement, see Oxford English Dictionary where the word "amend" is defined thus : "4 to make professed improvement (in a measure before Parliament); formally to alter in detail, though practically it may be to alter its principle so as to thwart it". The 1st, 4th, 16th and 17th Amendment Act made changes in Part III of the Constitution. All the changes are authorized by art. 368.

It is argued that under the amending power, the basic features of the Constitution cannot be amended. Counsel said that they could not give an exhaustive catalogue of the basic features, but sovereignty, the republican form of government the federal structure and the fundamental right were some of the features. The Seventeenth Amendment has not derogated from the sovereignty, the republican form of government and the federal structure, and the question whether they can be touched by amendment does not arise for decision. For the purposes of these cases, it is sufficient to say that the fundamental rights are within the reach of the amending power.

It is said that in the course of the last 16 years there have been numerous amendments in our Constitution whereas there have been very few amendments of the American Constitution during the last 175 years. Our condition is not comparable with the American. The dynamics of the social revolution in our country may require more rapid changes. Moreover every part of our Constitutions is more easily amendable than the American. Alan Gledhill in his book "The Republic of India", 1951 Edition, pp. 74 & 75, said :

> "The Indian Founding Fathers were less determined than were their American predecessors to impose rigidity on their Constitution..... The Indian Constitution assigns different degrees of rigidity to its different parts, but any part of it can be more easily amended than the American Constitution".

It is said that the Parliament is abusing its power of amendment by making too many frequent changes. If the Parliament has the power to make the amendments, the choice of making any particular amendment must be left to it. Questions of policy cannot be debated in this Court. The possibility of abuse of a power is not the test of its existence. In Webb v. Outrim ([1907] A.C. 81) Lord Hobhouse said, "If they find that on the due construction of the Act a legislative power falls within s. 92, it would be quite wrong of them to deny its existence because by some possibility it may of be abused, or limit the range which otherwise would be open to the Dominion Parliament".

With reference to the doctrine of implied prohibition against the exercise of power ascertained in accordance with ordinary rules of construction, Knox C.J., in the Amalgamated Society of Engineers v. The Adelaide Steamship Company Limited and others (28 C.L.R. 129, 151) said, "It means the necessity of protection against the aggression of some outside and possibly hostile body. It is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of power is no reason in British law for limiting the natural force of the language creating them".

The historical background in which the Constitution was framed shows that the ideas embodied in Part III were not intended to be immutable. The Constituent Assembly was composed of representatives of the provincial legislatures and representatives of the Indian States elected by electoral colleges constituted by the rules. The draft Constitution was released on February 26, 1948. While the constitution was on the anvil, it was envisaged that future Parliaments would be elected on the basis of adult suffrage. Such a provision was later incorporated in art. 326 of the Constitution. In a special article written on August 15, 1948, Sir B. N. Rau remarked :

> "It seems rather illogical that a constitution should be settled by simple majority by an assembly elected indirectly on a very limited franchise and that it should not be capable of being amended in the same way by a Parliament elected - and perhaps for the most part elected directly by adult suffrage", (see B. N. Rau India's Constitution in the making, 2nd Edition p. 394).

The conditions in India were rapidly changing and the country was in a state of flux politically and economically. Sir B. N. Rau therefore recommended that the Parliament should be empowered to amend the Constitution by its ordinary law making process for at least the first five years. Earlier, para 8 of the Suggestions of the Indian National Congress of May 12, 1946 and para 15 of the Proposal of the Cabinet Mission of May 16, 1946 had recommended similar powers of revision by the Parliament during the initial years or at stated intervals. The Constituent Assembly did not accept these recommendations. On September 17, 1949 an amendment (No. 304) moved by Dr. Deshmukh providing for amendment of the Constitution at any time by a clear majority in each house of Parliament was negatived. The Assembly was conscious that future Parliaments elected on the basis of adult suffrage would be more representative, but they took the view that art. 368 provided a sufficiently flexible machinery for amending all parts of the Constitution. The Assembly never entertained the proposal that any part of the Constitution including Part III should be beyond the reach of the amending power. As a matter of fact, Dr. Deshmukh proposed an amendment (No. 212) prohibiting any amendment of the rights with respect to property or otherwise but on September 17, 1949 he withdrew this proposal (see Constituent Assembly Debates Vol. IV pp. 1642-43).

The best exposition of the Constitution is that which it has received from contemporaneous judicial decisions and enactments. We find a rare unanimity of view among judges and legislators from the very commencement of the Constitution that the fundamental rights are within the reach of the amending power. No one in the Parliament doubted this proposition when the Constitution First Amendment Act of 1951 was passed. It is remarkable that most of the members of this Parliament were also members of the Constituent Assembly. In S. Krishnan and Others v. The State of Madras ([1951] S.C.R. 621, 652), a case decided on May 7, 1951, Bose, J. said :

> "My concept of a fundamental right is something which Parliament cannot touch save by an amendment of the Constitution".

In Sri Sankari Prasad Singh Deo's case ([1952] S.C.R. 89), decided on October 5, 1951, this Court expressly decided that fundamental rights could be abridged by a constitutional amendment. This view was acted upon in all the subsequent decisions and was reaffirmed in Sajjan Singh's case ([1965] 1 S.C.R. 933). Two learned Judges then expressed some doubt but even they agreed with the rest of the court in upholding the validity of the amendments.

A static system of laws is the worst tyranny that any constitution can impose upon a country. An unamendable constitution means that all reform and progress are at a stand-still. If Parliament cannot amend Part III of the Constitution even by recourse to art. 368, no other power can do so. There is no provision in the Constitution for calling a convention for its revision or for submission of any proposal for amendment to the referendum. Even if power to call a convention or to submit a proposal to the referendum be taken by amendment of art. 368, Part III would still remain unamendable on the assumption that a constitutional amendment is a law. Not even the unanimous vote of the 500 million citizens or their representatives at a special convocation could amend Part III. The deadlock could be resolved by revolution only. Such a consequence was not intended by the framers of the Constitution. The Constitution is meant to endure.

It has been suggested that the parliament may provide for another Constituent Assembly by amending the Constitution and that Assembly can amend Part III and take away or abridge the fundamental rights. Now if this proposition is correct, a suitable amendment of the Constitution may provide that the Parliament will be the Constituent Assembly and thereupon the Parliament may amend Part III. If so, I do not see why under the Constitution as it stands now, the Parliament cannot be regarded as a recreation of the Constituent Assembly for the special purpose of making constitutional amendments under art. 368, and why the amending power cannot be regarded as a constituent power as was held in Sri Sankari Prasad Singh Deo's case ([1952] S.C.R. 89).

The contention that the constitutional amendments of Part III had the effect of changing articles 226 and 245 and could not be passed without complying with the proviso to art. 368 is not tenable. A constitutional amendment which does not profess to amend art. 226 directly or by inserting or striking words therein cannot be regarded as seeking to make any change in it and thus falling within the constitutional inhibition of the proviso. Art. 226 gives power to the High Court throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority within those territories directions, orders and writs for the enforcement of any of the rights conferred by Part III and for any other purpose. The Seventeenth Amendment made no direct change in art. 226. It made changes in Part III and abridged or took away some of the rights conferred by that Part. As a result of the changes, some of those rights no longer exist and as the High Court cannot issue writs for the enforcement of those rights its Power under art. 226 is affected incidentally. But an alteration in the area of its territories or in the number of persons or authorities within those territories or in the number of enforceable rights under Part III or other rights incidentally affecting the power of the High Court under art. 226 cannot be regarded as an amendment of that article.

Art. 245 empowers the Parliament and the Legislatures of the States to make laws subject to the provisions of the Constitution. This power to make laws is subject to the limitations imposed by Part III. The abridgement of the rights conferred by Part III by the Seventeenth Amendment necessarily enlarged the scope of the legislative power, and thus affected art. 245 indirectly. But the Seventeenth amendment made no direct change in art. 245 and did not amend it.

Art. 31B retrospectively validated the Acts mentioned in the Ninth Schedule notwithstanding any

judgment decree or order of any court though they take away or abridge the rights conferred by Part III. It is said that the Acts are still-born and cannot be validated. But by force of Art. 31B the Acts are deemed never to have become void and must be regarded as valid from their inception. The power to amend the Constitution carries with it the power to make a retrospective amendment. It is said that art. 31B amends art. 141 as it alters the law declared by this Court on the validity of the Acts. This argument is baseless. As the Constitution is amended retrospectively, the basis upon which the judgments of this Court were pronounced no longer exists, and the law declared by this Court can have no application. It is said that art. 31B is a law with respect to land and other matters within the competence of the State Legislature, and the Parliament has no power to enact such a law. The argument is based on a misconception. The Parliament has not passed any of the Acts mentioned in the Ninth Schedule. Art. 31B removed the constitutional bar on the making of the Acts. Only the Parliament could remove the bar by the Constitution amendment. It has done so by art. 31B. The Parliament could amend each article in Part III separately and provide that the Acts would be protected from attack under each article. Instead of amending each article separately, the Parliament has by art. 31B made a comprehensive amendment of all the articles by providing that the Acts shall not be deemed to be void on the ground that they are inconsistent with any of them. The Acts as they stood on the date of the Constitution Amendments are validated. By the last part of Art. 31B the competent legislatures will continue to retain the power to repeal or amend the Acts. The subsequent repeals and amendments are not validated. If in future the competent legislature passes a repealing or amending Act which is inconsistent with Part III it will be void.

I have, therefore, come to the conclusion that the First, Fourth, Sixteenth and Seventeenth Amendments are constitutional and are not void. If so, it is common ground that these petitions must be dismissed.

For the last 16 years the validity of constitutional amendments of fundamental rights have been recognized by the people and all the organs of the government including the legislature, the judiciary and the executive. Revolutionary, social and economic changes have taken place on the strength of the First, Fourth and Seventeenth Amendments. Even if two views were possible on the question of the validity of the amendments, we should not now reverse our previous decisions and pronounce them to be invalid. Having heard lengthy arguments on the question I have come to the conclusion that the validity of the constitutional amendments was rightly upheld in Sri Sankari Prasad Singh Deo's ([1952] S.C.R. 89) and Sajjan Singh's cases ([1965] 1 S.C.R. 933) and I find no reason for over-ruling them.

The First, Fourth and Seventeenth amendment Acts are subjected to bitter attacks because they strike at the entrenched property rights. But the abolition of the zamindari was a necessary reform. It is the first Constitution Amendment Act that made this reform possible. No legal argument can restore the outmoded feudal zamindari system. What has been done cannot be undone. The battle for the past is lost. The legal argument necessarily shifts. The proposition now is that the Constitution Amendment Acts must be recognized to be valid in the past but they must be struck down for the future. The argument leans on the ready made American doctrine of prospective overruling.

Now the First, Fourth, Sixteenth and Seventeenth Amendment Acts take away and abridge the rights conferred by Part III. If they are laws they are necessarily rendered void by art. 13(2). If they are void, they do not legally exist from their very inception. They cannot be valid from 1951 to 1967 and invalid thereafter. To say that they were valid in the past and will be invalid in the future is to amend the Constitution. Such a naked power of amendment of the Constitution is not given to the

Judges. The argument for the petitioners suffers from the double fallacy, the first that the Parliament has no power to amend Part III so as to abridge or take away the entrenched property rights, and the second that the Judges have the power to make such an amendment.

I may add that the First and the Fourth amendments are valid, the Seventeenth must necessarily be valid. It is not possible to say that the First and Fourth amendments though originally invalid have now been validated by acquiescence. If they infringed art. 13(2), they were void from their inception. Referring to the 19th amendment of the U.S. Constitution, Brandies, J. said in Leser v. Garnett (258 US 130 : 66 L.Ed. 505, 511) :

> "This Amendment is in character and phraseology precisely similar to the 15th. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the 15th is valid, although rejected by six states, including Maryland, has been recognized and acted on for half a century..... The suggestion that the 15th was incorporated in the Constitution, not in accordance with law, but practically as a war measure, which has been validated by acquiescence, cannot be entertained".

Moreover the Seventeenth amendment has been acted upon and its validity has been upheld by this Court in Sajjan Singh's case. If the First and the Fourth Amendments are vandated by acquiescence, the Seventeenth is equally validated.

Before concluding this judgment I must refer to some of the speeches made by the members of the Constituent Assembly in the course of debates on the draft Constitution. These speeches cannot be used as aids for interpreting the Constitution. See State of Travancore-Cochin and others v. The Bombay Co. Ltd. ([1952] S.C.R. 1112). Accordingly, I do not rely on the, as aids to construction. But I propose to refer to them as Shri A. K. Sen relied heavily on the speeches of Dr. B. R. Ambedkar. According to him, the speeches of Dr. Ambedkar show that he did not regard the fundamental rights as amendable. This contention is not supported by the speeches. Sri Sen relied on the following passage in the speech of Dr. Ambedkar on September 17, 1949 :-

> "We divide the articles of the Constitution under three categories. The first category is the one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future Parliament wishes to amend any particular article which is not mentioned in Part III or art. 304, all that is necessary for them is to have two-thirds majority. They can amend it.

Mr. President : Of Members present.

Yes. Now, we have no doubt put articles in a third category where for the purposes of amendment the mechanism is somewhat different or double. It requires two-thirds majority plus ratification by the States". (Constituent Assembly Debates Vol. IX, p. 1661).

I understand this passage to mean that according to Dr. Ambedkar an amendment of the articles mentioned in Part III and 368 requires two-thirds majority plus ratification by the States He seems to have assumed (as reported) that the provisions of Part III fall within the proviso to art. 368. But he never said that Part III was not amendable. He maintained consistently that all the articles of the Constitution are amendable under art. 368. On November 4, 1948, he said :

> "The second means adopted to avoid rigidity and legalism is the provision for facility

with which the Constitution could be amended. The provisions of the Constitution relating to the Constitution divide the Articles of the Constitution into two groups. In the one group are placed Articles relating to (a) the distribution of legislative powers between the Centre and the States, (b) the representation of the States in Parliament (c) the powers of the Courts. All other Articles are placed in another group. Articles placed in the second group cover a very large part of the Constitution and can be amended by Parliament by a double majority, namely, a majority of not less than two-thirds of the members of each House present and voting and by a majority of the total membership of each House. The amendment of these Articles does not require ratification by the States. It is only in those Articles which are placed in group one that an additional safeguard of ratification by the States is introduced. One can therefore safely say that the Indian Federation will not suffer from the faults of rigidity or legalism. Its distinguishing feature is that it is a flexible Federation.

The provisions relating to amendment of the Constitution have come in for a virulent attack at the hands of the critics of the Draft Constitution. It is said that the provisions contained in the Draft make amendment difficult. It is proposed that the Constitution should be amendable by a simple majority at least for some years. The argument is subtle and ingenious. It is said that this Constituent Assembly is not elected on adult suffrage while the future Parliament will be elected on adult suffrage and yet the former has been given the right to pass the Constitution by a simple majority while the latter has been denied the same right. it is paraded as one of the absurdities of the Draft Constitution. I must repudiate the charge because it is without foundation. To know how simple are the provisions of the Draft Constitution in respect of amending the Constitution one has only to study the provisions for amendment contained in the American and Australian Constitutions. Compared to them those contained in the Draft Constitution will be found to be the simplest. 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 or 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. 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 a majority of the total membership of each House. It is difficult to conceive a simpler method of amending the Constitution".

On December 9, 1948, Dr. Ambedkar said with reference to art. 32 :

"The Constitution has invested the Supreme Court with these rights and these writs could not be taken away unless and until the Constitution itself is amended by means left open to the legislature". (Constituent Assembly Debates Vol. 7, 953).

On November 25, 1949, Dr. Ambedkar strongly refuted the suggestion that fundamental rights should be absolute and unalterable. He said :

"The condemnation of the Constitution largely comes from two quarters, the Communist Party and the Socialist Party ..... The second thing that the Socialists want is that the Fundamental Rights mentioned in the Constitution must be absolute

> and without any limitations so that if their Party comes into power, they would have the unfettered freedom not merely to criticize, but also to overthrow the State ..... Jefferson, the great American statesman who played so great a part in the making of the American Constitution, has expressed some very weighty views which makers of Constitution can never afford to ignore. In one place he has said :- 'We may consider each generation as a distinct nation, with a right, the will of the majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country. In another place, he has said : 'The idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage the min the trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves, and that we, in the like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine, that the earth belongs to the dead and not the living. I admit that what Jefferson has said is not merely true, but is absolutely true. There can be no question about it. Had the Constituent Assembly departed from this principle laid down by Jefferson it would certainly be liable to blame, even to condemnation. But I ask, has it ? Quite the contrary. One has only to examine the provision relating to the amendment of the Constitution. The Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfilment of extraordinary terms and conditions as in America of Australia but has provided a most facile procedure for amending the Constitution. I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which this country finds itself, provided such a facile procedure for the amendment of the Constitution. If those who are dissatisfied with the Constitution have only to obtain a 2/3 majority and if they cannot obtain even 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". (Constituent Assembly Debates Vol. II. pp. 975-6).

On November 11, 1948, Pandit Jawahar Lal Nehru said :

> "And remember this, 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 living vital organic people. Therefore it has to be flexible". (Constituent Assembly Debates Vol. 7, p. 322).

The views of Jefferson echoed by Ambedkar and Nehru were more powerful expressed by Thomas Paine in 1791 :

> "There never did, there never will, and there never can, exist a parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controlling posterity to the 'end of time', or of commanding for ever how the world shall be governed, or who shall govern it; and

> therefore all such clauses, acts or declarations by which the makers of them attempt to do what they have neither the right nor the power to do, nor take power to execute, are in themselves null and void. Every age and generation must be as free to act for itself in all cases as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow. The parliament of the people of 1688 or of any other period, had no more right to dispose of the people of the present day, or to bind or to control them in any shape whatever, than the parliament or the people of the present day have to dispose of, bind or control those who are to live a hundred or a thousand years hence. Every generation is, and must be, competent to all the purposes which its occasions require. It is the living, and not the dead, that are to be accommodated. When man ceases to be, his power and his wants cease with him; and having no longer any participation in the concerns of this world, he has no longer any authority in directing who shall be its governors, or how its government shall be organized, or how administered". (See 'Rights of Man' by Thomas Paine, unabridged edition by H. B. Bonner, pp. 3 & 4).

For the reasons given above, I agree with Wanchoo, J. that the writ petitions must be dismissed.

In the result, the writ petitions are dismissed without costs.

RAMASWAMI, J.

I have perused the judgment of my learned Brother Wanchoo, J. and I agree with his conclusion that the Constitution (Seventeenth Amendment) Act, 1964 is legally valid, but in view of the importance of the constitutional issues raised in this case I would prefer to state my own reasons in a separate judgment.

In these petitions which have been filed under Art. 32 of the Constitution a common question arises for determination, viz., whether the Constitution (Seventeenth Amendment) Act, 1964 which amends Art. 31-A and 31-B of the Constitution is ultra vires and unconstitutional.

The petitioners are affected either by the Punjab Security of Land Tenures Act, 1954 (Act X of 1953) or by the Mysore Land Reforms Act (Act 10 of 1962) as amended by Act 14 of 1965 which were added to the 9th Schedule of the Constitution by the impugned Act and their contention is that the impugned Act being unconstitutional and invalid, the validity of the two Acts by which they are affected cannot be saved.

The impugned Act consists of three sections. The first section gives its short title. Section 2(i) adds a proviso to cl. (1) of Art. 31-A after the existing proviso. This proviso reads thus :

> "Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value

thereof".

Section 2(ii) substitutes the following sub-clause for sub-cl. (a) of cl. (2) of Art. 31-A :-

"(a) the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include -

(i) any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any janmam right;

(ii) any land held under ryotwari settlement;

(ii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;"

Section 3 amends the 9th Schedule by adding 44 entries to it.

In dealing with the question about the validity of the impugned Act, it is necessary to consider the scope and effect of the provisions contained in Art. 368 of the Constitution, because the main controversy in the present applications turns upon the decision of the question as to what is the construction of that Article. Article 368 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 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, 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.

Provided that if such amendment seeks to make any change in -

(a) Article 5, 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".

It is necessary at this stage to set out briefly the history of Arts. 31-A and 31-B. These Articles were

added to the Constitution with retrospective effect by s. 4 of the Constitution (First Amendment) Act, 1951. Soon after the promulgation of the Constitution, the political party in power, commanding as it did a majority of votes in the several State legislatures as well as in Parliament, carried out radical measures of agrarian reform in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may be referred to as Zamindari Abolition Acts. Certain zamindars, feeling themselves aggrieved, attacked the validity of those Acts in courts of law on the ground that they contravened the fundamental rights conferred on them by Part III of the Constitution. The High Court of Patna held that the Act passed in Bihar was unconstitutional while the High Courts of Allahabad and Nagpur upheld the validity of the corresponding legislature in Uttar Pradesh and Madhya Pradesh respectively (See Kameshwar v. State of Bihar (A.I.R. 1951 Pat. 91) and Surya Pal v. U. P. Government) (A.I.R. 1951 All. 674). The parties aggrieved by these respective decisions had filed appeals by special leave before this Court. At the same time, petitions had also been preferred before this Court under Art. 32 by certain other zamindars, seeking the determination of the same issues. It was at this stage that the Union Government, with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution, brought forward a bill to amend the Constitution, which, after undergoing amendments in various particulars, was passed by the requisite majority as the Constitution (First Amendment) Act, 1951 by which Arts. 31-A and 31-B were added to the Constitution. That was the first step taken by Parliament to assist the process of legislation to bring about agrarian reform by introducing Articles 31-A and 31-B. The second step in the same direction was taken by Parliament in 1955 by amending Art. 31-A by the Constitution (Fourth Amendment) Act, 1955. The object of this amendment was to widen the scope of agrarian reform and to confer on the legislative measures adopted in that behalf immunity from a possible attack that they contravened the fundamental rights of citizens. In other words, the amendment protected the legislative measures in respect of certain other items of agrarian and social welfare legislation, which affected the proprietary rights of certain citizens. At the time when the first amendment was made, Art. 31-B expressly provided that none of the Acts and Regulations specified in the 9th Schedule, nor any of the provisions thereof, shall be deemed to be void or ever to have become void on the ground that they were inconsistent with or took away or abridged any of the rights conferred by Part III, and it added that notwithstanding any judgment, decree or order of any Court or tribunal to the contrary, each of the said Acts and Regulations shall subject to the power of any competent legislature to repeal or amend, continue in force. At this time, 19 Acts were listed in Schedule 9, and they were thus effectively validated. One more Act was added to this list by the Amendment Act of 1955, so that as a result of the second amendment, the Schedule contained 20 Acts which were validated.

It appears that notwithstanding these amendments, certain other legislative measures adopted by different States for the purpose of giving effect to the agrarian policy of the party in power, were effectively challenged. For instance the Karimbil Kunhikoman v. State of Kerala ([1962] Supp. 1 S.C.R. 829), the validity of the Kerala Agrarian Relations Act (IV of 1961) was challenged by writ petitions filed under Art. 32, and as a result of the majority decisions of this Court, the whole Act was struck down. The decision of this Court was pronounced on December 5, 1961. In A. P. Krishnaswami Naidu v. The State of Madras ([1964] 7 S.C.R. 82) the constitutionality of the Madras Land Reforms (Fixation of Ceiling on Land) Act (No. 58 of 1961) was the subject-matter of debate, and by the decision of this Court pronounced on March 9, 1964, it was declared that the whole Act was invalid. It appears that the Rajasthan Tenancy Act III of 1955 and the Maharashtra Agricultural Lands (Ceiling and Holdings) Act 27 of 1961 had been similarly declared invalid, and in consequence, Parliament though it necessary to make a further amendment in Art. 31-B so as to save the validity of these Acts which had been struck down and of other similar Acts which were

likely to be challenged. With that object in view, the impugned Act has enacted s. 3 by which 44 Acts have been added to Schedule 9. It is therefore clear that the object of the First, Fourth and the Seventeenth Amendments of the Constitution was to help the State Legislatures to give effect to measures of agrarian reform in a broad and comprehensive sense in the interests of a very large section of Indian citizens whose social and economic welfare closely depends on the pursuit of progressive agrarian policy.

The first question presented for determination in this case is whether the impugned Act, in so far as it purports to take away or abridge any of the fundamental rights conferred by Part III of the Constitution, falls within the prohibition of Art. 13(2) which provides that "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". In other words, the argument of the petitioners was that the law to which Art. 13(2) applies, would include a law passed by Parliament by virtue of its constituent power to amend the Constitution, and so, its validity will have to be tested by Art. 13(2) itself. It was contended that "the State" includes Parliament within Art. 12 and "law" must include a constitutional amendment. It was said that it was the deliberate intention of the framers of the Constitution, who realised the sanctity of the fundamental rights conferred by Part III, to make them immune from interference not only by ordinary laws passed by the legislatures in the country but also from constitutional amendments. In my opinion, there is no substance in this argument. Although "law" must ordinarily include constitutional law, there is a juristic distinction between ordinary law made in exercise of legislative power and constitutional law which is made in exercise of constituent power. In a written, federal form of Constitution there is a clear and well-known distinction between the law of the Constitution and ordinary law made by the legislature on the basis of separation of powers and pursuant to the power of law-making conferred by the Constitution (See Dicey on 'Law of the Constitution', Tenth Edn. p. 110, Jennings, 'Law and the Constitution' pp. 62-64, and 'American Jurisprudence', 2nd Edn., Vol. 16, p. 181). In such a written Constitution, the amendment of the Constitution is a substantive, constituent act which is made in the exercise of the sovereign power which created the Constitution and which is effected by a special means, namely, by a predesigned fundamental procedure unconnected with ordinary legislation. The amending power under Art. 368 is hence sui generis and cannot be compared to the law-making power of Parliament pursuant to Art. 246 read with List I and III. It follows that the expression "law" in Art. 13(2) of the Constitution cannot be construed as including an amendment of the Constitution which is achieved by Parliament in exercise of its sovereign constituent power, but must mean law made by Parliament in its legislative capacity pursuant to the powers of law-making given by the Constitution itself under Art. 246 read with Lists I and III of the 7th Schedule. It is also clear, on the same line of reasoning, that 'law' in Art. 13(2) cannot be construed so as to include 'law' made by Parliament under Arts. 4, 169, 392, 5th Schedule Part D and 6th Schedule para 21. The amending power of Parliament exercised under these Articles stands on the same pedestal as the constitutional amendment made under Art. 368 so far as Art. 13(2) is concerned and does not fall within the definition of 'law' within the meaning of this last article.

It is necessary to add that the definition of 'law' in Art. 13(3) does not include in terms a constitutional amendment, though it includes "any Ordinance, order, bye-law, rule, regulation, notification, custom or usage". It should be noticed that the language of Art. 368 is perfectly general and empowers Parliament to amend the Constitution without any exception whatsoever. Had it been intended by the Constitution-makers that the fundamental rights guaranteed under Part III should be completely outside the scope of Art. 368, it is reasonable to assume that they would have made an express provision to that effect. It was stressed by the petitioners during the course of the argument that Part III is headed as "Fundamental Rights" and that Art. 32 "guarantees" the right to move the

Supreme Court by appropriate proceedings for enforcement of rights conferred by Part III. But the expression "fundamental" in the phrase "Fundamental Rights" means that such rights are fundamental vis-a-vis the laws of the legislatures and the acts of the executive authorities mentioned in Art. 12. It cannot be suggested that the expression "fundamental" lifts the fundamental rights above the Constitution itself. Similarly, the expression "guaranteed" in Art. 32(1) and 32(4) means that the right to move the Supreme Court for enforcement of fundamental rights without exhausting the normal channels through the High Courts or the lower courts is guaranteed. This expression also does not place the fundamental rights above the Constitution.

I proceed to consider the next question arising in this case, viz., the scope of the amending power under Art. 368 of the Constitution. It is contended on behalf of the petitioners that Art. 368 merely lays down the procedure for amendment and does not vest the amending power as such in any agency constituted under that article. I am unable to accept this argument as correct. Part XX of the Constitution which contains only Art. 368 is described as a Part dealing with the Amendment of the Constitution; and Art. 368 which prescribes the procedure for amendment of the Constitution, begins by saying that an amendment of this Constitution may be initiated in the manner therein indicated. In my opinion, the expression "amendment of the Constitution" in Art. 368 plainly and unambiguously means amendment of all the provisions of the Constitution. It is unreasonable to suggest that what Art. 368 provides is only the mechanics of the procedure to be followed in amending the Constitution without indicating which provisions of the Constitution can be amended and which cannot. Such a restrictive construction of the substantive part of Art. 368 would be clearly untenable. The significant fact that a separate Part has been devoted in the Constitution for "amendment of the Constitution" and there is only one Article in that Part shows that both the power to amend and the procedure to amend are enacted in Art. 368. Again, the words "the Constitution shall stand amended in accordance with the terms of the Bill" in Art. 368 clearly contemplate and provide for the power to amend after the requisite procedure has been followed. Besides, the words used in the proviso unambiguously indicate that the substantive part of the article applies to all the provisions of the Constitution. It is on that basic assumption that the proviso prescribes a specific procedure in respect of the amendment of the articles mentioned in cls. (a) to (e) thereof. Therefore it must be held that when Art. 368 confers on Parliament the right to amend the Constitution the power in question can be exercised over all the provisions of the Constitution. How the power should be exercised, has to be determined by reference to the question as to whether the proposed amendment falls under the substantive part of Art. 368, or whether it attracts the procedure contained in the proviso.

It was suggested for the petitioners that the power of amendment is to be found in Arts. 246 and 248 of the Constitution read with item 97 of List I of the 7th Schedule. I do not think that it is possible to accept this argument. Article 246 states that Parliament has exclusive power to make laws with respect to matters enumerated in List I in the Seventh Schedule, and Art. 248, similarly, confers power on Parliament to make any law with respect to any matter not enumerated in the Concurrent List or State List. But the power of law-making in Arts. 246 and 248 is "subject to the provisions of this Constitution". It is apparent that the power of constitutional amendment cannot fall within these Articles, because it is illogical and a contradiction in terms to say that the amending power can be exercised and at the same time it is "subject to the provisions of the Constitution".

It was then submitted on behalf of the petitioners that the amending power under Art. 368 is subject to the doctrine of implied limitations. In other words, it was contended that even if Art. 368 confers the power of amendment, it was not a general but restricted power confined only to the amendable provisions of the Constitution, the amendability of such provision being determined by the nature

and character of the respective provision. It was argued, for instance, that the amending power cannot be used to abolish the compact of the Union or to destroy the democratic character of the Constitution guaranteeing individual and minority rights. It was said that the Constitution was a permanent compact of the States, that the federal character of the States was indissoluble, and that the existence of any of the States as part of the federal compact cannot be put an end to by the power of amendment. It was also said that the chapter of fundamental rights of the Constitution cannot be the subject-matter of any amendment under Art. 368. It was contended that the preamble to the Constitution declaring that India was a sovereign democratic republic was beyond the scope of the amending power. It was suggested that other basic features of the Constitution were the Articles relating to distribution of legislative powers, the Parliamentary form of Government and the establishment of Supreme Court and the High Courts in the various States. I am unable to accept this argument as correct. If the Constitution makers considered that there were certain basic features of the Constitution which were permanent it is most unlikely that they should not have expressly said in Art. 368 that these basic features were not amendable. On the contrary, the Constitution-makers have expressly provided that Art. 368 itself should be amendable by the process indicated in the proviso to that Article. This circumstance is significant and suggests that all the articles of the Constitution are amendable either under the proviso to Art. 368 or under the main part of that Article. In my opinion, there is no room for an implication in the construction of Art. 368. So far as the federal character of the Constitution is concerned it was held by this Court in State of West Bengal v. Union of India ([1964] 1 S.C.R.371, 405) that the federal structure is not an essential part of our Constitution and there is no compact between the States and there is no dual citizenship in India. It was pointed out in that case that there was no constitutional guarantee against the alteration of boundaries of the States. By Art. 3 the Parliament is by law authorised to form a new State by redistribution of the territory of a State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, to increase the area of any State, to diminish the area of any State, to alter the boundaries of any State, and to alter the name of any State. In In Re : The Berubari Union and Exchange of Enclaves ([1960] 3 S.C.R. 250) it was argued that the Indo-Pakistan agreement with regard to Berubari could not be implemented even by legislation under Art. 368 because of the limitation imposed but he preamble to the Constitution and that such an agreement could not be implemented by a referendum. The argument was rejected by this Court and it was held that the preamble could not, in any way, limit the power of Parliament to cede parts of the national territory. On behalf of the petitioners the argument was stressed that the chapter on fundamental rights was the basic feature of the Constitution and cannot be the subject of the amending power under Art. 368. It was argued that the freedoms of democratic life are secured by the chapter on fundamental rights and the dignity of the individual cannot be preserved if any of the fundamental rights is altered or diminished. It is not possible to accept this argument as correct. The concepts of liberty and equality are changing and dynamic and hence the notion of permanency or immutability cannot be attached to any of the fundamental rights. The Directive Principles of Part IV are as fundamental as the constitutional rights embodied in Part III and Art. 37 imposes a constitutional duty upon the States to apply these principles in making laws. Reference should in particular be made to Art. 39(b) which enjoins upon the State to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Art. 38 imposes a duty upon the State to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. I have already said that the language of Art. 368 is clear and unambiguous in support of the view that there is no implied limitation on the amending power. In principle also it appears unreasonable to suggest that the Constitution-makers wanted to provide that the fundamental rights guaranteed by the Constitution

should never be touched by way of amendment. In modern democratic thought there are two main trends - the liberal idea of individual rights protecting the individual and the democratic idea proper proclaiming the equality of rights and popular sovereignty. The gradual extension of the idea of equality from political to economic and social fields in the modern State has led to the problems of social security, economic planning and industrial welfare legislation. The implementation and harmonisation of these somewhat conflicting principles is a dynamic task. The adjustment between freedom and compulsion, between the rights of individuals and the social interest and welfare must necessarily be a matter for changing needs and conditions. The proper approach is therefore to look upon the fundamental rights of the individual as conditioned by the social responsibility, by the necessities of the Society, by the balancing of interests and not as pre-ordained and untouchable private rights.

As pointed out forcefully by Laski :

> "The struggle for freedom is largely transferred from the plane of political to that of economic rights. Men become less interested in the abstract fragment of political power an individual can secure than in the use of massed pressure of the groups to which they belong to secure an increasing share of the social product. Individualism gives way before socialism. The roots of liberty are held to be in the ownership and control of the instruments of production by the state, the latter using its power to distribute the results of its regulation with increasing approximation to equality. So long as there is inequality, it is argued, there cannot be liberty.
>
> The historic inevitability of this evolution was seen a century ago by de Tocqueville. It is interesting to compare his insistence that the democratization of political power meant equality and that its absence would be regarded by the masses as oppression with the argument of Lord Action that liberty and equality are antitheses. To the latter liberty was essentially an autocratic ideal; democracy destroyed individuality, which was the very pith of liberty, by seeking identity of conditions. The modern emphasis is rather toward the principle that material equality is growing inescapable and that the affirmation of personality must be effective upon an immaterial plane. It is found that doing as once likes, subject only to the demands of peace, is incompatible with either international or municipal necessities. we pass from contract to relation, as we have passed from status to contract. Men are so involved in intricate networks of relations that the place for their liberty is in a sphere where their behaviour does not impinge upon that self-affirmation of others which is liberty".

- (Encyclopaedia of the Social Sciences, Vol. IX, 445.).

It must not be forgotten that the fundamental right guaranteed by Art. 31, for instance, is not absolute. It should be noticed that cl. (4) of that Article provides an exception to the requirements of Cl. (2). Clause (4) relates to Bills of a State Legislature relating to public acquisition which were pending at the commencement of the Constitution. If such a Bill has been passed and assented to by the President, the Courts shall have no jurisdiction to question the validity of such law on the ground of contravention of cl. (2) i.e. on the ground that it does not provide for compensation or that it has been enacted without a public purpose. Clause (6) of the Article is another exception to cl. (2) and provides for ouster of jurisdiction of the Courts. While cl. (4) relates to Bills pending in the State Legislature at the commencement of the Constitution, cl. (6) relates to Bills enacted by the State within 18 months before commencement of the Constitution i.e., Acts providing for public

acquisition which were enacted not earlier than July 26, 1948. If the President certifies such an Act within 3 months from the commencement of the Constitution, the Courts shall have no jurisdiction to invalidate that Act on the ground of contravention of cl. (2) of that Article. similarly, the scheme of Art. 19 indicates that the fundamental rights guaranteed by sub-cls. (a) to (g) of cl. (1) can be validly regulated in the light of the provisions contained in cls. (2) to (6) of Art. 19. In other words, the scheme of Art. 19 is two-fold; the fundamental rights of the citizens are of paramount importance, but even the said fundamental rights can be regulated to serve the interests of the general public or other objects mentioned respectively in cls. (2) to (6) of Art. 19. It is right to state that the purposes for which fundamental rights can be regulated which are specified in cls. (2) to (6), could not have been assumed by the Constitution-makers to be static and incapable of expansion. It cannot be assumed that the Constitution-makers intended to forge a political strait jacket for generations to come. The Constitution-makers must have anticipated that in dealing with socio-economic problems which the legislatures may have to face from time to time, the concepts of public interest and other important considerations which are the basis of cls. (2) to (6), may change and may even expand. As Holmes, J. has said in Abrams v. United States (250 U.S. 616, 630) : "the Constitution is an experiment, as all life is an experiment". It is therefore legitimate to assume that the Constitution-makers intended that Parliament should be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course of socio-economic progress and development of the country. I find it therefore difficult to accept the argument of the petitioners that the Constitution-makers contemplated that fundamental rights enshrined in Part III were finally and immutably settled and determined once and for all and these rights are beyond the ambit of any future amendment. Today at a time when absolutes are discredited, it must not be too readily assumed that there are basic features of the Constitution which shackle the amending power and which take precedence over the general welfare of the nation and the need for agrarian and social reform.

In construing Art. 368 it is moreover essential to remember the nature and subject-matter of that Article and to interpret it subjectae materies. The power of amendment is in point of quality an adjunct of sovereignty. It is in truth the exercise of the highest sovereign power in the State. If the amending power is an adjunct of sovereignty it does not admit of any limitations. This view is expressed by Dicey in "Law of the constitution", 10th Edn., at page 148 as follows :

> "Hence the power of amending the constitution has been placed, so to speak, outside the constitution, and that the legal sovereignty of the United States resides in the States' governments as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union".

A similar view is state by Lord Bryce in 'The American Commonwealth", Vol. 1, ch. XXXII, page 366. Lester Bernhardt Orfield states as follows in his book. "The Amending of the Federal Constitution" :

> "In the last analysis , one is brought to the conclusion that sovereignty in the United States, if it can be said to exist at all, is located in the amending body. The amending body has often been referred to as the sovereign, because it meets the test of the location of sovereignty. As Willoughby has said :
>
> 'In all those cases in which, owing to the distribution of governing power, there is doubt as to the political body in which the Sovereignty rests, the test to be applied is the determination of which authority has, in the last instance, the legal power to

> determine its own competence as well as that of others'.
>
> Applying the criteria of sovereignty which were laid down at the beginning of this chapter, the amending body is sovereignty as a matter of both law and fact. Article Five expressly creates the amending body. Yet in a certain manner of speaking the amending body may be said to exist as a matter of fact since it could proceed to alter Article Five or any other part of the Constitution. While it accrue that the sovereign cannot act otherwise than in compliance with law, it is equally true that it creates the law in accordance with which it is to act".

In the book "Constitutional Law of the United States", Hugh Evander Willis says that the doctrine of amendability of the Constitution is based on the doctrine of the sovereignty of the people and that it has no such implied limitations as that an amendment shall not contain a new grant of power nor be in the form of legislation, nor change "our dual form of government nor change the protection of the Bill of Rights, nor make any other change in the Constitution". James G. Randall also enunciates the proposition that when a constitutional amendment is adopted "it is done not by the 'general government', but by the supreme sovereign power of the nation i.e., the people, acting through State Legislatures or State conventions" and that "the amending power is equivalent to the Constitution-making power and is wholly above the authority of the Federal Government" - ('Constitutional Problems Under Lincoln', p. 395). The legal position is summarised by Burdick at page 48 of his treaties "The Law of the American constitution" as follows :

> "The result of the National Prohibition Cases (253 U.S. 350) seems to be that there is no limit to the power to amend the Constitution except that a State may not without its consent be deprived of its equal suffrage in the Senate. To put the case most extremely, this means that by action of two-thirds of both Houses of Congress and of the legislatures in three-fourths of the States all of the powers of the national government could be surrendered to the States, or all of the reserved powers of the States could be transferred to the federal government. It is only public opinion acting upon these agencies which places any check upon the amending power. But the alternative to this result would be to recognize the power of the Supreme Court to veto the will of the people expressed in a constitutional amendment without any possibility of the reversal of the court's action except through revolution".

The matter has been clearly put by George Vedel in Manuel Elementaire De Droit Constitutional (Recueil Sirey) at page 117 as follows :

> "Truly speaking no constitution prohibits for ever its amendment or its amendment in all its aspects.
>
> But it can prohibit for example, the amendment (revision) during a certain time (the Constitution of 1791) or it can prohibit the amendment (revision) on this or that point (as in the constitution of 1875) which prohibits amendment of the republican form of Government and the present Constitution follows the same rule.
>
> But this prohibition has only a political but no juridical value. In truth from the juridical viewpoint a declaration of absolute constitutional immutability cannot be imagined. The Constituent power being the supreme power in the state cannot be fettered, even by itself. For example, article 95 of our constitution stipulates. "The

> republican, form of Government cannot be the subject of a proposal for amendment.
>
> But juridically the obstacle which this provision puts in the way of an amendment of the republican form of government can be lifted as follows.
>
> It is enough to abrogate by way of amendment (revision) the article 95 cited above. After this, the obstacle being removed, a second amendment can deal with the republican form of Government.
>
> In practice, this corresponds to the idea that the constituent assembly of today cannot bind the nation of tomorrow".

In In Re : The Berubari Union and Exchange of Enclaves ([1960] 3 S.C.R. 250) the argument of implied limitation was advanced by Mr. N. C. Chatterji and it was contended that item No. 3 of the Indo Pakistan Agreement providing for a division of Berubari Union between India and Pakistan was outside the power of constitutional amendment and that the preamble to the Constitution did not permit the dismemberment of India but preserved the integrity of the territory of India. the argument was rejected by this Court and it was held that Parliament acting under Art. 368 can make a law to give effect to and implement the Agreement in question or to pass a law amending Art. 3 so as to cover cases of cession of the territory of India and thereafter make a law under the amended Art. 3 to implement the Agreement.

There is also another aspect of the matter to be taken into account. If the fundamental rights are unamendable and if Art. 368 does not include any such power it follows that the amendment of, say, Art. 31 by insertion of Arts. 31-A and 31-B can only be made by a violent revolution. It was suggested for the petitioners that an alteration of fundamental rights could be made by convening a new Constituent Assembly outside the frame-work of the present Constituent, but it is doubtful if the proceedings of the new Constituent Assembly will have any legal validity, for the reason is that if the Constitution provides its own method of amendment, any other method of amendment of the Constitution will be unconstitutional and void. For instance, in George S. Hawke v. Harvey C. Smith, as Secretary of State of Ohio (64 L.Ed. 871) it was held by the Supreme Court of the U.S.A. that Referendum provisions of State Constitutions and statutes cannot be applied in the ratification or rejection of amendments to the Federal Constitution without violating the requirements of Article 5 of such Constitution and that such ratification shall be by the legislatures of the several states, or by conventions therein, as Congress shall decide. It was held in that case that the injuction was properly issued against the calling of a referendum election on the act of the legislature of a state ratifying an amendment to the Federal Constitution. If, therefore, the petitioners are right in their contention that Art. 31 is not amendable within the frame-work of the present Constitution, the only other recourse for making the amendment would, as I have already said, be by revolution and not through peaceful means. It cannot be reasonably supposed that the Constitution-makers contemplated that Art. 31 or any other article on fundamental rights should be altered by a violent revolution and not by peaceful change. It was observed in Feigenspan v. Bodine (264 Fed. 186) :

> "If the plaintiff is right in its contention of lack of power to insert the Eighteenth Amendment into the United States Constitution because of its subject-matter, it follows that there is no way to incorporate it and others of like character into the national organic law, except through revolution. This, the plaintiff concedes, is the inevitable conclusion of its contention. This, is so startling a proposition that the judicial mind may be pardoned for not readily acceding to it, and for insisting that

only the most convincing reasons will justify its acceptance".

I am, therefore, of the opinion that the petitioners are unable to make good their argument on this aspect of the case.

It was then contended for the petitioners that there would be anomalies if Art. 368 is interpreted to have no implied limitations. It was said that the more important articles of the Constitution can be amended by the procedure mentioned in the substantive part of Art. 368 but the less important articles would require ratification by the legislatures of not less than half of the States under the proviso to that Article. It was argued that the fundamental rights and also Art. 32 could be amended by the majority of two-thirds of the members of Parliament but Art. 226 cannot be amended unless there was ratification of the legislatures of not less than half of the States. It was pointed out that Arts. 54 and 55 were more difficult to amend but not Art. 52. Similarly, Art. 162 required ratification of the Sates but not Art. 163 which related to the Council of Ministers to aid and advise the Governor in the exercise of his functions. In my opinion the argument proceeds on a misconception. The scheme of Art. 368 is not to divide the Articles of the Constitution into two categories, viz., important and not so important Article. It was contemplated by the Constitution-makers that the amending power in the main part of Art. 368 should extend to each and every article of the Constitution but in the case of such articles which related to the federal principles or the relation of the States with the Union, the ratification of the legislatures of at least half the States should be obtained for any amendment. It was also contended that if Art. 368 was construed without any implied limitation the amending power under that Article could be used for subverting the Constitution. Both Mr. Asoke Sen and Mr. Palkhiwala resorted to the method of reductio ad absurdem in pointing out the abuses that might occur if there were no limitations on the power to amend. It was suggested that Parliament may, by a constitutional amendment, abolish the parliamentary system of government or repeal the chapter of fundamental rights or divide India into two States, or even reintroduce the rule of a monarch. It is inconceivable that Parliament should utilise the amending power for bringing about any of these contingencies. It is, however, not permissible, in the first place, to assume that in a matter of constitutional amendment there will be abuse of power and then utilise it as a test for finding out the scope of the amending power. This Court has declared repeatedly that the possibility of abuse is not to be used as a test of the existence or extent of a legal power [See for example, State of West Bengal v. Union of India ([1964] 1 S.C.R. 371), at page 407]. In the second place, the amending power is a power of an altogether different kind from the ordinary governmental power and if an abuse occurs, it occurs at the hands of Parliament and the State Legislatures representing an extraordinary majority of the people, so that for all practical purposes it may be said to be the people, or at least the highest agent of the people and one exercising sovereign powers. It is therefore anomalus to speak of 'abuse' of a power of this description. In the last analysis, political machinery and artificial limitations will not protect the people from themselves. The perpetuity of our democratic institutions will depend not upon special mechanisms or devices, nor even upon any particular legislation, but rather upon the character and intelligence and the goods conscience of our people themselves. As observed by Frankfurter J. In American Federation of Labour v. American Sash & Door Co. (335 U.S. 538, 556) :

> "But a democracy need rely on the courts to save it from its own unwisdom. If it is alert - and without alterness by the people there can be no enduring democracy - unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself".

I pass on to consider the next objection of the petitioners that the true purpose and object of the

impugned Act was to legislate in respect of land and that legislation in respect of land falls within the jurisdiction of State legislatures under Entry 18 of List II, and the argument was that since the State Legislatures alone can make laws in respect of land, Parliament had no right to pass the impugned Act. The argument was based on the assumption that the impugned Act purports to be, and in fact is, a piece of land legislation. It was urged that the scheme of Arts. 245 and 246 of the Constitution clearly shows that Parliament has no right to make a law in respect of land, and since the impugned Act is a legislative measure in relation to land, it is invalid. In my opinion, the argument is based upon a misconception. What the impugned Act purports to do is not to make any land legislation but to protect and validate the legislative measures in respect of agrarian reforms passed by the different State Legislatures in the country by granting them immunity from attack based on the plea that they contravene fundamental rights. The impugned Act was passed by Parliament in exercise of the amending power conferred by Art. 368 and it is impossible to accept the argument that the constitutional power of amendment can be fettered by Arts. 245 and 246 or by the legislative Lists. It was argued for the petitioners that Parliament cannot validate a law which it has no power to enact. The proposition holds good where the validity of an impugned Act turns on whether the subject-matter falls within or without the jurisdiction of the legislature which passed it. But to make a law which contravenes the Constitution constitutionally valid is a mater of constitutional amendment, and as such it falls within the exclusive power of Parliament and within the amending power conferred by Art. 368. I am accordingly of the opinion that the petitioners are unable to substantiate their argument on this aspect of the case. I should like to add that in Lesser v. Garnett (258 U.S. 13), in National Prohibition Cases (253 U.S. 350) and in United States v. Sprague (282 U.S. 716), a similar argument was advanced to the effect that a constitutional amendment was not valued if it was in the form of legislation. But the argument was rejected by the Supreme Court of the U.S.A. in all the three cases.

It remains to deal with the objection of the petitioners that the newly inserted articles 31-A and 31-B require ratification of the State legislatures under the proviso to Art. 368 of the Constitution because these articles deprive the High Courts of the power to issue appropriate writs under Art. 226 of the Constitution. I do not think there is any substance in this argument. The impugned Act does not purport to change the provisions of Art. 226 and it cannot be said even to have that effect directly or in any substantial measure. It is manifest that the newly inserted articles do not either in terms or in effect seek to make any change in Art. 226 of the Constitution. Article 31-A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of article 13 read with other relevant articles in Part III, while article 31-B purports to validate certain specified Acts and Regulations already passe,d which, but for such a provision, would be liable to be impugned under Art. 13. It is therefore not correct to say that the powers of High Courts to issue writs is, in any way affected. The jurisdiction of the High Courts remains just the same as it was before. Only a certain category of cases has been excluded from the purview of Part III and the High Courts can no longer intervene, not because their jurisdiction or powers have been curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their power in such cases. As I have already said, the effect of the impugned Act on the jurisdiction of the High Courts under Art. 226 of the Constitution is not direct but only incidental in character and therefore the contention of the petitioners on this point against the validity of the impugned Act must be rejected.

It is well-settled that in examining a constitutional question of this character, it is legitimate to consider whether the impugned legislation is a legislation directly in respect of the subject-matter covered by any particular article of the Constitution or whether it touches the said article only incidentally or indirectly. In A. K. Gopalan v. The State of Madras ([1950] S.C.R. 88, 101), Kania,

C.J., had occasion to consider the validity of the argument that the preventive detention order resulted in the detention of the applicant in a cell, and so, it contravened his fundamental rights guaranteed by Art. 19(1)(a), (b), (c), (d), (e) and (g). Rejecting this argument, the learned Chief Justice observed that the true approach in dealing with such a question was only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life. On that ground alone, he was inclined to reject the contention that the order of the detention contravened the fundamental rights guaranteed to the petitioner under Art. 19(1). At page 100 of the report, Kania C.J., stated as follows :

> "As the preventive detention order results in the detention of the applicant in a cell it was contended on his behalf that the rights specified in Article 19(1)(a), (b), (c), (d), (e), and (g) have been infrigned. It was argued that because of his detention he cannot have a free right to speech as and where he desired and the same argument was urged in respect of the rest of the rights mentioned in sub-clauses (b), (c), (d), (e) and (g). Although this argument is advanced in a case which deals with preventive detention, if correct, it should be applicable in the case of punitive detention also to any one sentenced to a term of imprisonment under the relevant section of the Indian Penal Code. So considered, the argument must clearly be rejected, In spite of the saving clauses (2) to (6), permitting abridgement of the rights connected with each of them, punitive detention under several sections of the Penal Code, i.e., for theft, cheating, forgery and even ordinary assault, will be illegal. Unless such conclusion necessarily follows from the article, it is obvious that such construction should be avoided. In my opinion, such result is clearly not the outcome of the Constitution. The article has to be read without any pre-conceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life. On that short ground, in my opinion, this argument about the infringement of the rights mentioned in article 19(1) generally must fail. Any other construction put on the article, it seems to me, will be unreasonable".

It is true that the opinion thus expressed by Kania, C.J. in the case of A. K. Gopalan v. The State of Madras ([1950] S.C.R. 88) did not receive the concurrence of the other learned Judges who heard the said case. Subsequently, however, in Ram Singh & Others v. The State of Delhi & Anr. ([1951] S.C.R. 451, 456) the said observations were cited with approval by the Full Court. The same principle was accepted by this Court in Express Newspapers (Pvt.) Ltd. v. The Union of India ([1959] S.C.R. 12, 129-30), in the majority judgment in Atiabari Tea Co. Ltd. v. The State of Assam (1961] 1 S.C.R. 809, 864), and in Naresh Shridhar Mirajkar v. The State of Maharashtra ([1966] 3 S.C.R. 744). Applying the same principle to the present case, I consider that the effect of the impugned Act on the powers of the High Court under Art. 226 is indirect and incidental and not direct. I hold that the impugned Act falls under the substantive part of Art. 368 because the object of the impugned Act is to amend the relevant Articles in Part III which confer fundamental rights on

citizens and not to change the power of the High Courts under Art. 226.

In this connection I should like to refer to another aspect of the matter. The question about the validity of the Constitution (First Amendment) Act has been considered by this Court in Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar ([1952] S.C.R. 89). In that case, the validity of the said Amendment Act was challenged, firstly, on the ground that the newly inserted Arts. 31-A and 31-B sought to make changes in Arts. 132 and 136 in Ch. IV of Part V and Art. 226 in Ch. V of Part VI. The second ground was that the amendment was invalid because it related to legislation in respect of land. It was also urged, in the third place, that though it may be open to Parliament to amend the provisions in respect of fundamental rights contained in Part III, the amendment made in that behalf would have to be tested in the light of provisions of Art. 13(2) of the Constitution. The argument was that the law to which Art. 13(2) applied would include a law passed by Parliament by virtue of its constituent power to amend the Constitution, and so, its validity will have to be tested by Art. 13(2) itself. All these arguments were rejected by this court and it was held in that case that the Constitution (First Amendment) Act was legally valid. The same question arose for consideration in Sajjan Singh v. State of Rajasthan ([1965] 1 S.C.R. 89) with regard to the validity of the Constitution (Seventeenth Amendment) Act, 1964. In that case, the petitioner in their Writ Petition in this Court contended that the Constitution (Seventeenth Amendment) Act was constitutionally invalid since the powers prescribed by Art. 226, which is in Ch. V, Part VI of the Constitution, were likely to be affected by the Seventeenth Amendment, and therefore the special procedure laid down under Art. 368 should have been followed. It was further contended in that case that the decision of this Court in Sankari Prasad's case ([1952] S.C.R. 89) should be reconsidered. Both the contentions were rejected by this Court by a majority Judgment and it was held that the Constitution (Seventeenth Amendment) Act amended the fundamental rights solely with the object of assisting the State Legislatures to give effect to the socio-economic policy of the party in power and its effect on Art. 226 was incidental and insignificant and the impugned Act therefore fell under the substantive part of Art. 368 and not attract the proviso to that article. It was further held by this Court that there was no justification for reconsidering Sankari Prasad's case ([1952] S.C.R. 89). On behalf of the respondents it was submitted by the Additional Solicitor-General that this was a very strong case for the application of the principle of stare decisis. In my opinion, this contention must be accepted as correct. If the arguments urged by the petitioners are to prevail it would lead to the inevitable consequence that the amendments made to the Constitution both in 1951 and in 1955 would be rendered invalid and a large number of decisions dealing with the validity of the acts included in the 9th Schedule which were pronounced by this Court ever since the decision in Sankari Prasad's case ([1952] S.C.R. 89) was declared, would also have to be overruled. It was also pointed out that Parliament, the Government and the people have acted on the faith of the decision of this Court in Sankari Prasad's case ([1952] S.C.R. 89) and titles to property have been transferred, obligations have been incurred and rights have been acquired in the implementation of the legislation included in the 9th Schedule.

The effect of land reform legislation has been clearly summarised in Ch. VIII of Draft Outline on Fourth Plan as follows :

> "Fifteen years ago when the First Plan was being formulated, intermediary tenures like zamindaris, jagirs and inams covered more than 40 per cent. of the area. There were large disparities in the ownership of land held under ryotwari tenure which covered the other 60 per cent. area; and a substantial portion of the land was cultivated through tenants-at-will and share-croppers who paid about one-half the produce as rent. Most holdings were small and fragmented. Besides, there was a large

> population of land-less agricultural labourers. In these conditions the principal measures recommended for securing the objectives of the land policy were the abolition of intermediary tenures, reform of the tenancy system, including fixation of fair rent at one-fifth to one-fourth of the gross produce, security of tenure for the tenant, bringing tenants into direct relationship with the State and investing in them ownership of land. A ceiling on land holding was also recommended so that some surplus land may be made available for redistribution to the landless agricultural workers. Another important part of the programme was consolidation of agricultural holdings and increase in the size of the operational unit to an economic scale through cooperative methods.
>
> Abolition of Intermediaries. - During the past 15 years, progress has been made in several directions. The programme for the abolition of intermediaries has been carried out practically all over the country. About 20 million tenants of former intermediaries came into direct relationship with the State and became owners of their holdings. State Governments are now engaged in the assessment and payment of compensation. There were some initial delays but a considerable progress has been made in this direction in recent years and it is hoped that the issue of compensatory bonds will be completed in another two years.
>
> Tenancy Reform. - To deal with the problem of tenants-at-will in the ryotwari areas and of sub-tenants in the zamindari areas, a good deal of legislation has been enacted. Provisions for security of tenure, for bringing them into direct relation with the State and converting them into owners have been made in several States. As a result about 3 million tenants and sharecroppers have acquired ownership of more than 7 million acres.
>
> Ceiling on Holdings. - Laws imposing ceiling on agricultural holdings have been enacted in all the States. In the former Punjab area, however, the State Government has the power to settle tenants on land in excess of the permissible limit although it has not set a ceiling on ownership. According to available reports over 2 million acres of surplus areas in excess of the ceiling limits have been declared or taken possession of by Government".

It is true that the principle of stare decisis may not strictly apply to a decision on a constitutional point. There is no restriction in the Constitution itself which prevents this Court from reviewing its earlier decisions or even to depart from them in the interest of public good. It is true that the problem of construing constitutional provisions cannot be adequately solved by merely adopting the literal construction of the words used in the various articles. The Constitution is an organic document and it is intended to serve as a guide to the solution of changing problems which the Court may have to face from time to time. It is manifest that in a progressive and dynamic society the character of these problems is bound to change with the inevitable consequence that the relevant words used in the Constitution may also change their meaning and significance. Even so, the Court is reluctant to accede to the suggestion that its earlier decisions should be frequently reviewed or departed from. In such a case the test should be : what is the nature of the error alleged in the earlier decision, what is its impact on the public good and what is the compelling character of the considerations urged in support of the contrary view. It is also a relevant factor that the earlier decision has been followed in a large number of cases, that titles to property have passed and multitude of rights and obligations have been created in consequence of the earlier decision. I have

already dealt with the merits of the contention of the petitioners with regard to the validity of the impugned Act and I have given reasons for holding that the impugned Act is constitutionally valid and the contentions of the petitioners are unsound. Even on the assumption that it is possible to take a different view and to hold that the impugned Act is unconstitutional I am of opinion that the principle of stare decisis must be applied to the present case and the plea made by the petitioners for reconsideration of Sankari Prasad's case ([1952] S.C.R. 89) and the decision in Sajjan Singh v. State of Rajasthan ([1965] 1 S.C.R. 933) is wholly unjustified and must be rejected.

In Writ Petition No. 202 of 1966, it was contended by Mr. Nambyar that the continuance of the Proclamation of Emergency under Art. 352 of the Constitution was a gross violation of power because the emergency had ceased to exist. It was also contended that Art. 358 should be so construed as to confine its operation only to legislative or executive action relevant to the Proclamation of Emergency. It was submitted that the Mysore State was not a border area and the land reform legislation of that State had no relevant connection with the Proclamation of Emergency and the fundamental rights conferred by Art. 19 cannot be suspended so far as the petitions are concerned. I do not think that it is necessary to express any opinion on these points because the Writ Petition must fail on the other grounds which I have already discussed above. It is also not necessary for me to express an opinion on the doctrine of prospective overruling of legislation.

For the reasons already expressed I hold that all these petitions fail and should be dismissed, but there will be no order as to costs.

Petitions dismissed.

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