C. B. II No. 204

# LOK SABHA

# JOINT COMMITTEE

## ON THE

# CONSTITUTION (AMENDMENT) BILL, 1967

## By Shri Nath Pai, M. P.

## EVIDENCE

LOK SABHA SECRETARIAT
NEW DELHI
*December, 1967/Agrahayana, 1889 (Saka)*
*Price : Rs. 2·55*

# C O R R I G E N D A

to the
Evidence given before the Joint Committee
on the Constitution (Amendment) Bill, 1967
by Shri Nath Pai, M.P.

Page (i), footnote, for 'reined' read 'resigned'
Page (iii) insert '5' in col. 1 against 'Shri H.M. Seervai', and insert '6' against 'Indian Chamber of Commerce'.
Page 2, col.2(i) line 3, for 'more' read 'some'
(ii) line 4, for 'and not' read 'and you are not'
(iii) line 15, for 'to' read 'of'
Page 3, col.1, line 1, for 'our' read 'your'
Page 5, col.1, line 13 from bottom, for 'mean' read 'need'
Page 5, col.2, line 8, for "India...." read "India...." ".
Page 5, col.2, line 19, for 'bridges' read 'abridges'
Page 5, col.2, line 2 from bottom, for 'expension' read 'extension'
Page 7, col.2, line 14 from bottom, for 'ooducted' read 'conducted'
Page 8, col.1, line 16, for 'referandum' read 'referendum'
Page 8, col.1, line 7 from bottom, for 'ariticles' read 'articles'
Page 8, col.1, line 3 from bottom, for 'aritcles' read 'articles'
Page 8, col.2, line 6, for '(395 minus 24-371' read '(395 minues 24-371'
Page 12, col.1, line 30, for 'Assemby' read 'Assembly'
Page 12, col.1, line 38, for 'Tirloki' read 'Triloki'
Page 12, col.2, line 32, for 'Not' read 'No'
Page 13, Col.1, line 11, for 'tutution,.....would' read 'fluous so far as the ordinary law is'
Page 13, col.1, line 16, for 'tituion' read 'titution'
Page 13, col.2, line 13 from bottom, for 'sugested' read 'suggested'
Page 17, col.1, line 31, for 'o' read 'to'

....2/-

Page 21, col.1 -
(i) line 17, for 'ques ion' read 'questi on'
(ii) line 22, for 'e her' read 'ether'
(iii) line 32, for 'e c.,' read 'etc.'
(iv) line 36, for 'Cour' read 'Court'
(v) line 41, for 'he' read 'the'
(vi) line 50, for 'interes' read 'interest'
Page 21, col.2-
(i) line 12, for 'fundamen al' read 'fundamental'
(ii) line 15, for 'cour s' read 'courts'
(iii) line 39, for 'wi ness' read 'witness'
(iv) line 43, for 'befit ing' read 'befitting'
(v) line 47, for 'incorpora ing' read 'incorporating'
Page 22, col.1, line 15 from bottom for 'Consti u' read 'Constitu'
Page 23, col.2, line 18, for 'laws' read 'law'
Page 24, col.1-
(i) line 14, for 'Consti ution' read 'Constitution'
(ii) line 26, for 'con inuation' read 'continuation'
(iii) line 34, for 'Ar icle' read 'Article'
(iv) line 48, for 'tha' read 'that'
Page 26, col.2, lines 26-27, for 'Chandrasekhram' read 'Chandrasekhran'
Page 32, col.1, line 2, for 'difference' read 'deference'
Page 38, col.1,(i) line 9 for 'right,' read 'right'
(ii) line 15, for 'section' read 'Article'
(iii) line 32, for 'Reality' read 'Social reality'
Page 38, col.2(i)lines 3-4, for 'corrcetive' read 'corrective
(ii) line 10, for 'reacing' read 'reaching'
(iii) line 36, for 'is is' read 'it is'

....3/-

(i)

Page 39, Col.1,/line 4, for 'togethr' read 'together'
(ii) line 29, for 'precate' read 'preciate'
col.2, line 19, for 'transgrees' read 'transgress'
Page 40, col.1, line 17 from bottom delete 'them'
col.2, line 1, delete 'can'
Page 41, col.2, line 13, for 'Palkhiwala' read 'Palkhivala'
Page 54, col.1, line 25, for 'he' read 'the'
Page 72, col.1, line 8, for 'Murthi' read 'Murti'
Page 77, col.2, line 4 from bottom for 'provision' read 'proviso'
Page 78, col.1, line 6, for 'include' read 'included'
Page 94, col.2, line 13 from bottom for 'inserved' read 'inserted'
Page 100, col.2, for line 4 read 'it could be urged that the State Legis-'
Page 105, col.1, line 8, for 'required' read 'referred'
Page 107, col.1, line 21 from bottom for 'their' read 'there'
Page 130, col.2, line 13, for 'absured' read 'absurd'
Page 134, col.1, line 7 from bottom for 'N.' read 'M.'
Page 137, col.2, line 3, for 'worlds' read 'words'
Page 154, col.2, line 26, for 'The' read 'Shri'
Page 157, col.1, lines 12 and 30, for 'Vishwanatham' read 'Viswanatham'
Page 157, col.2, line 25, for 'limitaton' read 'limitation'
Page 162, col.1, line 9, for 'Kalyansudaram' read 'Kalyanasundaram'
Page 164, col.2, for line 25, read 'cannot touch them. You would'
Page 167, col.1, line 18, for 'Tapar' read 'Thapar'
col.2, line 13 from bottom for 'M.' read 'N.'
Page 173, col.1, line 5 from bottom for 'Chandrkseaharan' read 'Chandrasekharan'
Page 176, col.1 & 2 for 'Kumaramanglam' read 'Kumaramangalam'

Page 186, col.1, line 15, delete 'ev'
Page 187, col.2, line 6 from bottom for 'Purshattam' read 'Purshottam'
Page 192, col.1 (i) line 7 from bottom for 'yu' read 'you' (ii) line 11, for 'wuld' read 'would'
Page 185, col.2, line 25, for 'Kunta' read 'Kunte'
Page 199, col.1, for line 18 from bottom read 'Part III. Is this not as important'
Page 204, col.1, for line 6, read 'Shri Hanumanthaiya: I find people'
Page 205, col.1, line 32, for 'Convenant' read 'Covenant'
Page 214, col.1, line 15 from bottom for 'Daula ram' read 'Daulatram'
Page 219, col.1, line 5, for 'owining' read 'owning'
Page 221, col.1, line 18 from bottom for 'didate' read 'date'
Page 224, col.2, line 15, for 'Is what' read 'What'
Page 227, col. 1, line 15, for 'and.' read 'and..'
Page 228, col.1, line 2, delete 'the'

## JOINT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1967 BY SHRI NATH PAI, M.P.

### COMPOSITION OF THE COMMITTEE

Shri R. K. Khadilkar—*Chairman*

MEMBERS

*Lok Sabha*

2. Shri R. S. Arumugam
3. Shri N. C. Chatterjee
4. Shri Surendranath Dwivedy
5. Shri Ram Krishan Gupta
6. Shri S. M. Joshi
7. Shri Kameshwar Singh
8. Shri Krishnan Manoharan
9. Shri D. K. Kunte
10. Shri J. Rameshwar Rao
11. Shri V. Viswanatha Menon
12. Shri Mohammad Yusuf
13. Shri Jugal Mondal
14. Shri H. N. Mukerjee
15. Shri Nath Pai
16. Shri P. Parthasarthy
17. Shri Deorao S. Patil
18. Shri Khagapathi Pradhani
*19. Chaudhari Randhir Singh
20. Shri K. Narayana Rao
21. Shri Mohammad Yunus Saleem
22. Shri Anand Narain Mulla
23. Shri Dwaipayan Sen
24. Shri Prakash Vir Shastri
25. Shri Digvijaya Narain Singh
26. Shri Sant Bux Singh
27. Shri Sunder Lal
28. Shri V. Y. Tamaskar
29. Shri Tenneti Viswanatham
30. Shri P. Govinda Menon.

*Rajya Sabha*

31. Shri Chitta Basu
32. Shri M. V. Bhadram
33. Shri Kota Punnaiah
34. Shri M. P. Bhargava

*Appointed on the 22nd December, 1967 *vice* Shri K. Hanumanthaiya regined.

35. Shri K. Chandrasekharan
36. Shri A. P. Chatterjee
37. Shri Jairamdas Daulatram
38. Shri Ram Niwas Mirdha
39. Shri G. H. Valimohmed Momin
40. Shri G. R. Patil
41. Shri J. Sivashanmugam Pillai
42. Shrimati Yashoda Reddy
43. Shri Jogendra Singh
44. Shri Triloki Singh
45. Shri Rajendra Pratap Sinha.

REPRESENTATIVES OF THE MINISTRY OF LAW

1. Shri R. S. Gae, *Secretary, Department of Legal Affairs.*
2. Shri V. N. Bhatia, *Secretary, Legislative Department.*
3. Shri K. K. Sundaram, *Additional Legislative Counsel.*
4. Shri S. K. Maitra, *Additional Legislative Counsel.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

## Witnesses Examined

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| | *Spokesmen* : | | |
| | 1. Shri B. S. N. Murti, *Director.* | | |
| | 2. Shri P. Chandrasekhara Rao. | | |
| | 3. Shri M. Chand rasekharan. | | |
| 4. | Shri R. S. Gae, Secretary, Department of Legal Affairs, Ministry of Law, Government of India. | 26-10-1967 | 94 |
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| | *Spokesmen* : | | |
| | 1. Shri I. M. Thapar, President | | |
| | 2. Shri G. K. Bhagat, Senior Vice-President. | | |
| | 3. Shri B. Kalyanasundaram, Secretary. | | |
| 7. | Shri S. Mohankumaramanglam, Ex-Advocate-General of Madras. | 18-11-1967 | 168 |
| 8. | Shri Purshottam Trikamdas, Advocate, New Delhi. | 25-11-1967 | 186 |
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# JOINT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1967 BY SHRI NATH PAI, M.P.

MINUTES OF EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1967, BY SHRI NATH PAI, *M.P.*

*Monday, the 23rd October, 1967 at 10.00 hours.*

PRESENT

Shri R. K. Khadilkar—*Chairman*

MEMBERS

*Lok Sabha*

2. Shri R. S. Arumugam
3. Shri N. C. Chatterjee
4. Shri Ram Krishan Gupta
5. Shri S. M. Joshi
6. Shri Kameshwar Singh
7. Shri D. K. Kunte
8. Shri V. Viswanatha Menon
9. Shri Mohammad Yusuf
10. Shri Jugal Mondal
11. Shri Nath Pai
12. Shri P. Parthasarthy
13. Shri Deorao S. Patil
14. Shri Khagapathi Pradhani
15. Shri Mohammad Yunus Saleem
16. Shri Anand Narain Mulla
17. Shri Dwaipayan Sen
18. Shri Prakash Vir Shastri
19. Shri Digvijaya Narain Singh
20. Shri Sunder Lal
21. Shri Tenneti Viswanatham
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29. Shri J. Sivashanmugam Pillai

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31. Shri Triloki Singh.

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2. Shri K. K. Sundaram, *Additional Legislative Counsel.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESS EXAMINED

Shri K. Santhanam, *Ex-M.P. and Member of the Constituent Assembly.*

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**Shri K. Santhanam, Ex-M.P. and Member of the Constituent Assembly**

*(The witness was called in and he took his seat)*

**Mr. Chairman:** There is a Rule which I have to read out to you. It says that when a witness appears before a Committee to give evidence, the Chairman shall make it clear to the witness that the evidence shall be treated as public and is liable to be published unless he specifically desires that all or any part of the evidence given by him is to be treated as confidential. It shall, however, be explained to the witness that even though he might desire his evidence to be treated as confidential, such evidence is liable to be made available to the Members of Parliament.

This is just a formality. You know this. You have been here for a long time.

Mr. Santhanam, the members of the Committee and myself are very happy and grateful to you because you could spare some time to appear before this Committee and place your views before us and thus help in our deliberations. You know this is a very important issue raised after you really hammered out our Constitution. it goes to the fundamental basis of our Constitution and as such we will have to apply our mind in a most objective manner. Not only that. We must look to the future also because, as you know, you have got more sort of an academician's approach and not a partisan—politically biassed—in your views. I have seen whatever you have written. We are not responsible to the present but we are responsible for the future as well. When we framed the Constitution, you had that far-sighted vision. The purpose behind Mr. Nath Pai's Bill is intended to correct, if correction is possible, the views expressed by a majority to one of the Supreme Court Judges. While correcting it, if I have understood him correctly, there is no intention to create a sort of a tension or a conflict between Parliament—a sovereign body—and the judiciary. But, at the same time, it has been made clear on the floor of the House that the intention of the framers of the Constitution is very clear on one point viz., that they have never desired that the judiciary would act or arrogate to themselves as if they are the third House. This is very important matter.

Last but not the least, on previous occasion, like the present one, the conflict centres round the fundamental right regarding the property; tension has been developed to some extent, whenever question of property rights and compensation and other allied matters came up before the Supreme Court for a decision. Keeping this in

view, we would like to have our guidance how we can correct, if correction is called for, how far the learned judges are right and how far their views are a little biassed. If it is so, what is the remedy to set things right? That is the purpose. So, I would very much like you to be very frank on these matters.

**Shri K. Santhanam:** Thank you Mr. Chairman. I shall try to place my views before you.

I do not want to waste the time of this Committee and I would like to have your guidance as to how I should proceed in the matter. There is a historical aspect; there is a legal aspect and there is a national aspect in this issue. If you will permit me, I will say a few words on each of these aspects.

The historical aspect is that when we were framing the Chapter III, it was never in our minds that by a two-third majority, the entire Chapter III could be repealed or Article 32 could be repealed. We did intend that the fundamental rights should be more or less sacrosanct. That was why Article 32 invested the Supreme Court with the original jurisdiction. We never contemplated that this original jurisdiction would be taken away by any amendment under Article 368. Similarly, we did not think that the fundamental rights under Article 19 would be abridged. It is for this purpose of preventing any further abridgment that every Article was subject to broad restrictions of public interest, morality, decency etc. If we thought they could be easily abridged, then, these restrictions had no purpose. It is also true that when we came to Article 368, we did not think of excluding Chapter III from the scope of Article 368 because the very first amendment amended three Articles of Part III and that the people who were responsible for these amendments were Dr. Ambedkar, Rajaji who moved the Bill and Sardar Patel. Nobody raised an objection that Article 368 was not applicable to Part III. That is the historical aspect.

So far as the legal aspect is concerned, I think Article 13(2) is more or less conclusive. There the word 'law' cannot possibly be applied to ordinary law because it is not possible by ordinary law to change any Article of the Constitution. An Article of the Constitution can be affected only by a constitutional amendment or what you may call a 'Constituent Law'. Therefore, Article 13(2) is either nonsense or the word 'law' there can apply only to a constitutional amendment. There is no question of this being applicable to ordinary law because even for expanding the fundamental rights, only a constitutional amendment can make that expansion valid. For instance, if you want to shut out the State Legislatures from amending any Article of Part III, then, you cannot do it by ordinary law even though it means expanding the fundamental rights. So, any Article of the Constitution can be affected only by an amendment of the Constitution. Therefore, the word 'law' under Article 13 cannot possibly mean any ordinary law. So, from the legal aspect, unless Article 13(2) is amended, the Supreme Court would be entitled to say that 13(2) bars the amendment of any Article of Part III by 368. That is the legal position.

Now, I would say a word about the national interest. That of course is a matter for you to keep in mind. My own feeling is that in the present state of Part III including all the amendments about which even the recent Supreme Court judgment has said that they will continue as part of Part III, I cannot conceive of any possible need for amending outside the scope already contained in the articles. As I have said each of ten Articles gives a wide scope for Parliament and in the case of many Articles, the State Legislatures also to enact on a broad basis. The only thing which the Parliament and the State Legislatures cannot do is to take away the judicial review. The only purpose under which any article may need to be amended is to shut out the Courts from looking into the reasonableness or justice of

a law. I do not think that it is in the national interest that there should be any law which could not be taken to the Courts on account of unreasonableness or injustice. Therefore, I think it is not necessary at all to amend the present position so far as the fundamental rights are concerned. From the national point of view, I would like that the position be left as it is because the Parliament and the State Legislatures have ample powers even to nationalise private sector undertakings. For instance, nationalisation of the Life Insurance was effected and nobody questioned even nationalisation of banking or general insurance. Anything can be done under the present Articles even after the judgment of the Supreme Court. Therefore, as the only purpose of an amendment can be to take away the judicial review, I am not very anxious that the position should be changed. At the same time, assuming that a change is needed, I would give my suggestions. Assuming for the moment that it has been decided by your Committee that the present position is not satisfactory and that some way should be found to amend any article of the Constitution. For that also, I think the present Bill is ineffective because, if Article 368 is not applicable to Part III, an amended 368 will not also be applicable. Therefore, unless the Supreme Court itself changes that position that Article 13(2) bars the Parliament, this Bill, even if it is passed, will not be effective. It is effective only when the Supreme Court revises its own position. In that case the present Article 368 will suffice. No change is needed. But in this Bill I think one or two amendments are required to make your intentions clear. For instance, I would suggest that the following clause shall be inserted: 'Notwithstanding anything in Art. 13 or any other Article'. That should be put in to make your position clear because that is the point at issue. Unless you say 'Notwithstanding anything in Article 13 or any other Article', your intention will not be clear I would also suggest that another clause should be put in to bring in the amendment of Part III under the proviso to Art. 368 because to-day one of the grave anomalies of the Constitution is that while many Articles are amendable by the longer process, that is, by two-thirds majority in both houses and endorsement by a majority of the State Legislatures, the fundamental rights can be changed by a mere two-thirds majority of both Houses. This is a very unsatisfactory position. At least if you say that the longer method, that is, the approval of a majority of the legislatures is needed for an amendment of Part III, that would be better. It has got two merits. One is that it removes the anomaly. Secondly, it also takes away the technical interpretation of law. So long as it is only a Bill approved by Parliament and assented to by President, it comes under the technical definition of 'law'. But anything in such Bill subject to the majority endorsement of State legislatures takes it away from the normal procedure of law-making. In that way it gives some amount of sanctity to the fundamental rights.

Only one more suggestion I shall make. That is, I think, the logical method of overcoming Supreme Court's judgment. That is to pass a law saying that any amendment to the fundamental rights shall be done through a referendum, a law making provision for referendum. It is not a substantive law; it is a procedural law. So it is within the four corners of the Supreme Court's judgment and referendum as a method of amendment is already prevalent in many Constitutions like Ireland, Switzerland and Australia. There is no difficulty because amendment of fundamental rights must be very rare and it must be well-discussed. So there should be no difficulty in conducting a referendum and I would earnestly plead that it will give a great assurance to the people that fundamental rights will hereafter be amended only through the people of India who are certainly the

ultimate sovereign authority so far as the constitution is concerned.

I may also add that it is rather dangerous to give Parliament unfettered power to tamper with Part III. After amending Article 368 as provided in this Bill, it should be possible for anybody to bring in a Bill that Part III is hereafter repealed and as soon as two-thirds majority in both Houses approve of it, Part III will automatically be repealed and you can imagine what the position of the country will be. Therefore, now that we have an opportunity to consider this question *de novo*, I suggest that you should take steps to see that owing to the electoral changes by any chance some Party or other which does not like fundamental rights or which does not like democracy comes to power, it can by one single sweep, by a single overnight session, sweep away the entire Part III of the Constitution.

These are my views and I shall be glad to answer any question.

**Mr. Chairman:** From your statement it is clear that you also feel that after the Supreme Court's judgment some action is called for. Do you agree with this or not? How to do it is a different matter.

**Shri K. Santhanam:** I do not agree that it is called for. I am willing to provide for the contingency, but I do not think that the country will lose anything if the present position is left as it is.

**Mr. Chairman:** For the present one vote majority judgment does not mean any sort of action on our part. Not only in regard to fundamental rights but the whole constitutional structure, no action is called for. As it is you agree with the judgment entirely?

**Shri K. Santhanam:** I do not think the country will lose anything if no action is taken. I do not think anything is called for on account of necessity.

**Shri Govinda Menon:** You referred to the legal aspect of the matter. Your second point was about that and you said that the word 'law' in Art. 13(2) cannot be ordinary law; it can only be constitutional law. I doubt very much whether in the face of Art. 13(1) it would be all right. Art. 13(1) refers to existing law—'All laws in force in the territory of India.... etc. 'shall, to the extent of such inconsistency, be void.' Certainly, there 'law' means ordinary law.

**Shri K. Santhanam:** There it is existing law because there was no constitutional law.

**Shri Govinda Menon:** Art. 13(2) logically refers to future legislation and you can certainly conceive of a law, say, the Preventive Detention Act which takes away or bridges one or other of the fundamental rights in Part III. Can you not interpret the word 'law' in Art. 13(2) to mean that kind of law? In fact all along the Supreme Court and High Courts have been striking down legislations on the ground that those legislations contained provisions which abridged or took away one or the other of the fundamental rights and but for something like Art. 13(2), it would not have been possible for these courts to do so. Many legislations have been struck down because under Art. 13(2) no law can abridge or take away fundamental rights. How can you say that 'law' there can only be constitutional law? I can understand the position that 'law' there may mean ordinary law and constitutional law. That is what the majority of the recent Supreme Court Bench held. It would cover both.

**Shri K. Santhanam:** It cannot cover because an ordinary law cannot possibly affect any Article of the Constitution. Take for instance preventive detention. Can you say by ordinary law that no State legislature shall have power to enact a law of preventive detention and that Parliament only can make that law because, as it is, Art. 13(2) gives State legislature power to pass a preventive detention law. Even for expension of rights, supposing Parliament makes a

law saying that no State legislature shall pass a law of preventive detention, that would be extending the fundamental rights. Even that extension will be unconstitutional because an ordinary law cannot change a constitutional provision—not only this Article but any Article of the Constitution. This is the fundamental basis of constitutional law. The constitutional law can be changed, enlarged or abridged or done anything only through a constitutional amendment. The ordinary law is subject to other articles of the Constitution. That is the basis of all constitutional law and, therefore, I think an ordinary law has to be governed by the provisions of the Constitution. That is all. So, to say that an ordinary law will be governed by the Constitution, no provision is needed. That is the foundation of every constitution and, therefore, it may be by mistake—I can understand saying that this Art. 13(2) has been put in by the draftsmen without fully realising the implications—I have no objection to that. But if it is to have any meaning, the word 'law' here, it can have only one meaning. That is "constitutional law'; otherwise, it has no meaning.

**Shri Govinda Menon:** In that case Article 13 (2) should find its place elsewhere. If you sav that an ordinary law cannot change any of the provisions of the Constitution, then it need not come particularly in Chapter III.

**Shri K. Santhanam:** It should not come any where; in fact it is superfluous.

**Shri Govinda Menon:** I hope you are aware that the High Courts and the Supreme Court have struck down some of the laws basing their stand on Article 13 (2).

**Shri K. Santhanam:** They have done it simply because Article 13 (2) is there. Even without Article 13 (2) they could have done that. If they have based any argument on the basis of this Article, it must be only supplementary and not basic.

**Shri Govinda Menon:** That is all right. On a point of law there is no use arguing in this Committee. You specifically stated that you don't find any need for amending the Constitution. Are you aware of a series of decisions of the Courts recently on Article 31 (2) where it is said:

> ". . . . no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate."

My recollection is that this amendment was introduced in the Constitution to provide for compensation for land which will not be taken up and litigated upon in the Courts. But I find in 4 or 5 decisions of the Supreme Court where it is said that compensation means compensation and it should be the market value and nothing less than that. I hope you catch my point. If my recollection is correct, this amendment was brought in order to enable the State to acquire land in the public interest and compensation shall not be payable which is not bearable by the State and over which there could be litigation. But there have been three or four decisions recently wherein it is said that compensation is compensation and therefore unless it is the market value of the property the law providing for acquisition will be invalid. Supposing the State does that in the public interest, there should be power vested in Parliament to provide for acquisition of immovable property and compensation shall be payable in a reasonable manner, that is to say, not in a manner in which it is impossible for the Governments to pay up. If that is necessary, should it not be possible for Parliament to amend Article 31 (2)?

**Shri K. Santhanam:** I wish you read that Article again. It says:

> "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies

the principles on which and the manner in which the compensation is to be determined and given; . . . . ."

Then read 31 (3):

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

After the principles on which and the manner in which the compensation is to be determined and given and the law after having been given assent by the President shall not be called in question in any Court stating that it contravenes the provisions of Clause 31 (2). I think many of the interventions of the Supreme Court are due to the bad drafting of State laws. They never fixed the compensation or the principles of compensation but simply make some *ad hoc* arrrangements. I can give you one example. When I was in Vindhya Pradesh, we passed a law about zamindaris where we followed strictly Article 31 (2). When that legislation was taken to the High Court and the Supreme Court, it said it is quite legal, though we did not take the market value as the basis for compensation at all. If it was only a small zamindari, then it would have ten times, others would have seven times and some others two times—this was on the basis of what the State could pay. The principles were clearly laid down and it was considered quite legal. Simply because our legislative departments are not quite competent and they make bad laws which are questioned in the Supreme Court, immediately we proceeded to amend the Constitution to fit in such a law. If you pay Re. 1 as compensation for a property worth a crore of rupees, then it will be fraud on the Constitution. A reasonable compensation should be fixed or the principles to arrive at such a compensation should be fixed. Various other amendments which have been brought so far are adequate to meet the contingencies which you contemplate. I don't think any further amendment is required so far as property is concerned.

**Shri Govinda Menon:** I am afraid you have not caught my point. In two recent decisions—one is Vajravelu Mudaliar case and tthe other Metal Corporation case—of the Supreme Court covered two pieces of parliamentary legislation. In those two cases the Bench said that compensation under Article 31 (2) means market value. Article 131 says what is declared by the Supreme Court is law of the land. Unless you further explain what is meant by compensation under Article 31 (2), that ruling will stand. I hope you have read those two judgments.

**Shri K. Santhanam:** I would like to read them. I am sure that they should be such as to be capable of being reconciled with the actual provisions of the Constitution. In certain circumstances and in certain contingencies they could say that the principle should be only by having market value. I don't think they would have said that a law which does not take market value as a basis is illegal. I don't think any Supreme Court can say in that way.

**Shri Govinda Menon:** What the Supreme Court said was that unless it is market value, it would be a fraud on the Constitution. I will get the decisions. Thirdly, you said that there should be referendum. Do you think that in conditions in India today, with the vast population involved, it is easy or possible to have referendum coducted on a constitutional question?

**Shri K. Santhanam:** It will be very simple if the people are educated by all the political parties. No one will be bringing an amendment to all the 24 Articles of Chapter III. It will be an amendment for a particular purpose. I think it will be a fine way of politically educating the people. I think there should be no difficulty.

**Shri Govinda Menon:** You said that in Australia, in Switzerland and in Ireland, referendum is provided as machinery for amending the Constitu-

tion. I suppose in a large number of countries in the world they have conferred constituent powers on the Parliament, for example, in America.

**Shri K. Santhanam:** America has not given the constituent power to Parliament in this matter. Every amendment has to be ratified by three-fourths of the States.

**Shri Govinda Menon:** Parliament and the **State Legislatures.**

**Shri K. Santhanam:** There is no constitution in the U.K. and the Parliament is absolutely supreme. There are all kinds of Parliaments and for Constitutional amendments, they have got varied provisions. I don't see any other way. 368 will not be available. The only authority above Parliament is the people. Logically, therefore, that is the only thing which will effectively get over the decision of the Supreme Court. Any other authority would be an inferior authority. For instance, somebody has suggested a Constituent Assembly. Another Constituent Assembly will be less effective than the present Parliament. At least, here you have got the two Houses of Parliament in which you have to get two-third majority and, therefore, any single body based on adult franchise, by or majority of which you can pass an amendment will be much inferior to the present provisions of Art. 368. Therefore, if you want to have a stronger provision than Art. 368, or a higher constitutional authority, it can only be refrendum.

**Shri Govinda Menon:** Under Art. 368, it is stated that with respect to certain articles of the Constitution, amendment is possible only if Parliament passes it with a certain majority and if a certain majority of States also approve of it. Does it not follow by necessary implication that with respect to other aritticles of the Constitution, Parliament can do it?

**Shri K. Santhanam:** No. No. Nobody denies that under Art. 368, amendment to certain aritcles can be passed by two-third majority and the other articles have to be amended by two-third majority and ratification by majority of the States. The whole question is whether articles in Part III are subject to Art. 368. Nobody has doubted that all the other articles (395 minus 24-371 articles) of the Constitution are subject to Art 368. There is no doubt about it. Only point is whether the 24 articles of Part III are liable to be amended by Art. 368.

**Shri Govinda Menon:** I hope you are aware that the latest constitution of France has conferred constituent powers on the two Houses of Parliament sitting together.

**Shri K. Santhanam:** Yes. In Switzerland, the interpretation of the Constitution is vested only with the Parliament. The High Court there has no power to interpret the Constitution. There are all kinds of constitutions.

**Shri Govinda Menon:** Supposing the amendment of articles in Part III of the Constitution is also made an entrenched provision i.e. concurrence of the majority of the States will be necessary, do you think it will be satisfactory?

**Shri K. Santhanam:** It will be more satisfactory than the present situation. Certainly.

**Shri A. N. Mulla:** I believe you accept the principle that a democratic State means the Government by the people.

**Shri K. Sanathanam:** Yes, but "by the people" may mean anything—directly through the Parliament or through a dictatorship.

**Shri A. N. Mulla:** I am putting it to you, do you accept this principle or not or you have your own reservations?

**Shri K. Santhanam:** I accept the Lincoln definition—by the people, for the people and of the people.

**Shri A. N. Mulla:** Could you agree with me or not that the people of the country stand at a higher level than even the written constitution?

**Shri K. Santhanam:** Yes, the people are the basis of the written constitution and they are above the written constitution.

**Shri A. N. Mulla:** Therefore, you will agree that if a piece of paper becomes not a representation of the will of the people, then the people have a right to change that piece of paper?

**Shri K. Santhanam:** People have absolute right to do anything.

**Shri A. N. Mulla:** Therefore, I take it that you think that the Parliament does not represent the people in that sense.

**Shri K. Santhanam:** Parliament is not the people. It represents people only for particular purposes, not for all purposes. In fact Parliament represents people for certain Central functions. The people are represented by State Legislatures for other functions. Therefore, in a federal Constitution, Parliament cannot be equated with the people.

**Shri A. N. Mulla:** Therefore, so far as our Constitution is concerned, you are of the opinion that those who framed this Constitution gave certain fundamental rights to the citizens and they intended that under no circumstances could these rights be changed.

**Shri K. Santhanam:** I have already explained the historical aspect.

**Shri A. N. Mulla:** I would like to know from you whether they intended that they should not be changed under any circumstances.

**Shri K. Santhanam:** In this respect, their mind was not very definite when they framed the fundamental rights. That was the general feeling behind the Constitutent Assembly. But when they came to enact Art. 368, they did not clearly contemplate that it should not apply to the fundametal rights. Therefore, it is a point of ambiguity regarding the intention of the Constituent Assembly.

**Shri A. N. Mulla:** Therefore, if we accept your version of the manner in which the Constitution was passed, the position is this. The framers of the Constitution were not clear in their minds whether the fundamental rights should subsequently be modified or abridged or they should not be modified or abridged.

**Shri K. Sanathanam:** That is the position.

**Shri A. N. Mulla:** If that is the position, then in that light will you not reconsider the opinion you gave about the interpretation of Art. 13(2) of the Constitution.

**Shri K. Santhanam:** I gave an interpretation of Art. 13(2) on a rational basis. Art. 13(2), as it stands, can have only one meaning but that meaning was not explicitly in the minds of the Constitution-makers. That is the point that I have been trying to make.

**Shri A. N. Mulla:** Therefore I understand it that the intention of those who framed the Constitution was not exactly the same as can be interpreted from the words of Art. 13(2).

**Shri K. Santhanam:** When I have admitted that it is a point of ambiguity all that you say follows.

**Shri A. N. Mulla:** Is it your stand then that ordinary law cannot infringe the fundamental rights and no protection is needed against it?

**Shri K. Santhanam:** Ordinary law cannot infringe any article of the Constitution. That is my point.

**Shri A. N. Mulla:** I am not asking about articles of the Constitution. Please confine yourself to my question. My question is, is it your position that the ordinary law cannot infringe the fundamental rights guaranteed under the Constitution?

**Shri K. Santhanam:** It cannot infringe the fundamental rights.

**Shri A. N. Mulla:** It cannot infringe those rights. Therefore, would you say—just as the Minister of Law said —the Preventive Detention Act is not an ordinary law.

**Shri K. Santhanam:** It is an ordinary law. Art. 22 gives the power to Parliament and Legislatures to make

a Preventive Detention law and so any law made under that is an ordinary law.

**Shri A. N. Mulla:** Therefore, if the Preventive Detention Act is an ordinary law, does it in your opinion infringe the fundamental rights?

**Shri K. Santhanam:** No. No. It does not infringe, because the Constitution itself has provided for such an infringement. To the extent that ordinary law can infringe in accordance with the articles of the Constitution, that infringement will not be unconstitutional.

**Shri A. N. Mulla:** Therefore, I now understand your position is where the framers of the Constitution wanted that these fundamental rights could be infringed, they have themselves made provision for that infringement in the Constitution.

**Shri K. Santhanam:** Yes, Exactly.

**Shri A. N. Mulla:** And therefore if you infringe those rights according to those provisions, you say it is within the limits of the Constitution.

**Shri K. Santhanam:** Exactly.

**Shri Jairamdas Daulatram:** That is not an infringement really, because it is provided.

**Shri A. N. Mulla:** I take it that in America, you have found that the Judges have evolved a doctrine of residuary powers of the State.

**Shri K. Santhanam:** There is only the doctrine of police powers and implied powers. The residuary powers are with the States. Therefore, there is no question of residuary rights in America.

**Shri A. N. Mulla:** Do you agree that the purpose of the State is to protect the community from injury and laws are framed to protect the community from injury?

**Shri K. Santhanam:** Yes.

**Shri A. N. Mulla:** Can you possibly concieve that the exercise of certain fundamental rights may come into conflict with the interests of the community and may injure the community? Or is it not possible?

**Shri K. Santhanam:** According to our Constitution that is absolutely protected by article 19(2).

**Shri A. N. Mulla:** That does not cover my question. Can you conceive of this situation or not that the interests of the community should conflict with the interests of the individual and the rights guaranteed to him under the Constitution? Or is such a thing impossible?

**Shri K. Santhanam:** My point is that all such contingencies have been provided for in the Constitution itself.

**Shri A. N. Mulla:** What is the provision in the Constitution where the exercise of absolute liberty interferes with the welfare of the community? What would you like us to do in those circumstances?

**Shri K. Santhanam:** Almost every article provides for it. Articles 19 (2), 19 (3), 19 (4), 19 (5) and 19 (6) etc. provide for it. Article 22 also provides for more serious cases.

**Shri A. N. Mulla:** Is it a fact or not that in the original articles these restrictions did not exist and it was only by way of amendments that we had brought forward these additions to the Constitution?

**Shri K. Santhanam:** The amendment added just one or two more words. The words "decency", "morality", "security of State" were all there in the beginning itself. The additional words put in were 'friendly relations with foreign States', "incitement to an offence" and so on. These were the additions which were made which we did not think to be necessary when the articles were first passed?

**Shri A. N. Mulla:** In certain articles, the conception of restricting the liberty of the individual for the welfare of the community has come in through an amendment made in the Constitution, subsequently in 1951 and other years....

**Shri K. Santhanam:** It is not so. I think we had better compare it with the original Constitution. I have brought with me here the copy

of the original Constitution which contains only the original article without the amendments.

**Shri A. N. Mulla:** We are only confining ourselves to article 19 now.

**Shri K. Santhanam:** You may take another article also.

In every article there is provision for protecting the security of the State, the interests of the people or the interests of the State. In some articles it is said 'in the interests of the people' and in others it is said 'in the interests of the State'. I do not know whether I should give a running commentary on all the articles.

**Shri A. N. Mulla:** Several amendments have been made in the American Constitution. Is there one instance in which a referendum was made or the States were called upon to express their opinion?

**Shri K. Santhanam:** For one thing, there is no provision for referendum in the American Constitution.

**Shri A. N. Mulla:** Or where the States were called upon to give their opinion?

**Shri K. Santhanam:** There has not been any case in which any of the fundamental rights has been amended at all, after the American Constitution was framed. The power of amendment was there in the American Constitution but during these 180 years it has not been amended so far as the fundamental rights are concerned, and there has been no bar to the progress of America.

**Shri A. N. Mulla:** I believe you have read the earlier decisions on this point, particularly the decision given by Mr. Justice Mudholkar in an earlier case, where he had said that the Constitution-makers were not the representatives of the people but they framed the Constitution for the people. Do you agree that the Constitution was not made by the representatives of the people?

**Shri K. Santhanam:** If you mean by the term 'representative' elected by adult franchise, they were not. But we were functioning and acting—I was myself a member of the Constituent Assembly—as the representatives of the people.

**Shri A. N. Mulla:** If there is provision in our Constitution that certain conditions are to be fulfilled before an amendment can be made of the Constitution, have you looked into those conditions and tried to satisfy yourself whether if those restrictions are followed they would change the character of the ordinary Parliament and enclothe it with the same status as that of the people? If the two-thirds majority is necessary or if the two-thirds majority of those who are present is necessary, does the voice not become the voice of the people and does it not cease to be merely the voice of Parliament?

**Shri K. Santhanam:** All these are mere verbal distinctions. The Supreme Court has decided that the two-thirds majority will not do to amend the articles in Part III. Therefore, either you accept the Supreme Court decision or you do not. If you accept the Supreme Court decision, then my contention is that any change in article 368 will not help you. If you do not accept it, then, I do not know what follows; if the Central Government flouts the advice or decision of the Supreme Court, the Constitution will be broken. That is all.

**Shri A. N. Mulla:** Therefore, your position is that because the Supreme Court, whether rightly or wrongly, has come to a particular decision, this is the fact now and this decision exists, and if you try to get over that decision you will create constitutional complications, and, therefore, you should not proceed?

**Shri K. Santhanam:** It is not a question of complications. Either the Supreme Court should again revise its own decision or it cannot be revised at all by any constitutional process, unless, as I said, you devise a new constitutional process like referendum which may be accepted

by the Supreme Court. As in the case of America, the Supreme Court is the final interpreter of our Constitution; it may be right or wrong; its decision may be vitiated even by prejudice or anything else, but then we have accepted it as the supreme authority for interpreting our Constitution.

**Shri A. N. Mulla**: There are two ways in which we can proceed. One is that we can go back to the Supreme Court for its view. The other is that we could make certain suggestions for the amendment of the Constitution and when that goes before the Supreme Court let us see whether the Court upholds it or not.

**Shri K. Santhanam**: You may try that. So long as the Supreme Court finally accepts your view, there is an end of it. If it does not accept it, this Bill has no meaning.

**Shri M. P. Bhargava**: Have you any recollection whether the idea of referendum was ever mooted in the Constituent Assembly or any of its Committees?

**Shri K. Santhanam**: It was mentioned in many speeches in the Constituent Assemby, but it was not accepted and it was rejected by the majority.

**Shri M. P. Bhargava**: So, you are suggesting it *de novo* now?

**Shri K. Santhanam**: I am suggesting it as a means of getting over the judgment of the Supreme Court.

**Shri Tiriloki Singh**: You seem to hold the view that when the fundamental rights chapter was adopted, the Constituent Assembly thought that it was sacrosanct and it could not be amended. When it came to the consideration of article 368, it also thought that the whole of the Constitution including the chapter on fundamental rights could be amended. It seems and it is so clear and obvious that there is a lacuna in our Constitution in so far as the amendment of the fundamental rights chapter is concerned. The very purpose of this Bill is to remove that lacuna and suggest how to do it, and how to get over the judgment of the Supreme Court. The provisions of the Constitution as declared by the Supreme Court form part of the law of the land and we cannot get over them so easily as that.

We had suggested two ways to get over the difficulty. One is to have an addition made by way of amendment to the provisions of article 368 specifically laying down that the provisions of the fundamental rights chapter could be amended and we could specify also the procedure for the change. Since you also seem to have some doubt over this, therefore, I ask you this question. Even after this amendment is made making some addition to the provisions of article 368 authorising Parliament to amend the fundamental rights chapter, the Supreme Court may not agree to it. Then the difficulty remains as to what should be done.

The Supreme Court has suggested a Constituent Assembly? First of all, they have suggested a referendum to get over the provisions of article 13(2). Article 13 (2) should remain as it is only with a little change, because if we repeal that article then any State can pass any law.

**Shri K. Santhanam**: Not State can pass any law infringing any article of the Constitution. All articles of the Constitution are sacrosanct so far as the ordinary law is concerned.

**Shri Triloki Singh**: I know that. But consider the position when article 13 (2) is deleted from the Constitution. Then, the States and the Centre could legislate. Article 13 (1) would apply to the laws which were already in force, passed under the Government of India Act, by the various State legislatures and the old Central Legislative Assembly.

**Shri K. Santhanam**: Past laws are taken care of by Article 13 (1).

**Shri Triloki Singh**: Article 13(2) lays down that the State shall not make any law which takes away or abridges the rights conferred by part III. So, if that article is deleted, then

any law of the legislature could abridge the fundamental rights.

**Shri K. Santhanam:** No. The State cannot make any law which infringes any article of the Constitution, not only this article, but any article of the Constitution.

**Shri Triloki Singh:** Then article 13 (2) becomes redundant?

**Shri K. Santhanam:** It is superfluous. If you somehow or other succeed in deleting article 13(2) from the provisions of the Constitution, much of our difficulty would be solved.

**Shri K. Santhanam:** If you want to have an amendment made, you have to mention article 13 (2) and specifically say 'Notwithstanding anything contained in article 13 (2)'. The whole dispute is whether the term 'any law' in article 13 (2) includes a constitutional amendment. That is the major issue before us. Unless you tackle this major issue, even your amendment, when it comes to the Supreme Court, would not be effective. If you change the procedure and provide for a longer procedure for the amendment of the fundamental rights, then the Supreme Court will have an opportunity to consider it *de novo*,because as they have stated, it is not a mere parliamentary law, but it has to be ratified by the States; therefore, there is greater sanctity attached to the fundamental rights. If you provide for the longer procedure, then the Supreme Court can consider that and can possibly come to the conclusion that the present amendment is valid. I am only trying to make the Bill more acceptable to the Supreme Court.

**Shri Triloki Singh:** So, the only remedy left open is to amend article 13 (2).

**Shri K. Santhanam:** I do not want you to amend article 13 (2). You may simply provide 'Notwithstanding anything contained in article 13 (2) of the Constitution or any other article of the Constitution', so that you could anticipate their argument and proceed with this amendment.

**Shri Triloki Singh:** This can only be done by resorting to referendum or Constituent Assembly or something like that and not otherwise?

**Shri K. Santhanam:** Even if you do that, they may say that the changed article 368 cannot apply to Part III. So, I had suggested an alternative to which the Supreme Court would be hard put to deny authority.

**Shri Triloki Singh:** That means that Parliament is competent?

**Shri K. Santhanam:** That is the issue in court, namely whether Parliament is competent to amend the articles in Part III by any process under article 368. That is the whole point at issue, and so long as the Supreme Court denies that power, you are powerless.

**Shri Triloki Singh:** That goes without saying. But according to you if we put in the phrase 'Notwithstanding anything contained....', then we could get over the difficulty and there is a likelihood of the Supreme Court accepting this view?

**Shri K. Santhanam:** That will show that Parliament considered the entire thing and then had passed the law, and the Supreme Court may consider it *de novo*. I do not say that they will necessarily do so; they will decide on the basis of the merits.

**Shri Triloki Singh:** Instead of having a referendum or a Constituent Assembly as sugested by the Supreme Court, it would be better if we have some such article incorporated in the Constitution and then let it be tested by the Supreme Court again.

**Shri K. Santhanam:** We are arguing round the circle. The Supreme Court says that Parliament has no power to do it. And you say that you would amend the article. So, that does not help you any way.

**Shri Triloki Singh:** Then it comes to this that the remedy of the Constitu-

ent Assembly is open to us or the referendum as suggested by you?

**Shri K. Santhanam:** As I have suggested, Constituent Assembly may not be a very suitable remedy. They may say that it has no more authority than Parliament itself. So far as Parliament is concerned, there are checks; two-thirds majority is there; then there are two Houses, and both Houses must pass by two-thirds majority and so on. But the Constituent Assembly may pass it by a simple majority; and the Supreme Court may say that it would not even be so good as under the present article 368. So, in my view, the Constituent Assembly being convened is not a very suitable method. I do not think that that will be acceptable to the Supreme Court.

**Shri Triloki Singh:** The only safe course then is to have a referendum?

**Shri K. Santhanam:** That seems to be the position. Of course, the Supreme Court may revise its view. It is open to it to do so.

**Shri Kameshwar Singh:** I would say that a referendum is very important on this issue. Or, a full bench of the Supreme Court should be called upon to give its advice under article 143. What is your opinion on this?

**Shri K. Santhanam:** Article 143 is not applicable here. It provides for advice, when no concrete case has come in. The Supreme Court has given its opinion in an actual case, and, therefore, there is no meaning in the President again referring it to the Supreme Court under 143.

**Shri Kameshwar Singh:** The question of there being a concrete case does not come in here. The case which the Supreme Court has referred to is not as clear as it should be, in my opinion.

**Shri K. Santhanam:** I accept your view that referendum is a very important alternative, but about article 143, I do not accept.

**Shri N. C. Chatterjee:** You say that the Supreme Court has said that a referendum is necessary. But only one Judge has said it.

**Shri K. Santhanam:** I do not think there has been any positive suggestion about a referendum. I am making a positive suggestion.

**Shri N. C. Chatterjee:** Under what provision of the Constitution will Parliament make that law?

**Shri K. Santhanam:** Under the residuary powers under article 248(1), because referendum is a subject which is not enumerated in any List.

**Shri N. C. Chatterjee:** If Parliament makes a "law" under that article, it will be immediately hit by article 13 (2).

**Shri K. Santhanam:** That law will be valid because according to the Supreme Court judgment, it will not be a substantive law, but only a procedural law. Under article 368, all procedural laws are valid. Article 13 (2) will not apply to such a law because law relating to referendum cannot abridge or take away the fundamental rights. It will only say that the amendment of the fundamental rights shall be referred to the people.

**Shri N. C. Chatterjee:** Referendum will be on a particular issue. It could be restricted under suitable conditions. If you want to remove those conditions, I take it that a referendum will be necessary.

**Shri K. Santhanam:** To remove those restrictions, you can do it under article 368, because it will be expanding the scope of fundamental rights. It is only for abridgement they have said that you cannot use article 368. But a procedural law providing for a referendum will not abridge any fundamental right.

**Shri N. C. Chatterjee:** Kindly look at article 368. Why do you say that part III is outside that provision?

**Shri K. Santhanam:** When the first amendment was made by Parliament, none of us raised the point that article

13(2) barred it. It can be interpreted as saying that Part III comes under it. But my opinion does not count in the face of the Supreme Court judgment.

**Shri N. C. Chatterjee:** This point was raised before the Supreme Court in Shankari Prasad case and it was argued that article 368 does not cover any amendment of fundamental rights to the detriment of the citizen. But the Supreme Court rejected that argument.

**Shri K. Santhanam:** The existing law of the land is what has been laid down in the latest judgment of the Supreme Court. One may consider it right or wrong, but that does not count.

**Shri N. C. Chatterjee:** Article 368 says "Amendment of this Constitution . .", which means including Part III.

**Shri K. Santhanam:** But you must make some meaning out of article 13(2) also. The word 'law' cannot possibly mean any ordinary law, unless you say that in the light of article 368, article 13(2) is a mistake of the draftsman. Therefore, the reconciliation is that article 368 applies to fundamental rights but only for expanding the fundamental rights and not for abridgement. That is the reconciliation of the majority judgment.

**Shri N. C. Chatterjee:** If you want to provide for a referendum by a law, immediately you will be hit by article 13(2), because by the machinery you provide you can expand the fundamental rights or abridge them.

**Shri K. Santhanam:** I do not think such a law will be hit by article 13(2) because it would not be a law abridging the fundamental rights.

**Shri N. C. Chatterjee:** I hope you have read the Defence of India Act case. There Justice Gajendragadkar has pointed out that immediately the emergency is lifted a large number of suits, both criminal and civil, can be filed by the citizens making claims for damages against officers who might have acted under the Defence of India Act and deprived people of their fundamental rights and the Government should bear this fact in mind. The Attorney-General had admitted that the Defence of India Act is in violation of the fundamental rights and it abridges the fundamental rights to a large extent. Supposing the Government of India thinks that before the emergency is lifted immunity should be granted through an Act of Parliament so that these officers for their *bona fide* acts should not be made susceptible to a large number of litigations, can that be done?

**Shri K. Santhanam:** Yes. There is a specific article authorising Parliament to make such an indemnity Act.

**Shri Govinda Menon:** There is no provision for indemnity today.

**Shri N. C. Chatterjee:** There is no article which authorises Parliament to pass an Act of indemnity. Therefore, if litigations are to be avoided, the emergency must be made perpetual and can never be lifted.

**Shri K. Santhanam:** The emergency provisions do not constitute part of Part II. Therefore, even under the existing judgment of the Supreme Court there is nothing to prevent their amendment under Article 368.

**Shri N. C. Chatterjee:** The Chief Justice pointed out that because it had been conceded by the Government and the biggest lawyers appearing on behalf of the Government that the Defence of India Act means an abridgment of fundamental rights the Government will be flooded with a number of suits and litigations, both criminal and civil, against officers who restricted the fundamental rights of citizens by the operation of the Defence of India Act. I want to know, supposing the Government thinks and the Parliament also agrees that an Act of indemnity be passed so as to protect *bona fide* actions taken by honest officials under the Defence of India Act and rules thereunder, will

that not be an abridgment of fundamental rights?

**Shri K. Santhanam:** No. I do not agree with you. So long as the Act itself does not actually infringe a fundamental right, and deals only with the consequences of an infringement the Parliament has jurisdiction. The Constitution does not provide any specific punishment or penalty. The Parliament can say what punishment or penalty should be there.

**Shri N. C. Chatterjee:** You know we have gone one step further. We have not merely made the fundamental rights we have granted remedial rights and made those remedial rights fundamental rights. If you pass an Act saying that a citizen has no right to file a suit for the purpose of vindicating his right, it will be a violation of his fundamenal right.

**Shri K. Santhanam:** The Act will say that no suit can be filed unless it is a *mala fide* act, unless an officer has acted in a dishonest way and all that.

**Shri N. C. Chatterjee:** In whatever way you may word it, the fact will remain that by such an Act the fundamental rights will not only be under a shadow during the emergency but they will be practically liquidated for ever during this period. You do not accept that it will be a violation of the fundamental rights?

**Shri K. Santhanam:** Not at all.

**Shri Kunte:** You suggested an amendment or passing a law under article 248 by which provision for holding a referendum could be had, when the framers of the Constitution have positively rejected a referendum while framing the Constitution as you indicated referring to the debates of those days. Now, if the Constitution does not provide for a referendum, can a procedural law provide for that?

**Shri K. Santhanam:** The framers of the Constitution did not reject referendum as such.

**Shri Kunte:** We will leave it at that. That was a statement of fact which you made which I wanted to be corroborated.

**Shri K. Santhanam:** It was raised in the debates but was not accepted. It has no legal or constitutional effect whatever. That is only an opinion.

**Shri Kunte:** I am not basing my question on that. As long as the Constitution does not provide for holding a referendum, could it be provided by a procedural law under article 248, where also it will have to be stated that the amendment of the Constitution could be made by a referendum?

**Shri K. Santhanam:** Yes. If an amendment of the Constitution comes under article 368, you cannot provide it under article 248. If a thing can come under any article or the Constitution, or any of the lists mentioned in the Seventh Schedule, article 248 cannot apply. But if it is contended that a particular thing cannot come under article 368 or under any of the items mentioned in the Seventh Schedule, article 248 comes into operation, because that is one of the things which has not been mentioned Therefore, a law can be passed.

**Shri Kunte:** Article 248 refers to residuary powers. If under the residuary powers Parliament pass a law, that law also has got to be subject to the Constitution. Subject to this Constitution if a law has to be passed and if the framers of the law under article 248 are contemplating an amendment of the Constitution as far as fundamental rights are concerned, if that is the law you are suggesting as a procedure, could such law not contravene article 13(2)?

**Shri K. Santhanam:** No, it would not. Though referendum was discussed in the Constituent Assembly...

**Shri Kunte:** We will leave out that discussion.

**Shri K. Santhanam:** So long as the Constitution does not positively prohibit a referendum, a law for referendum does not infringe the Constitution. But article 13(2) prohibits any law infringing or abridging the fundamental rights. A procedural law for referendum does not abridge or do anything to the fundamental rights; it gives only a method of reference to the people. A method of reference does not come under article 13(2) and that is why I said that it will be a method of getting over this. But it cannot be done under article 368. By an amendment of article 368 you cannot bring about such a law; it must be a separate law.

**Shri Kunte:** You say that a law under article 248 can be passed as to how a referendum could be held. But which is the article of the Constitution which authorises the Parliament or any other body to hold a referendum?

**Shri K. Santhanam:** Which is the article which prohibits you from holding a referendum?

**Shri Kunte:** There is no such article.

**Shri K. Santhanam:** Therefore, it is left o be decided by the people, whether there should be a referendum or not. The Constitution leaves it open. It does not say either that there should be a referendum or that there should not be a referendum.

**Shri Kunte:** Open to whom?

**Shri K. Santhanam:** Open to the people through the machinery of Parliament.

**Shri Kunte:** It is not clear in the Constitution.

**Shri K. Santhanam:** If the wording was so clear, this Committee would not have come into existence.

**Shri Kunte:** It is not sanctioned by any article of the Constitution and so long as it is not sanctioned, a counter question asking where it is prohibited will not justify the argument you are advancing. That is my difficulty.

**Shri K. Santhanam:** It is a matter of opinion.

**Shri Kunte:** You referred to the recent judgment of the Supreme Court and said that it is the law of the land. I would like to know whether you are accepting the Supreme Court judgment merely as a law-abiding citizen or you are also holding that it is good law.

**Shri K. Santhanam:** According to the Constitution, whatever the Supreme Court declares to be the law is the law unless that law is amended by a suitable authority. If it is amendable under article 368, Parliament is the suitable authority. If it is not amendable under article 368, people will be the suitable authority. Therefore, in the constitutional sense, it is the law. Under the Constitution, whether it is right or wrong, whatever the Supreme Court declares to be the law is the law of the land. If you ask me whether it is a good law, in my view it appears to be a good law also.

**Shri Kunte:** Then I come to the question of infringement. According to you, an indemnity Act could be passed. If an Indemnity Act is passed, will it not mean that the protection given to a subject, to a national of this country, to be protected against the infringement of the fundamental rights, is taken away by another Act?

**Shri K. Santhanam:** No, it does not. Because, the Constitution does not lay down any specific punishment for infringement of any fundamental rights, just as for contempt of legislature; you may let it off with a warning. Therefore, so long as no specific punishment is prescribed by the Constitution, Parliament is free to give a nominal punishment or no punishment at all.

**Shri Kunte:** Any way you are providing for some sort of punishment, even if it is a warning. It might not

be valued in rupees, annas, pies. But if you concede it is an infringement, if a national is able to vindicate his right and prove that his fundamental right is being infringed, he ought to be compensated, if not in rupees, annas, pies, by some other method.

**Shri K. Santhanam:** I am presuming that when Parliament makes a law of indemnity it will take into account those aspects and see that the dignity of the fundamental rights is respected, while the people who did it for public purpose are reasonably protected.

**Shri Kunte:** I accept your presumption. But the basic question which I am asking is whether the Parliament has, under any article of the Constitution, a right to pass such an indemnity Act.

**Shri K. Santhanam:** That again is a difficult legal issue which I do not think we can argue out here.

**Shri Viswanatha Menon:** Could you explain why you prefer referendum to a Constituent Assembly?

**Shri K. Santhanam:** What do we mean by a constituent assembly? A body elected by adult franchise. The Lok Sabha is such a body. Such a body will decide only by its own majority. But if the Lok Sabha has to decide anything, it has to be done in consultation and co-operation with Rajya Sabha; unless the two bodies agree, there cannot be any law. Therefore, a Constituent Assembly, by any test will be a less effective body to protect the fundamental rights than the present Parliament under the procedure laid down in article 368. Unless we give a superior machinery, there is no purpose in saying that we are conforming to the judgment of the Supreme Court and yet make it much easier to restrict or infringe the fundamental rights.

**Shri Viswanatha Menon:** Do you think that referendum will be a superior machinery?

**Shri K. Santhanam:** It is always considered a superior machinery in constitutional law, because it is decided by the people themselves as a whole body. If really 200 million people are convinced that a particular amendment of the Constitution is necessary, then, whether any particular individual considers it right or wrong, I cannot see any higher authority for deciding it.

**Shri K. Chandrasekharan:** Do you think that Parliament has got the power to amend article 358 of the Constitution?

**Shri K. Santhanam:** It can amend any article except those included in Part III.

**Shri K. Chandrasekharan:** Article 358 applies and touches upon provisions contained in Part III of the Constitution. Do you agree that Parliament has power to amend that part of article 358 of the Constitution?

**Shri K. Santhanam:** Yes.

**Shri K. Chandrasekharan:** The provisions contained in articles 358 and 359 of the Constitution are not in derogation to what is contained in Part III of the Constitution and will not be affected by article 13(2); that is, any action, legal or executive, taken by Government under articles 358 or 359 will not be affected by article 13(2).

**Shri K. Santhanam:** That is quite correct.

**Shri K. Chandrasekharan:** So, the difficulty that has now arisen on account of the Supreme Court judgment is that in article 13(2) the word "law" includes a Constitutional amendment and if article 13(2) is amended to state that in article 13(2) the word "law" would not include a Constitutional amendment, the difficulty would be resolved.

**Shri K. Santhanam:** I am afraid, you have not got my point. What I

have said is that in article 13(2) the word 'law' cannot be anything but a Constitutional amendment because only a Constitutional amendment can affect any article of the Constitution. Therefore article 368 is not applicable for the amendment of any article in Chapter III and again we are in a vicious circle.

**Shri K. Chandrasekharan:** I would request you not to mix up the question of power to amend here I am just asking whether the difficulty pointed out by the Supreme Court will be resolved if article 13(2) could be amended—in what manner, we shall see—to state that in article 13(2) the word 'law' would not include a Constitutional amendment.

**Shri K. Santhanam:** If it does not include a Constitutional amendment, it has no meaning and article 13(2) becomes altogether superfluous and meaningless. If you omit article 13(2), much of the objection of the Supreme Court will go. But it should be through a valid amendment and you cannot have a valid amendment of article 13(2) under article 368.

**Shri K. Chandrasekharan:** The Supreme Court, in the majority judgment, has suggested that a valid amendment of article 13(2) or of any provision contained in Part III can be had through a Constituent Assembly.

**Shri K. Santhanam:** It was a suggestion thrown by Justice Hidayatullah; the majority has not accepted it. It has not proposed it; it has not even positively suggested it.

**Shri K. Chandrasekharan:** The majority judgment has stated on page 38, paragraph 2,—

> "Firstly, this visualises an extremely unforeseeable and extravagant demand, but even if such a contingency arises, the residuary power of Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it."

So, the majority judgment has indicated that. Mr. Justice Hidayatullah has specifically stated that.

**Shri K. Santhanam:** But I do not agree with him.

**Shri K. Chandrasekharan:** You do not agree that a Constituent Assembly can be convened.

**Shri K. Santhanam:** Not that it cannot be convened but it is not a suitable instrument for an amendment of the Constitution.

**Shri K. Chandrasekharan:** Do you agree that a more representative forum cannot be had than the Members of the two Houses of Parliament sitting together because one House is directly elected and the other House is indirectly elected? I am unable to visualise a more democratic forum than the Houses of Parliament sitting together for this purpose.

**Shri K. Santhanam:** I can visualise a more democratic forum, namely, the present electorate for the President. A body consisting of all the Members of the State Assemblies and Parliament will certainly be a much more effective forum than this.

**Shri K. Chandrasekharan:** I would like to add a proviso to what I said, that is, the two Houses of Parliament sitting together constituting itself into a Constituent Assembly and the amendment to any provision in Part III of the Constitution being circulated to the States, with half the number of States concurring.

**Shri K. Santhanam:** That will certainly be better than the present position.

**श्री बे० ला० पंडित :** सुप्रीम कोर्ट ने केस्ट ऑफ 17वीं एमेंडमेंट आफ दी कांस्टीट्यूशन का भविष्य के लिए वैध घोषित किया है। भविष्य के लिए यह मत है कि अगर ऐसा कांस्टीट्यूशन एमेंडमेंट किया जायेगा और जब वह सुप्रीम कोर्ट के सामने आयेगा तो सुप्रीम कोर्ट उस संशोधन को अवैध घोषित कर देगा। भविष्य के लिए सुप्रीम कोर्ट का

यह मत है, आज के लिए नहीं है। तब तो एमेंडमेंट आफ दी कांस्टीट्यूशन जब हो जायेगा तब उस पर विचार किया जाना चाहिए। इसलिए मैं पूछना चाहता हूं कि सुप्रीम कोर्ट का जो निर्णय है उस निर्णय पर आज क्या कोई एक्शन लेने की जरूरत है और अगर है तो इसका क्या कारण है?

**Shri K. Santhanam:** Any act applies only to the future unless it is made retrospective. Therefore, this Bill is essentially intended for contingencies when an amendment of any article of Part III may be necessary. Therefore, in that way it is quite relevant and necessary.

**Shri Nath Pai:** I should like to thank Shri Santhanam because listening to his very cogently and lucidly put arguments I have been able to facilitate my own understanding of some of the ancillary issues which are coming up as a by-product of my amendment. The three main points which he raised are these. Firstly, he said that we, meaning the Constitution framers, did not intend to exclude any part from the purview of article 368. He can perhaps modify it, but I was taking down when he was speaking because I attach so much importance to his views.

**Shri K. Santhanam:** You are entirely correct.

**Shri Nath Pai:** The second point was that the word 'law' in article 13 does not mean ordinary law but only Constitutional law. May I submit that the Supreme Court itself—since you have said how important it is for us to attach the highest importance to the views of the Supreme Court—has interpreted not once but on several occasions the word 'law' in article 13(2) to mean the ordinary law of the land. This is not an interpretation which I or those who agree with me are trying to impose on the word. The article itself in clause 3(a) gives the meaning to the word, namely,—

> "'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;"

There are two interpretations given. I submit to you, therefore, that this is a view which can be different. You hold that 'law' means not only 'ordinary law'.

**Shri K. Santhanam:** What I mean is this. 'Law' may mean anything but to the extent that it applies to ordinary law, it is superfluous and meaningless because by no stretch of imagination can any ordinary law affect an Article of the Constitution.

**Shri Govinda Menon:** I can point out that in Article 31 itself, the word 'law' has been used as 'ordinary law'.

**Shri K. Santhanam:** In Article 31, 'law' can only mean 'ordinary law' because if an ordinary law infringes, then you go to the Supreme Court for a writ. Here, an ordinary law cannot abridge or expand the fundamental rights. That is the point that I am making. Not only this article, you can take any Article. The Supreme Court did not visualise the operation of ordinary law in respect of an Article of the Constitution.

**Shri Nath Pai:** I will read this out for him, Mr. Chairman. I am not contradicting him, I am only trying to understand him because an hon. witness is invited not to be contradicted but to be benefited by his views. I am reading out the view of the Supreme Court itself:

> "We are of the opinion that in the context of Article 13, law must be taken to mean rules and regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of the constituent powers of Parliament."

**Shri K. Santhanam:** Then, in that case, it is entirely superfluous, for, it is an impossibility. It is an impossi-

bilty for any rule or anything to infringe an Article of the Constitution; it becomes automatically void.

**Shri Nath Pai:** I have just pointed out to the learned witness that this view is taken by the Supreme Court.

I will now proceed to the third point. You submitted that it is not in national interest to shut out the courts from examining the reasonableness or otherwise of any act or measure. I want to submit to you that this is rather unfair because nowhere are we trying to oust the jurisdiction of the Supreme Court or any High Court. It is conceivable as Mr. Patil pointed out in his question that if this Amendment is passed, the Supreme Court might strike it down....

**Shri K. Santhanam:** Hitherto, except Amendments 1, 4 and 17, the main purpose of other amendments has been to exclude the courts from examining the compensation or other regulations regarding agrarian legislation. Except for the shutting of the jurisdiction of the courts, no amendment of fundamental rights is needed at all for any other purpose. It is only when we want to shut out the courts from examining the reasonableness of an act or justice, etc., we have to because that can be done only by a Constitutional amendment; an ordinary law cannot shut out the jurisdiction of the Supreme Court because under the Constitution it has got absolute jurisdiction unless the jurisdiction is shut out.

**Shri Nath Pai:** Based on the practices of the Executive, such an apprehension is legitimate to a certain extent; I would submit that to you. But where do you find the justification for your apprehension in my amendment, even remotely? Mr. Chairman, I would like to have your attention. Mr. Santhanam now concedes this. His third point was national interest. In that submission he has said that it is not in national interest to shut out the courts from examining the reasonableness or otherwise of any act or measure. But after I have pointed out to him, he agrees that this criticism does not apply to my amendment.

**Shri K. Santhanam:** I am sorry, it applies to the extent that it permits any amendment of fundamental rights. My argument is that an amendment of fundamental rights is likely to be needed only to shut out the courts. Because your amendment permits amendment of fundamental rights, to that extent, it is intended ultimately for the purpose of shutting out the courts.

**Shri Nath Pai:** Before even taking advantage of my amendment, if the Executive brings a measure curtailing the fundamental rights, would that not go to the Supreme Court? Is it overruled at all? Is not the Supreme Court competent to make a judgment on my amendment?

**Shri K. Santhanam:** If the Supreme Court rules out this amendment, then there is no point. All your labours will be wasted.

**Shri Nath Pai:** What I say is this. This Bill does not in any way try, in the remotest possible way, to infringe on the authority or the competence of the Court.

**Shri K. Santhanam:** I only said that it is in national interest that the fundamental rights should not be hereafter amended. Further amendment will mean shutting out the courts. That was the general point I made.

**Shri Nath Pai:** The eminent witness disagrees with the Bill, but if at all we are going to pass it, he makes some useful suggestions. That shows the fairness and objectivity befitting the person who helped in framing the Constitution. He says that in Article 368 it was misunderstood and, therefore, suggests incorporating the clause 'Notwithstanding anything contained....' etc. That is a good suggestion; I would examine it. You made a very useful suggestion. You say

that any amendment of the fundamental rights should be subject to ratification by the majority of States....

**Shri K. Santhanam:** You start the proviso by saying, "Any Article in Part III etc., etc.".

**Shri Nath Pai:** You suggested a very important thing. This is an argument which I want the Committee, those members who disagree, to bear in mind because the idea of Constituent Assembly as something superior to Parliament has been brought out. In reply to a question by Mr. Chatterjee, you agreed that legally the Constituent Assembly was not even half as representative as Parliament. Even a Constituent Assembly constituted on the basis of universal adult franchise will not have the checks which the Parliament has because the Constituent Assembly will be amending the Constitution by a simple majority, without two-third majority, without going to the States, and its representative character being limited, you do not agree with the idea of Constituent Assembly. Do I understand you correctly?

**Shri K. Santhanam:** Yes.

**Shri Nath Pai:** Finally, the Constitution of India, according to me, is not being amended by us. I want you to carefully follow my submission. The Constitution of India stood in one form not as we interpreted it but as the highest interpretive body, the Supreme Court, interpreted it. Till the 26th February, 1967, the Constitution of India gave Parliament, according to the Supreme Court, the power to amend any section. By a judgment of five versus four, this power of Parliament has been amended by a body which is not supposed to amend the Constitution, the Supreme Court. I submit to you that we are not trying to amend the Constitution, we are trying to restitute the Constitution in its pristine glory. The Constitution has been amended by the Supreme Court. I am trying to restitute the Constitution as you gave it to us.

**Shri K. Santhanam:** This is not the procedure for restitution. The Supreme Court has made the judgment; even if it is by a majority of one, that is the law factually, and that law stands until the Supreme Court itself revises. If you simply say that your Bill gives an opportunity for the Supreme Court to revise its judgment, I have nothing to say; it may or may not.

**Shri Nath Pai:** Do you agree that till 26th February, 1967 under the two judgments, one majority and the other unanimity, Supreme Court held that Parliament has the power. For 20 years the law of the land was this. One day the Supreme Court changes. Do you agree?

**Shri K. Santhanam:** That was the law of the land.

**Shri Nath Pai:** How the law has changed?

**Shri K. Santhanam:** This happened in the U.S.A. So long as Supreme Court is the interpreter of the Constitution, whether it is right or wrong if it changes, it changes. If you are the supreme authority if you change, can anybody say, for 20 years this was the Constitution, why do you change. Therefore, for good or for evil, they have given their judgment. You have to take it for what it is worth.

**Shri Nath Pai:** You agreed in reply to Justice Mulla's question that it is the people of India who are the sole, the beginning of the sovereignty of the country. Except the case of Athens where people exercised sovereignty direct is there any case where sovereignty can be exercised except through the instrumentality of legislature?

**Shri K. Santhanam:** It happens in Ireland, in Switzerland and in Australia. It is the people who exercise that sovereignty in the matter of amendment of the Constitution. Parliament there can only submit the issues to the people. They cannot

decide anything about the amending of the Constitution. Referendum is a thing which exists in many countries.

**Shri Nath Pai:** It is very interesting; but not in reply to the question. If people are sovereign, how on earth could they exercise it except through the instrumentality of parliament? Athens can do it directly as the whole population is only 30,000. They directly constitute the assembly and pass the law. Parliament is created by the people; it is the symbol of people's sovereignty.

**Shri K. Santhanam:** It is only a half truth. People may exercise sovereignty in federal democracy through Parliament only to a partial extent. In America they do it partly through the President and partly through the State Legislatures and the executive authorities. Sovereignty is divided among different authorities. Parliament is only one of the authorities exercising sovereignty. There is no complete delegation of people's power to Parliament anywhere. It is only in unitary constitutions like Great Britain that Parliament becomes the sole repository of the sovereignty of the people.

**Shri Nath Pai:** You are a signatory to the Constitution. There it is stated: "We, the people of India". You represented less than 28 per cent of the people of India at that time. Still you called yourself 'The people of India'. I am not challenging that legally. I am an adult Indian who fought for Indian independence who was not represented there. We, the people, meant a small body of good citizens. You represented Indian patriotism; you represented democracy. I agree with you there. But the people of India have not been given a chance about the Constitution. Parliament is far more representative of the people of India than the Constitution. Do you agree with me?

**Shri K. Santhanam:** You cannot go to the source of Rishis and many other things. You can't call it presumptuous that we called ourselves as 'The people of India'. It might have been constitutionally more appropriate if we had a procedure for Referendum and had it ratified by the people. We presumed that all our successors would respect the Constitution as it were.

**Shri Nath Pai:** Thank you very much.

**Mr. Chairman:** In Article 31-A it is stated 'Notwithstanding anything contained in article 13, no law providing for (a) the acquisition by the State of any estate or of any rights therein..." etc. If you take this into consideration, the word 'law' is used in several places. All these indicate. laws in Article 13(2) is ordinary law.

**Shri K. Santhanam:** It is ordinary law. When Constitution empowers Parliament to do something. It can function through ordinary law. In 13(2) it is for amending the Constitution.

**Shri Govinda Menon:** Notwithstanding anything contained in Article 13..

**Shri K. Santhanam:** 'Notwithstanding anything' that is what I wanted you to put. Even if it restricts the fundamental right that ordinary law will prevail. Even that ordinary law may go contrary to Article 13. By virtue of this article it will prevail.

**Shri Govinda Menon:** The intention in introducing Article 13(2) was this. That is, to make it clear that the Supreme Court and High Court of India have the power which Justice Marshal contended, in the early cases of striking down laws.

**Shri K. Santhanam:** It would have the power without Article 13.

**Shri Nath Pai:** That is a matter of abundant caution.

**Shri K. Santhanam:** Rule of interpretation has to presume that every article has a meaning and purpose and

that it is really not superfluous or meaningless.

**Shri Govinda Menon:** Justice Kania has said that it is by way of abundant caution.

**Shri A. P. Chatterjee:** If Parliament could be given power to amend even Part III of the Constitution, what is there to be afraid of? You framed the Constitution. You have given power for suspension of Part III in Articles 358 and 359, namely to President, advised by the Cabinet. If you, as framers of the Constitution, would give the power of suspension—the most valuable right in Part III—to executive namely the President, aided maybe, by a small cabinet, why are you afraid of giving the power of amending Part III to a Parliament elected on Adult franchise?

**Shri K. Santhanam:** The reply is simple. We thought emergency would be maintained only when there is actual invasion or civil revolt. We did not contemplate the continuation of emergency during normal times. But here the amendment of the fundamental rights is for normal times and for all time. Once you amend it, it is for all time. Suspension for a limited time is not comparable with a complete extinction. Parliament can introduce a Bill saying that Article 32 is hereby repealed. That will be one of the powers given. If Article 32 is repealed, then you cannot go to Supreme Court; you cannot enforce fundamental rights. Do you think that by two-thirds majority Parliament should be given the power to repeal Article 32 or the power to say that by a simple Bill Part III of the Constitution is repealed? Do you want Parliament to have power to say that Part III is repealed?

**Shri A. P. Chatterjee:** Do you or do you not agree that if the President is satisfied that an emergency exists, then under Article 358 and Article 359 he has been given the power in effect to repeal Part III?

**Shri K. Santhanam:** Under that, the operation of Article 19 is suspended and other articles of the Part can be suspended by a Presidential order. Therefore, he cannot repeal them. He can be said to repeal them temporarily in the sense that he can keep the emergency going on indefinitely and that is what they are doing.

**Shri A. P. Chatterjee:** Therefore it is your evidence that the Executive can be given the power of suspending, for whatever period they like, certain valuable rights given in Part III?

**Shri K. Santhanam:** That is not my view. I do not want to give them this power.

**Shri A. P. Chatterjee:** Have a look at Article 352. It does not give any time limit to the declaration and operation of emergency declared by the President.

**Shri K. Santhanam:** That is so unfortunately.

**Shri A. P. Chatterjee:** It is on the satisfaction of the President that an emergency exists,—do you agree that it is not justiciable?

**Shri K. Santhanam:** I agree that it is a mistake.

**Shri A. P. Chatterjee:** I am not asking you to say whether it is a mistake or not. If it was a mistake, then it is for the people or the representatives in the Parliament to amend the Constitution. I am asking you this in your capacity as one of the framers of the Constitution. When you framed the Constitution, it did not strike you that you gave the power to suspend the fundamental rights to the Executive. It did not strike you at all that it was a dangerous thing?

**Shri K. Santhanam:** You are not correct in saying that we gave it to the Executive because the proclamation of emergency has to be ratified

by Parliament. If it is not ratified, the proclamation will come to an end. When the Parliament ratifies the proclamation, the power of suspension accrues to Parliament, not to the Executive. Till Parliament comes into the picture, the Executive has that power. As I have already said it was considered to be a power only for emergency, not for prolongation under the cover of emergency and that Article has been framed too widely for which I blame myself.

**Shri A. P. Chatterjee:** You are not quite correct in saying that because the proclamation is ratified by Parliament the suspension of fundamental rights is made by Parliament. According to Article 359 there has to be an independent Act of President in order to suspend the other fundamental rights and that is not to be ratified by Parliament. Do you agree?

**Shri K. Santhanam:** If the Parliament ratifies the proclamation, the President can function under Article 359. Without the ratification by Parliament, the President could not function under that Article.

**Shri A. P. Chatterjee:** The next question which I would put to you is this: You have said that the Constituent Assembly would not be a proper machinery, if I have understood you aright. But if the Constituent Assembly is elected on the basis of a particular issue like the amendment of the Constitution or a part of the Constitution, don't you think that the represetatives sent by the people will be more conscious and aware of the issue than a Parilament based on adult suffrage and elected to deal with several problems, some of them known and some of them unknown?

**Shri K. Santhanam:** Technically what you say has got some substance. But as you know, these things are done under high emotions. A single Party in a moment can sweep the poll. The Costituent Assembly is elected on the basis of persons and not on the basis of issues. These elections are made for people not on issues. Therefore, if only issues are put forward, then personal considerations would not come into the picture as in the case of Goa, for instance. If the decision was left to the Constituent Assembly, then the result in that case would have been quite different. Then candidates, rivals, parties, etc. would have come into the picture, not the issue. The idea of electing people on the basis of issues is indirect and not effective. People are elected on the basis of personalities—at least as much as on the basis of issues. Therefore, if anything is to be done, educate the people rather than having elections for the Constituent Assembly which is a more costly, roundabout procedure than the referendum.

**Shri A. P. Chatterjee:** Would not the difficulty which you have now indicated be obviated if a Constituent Assembly was convoked on the basis of proportional representation?

**Shri K. Santhanam:** I can devise a procedure for a Constituent Assembly with 2,000 members and all kinds of restrictions about representation, etc. which may be better....

**Shri A. P. Chatterjee:** You are not answering my question. Would the difficulty indicated by you—a single party sweeping the polls and emotional upsetting—be obviated if a Constituent Assembly is convoked on proportional representation?

**Shri K. Santhanam:** Proportional representation, I suppose, will be of single transferable vote. I think it will be very difficult in our conditions to operate.

**Shri A. P. Chatterjee:** If possible, would it be better?

**Shri K. Santhanam:** Even then, my view is that it won't be as good as two distinct chambers which have to approve by a two-thirds majority or absolute majority. If you put in the constitutional law that it will be done by two-thirds majority and if all the

other checks are also introduced in the Constituent Assembly, then it may be a substitute, but I do not see how it can be a better substitute than the present 368?

**Shri A. P. Chatterjee:** The next question which I would put to you is this. You seem to be a little enamoured—excuse me for the expression—of the power that has been vested in the Supreme Court of interpreting the Constitution. You know that there are certain Constitutions where the power of interpreting has been given to Parliament.

**Shri K. Santhanam:** Yes, for instance in USSR and Switzerland. France was also cited.

**Shri Govinda Menon:** That is only for amendment.

**Shri A. P. Chatterjee:** Therefore, you will agree that the fundamental concepts of democracy are compatible with the provision of power of interpretation of Constitution being vested in the Parliament and not in the Supreme Court?

**Shri K. Santhanam:** It is quite compatible without any Constitution at all as in the case of U.K.

**Shri A. P. Chatterjee:** With your great learning, would you be correct in saying that U.K. has no Constitution. It is said that in the U.K. there is one bundle of constitution in several constitutional Acts.

**Shri K. Santhanam:** There are. But, if you put all the Acts together, they don't form the Constitution. For instance, there are executives and other things. Much of the British Constitution is in the form of conventions and traditions. You cannot call it a Constitution.

**Shri A. P. Chatterjee:** Do you agree that fundamental concept of democracy is compatible with the right of the Parliament?

**Shri K. Santhanam.** It is compatible if it is not a written Constitution. But, it would not be compatible if the federal Constitution is to be a written Constitution and if there is to be fairness and justice, only interpretation by an impartial body is compatible if there is to be a written constitution.

**Shri A. P. Chatterjee:** My last question is this. As you have seen the Supreme Court has struck down—not really struck down—but declared as *ultra vires*—the Seventeenth Amendment because it violates Article 13, sub-article (2) of the Constitution.

**Shri K. Santhanam:** I think it has been allowed to stand.

**Shri A. P. Chatterjee:** The Supreme Court have said that amendments of the Constitution have to pass the test of Article 13, sub-article (2).

**Shri Nath Pai:** Hereafter.

**Shri A. P. Chatterjee:** I accept the amendment 'hereafter'. Mr. Chandrasekhram also said something about Article 13. But, I shall put that in a different way. See Article 13(2) and 13(3). 13(3)(a) says:

> "'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."

If it is put thereafter in this way—"but does not include any amendment of the Constitution," that, the basis of the judgment of the Supreme Court would go. Do you agree with me?

**Shri K. Santhanam:** Of course, if it does not include amendment of the Constitution, there would be no basis for the judgment.

**Shri A. P. Chatterjee:** But the basis of the judgment would go. In this context, I ask you this question. Will

there be any difficulty in amending Article 13(2) in that way?

**Shri K. Santhanam:** Yes, please. The whole point is whether procedure in Article 368 is applicable to any article of the Constitution including those in Part III. If it is applicable to any article of the Constitution, then, Part III you may make it applicable to 13(2) also. If it is not applicable 13(2) cannot be amended.

**Shri A. P. Chatterjee:** You are missing my point. For example, in Mr. Nath Pai's Bill, there is provided another section saying that 'law' in Art. 13(3) (a) includes such and such but does not include amendment of the Constitution. Would that be all right according to you?

**Shri K. Santhanam:** If Article 13 can be amended it will be alright. If it cannot, this amendment will have no effect.

**Shri A. P. Chatterjee:** I do not understand why that will not do.

**Shri K. Santhanam:** Because Article 368 is not applicable to amend it. You can do that only if the Supreme Court can supersede the present judgment.

**Shri A. P. Chatterjee:** The Supreme Court has stated that under Article 368 you cannot amend the fundamental rights. It is not applicable to 14, 15 or 16.

**Shri K. Santhanam:** No, no. It applies to every Article of Chapter III.

You just see how it starts.

**Shri A. P. Chatterjee:** Part III deals with Fundamental Rights in general. That also deals with fundamental rights.

**Shri K. Santhanam:** 13(2) deals with fundamental rights and no law can amend it because it is part of our fundamental rights. It only applies to any abridgment of fundamental rights. The other article in that Chapter must be deemed to be all parts of the fundamental rights.

**Shri A. P. Chatterjee:** According to you Parliament cannot amend Article 13(2). That is the opinion.

**Shri K. Santhanam:** Yes, please. That is the stand of the Supreme Court.

**Shri Tenneti Vishwanatham:** Your opinion is that Article 368 is of no use to amend the Constitution.

**Shri K. Santhanam:** I don't say that. Article 368 is no use to amend the fundamental rights. In accordance with the ruling of the Supreme Court, you can amend any other article of the Constitution by the procedure of the Article 368.

**Shri Tenneti Viswanatham:** You say that 368 is not merely a procedural section but also a section to amend the Constitution. There was a view expressed that 368 is only a procedural section and is not giving substantial power to amend the Constitution.

**Shri K. Santhanam:** That is not my view.

**Shri Tenneti Viswanatham:** Then what is your view?

**Shri K. Santhanam:** According to a reasonable interpretation of 13(2), 368 will not be applicable to Part III.

**Shri Tenneti Viswanatham:** In this Constitution, there are several articles which are mentioned either in Part III or in the Proviso to Art. 368. Take for example Art. 124, Chapter IV—the Judiciary, the Union. If this amendment, as provided in the present Bill, is passed then the Parliament has the power in abrogating 124 and other sections.

**Shri K. Santhanam:** I think that if this Bill is passed, it may remedy

the objection that Art. 368 does not confer part of amendment and is only procedural. Art. 368 provides specifically for its own amendment through the longer procedure. As soon as this is passed, this will have to be sent to the Legislatures. Then its actual application will be to all articles other than those contained in Part III.

**Shri Tenneti Viswanatham:** But, why do you say that certain articles cannot be amended while others can be amended?

**Shri K. Santhanam:** I do not say. The Supreme Court says that. There are two things—one is the procedure and the other is Art. 13(2). This, in my opinion, is the real obstacle which prevents the application of 368 to Part III.

**Shri Tenneti Viswanatham:** Why do you put certain powers if you have the power for amendment?

**Shri K. Santhanam:** You are asking about the intentions of Constituent Assembly.

When Part III was moved, our idea was that the fundamental rights should not be easily amended. That was the basis of the wording of 13(2). It was not because our constitutional lawyers like Sir Alladi Krishnaswamy Iyer, Shri Munshi and Dr. Ambedkar did not know that ordinary law cannot amend any Articles of the Constitution. When we came to Art. 368, they forgot about it.

**Shri Tenneti Viswanatham:** You consider this part (Part III) as more important than any other parts?

**Shri K. Santhanam:** Yes, Sir. You see Art. 32 Original jurisdiction for issuing writs are under 32(2). The Parliament empowers the Supreme Court to issue writs under Art. 32 and no other ways. There is a separate Chapter. What is stated here has been specifically expanded to include all bodies controlled by the Government of India in legal departments etc. for the purpose of Part III of the Constitution. For the purpose of other sections they may or may not be included. So, in many ways a distinction has been made between Part III and the rest of the Constitution.

**Shri Tenneti Viswanatham:** You think that the rights embodied in Part III are more important than, for example, Art. 124 and subsequent Articles regarding Union Judiciary?

**Shri K. Santhanam:** That was our view.

**Shri Tenneti Viswanatham:** Therefore, if this amendment is passed, namely, that any article in the Constitution can be amended by Parliament, it means to say that it gives power to Parliament to repeal the provisions regarding Judiciary and we can get on without the Judiciary. That is the view you are taking?

**Shri K. Santhanam:** That is the view we can take.

**Shri Tenneti Viswanatham:** For example, adult franchise—it is not one of the things embodied in Part III. Parliament will have the power.

**Shri K. Santhanam:** Parliament has the power even now, even after the Supreme Court's judgment to change adult franchise to limited franchise.

**Shri Tenneti Viswanatham:** Therefore, Parliament has got the powers to stop the courts from functioning and possibly take away adult franchise also. And, for example, it can also repeal Art. 265 regarding levying of taxes and Parliament has got all these powers. Now when Parliament has got all these powers, why are you nervous about other powers?

**Shri K. Santhanam:** The reason is clear. When the Bill repeals adult franchise, we should at least have the power to represent and freedom of

speech is very vital. We do not want you to take away our freedom of speech; then it will degenerate into autocracy. So we want to protect at least that. If you start saying that Art. 19 is repealed, then you can do anything.

**Shri Tenneti Viswanatham:** So you thought that having provided for certain rights in Part III, it was no longer necessary to say that these need not to be amended or these can be amended. You were of the opinion at that time that when once fundamental rights are there without the fear of being easily touched by others, it did not matter about other things.

**Shri K. Santhanam:** It mattered. But because even they can be done only through a constitutional amendment and some of them only by the longer process of constitutional amendment, therefore, this will be considered sufficient safeguard. But they would not matter so much as the repealing of fundamental rights.

**Shri Tenneti Viswanatham:** They would not matter so much when once these rights are guaranteed. That is the reason why you are of the opinion that rights under Part III are safeguarded under the Constitution and there is no implied right under Art. 368 to amend Part III. That is your view.

**Shri K. Santhanam:** That is correct.

**Mr. Chairman:** May I thank Mr. Santhanam for having come over here and given us his very lucid and helpful suggestions which I hope will be very useful to us?

**Shri K. Santhanam:** I thank you and the Committee for giving me this opportunity.

*(The witness then withdrew)*

*(The Committee then adjourned)*

MINUTES OF EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1967 BY SHRI NATH PAI, M.P.

*Tuesday, the 24th October, 1967 at 10.00 hours*

PRESENT

Shri R. K. Khadilkar—*Chairman.*

MEMBERS

*Lok Sabha*

2. Shri R. S. Arumugam
3. Shri Ram Krishan Gupta
4. Shri Kameshwar Singh
5. Shri D. K. Kunte
6. Shri V. Viswanatha Menon
7. Shri Jugal Mondal
8. Shri Nath Pai
9. Shri P. Parthasarthy
10. Shri Deorao S. Patil
11. Shri Khagapathi Pradhani
12. Shri Mohammad Yunus Saleem
13. Shri Anand Narain Mulla
14. Shri Dwaipayan Sen
15. Shri Prakash Vir Shastri
16. Shri Digvijaya Narain Singh
17. Shri Tenneti Viswanatham
18. Shri P. Govinda Menon.

*Rajya Sabha*

19. Shri M. P. Bhargava
20. Shri K. Chandrasekharan
21. Shri A. P. Chatterjee
22. Shri Jairamdas Daulatram
23. Shri G. H. Valimohmed Momin
24. Shri G. R. Patil
25. Shri J. Sivashanmugam Pillai
26. Shri Jogendra Singh
27. Shri Triloki Singh.

REPRESENTATIVES OF THE MINISTRY OF LAW

1. Shri R. S. Gae, *Secretary, Department of Legal Affairs.*
2. Shri V. N. Bhatia, *Secretary, Legislative Department.*
3. Shri K. K. Sundaram, *Additional Legislative Counsel.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESS

Shri N. A. Palkhivala, *Bar-at-law, Senior Advocate, Supreme Court of India.*

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**Shri N. A. Palkhivala, Senior Advocate, Supreme Court of India**

*(The witness was called in and he took his seat)*

**Mr. Chairman:** We are fortunate in having Mr. Palkhiwala, one of the eminent jurists, in our midst today. He has accepted our invitation to enlighten us on various problems raised by the recent decision of the Supreme Court.

At the outset, for your information I may read out the relevant Direction:

> "Where witnesses appear before a Committee to give evidence, the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published, unless they specifically desire that all or any part of the evidence tendered by them is to be treated as confidential. It shall, however, be explained to the witnesses that even though they might desire their evidence to be treated as confidential such evidence is liable to be made available to the members of Parliament."

Since you have appeared before parliamentary committees on so many occasions, you know all this.

The main question that we are discussing here is, in the light of the recent judgment of the Supreme Court, in order to keep up the constitutional structure as it was devised by the founding fathers, whether an amendment is called for. That is the main problem we are debating today. You have spoken and written on this subject and most of us are acquainted with your views. We hope that your approach here would be more constructive and helpful to the Committee.

**Shri Palkhivala:** I am very grateful to the hon. Members for giving me this opportunity of placing a point of view before you. I quite appreciate, as you rightly stated, the question is whether, having regard to the soul of the Constitution, so to speak, its temper and unfolding future that we are all looking forward to, is it desirable, is it in the public interest that the Constitution should be amended. And the implication of what the hon. Chairman told me, and I understand that clearly, is that I am not here to tell you whether the majority view is right or the minority view is right and what are the pros and cons . There is the judgment of the Supreme Court, which is the law of the land, and the only question today is should you supersede that judgment.

If you will permit me, may I deal with this question in different, specific aspects? First, if you will forgive my saying so, I would say that the question here involved mainly is not that of the supremacy of Parliament so much as the question of the future of 500 millions.

I think, though we are young as a republic, we are mature as a human civilization and we have reached a stage in our country's history when what matters is not the authority, the jurisdiction, the ambit of powers of an individual or of a body of men but what matters is how best to bring light to this vast sub-continent, how best to provide for political stability and for that degree of balance in the constitutional development of the country it is essential if this country is to remain and survive as a dynamic republic.

I am inclined to think, and I Speak with great difference and with great respect to hon. Members, that it would lead to a distortion in one's thinking if a question of the most far-reaching importance, like the present one, were to be regarded as a question where the main issue is whether Parliament is sovereign and whether it should have the right to amend the fundamental rights. I think, the issues go far deeper than this. Many of you must be familiar with those lines of Sankaracharya where he says that we are born and reborn, that we die and are born again lying in the mother's womb generation after generation. As I see it, these various generations of politicians come and go, but there is an abiding reality so far as politics is concerned and that abiding reality is the Constitution.

All that the Supreme Court decided was not that you cannot amend the Constitution but it said that one part of the Constitution, namely, the fundamental rights, cannot be amended. If one is to regard it as a slight, as an insult to Parliament, and if one is to solve this problem in a spirit of pique or a spirit of distress in the sense that my authority or my right has been questioned, I think, perhaps it may lead not so much to a rational answer and settle the question which you are considering but to an emotional answer. I think, emotional answers have to be avoided in the context of an issue of this character.

So, the first point which I would, with great respect, place before the hon. Members is that the question is not one really of the sovereignty of Parliament; the real question is: Is it for the well-being and for the future benefit of this sub-continent that the fundamental rights, after the amendments that they have already suffered, should now remain unabridged? This, I respectfully submit, is the main approach to the question.

May I place before you the second aspect which is: Does this country need to have a Constitution where the fundamental rights are sacrosanct? I am inclined to think that if ever there was a country which needed some kind of stability about its fundamental rights, it is the Indian nation. The reasons I would enumerate as threefold. Firstly, I think, we Indians are individually intelligent and collectively foolish. Frankly, I cannot conceive of any nation which has such enormous gifts, talents and abilities and which yet collectively has made so many decisions which have created unnecessary problems for itself and alienated the sympathies of the world. But I shall not venture into any field of politics. That is not the purpose for which you have been kind enough to call me. The reason why I said so is just to make good my point, which is this.

A nation which is in the nascent stages of growth, which is so to speak in its swaddling clothes, a young democracy, needs some kind of an anchor and that anchor is provided by its fundamental rights. One very great jurist, Mr. Austin, when he wrote on the Indian Constitution, called Part III of the Constitution, the Fundamental Rights, the conscience of the Constitution. I would say, yes it is the conscience and I would add, it is the anchor of the Constitution, in the sense that while the political scene shifts and changes, while we are tossed about by pressures and counter-pressures, there is some degree of stability given to this country with its shifting policies, its varying creeds and its diverse ideologies. It is the ballast in the ship, the stability which enables the ship to go on despite the storms and the stresses which beset it from every direction.

The second reason why I think this nation, more than any other, needs stable fundamental rights is the wide, diverse ideologies and doctrines which we are pursuing and quite rightly because out of this crucible into which we throw our dogmas and creeds the truth will one day ultimately emerge. As Justice Holmes said, the great power of truth is to stand

the test of the market place. You can go to the market place, the common people, agitate your point of view to see whether it is accepted. This is the one country where in one part we have Communism as the system of government, in another part socialism, in a third part a more rightist government etc.; in other words, in the same country you have the whole gamut of political creeds, not only expressed as a matter of freedom of expression but practised as a matter of governmental action.

In a sub-continent where you have got this tremendous divergence in creeds and ideologies it is very essential that all of us agree on some stable fundamental principles which we say we shall not transgress in trying to translate our political doctrines into action. So, the great advantage of the fundamental rights is that it enables the country to remain united in one basic thinking of constitutional law while at the same time different political ideologies are practised. This to my mind is a tremendous asset and we would be rather unwise to throw away this bond or cement which is holding the country together. Believe me, I have no doubt whatever in my mind as a humble student of the constitutional development of this country, that if you did not have fundamental rights and if each State were free to develop its own ideology as it liked, very probably, the bonds which are today holding the States together, would have been loosened long ago. The reason why the Communist states and the socialist states and the coalition states are still united in one country is that there is a basic pattern of constitutional thinking which holds them together and that is no more and no less than Chapter III of the Constitution, the Fundamental Rights.

So, in this enormous diversity which characterises the political scene in India today, this to my mind is of the utmost importance that all parties should be agreed on a limiting chapter which we call Part III of the Constitution. If we are agreed on that, within the limits set out in the chapter, we are free to translate our ideologies into action. But if you remove that, you are confronted with a situation where there would be a terrific clash, a terrific conflict. Let us make no mistake, in the years to come there will be a tremendous clash and conflict between different ideologies practised in different States, which will tear this country as under.

The third reason why, I think, in India we need the chapter on fundamental rights and need it badly as a nation, is—let me say it in all humility—that we as a nation by and large are not characterised by a strong feeling of justice and fair-play. I am very proud of my country and I am inordinately proud of my countrymen. I am proud to the point of being vain of the intelligence and the superb culture of this country. But looking round, I must confess that though there are numerous exceptions to prove the rule, broadly speaking, we do not have a very strong sense of justice and fairplay. That is why the past systems, the untouchability and the rest, are there. It could never have survived for centuries if there had been a sense of justice and fairplay. But since a sense of justice and fairplay, a desire to do to the neighbour what we would like the neighbour to do to ourselves, a civic virtue which will enable you keep your streets clean, is not the strong point of the Indian nation taken as a whole, I think, this is one country which needs that ballast, as I call it, the anchor of the fundamental rights.

Having inflicted on you my views which I have tried to express without any reserve so that you may consider them for what they are worth on this first point of view, namely, that as a nation, I think, we need and badly

need this kind of ballast and anchor in the form of fundamental rights, may I come to the second aspect which, I think, is equally important? The second aspect is the timing of this measure. What I mean to say is, supposing for the purpose of argument you hon. Members who decide the destinies of 1|7th of the human race, if you reject my first point of view, if you decide that Parliament must have its sovereignty prevailed even in the field of fundamental rights and that this nation does not need a Chapter on Fundamental Rights, would you regard the present time as the appropriate time for the introduction of this Bill? I have the highest possible admiration for Mr. Nath Pai. I read all that he says with great avidity and deep interest. Since he has introduced this Bill, I have no doubt that there are merits in the point of view which underlies this Bill. What, however, I would like the hon. Members to consider is whether, as a matter of timing, at the present juncture of the development of this country, would it be regarded as a well-timed measure. In considering whether it is a well-timed measure, may I request you to consider the political scene as it strikes anybody who looks at it and even the man who runs can read the signs? You have a tremendous degree of political turmoil. I think, the people who are in the political arena are perhaps a little less prone to see the signs of the times than the people who are outside the arena. Maybe, I am wrong here. But it has always struck me that as a lawyer, if I keep on practising as a lawyer, I am not able to see very often the point of view which the layman feels, which he himself sees more clearly, than I do as a professional man. Perhaps, for politicians, the same thing goes as it goes for lawyers.

Here is a time when the country is practically torn as under by various dividing loyalties. Even language instead of being a bond becomes a topic of discontent and unrest and disharmony. At a juncture, when you find the political turmoil perhaps at a point when even very responsible leaders have started expressing a doubt whether the Constitution will survive, at such a point in the country's political development, no doubt, the hon. Members will consider whether at such a juncture, it is desirable to create another aspect of discontent. If I may venture, in all humility to express an opinion before you gentlemen who are much more qualified than I am to judge the political future of the country, I am inclined that this is a time when every single measure should be taken up to reduce the stresses and strains which are developing within the community rather than add to them. I am inclined to think, for example, that if you were to ask for a referendum and you were to tell the people, "This is your Chapter on Fundamental Rights. Are you willing that your elected representatives should take them away or to have the right to take them away?", I have a feeling that the answer will be, by a large majority, against the proposal to tinker with the fundamental rights.

The ordinary men are sick and tired of certain political conflicts and, I think, they would rather have stability in preference to instability even if that instability is actuated by very laudable motives and, I believe, the fundamental rights are well-calculated to give that degree of political stability which is essential to the political growth in this country. Therefore, in regard to second aspect, namely, the timing, I venture to submit that this Bill, assuming it is well-conceived, might be deferred to an occasion; at a future date, when you have that degree of political stability when you can apply your mind or divert your attention to problems of this nature.

Then, you consider the question of timing from another point of view. Is there any pressing urgency for the amendment of the fundamental rights

which one can conceive of which is so essential at this juncture, at this point in the country's development, that you must overrule the judgment of the largest Bench so far formed of the Supreme Court? The Supreme Court is intended by the Constitution to command the same degree of respect as the Parliament. The Parliament is supreme in its own sphere and so is the Supreme Court in its own sphere. I think, to the extent respect for the Supreme Court is reduced in the public mind, the natural, the inevitable, concomitant will be that respect for law and order, and ultimately for Parliament, will be reduced. It is not possible to make the polity of the country so developed that the respect for one organ of the State increases and the respect for the other decreases. It, more or less, goes in harmony. Either people have respect for their chosen institutions or they have not. If respect for one decreases, the normal tendency is that respect for another chosen institution equally decreases. I am inclined to think that at this juncture, when there is scant respect for law and order, it is desirable that nothing should be done which would, in any way, seek to undermine the authority of that institution, namely, the Supreme Court, which has been entrusted with the task of upholding the fundamental rights and interpreting the Constitution.

The point I am urging, therefore, is that as a matter of timing, I think, the consideration of a very very far-reaching measure like this should be deferred. I cannot conceive of any amendment of the Constitution which can have a more far reaching effect than this one unless one day you are going to convert the Republic of India into a monarchy or a dictatorship. But short of that, it is inconceivable, talking only within the realms of the probable amendment of the Constitution. I have no doubt that there will never be a more far-reaching amendment than the one you have under consideration. As a humble citizen, I would beg of you to defer consideration of a topic like this till you have got a greater degree of maturity brought into your legislatures, in the electorate and in the political system and government of the country.

Having finished with the second aspect, namely, the timing of the Bill, may I request you to consider the third aspect, namely, the aspect of validity. If this Bill is passed into law and if the Supreme Court's judgment in Golaknath's case holds the field, are we sure that this amendment of the Constitution itself may not be declared to be invalid? It is a possibility. You will forgive me if I am expressing this feeling a little strongly. But I had the same feeling when the question of privilege of Legislatures was being debated. I have a strong feeling that perhaps the time has come to foster deeper respect for the Parliament, for the Supreme Court, and for the Executive rather than take measures one by the other where that respect is brought down. It is inconceivable that this country can have a great future in the council of nations if within the country itself we are trying to do things which undermine the authority and the prestige of the finest, the best, the greatest and the highest institutions in the land. I had the same feeling when I appeared in the Golaknath's case where the matter was decided; I could see the sharp clash of opinions; the majority was the narrowest possible—majority of one. I am also conscious of the fact that, if instead of Mr. X as the judge you had Mr. Y as the judge, the decision in Galaknath's case would have been different. But you can equally say that if in Parliament instead of Mr. X as the Member, you have Mr. Y as the Member, the Bill would be defeated. In other words, in the realm of constitutional jurisprudence, there are no absolutes; there is no mathematical calculus for constitutional engineering; you cannot say in jurisprudence that two and two make four; you can-

not say that the Golaknath's case was rightly decided, nor can you say that it was wrongly decided. The matter is one of approach. As I see it, it is a mistake which a layman sometimes makes; he wants the absolute, the unalterable, in law where there is no such thing. Much depends on the personality of the judge himself. As Justice Holmes said: "The inarticulate major premise is the culture, the background, of the judge". The judge sees for himself how things are happening and comes to certain conclusions.

What I say is this. We have reached a stage in our country's development where, if a judgment or a decision is given which we do not like, we are tempted to think that something is wrong with the judgment.

If you are going to have a bill which will again result in a constitutional fight and a further uproar and a further attempt to supersede the judgment in Golaknath's case and then if that judgment comes, a further attempt thereafter to supersede that judgment, there will not be any end. For example, there was the Shankari Prasad case where the Supreme Court had taken a different view. Golaknath's case overruled that case.

**Shri Nath Pai:** Sajjan Singh case was also there.

**Shri Palkhivala:** Yes. Suppose, you have another case where Golaknath's case is superseded, the battle will not end there. In the years to come, when perhaps we are all gone, there will be a fresh generation of liberals who feel this: "let the fundamental rights be there, which are above the reach of Party and the State and let them be sacrosanct". The wheel will come full circle when the decision on Golaknath's case will itself be over-ruled or superseded. The fight is endless.

Having said this, may I sum up what I have said in posing one question. I think, this field of fundamental rights is one field where, if it is not necessary to change, it is necessary not to change. In other words, unless a change is imperative and unless it is to be followed up by certain concrete measures which we think are essential to the country's development, it is desirable that the law should not be unsettled. For 17 years we have had amendments to the Constitution and practically all that was needed has been done by way of abridging the fundamental rights, so that the various reforms the Parliament had in mind, the State Legislatures had in mind, could be implemented. Having done all that and the Supreme Court having held that all that is valid and not to be touched—in other words, all the past amendments are valid and are to be upheld—is it now necessary for the future to provide the ground when, as I was saying, there does not to be any pressing urgency to create this new conflict between the highest legislative body and the highest judicial body? If this Bill is enacted, I conceive of some consequences— maybe, I am wrong; I am hopeless as a prophet in my own life—which may be more far-reaching than perhaps what some of us may have envisaged. Suppose, there was no chapter on fundamental rights, what will be the attitude of certain States where certain ideologies prevail which are not shared by the other parts of the country? For example, let me put before you the rights to equality and personal liberty and freedom of expression. That brings me to one point here. A lot of this discussion tends to get distorted because one has in mind the right to property. Because there is the fundamental right to property, you cannot have the various reforms you have in mind. But undoubtedly the hon. members are aware that, apart from that right, you have the various other rights which have

nothing to do with property—the right to equality, the right to freedom of speech and freedom of expression, the right to personal liberty, etc. Suppose, these rights were not there, what would be the situation in the country today? I conceive of two consequences: one is that this constitutional cement which is holding the country together by providing a kind of common platform on which all the parties and ideologies meet would be taken away from under the feet of the nation; the common platform on which the communists, socialists, liberals, Swatantrites and all other parties meet is the platform of fundamental rights; there you walk, there you express your views, and within the confines of that chapter, you express and translate into action your ideologies. If that is removed, you will have a condition created in the country where it will be impossible to hold the States together because what holds the States together is not money or geography or culture—we know it to our cost; otherwise we would not be fighting for those things that we are fighting for. What holds the nation together is a certain intellectual or constitutional unity which is, I think, provided by the chapter on fundamental rights.

The second consequence will be this. You will be getting certain States which pass legislation which will be quite inconsistent with the basic human rights. You will ask, is it Parliament which should decide how far to amend fundamental rights and to what extent? If Parliament decides not to abridge the fundamental rights, the matter ends there. Nobody challenges the decision of Parliament not to abridge a particular right. The point, if I may say so, is this. You are by this process opening up the flood-gates. Certain pressures and counterpressures will be built up within Parliament, outside Parliament, on Parliament, and these pressures will remain and it will be difficult to withstand them. These pressures and counterpressures are bound to be built up. In this highest legislative body of the land there is bound to be a situation created where States will be fighting, different political parties will be fighting for an abridgment of certain rights in order to be able to translate their ideology into action. I go to certain States. I will not name them. I am wondering whether we are living in a country where there are any fundamental rights even. You have these political pressures being built up, once such Chapters can be tinkered with. Today it cannot be done. Nobody can bring pressures or counterpressures because of your being powerless to go into it. But believe me, if this freedom is given to Parliament to take away rights, believe me, you are only making it possible for people who are not able to see much ahead, who think that the constitution is made only for the present generation, and for the present political thinking. You are making it possible for these groups to build up these pressures. How it will be abridge, to what extent and to what rights, will depend upon who is able to exert the maximum pressures. Therefore, I would say this, that on the whole (a) having regard to the state of the country; (b) the present timing; and (c) the conditions today and the future which we are looking forward to, it is, in my respectful submission very desirable that you might be perhaps well-advised to defer consideration of this Bill to a point of time when you feel that this type of Bill if passed into law will not result in more political unrest in the community. Thank you.

**Mr. Chairman:** We are much grateful to you for the socio-economic thinking and the background in which you have made the various remarks. Let us clinch the issue. You made reference to Austin's commentary on Indian Constitution. He has stated in categorical terms how our Constitution-makers have enshrined certain things in our Constitution. It is based more on consensus and not majority of one or minority of one. That

point he has said. We will keep that in view. We who are gathered here are not very eager to see that our authority to curtail fundamental rights is ensured. That is not the point. Under the scheme as visualised by our Constitution makers a section has been inserted. On 3 occasions regarding one fundamental right, regarding property, between the judiciary and Parliament certain divergence developed, certain tension developed. It has culminated in the last judgment. Now let us clinch the issue whether while interpreting that section the Supreme Court or their Lordships were right in putting that interpretation. This is the main issue before us. In terms of the Constitution how far that view is correct. This is Number one. Number two is this. If tomorrow the issue goes to the Supreme Court, they have a reviewing authority, and perhaps the next judgment of the Supreme court might be revising the present judgment. It is a judgment by majority of votes. It is just possible. We are not eager to challenge the authority. There is no question of challenge. We want to set things right in the light of the Constitution as it is framed. Reality is a changing phenomena. So I would like to know from you whether the interpretation of the Constitution is right. Every jugdment has socio-economic background. If they have erred here or there, is a certain corrective called for, for certain corrective action? This Bill is an attempt at giving the corrective action in the light of the Constitution. So, Members will like to hear from you on this specific issue in the light of various provisions of the Constitution. Any self-evolving constitution can give the rights to amend. If you see the amendments you will see that that right was never light-heartedly exercised by Parliament at any moment. So, I would like to know specifically on this point from you.

**Shri Palkhivala:** While I appreciate the approach that you have brought to bear on this question, still, the question remains. Assuming for a moment that in the years to come a corrective will be needed, which corrective Parliament alone will supply, I would still beg of you to consider whether this present juncture in the nation's history is the right moment when you should try to apply such objectives and raise questions of the most far-reacing importance. So far as the constitutional question is concerned. I did not deal with it in my little address to the Hon. Members. I would not say that two and two means four and majority view is the only possible view. The very fact that some learned members took a very different view shows that a different view is possible. But what I fail to understand is this: There have been certain comments of people like the eminent jurist who will be appearing before you a few days later who has said in his book on the constitution that the majority view is clearly wrong, is productive of the greatest public mischief and should be overruled at the earliest opportunity. To say that it is clearly wrong is in my opinion over-stating the case. It all depends upon what the approach is. If you follow one approach you get one answer. If you follow another approach you get another answer. So far as public good or public harm is concerned, is is a question of approach. What do you regard as public good and what do you regard as public harm? There are people and please permit me to put myself in that class of just being humble citizens and not more than that, who feel that this country's future development postulates a certain degree of basic civil rights which must not be at the mercy of any political party, however enlightened it may be. There are some others feeling that this is something obstructing the nation's progress. I have very great respect for the other point of view. I would like to refer to what one great English judge said. He said: 'I may be wrong, but I am not in doubt', in the sense that I am willing to concede that another person may be right and I may be wrong. But so far as my own thinking is concerned,

I am clear that certain basic minimum rights on the basis of which—you will forgive my repetition—all Parties can come togethr are essential. Permit me, honourable friends, even at the risk of taking your time, to ask you a question. Do you think anything is wrong with that consitutional doctrine which says that on this common platform all political parties will meet, discuss, debate and act? What is wrong with that? Suppose you try to abridge the right. Some will think that you should have abridged only very little. Others will think that you should abridge a little more. The conflict will go on, on the extent to which the rights must be abridged. Take, for instance, the emergency and the controversy which was created by the fundamental rights to personal liberty being suspended. When in a emergency personal liberty was suspended, you can realise what tension and commotion there was in the country. Imagine what will happen 10 years hence. You are all persons with a certain vision and intelligence. I fully apprecate what the honourable Chairman has said that you have not transcended the limits of your power. But you are not ever-lasting. The Constitution is meant to be permanent. Twenty years later who knows who will be working within these limits, what kind of people, how elected and with what background and culture. We are providing for the unfolded future. If somebody asks: "Can you trust your representatives?" I would say "Yes". If he asks: "Can you trust the repersentatives who will come 15 years later?" my answer would be, "I do not know". With all respect, my request to you is that you will be kind enough not to decide this kind of thing by reference to what you know or your own sense of responsibility and respect for certain traditions. People like the honourable members here are not going to be here for all time to come. You don't have a Nath Pai every day. Once you leave room open for the future to operate, you do not know what kind of policies will be pursued, how far this freedom will be there and how far the people will be able to express their views. Today I can tell you whatever I want to. If there is no Chapter on fundamental rights after 20 years, it is possible that I may not be able to express my views. There are countries in the world where views cannot be expressed. Here you can talk quite freely. My friends may not agree with me. But we have respect for each other's opinion. But a stage may come when the basic sub-stratum of this fundamental rights may be removed. There may come a stage when people may not have a clear concept what the basic rights are. Therefore, while fully appreciating that this Parliament is not likely to exceed or transgrees the limits of due, responsible legislation by way of amendment of the fundamental rights—I fully appreciate that and I concede that—I am seeing a danger in the years to come when future members—no one knows elected how or with what culture—will be able to wield a certain power which may be to the detriment of the nation.

**Shri A. N. Mulla:** Mr. Palkhivala, I think you are greatly apprehensive that if this power to amend the fundamental rights is given to the Parliament, it is likely to be abused. You are more apprehensive of this power being abused than the actual taransfer of this power to the Parliament.

**Shri Palkhivala:** May I give this answer? I would put it accurately this way. I am afraid of the power being given because of the possible abuse. But as a student of constitutional law, I am also inclined to think that, apart from the question of abuse, it is good for a nascent democracy to have some basic rights which must endure when generations of politicians have come and gone. Therefore, on the point of abuse, clearly I am apprehesive. But apart from the question of abuse, as a matter of intellectual thinking and intellectual honesty, I cannot hide my feeling from you which is that it is good for the

country, even assuming that there is no abuse, that you have a certain basic set of principles which will be above the reach of Parites and the State.

**Shri A. N. Mulla:** Therefore I think I am right when I summaries your opinion that though you may be opposed to the Bill brought forward by Mr. Nath Pai on other grounds also, one of the main and dominant reasons for your opposition to it is that there is a fear that this right will be abused if it is given to the Parliament.

**Shri Palkhivala:** It is certainly one of the reasons and I would say one of the main reasons.

**Shri A. N. Mulla:** You also, in your opening observations, said that we should not react emotionally and we should not approach this question in a spirit of pique. Have you tried to analyse the Supreme Court's majority decision? Have you seen any trace in the decision that might have been due to that type of distrust or which is due to pique?

**Shri Palkhivala:** I have taken the trouble to look at the judgment and in fact I have them them before me. I certainly do not have the impression that the judgment, for example, of Mr. Justice Subba Rao is actuated either by any emotional feeling or any feeling of distrust. According to my reasoning what he has said is that the Constitution-makers wanted the fundamental rights to be inviolable and while they gave Parliament the right to amend the Constitution in this particular field, the Constitution-makers wanted Parliament not to interfere. That is the line of reasoning, according to me.

**Shri Jairamdas Daulatram:** The provisions in the Constitution are that you can cannot abridge or take away, but you can amend it to increase the rights.

**Shri Palkhivala:** I stand corrected.

**Shri A. N. Mulla:** Therefore, as a citizen of this country and the world and as a person living in present day, do you think that any reasonable man or a reasonable body of men can definitely come to the conclusion that certain rights which we declare to be inviolable today should remain inviolable for all time to come?

**Shri Palkhivala:** If I may say so, it is certain. It is so in the United States, it is so in France in the sense that in France they have a republic and it is so in Itlay. Without any disrespect to any one of you, suppose tomorrow a body of men come to power who feel that democracy is not good for the country; we must have a set of wise men who are selected and who for the next 30 years must rule the country. Suppose they *bona fide* believe in this with the same conviction as we have in democracy. Then is it something for all time to come? What happened in Germany? When Hitler came to power, it was by the most meticulous observance of all constitutional proprieties. Before him there was a republic.

**Shri A. P. Chatterjee:** Are you sure of that?

**Shri Palkhivala:** I am sure.....

**Shri Nath Pai:** By the most gangsteristic methods he brought down the German . . .

**Shri Palkhivala:** Let me say what I have in mind. If I am still wrong, you will correct me.

He took every legal step to amend the Constitution of Germany in order

that he may come to power. My good friend, Mr. Nath Pai is absolutely right—instead of calling him as an hon. Member I had to call him as good friend—when he said that he did employ the gangsters' methods. But the point is that he combined his methods with the constitutional propriety in the sense that he amended the Constitution. If you read the text on the Historic Evolution of Germany, you will find that all writers agreed with that. He took every single measure which he could possibly take, so as to amend the Constitution Just as one set of people to-day say why should any rights be inviolable, by the same token another set of people might equally say why should this principle of electorate be inviolable? They did it in England. The Parliament there was for 20 years from 1620 to 1640. Throughout, the history showed that the right-thinking men wanted to do good things. They conceived of a good thing which they all thought would be quite all right. But, from the objective point of view, there was bound to be an objection. If you say that no fundamental rights should be sacrosanct, I would say why should the election system be sacrosenct by the same token. Somebody will say that one day the Republic of to-day will be converted into a dictatorship tomorrow. The reason why the Supreme Court came to this conclusion was that it had this approach. I don't think that there is anything wrong with this approach as I said Perhaps. after four thousand or five thousand years, it would be an irony of fate that our Constitution itself would not survive. We have not had any trouble so far from our Constitution. Our Constitution is only 17 years old; we have amended it seventeen times. At the moment we have this Bill. Suppose this Bill deserves to be passed and suppose it is also passed at a future date. It may be valid. But, after some time, something wrong happens. At this juncture, in our country, if you bring this to the fore, when already there is some turmoil, somebody may take it to the Supreme Court. It may decide in your favour or may not decide in your favour. These things are bound to persist. One day they will ask for the reversal of that. I am sure you are not providing for any further conflict or dissension and strife.

**Shri A. N. Mulla:** In your opinion is it a rigid or a flexible Constitution which is conducive to the process of evolution?

**Shri Palkhiwala:** I quite agree with the hon. Member that flexibility is preferable to rigidity. The only question is when you say that flexibility is preferable to rigidity, I would say that no doubt rigidity is preferable to instability. I would put it this way.

**Shri A. N. Mulla:** Excuse me for interrupting you. Does it mean that the change is not called for?

**Shri Palkhivala:** I would say that there are no doubt subjective personal factors involved. There is also no doubt that there are some reasonably basic rights which are well known throughout the ages and throughout the world; they are accepted as such.

Now, the Constitution-makers, I believe, were as enlightened people as the learned hon. Membrs of Parliament are. I think that subject to the modifications which have been made and which stand to-day, the rights are not such as to provide for any undue degree of rigidity. In other words. I do not think in any way the progress of the country would be hampered if the constitutional rights Chapter continued for years to come—I don't say for all time to come—but for years to come. For how many years they should be continued is a matter of history.

**Shri A. N. Mulla:** Do you or do you not agree that the fundamental rights really depend upon the conception as to how an individual should

be related to the society which the people want?

**Shri Palkhivala:** Fundamental rights are related to that.

**Shri A. N. Mulla:** Therefore, will you agree or not that this conception of the life of the community and society is a dynamic conception and it is not a static conception? If the conception of a society changes, then obviously, the conception of fundamental rights will change along with it.

**Shri Palkhivala:** I agree with the proposition subject to this exception *viz.*, that the change is one which must not be such as to deprive the fundamental rights of the immediate and modicum stability. In other words, we have worked our Constitution for 17 years whereas other countries have worked their Constitution for the last 150 or 160 years. I have sometimes wondered whether that dynamism is not perhaps more deterimental to the nation than a little stability.

**Shri A. N. Mulla:** Excuse me for interrupting you. In these 17 years, our life has become more speedy by and large and perhaps these 17 years are more than a century of the olden times.

**Shri Palkhivala:** I fully agree with you and we are all proud of that phenomenon. The only point is that when we have made this progress with these fundamental rights are there not any reasons to believe, even with these fundamental rights, you will not make even better progress by giving them a certain degree of political stability?

**Shri A. N. Mulla:** You yourself have stated that we have made a large number of amendments during these 17 years, you accept that a common plat form remains in spite of different ideologies. Why are you afraid that this common plat form would be removed if some more amendments keeping in view the wishes of the people are also introduced.

**Shri Palkhivala:** Frankly, the whole question is whether every amendment that is made can be said to be in conformity with the wishes of the people? It has a very large area of debate. You will forgive me if I say that I do not want to take your time on this by going into details. I would only say that every honest Member of Parliament always believes—I am sure that everyone honestly does believe—that he represents the wishes of the people. And yet, in other's thinking, it may be that one person must be wrong or both must be wrong—all cannot be right. The very fact that you have the whole gamut of political thinking goes to show that everyone is honestly convinced that his thinking represents the wishes of the people and it is for the good of the people. This itself poses the danger which the Constitution-makers wanted to avoid by placing some basic rights in the seal of inviolable principles of the Constitution.

**Shri A. N. Mulla:** You have said that; you referred to something in that connection. I believe you must be aware of the doctrine of the police powers which has been accepted in the U.S. Is it a fact or not that in exercise of these police powers, the Americans have come to this conclusion that these fundamental rights can be abridged?

**Shri Palkhivala:** The position is this. What the U.S. Government or the U.S. Congress can do in exercise of it police powers is something which I don't think can be done here in India under the existing constitutional provisions. What can be more flexiable or more elastic than the power of Parliament to impose reasonable restrictions in the public interest, which can be done within the powers

which you possess already. When one talks of the police powers, one cannot perhaps forget that in the U.S. the police power is no higher, no wider or no greater than the power of the Indian Legislatures to impose reasonable restrictions in the public interest which power is already there.

**Shri A. N. Mulla:** Therefore, any amendment which comes within the definition of 'reasonable restriction' on the liberty of the individual is conceivable as proper and desirable if the people wish it.

**Shri Palkhivala:** I respectfully agree, and that power is already there. The fundamental rights, as you will no doubt kindly recall, are subject throughout the Constitution, throughout Part III of the Constitution, to reasonable restrictions in the public interest. The words are used in Art. 19. Exactly the same words may not be there in other Articles, but it is clear that every legislature has power to impose reasonable restrictions in public interest and if our fundamental rights were not subject to that restriction, I would be the first one to agitate for abridgment of the fundamental rights, but every fundamental right is already subject to that restriction.

**Shri A. N. Mulla:** On the basis of the amendments which have been passed and which have been upheld by the Supreme Court, can it be said that Parliament has on any occasion passed any abridgment of these fundamental rights which has transgressed these limits of reasonable restriction?

**Shri Palkhivala:** You will no doubt recall that so many High Courts and Supreme Court have struck down so many laws. Therefore, the very fact that there are innumerable judgments striking down various laws as transgressing the limits of constitutional limitations, is the answer to that question whether the legislatures have transgressed the Constitution

**Shri A. N. Mulla.** I think I have not made myself quite clear. What I wanted to place before you is whether there is any constitutional amendment which has been struck down—not an amendment to ordinary laws. The ordinary laws are not excluded from the review of the High Court or the Supreme Court. I am only referring to constitutional amendment.

**Shri Palkhivala:** If you ask me frankly, let me be honest and very frank, let me tell you how these things operate. Since the question has been put and I will hope you will take it in the right spirit. Take the list of your various Acts which were laid down in the Constitution as such that these Acts shall not be challenged on the ground that they violate any of the fundamental rights. Now a whole list was drawn up a hundred of them. Then there were pressures, and counter pressures. So some were dropped first and some were dropped later and then ultimately the list comes down to 40 odd or 50 odd Acts. Frankly some of these provisions are clearly violative of the basic, elementary human rights, but because they could not be challenged, you have no pronouncement uptil now. They could not be challenged because it was an amendment of the Constitution. Therefore, there is no judicial pronouncement. However, they violate even the basic human rights. What I am trying to point out is how political pressures build up in a field like this which frankly is not conducive to fair justice to the citizen. You have a list of say about 200 Acts which are to be put in the Constitution as beyond the reach of challenge on the ground that they violate fundamental rights. Then the list gets reduced to less than 50. We found how it was cut down. Those who have got the maximum pressure have got their way but those who did not have any political pressure behind them are not able to get anything done. That is how injustice is done. That is why the common citizen easily feels very much disillusioned

**Shri A. N. Mulla:** I would like to know what was the difficulty in the way of the Supreme Court striking down all the bad laws when the cases came before them even by entertaining the applications in those cases which were excluded from the review instead of laying down the general principle?

**Shri Palkhivala:** As the hon'ble Members will clearly realise, it could not be done because upto now no amendment of the Constitution abridging fundamental rights could be called in question at all. Therefore, the Supreme Court could not go into this question.

**Shri Nath Pai:** It was debarred.

**Shri Palkhivala.** Yes, it was debarred under a ruling of the Supreme Court itself, to even admit a petition.

**Shri A. N. Mulla:** What I said was: every bad law which is made by the State legislatures comes to the courts and they can strike it down. Now, if according to a constitutional amendment certain Acts were excluded from the judcial purview of the courts, it was open in spite of the old traditions that existed in the Supreme Court, for the Supreme Court to confine to that particular Act for the various reasons instead of laying down a general principle for all time to come.

**Shri Palkhivala:** Well, that would perhaps be going into the question of what is the right exercise of discretion by the Supreme Court. I can only say this that the Supreme Court has been reasonable and eminently reasonable to this extent that although they regarded abridgment of fundamental rights as being beyond the competence of Parliament, they have upheld, as you have already seen every single amendment so far. This is fair exercise of discretion so that society may not suffer as a result of unsettling of the law.

**Shri A. N. Mulla.** You have said that if we take up this Bill to-day we may in a way be casting a slur on the decision of the Supreme Court. Now if you take the totality of the cases, a larger number of Supreme Court Judges have held one view and the lesser number of Judges have taken the other view. How would we be casting a slur on the Supreme Court when we say that their earlier decision is not correct, not the later decision?

**Shri Palkhivala:** I think this assumes that wisdom lies in numbers. But I wonder whether this assumption, at least in the field of Constitutional law, is correct.

The validity or otherwise of the Supreme Court majority view you would kindly decide by reference to the conditions prevailing in the country to-day and I do not think it would be a fair view of looking at the question so as to say that I will count the number of judges duirng the last 17 years who have taken one view as against the number which has taken the other view.

**Shri A. N. Mulla:** Not only that. You have given two decisions. We are in favour of one of those decisions, not in favour of the other decision. How are we casting a slur?

**Shri Palkhivala:** I have not said that. I have never used the words 'You are casting a slur'.

**Shri Nath Pai:** You did not say that, but you did say that decreasing respect for one of the co-ordinate organs of the State is a very dangerous thing and that people's respect for the Supreme Court should not be tampered with. What, I think, Justice

Mulla is seeking to get clarified from you is: how is it tantamount to attempting to decrease any respect when we are upholding two judgments of the Supreme Court as against one judgment?

**Shri Palkhivala:** The answer is this: under the Constitution the law laid down by the Supreme Court is the law of the land and the law that is laid down is the law laid down by the final largest Bench. In other words with regard to constitutional law, the Supreme Court to-day has spoken with one voice. For the purposes of constitutional law, the law of the land is not the majority view or the minority view.

The law of the land is that the Fundamental Rights cannot be abridged. This is Article 141. The law laid down by the Supreme Court is the law of the land. This is sought to be superseded. That is why I said in my opinion it would be reducing the respect of the Supreme Court to overrule what they have done when there is no urgent immediate occasion to doing so.

**Shri A. N. Mulla:** Now, coming to the real point that you raised this is not the time suitable for doing so, have you any idea when this suitable time is likely to come, will it come within a reasonable period of time and because of the existing tension should we go on postponing the question for all time to come?

**Shri Palkhivala:** My answer is, we would go much further if we eliminate those disputes which may have pros and cons between different States, between different ideologies, between different groups and parties and try to concentrate on the questions only which are of most immediate urgency. I do think that there are various questions which can be shelved and one of the questions which can be shelved is the question as to whether the Parliament should assert itself because it has the power to supersede the Supreme Court's decision; this is not a question of immediate urgency especially when the country is faced with enormously complicated, tangled and ticklish problems of utmost urgency.

**Shri A. N. Mulla:** I think you will concede that Fundamental Rights as conceived in a democracy and the Fundamental Rights as conceived in a Welfare State are not identical.

**Shri Palkhivala:** We are in the realm of one's subjective understanding of what is a welfare state. There are notions of social justice, notions of welfare state. Our goal is the same, the end is the same, but the means are very different. It is true that there are some parties, I have no doubt, who believe that a welfare state can be achieved or can become a reality only by suppressing the freedom of expression, which is contrary to their own point of view. They believe in it quite honestly. This is their own notion of how a welfare state is to be achieved. As I said, there will be doubts and differences and disputes and pros and cons. There are some basic human rights about which all the jurists are agreed. The Charter of Human Rights which all nations agreed to including India in 1947—Mr. Nath Pai would correct me if I am wrong about the year—lays down a certain series of rights. For example, the right to educate your child in such ways you want supersedes all the various controversies about language. Such rights like the right to educate your child in the way you think best are the basic rights. They are basic, inalienable rights inasmuch they are in a welfare state as in a democratic state as ordinarily understood.

**Shri Tribhi Singh:** Mr. Palkhivala seems to hold the view and perhaps rightly too that Parliament has the right to amend the Constitution ex-

cept Part III and that also is a matter of taking away or abridging the Fundamental Rights. Conceding that position, I am afraid I am not becoming a little hypothetical, he also seems to hold that view that a time might come when people in this country will not hold the Fundamental Rights laid in Chapter III of the Constitution as sacred or inviolable and a time might come that they would like to change them. In fact, he thinks, I am also inclined to agree with him that there are elements in the public life of this country who would care a tuppence for some of the Fundamental Rights laid down in Part III. Supposing a large section of our population, say 5 years hence or 10 years hence or 15 years hence, is of the view that some of these rights should be done away with, then, will Mr. Palkhivala give us an idea as to what agency would he envisage to bring about an amendment of the Constitution—because then that would not be in conformity with the wishes of a large number of people inhabiting our country. If the Parliament shall have no right under this Constitution, what will they do, will they amend the Constitution or scrap it altogether and what is the remedy Mr. Palkhivala would suggest in such an exigency?

**Shri Palkhivala:** May I make it clear that it is not my reading of the Constitution that any part of the Constitution can be amended by Parliament so as to break the very basic structure of this Republic. For example, I don't believe that Parliament has the right to amend the Constitution so as to establish a monarchy in this country. I will not explain that further because that is outside the purview of this Bill. I wanted only to clarify that point. Coming to the question the hon. Member has raised, the majority judgment itself on the last page points out that there is a possibility—they do not decide the matter but they hint at the possibility—of achieving the result that the hon. Member has in mind. The mechanics are these. The Parliament has the residuary power under the Constitution to do all those things not provided by other express items in the Union List or in any other list. In the exercise of the residuary power, it is a possible view that Parliament may constitute a Constituent Assembly which will make those changes to the Fundamental Rights or to the basic structure. Therefore, it is not as if according to the majority view of the Supreme Court revolution is the only mode of achieving the desired result. A peaceful mode and an equally effective mode of achieving the result is the possibility of Parliament constituting a Constituent Assembly in the exercise of residuary power and that Constituent Assembly may go into the question of breaking up the basic structure of the Constitution or abridging the Fundamental Rights etc. The Supreme Court has not said that it can be done or it cannot be done. It has said that is a matter which is open. I am myself inclined to think that it is open to the Parliament to have a Constituent Assembly expressly constituted for that purpose. Of course, once you do that, you are opening up, as I said, flood-gates, to all kinds of tremendous pressures which are already building up in the country and it may have disastrous consequences. But in the theory of law this is undoubtedly a possibility.

**Shri Triloki Singh:** Mr. Palkhivala knows better than at least myself. There are so many laws passed both by Parliament and State Legislatures which have been struck down by various High Courts and the Supreme Court. In order to replace the Acts struck down by the Courts, they have promulgated ordinances and taken other such measures, just to get over the difficulty created by the judgments of the various Courts. In no case was it ever meant as disrespect to the High Court or the Supreme Court. Instead of amending the Constitution to get over the difficulty created by the Courts, the Parlia-

ment and the State Legislatures have taken these measures. If a Constituent Assembly is convened, why are you afraid that flood-gates will be opened. After all, the wishes and the will of the people are to be carried out, whether it is 10 years hence or after to get over the difficulty that has been created. This difficulty can be got over by resorting to the vote of the Constituent Assembly or referendum. Why can't it be and why should it not be done today? With the various ideologies prevailing in the country, why should he be afraid that there will be so many pulls and pressures and it will open the flood-gates etc. As a safety valve, I would like the amendment to be done here and now, rather than postpone it for 10 or 15 years. Parliament must have a right to amend.

**Shri Palkhivala:** I see your point of view. I see that I am in a minority—I hope not a minority of one. But to answer your question, you have raised two questions. Your first question was that if the judiciary can declare a parliamentary law to be void without involving the imputation of disrespect to Parliament, why cannot Parliament supersede a Supreme Court decision without involving reduction of the respect due to Supreme Court. May I answer the question this way? It is not a question merely of the Parliament superseding the Supreme Court. For example in Income Tax Law, with which I am less unfamiliar than with other branches of law, you have the head of income, "house property." The Supreme Court declared that certain municipal taxes should be allowed as a deduction. Parliament intervened—I should have said acted—and made a law which superseded the Supreme Court decision and said: "No, municipal taxes shall not be deducted except to the extent of 50 per cent allowed by the law." Nobody says that this is disrespect to the Supreme Court. No. You carry on the administration; you make decisions; somebody else makes some other decision.

Here you are dealing with the whole philosophy of the Constitution, the basic framework underlying the Constitution, as the Supreme Court conceived it to be. The Judgment has come only now. Let time pass. May be I may change my opinion and come over to your point of view. May be the Majority who is today against me may have second thoughts and come over to my point of view. This is a matter of such tremendous and far-reaching importance that at least I do not regard myself sufficiently well equipped mentally to give a final decision one way or the other. I may be quite wrong in all that have told you, and you, Hon'ble Members, who have put questions to me, may be absolutely right. What I am asking is this: should not a little time pass can we allow the water to settle down, can we not do a little thinking by ourselves and don't you think a reasonable time should be allowed to do rethinking on matter of such far reaching importance? We are today going to affect the destiny of the country. If I am wrong, and the hon'ble Members who are today pleased to talk to me, are right, well the destiny of India will be one way. If, on the other hand, the truth is the other way about, the whole political future of the country may be different. You are playing with the entire future of the whole nation on that particular aspect of the constitutional law which is of very basic, fundamental importance. The only chapter where the word "fundamental" is used is Chapter III. Am I asking for too much if I am telling the hon'ble members to let a little time pass? May be your second thoughts may be the same as they are now, may be after 2 years. You might be in the same mood, but couldn't that much time be given to yourself? If I were a Member of Parliament—I am not presuming too much, I am only talking about hypothesis—I would like to give a little more time to myself. I would tell myself I don't have that degree of universality of intellect which can enable me to come to a conclusion. Let me see how the country develops, how these things work. Maybe these things may not work.

Maybe the Supreme Court is wrong. Maybe after 4 or 5 years, people may say: look at the significance of what the Supreme Court did. On the other hand, it may be, if I may say with great respect to the hon'ble members, that your present thoughts require a little re-consideration. All that I am asking is this. After all it took us 2½ years to frame the Constitution. Are we so well qualified that we can now come to a decision on this matter in the course of a few weeks or a few months. Hon'ble members' time is so completely taken up by a number of issues. I can understand the Constituent Assembly did nothing but frame the Constitution. Even then they took more than two years. The Hon'ble Members have a hundred and one things to do. I frankly wonder how a Member of Parliament can go through his day's work. It must be nerve-raking. If these tremendous pressures which are on you from 101 directions—from our own constituency, your States, your loyalties (sometimes divide sometimes unified)—if with all that, would it be too rash, too unwise to ask of you, the hon'ble members, to give little more time to this. Let, as said, the thinking be crystallised. You have different opinions. There will be articles, debates, symposiums etc. I am sure you are all openminded, otherwise you wouldno't have called me and I would not have been inflicting my views on you in this way. Having that open mind which is implicit in this meeting, I would put it to you to give yourself, in fairness to the nation, a little time, and consider the implications. I am not saying give up the thought. All that I am asking is give yourself a little time in fairness to the nation. After some time, when your views and other people's views have crystallised, when the truth has crystallised and after the truth has emerged, you can come to an ultimate decision. After all most of you will be here for some years to come, not only in this Parliament; in fact, some of you particularly the mover of this bill cannot be spared at all by the nation and therefore, there will always be time to do the right thing. That is my answer.

**Mr. Chairman:** Good honest people are haunted by doubts, I agree

**Shri Kunte:** Am I right in saying that you have a feeling that this legislation is being undertaken as a sort of retaliation to the recent judgment of the Supreme Court?

**Shri Palkhivala:** No. I have too much respect for my Parliament. This is my Parliament as much as anybody else's to ever conceive of that. I merely referred to the question of sovereignty of Parliament, because in the Statement of Objects and Reasons the sentence is "The issue raised is of cardinal importance to the supremacy of Parliament." That is why I started by pointing out that you would be good enough to consider this issue principally as involving the future of the country more than the question of supremacy of Parliament. But I have no doubt whatsoever that none of you will act out of a motive of retaliation. That would be unworthy of a parliamentarian.

**Shri Kunte:** You were pleased to say that this is ot the proper opportunity, because you want the decision of the Supreme Court to go down the minds of the people. You want the people to think about it. How long do you think would it take before a definite position emerges?

**Shri Palkhivala:** It would be difficult to say that it would be 'X' number of years and not 'Y' number of years. But it is easy to say the negative. It is easy to say that any action taken within 2 years of the passing of the judgment of this importance would be a hasty action.

**Shri Kunte:** Therefore, you concede that despite the Supreme Court's Jud-

gment, even these fundamental rights are liable to need amendment on some occasion. By whom, we will come to that later on.

**Shri Palkhivala:** No. Perhaps I have not made myself clear to the hon'ble member I am not for a moment suggesting that nor am I disputing at the moment that Parliament has the right or not the right to do so. Supreme Court alone can decide the question when the matter comes before them. Much will depend on the personality of the Judges. What I am saying is that the the question is of such tremendous importance that even jurists who have devoted a whole lifetime of study to the Constitution cannot come to a fair decision in such a short time, and particularly a decision which tries to probe into the motives and intentions of the Constitution-makers. After all we are interpreting the Constitution. Chief Justice Marshall, perhaps the greatest of the Chief Justices of the United States, whenever a constitutional question came before him, would make one suggestion to his brother Judges: "Remember we are construing a Constitution." It created or opened a vist a of thought that 'You are not construing a law, an Act or a Bill or a bye-law, but you are construing a Constitution'. In other words, he looked a hundred years ahead, and if what I have said has been at some length, it is only because of my conviction that democracy and the republic form of government will survive in this country for many many decades; and what is a couple of years or what is a period of three years in the lifetime of a nation?

**Shri Kunte:** If I pursue my question a little further, I hope you will not misunderstand me. You have been telling your views as a social thinker. I now put it to you as a jurist.

**Shri Palkhivala:** If he wants to know my view as a jurist, I would say that let him not call me a jurist, but I would say that my own view as a humble student of constitutional law is that the fundamental rights in the Constitution as it stands today cannot be abriged by Parliament.

**Shri Kunte:** I shall quote an analogy and then put you a question. Let us suppose that for better administration of the country, a feeling grows in this country that no member of the legislature and much more so no person holding an executive office as a member of the legislature should hold any personal or private property. Under the present Part III of the Constitution, such an amendment would not be in accordance with the Constitution. In that case, as it has happened in the case of women's property under Manusmriti, where the position had to be changed by the courts by constructive legislation, would you like the position of the courts going into it and amending it by constructive legislation in their judgment, or would you like that the legislature or Parliament should directly take that position?

**Shri Palkhivala:** The direct answer to your direct question is that I would prefer through the judicial process the right to property being whittled down, if it has to be whittled down, because the right to property is subject to reasonable restrictions in the public interest, and if ever we evolve a society where holding of property was held to be improper, then at such a state of society it would be a reasonable restriction in the public interest to do away with the right to property. But having answered the question, may I say this? What is troubling me most is this. I am not a whit worried about the right to property, believe me I could not careless; what is worrying me more than anything else is the right to freedom of expression and the right to

personal liberty, The same thinking which can enable a man to take away all rights to property would equally enable him to say that he would take away the right to freedom, because he may say 'If I give freedom of expression, somebody else will interfere with my mode of thinking which enables me to take the nation to the stage where all property is abolished." This is the tremendous danger to the right to personal liberty and the right to freedom of expression which are more precious than any right to property. Just as the right to property may be taken away as you have said through the judicial process, I would say that if the fundamental rights have to be whittled down—God forbid that the right to freedom of expression and the right to personal liberty should be whittled down—I would rather that they are whittled down through the judicial process rather than through any other.

**Shri Kunte:** I referred to the right to property because as it has happened a number of cases have gone up to the Supreme Court, and a number of amendments that have come up relate to property rights. Therefore, it stands to reason that the Supreme Court had on many an occasion to consider the question of the right to property and similarly Parliament had to consider the question of amending the Constitution in regard to the right to property. That is the background. If you say that you do not mind whittling down the right to property, do you want to suggest that it is better that the courts which are only entitled to interpret the Constitution should also legislate?

**Shri Palkhivala:** I cannot suggesting for a moment that the courts should legislate. For give me if I have not made myself clear. My suggestion has been simply this. Let me try to put it, a little more clearly. The fundamental rights to property, to freedom of expression to individual liberty personal liberty etc. are subject, as I said, to reasonable restrictions in the public interest. The question of what restriction is reasonable and what is in the public interest is a question to be answered not in the abstract, not in the vacuum but by reference to the conditions prevailing in the society at a given point of time. So, when a law is declared by the Supreme Court to constitute a reasonable restriction in the public interest, it is not legislation but it is discharging ther duty under the Constitution, of deciding whether the constitutional limits have been transgressed.

With great respect of Shri Kunte, I am inclined to think that it is not a right conception of the judicial function, when a law is declared valid or void, that it is legislation. It simply happens here as in all other countries such as the USA, the UK or France or Germany that the courts are entitled to declare whether certain limitations on the legislative powers have been transgressed or not.

**Shri Kunte:** I was on the very narrow point of whittling the right one way or the other, and whittling the right one way or the other would really mean a sort of legislation and bring in the question of its reasonableness or otherwise. Would you like to suggest that the members of the legislature who are from and among the people and who mix more with the people than the judges are in a lesser position to understand the mind and the mood of the people than the judges and therefore the judges should whittle down or do it by constructive legislation?

**Shri Palkhivala:** I think the hon. Member will no doubt agree with me that when any representative of the people says that this is his thinking, then (a) it might be his thinking and not on that particular issue, the thinking of the electorate, and (b) assuming that it is the thinking

of his electorate, it is not necessarily the thinking of the country at large. Now, there is no infallibility in political opinions. Someone said the other day that high public office carried with it the occupational hazard of a sense of infallibility. I think the basic thing in a democracy is to realise that no one is infallible, no views are infallible. Therefore, while I concede that a particular hon. Member may have a certain view on fundamental rights which he honestly holds and which I shall assume are right, his views may not be shared by the others; in other words, others might be wrong-headed enough not to share his right views. Let us look at it in the abstract. How does a man become infallible? After all, I am not going into politics, but I am only stating the objective facts. You have had for so many years a particular party in power which does not represent the majority of the electorate. And yet it had an absolute majority in Parliament. Suppose such a party were introduce a Bill and suppose it were to carry it out honestly thinking that it is for the good of the country, is it right to say that that is the wish of the electorate? The electorate, if they were asked, would say 'we never by a majority returned this party to power'. In a country where there is no proportional representation and where you can have a party in absolute majority without having carried the majority votes of the total electorate if such a party introduces a Bill and passes it into law, is it right to say that that is the wish of the majority of the people?

**Shri Kunte:** You were pleased to refer to the Supreme Court judgment wherein they have made a reference to the possible creation of a Constituent Assembly. Do I take it that that would be a better way of amending the Constitution or the fundamental rights, according to you?

**Shri Palkhivala:** According to me, the best way would be to wait and consider. If that view is rejected and someone says 'No, I must take action immediately' and his view prevails which, with the greatest respect, I do not subscribe to namely that prompt action is needed, then I would say....

**Shri Kunte:** My question is this. Even after two years should Parliament amend or should the amendment come through the Constituent Assembly?

**Shri Palkivala:** I would rather have a constituent assembly where you have people in whose integrity, vision and farsightedness you have confidence. You elect them to the constituent assembly and let them consider this question. I would say it would certainly be a preferable line of action.

**Shri Kunte:** Taking elections as they are, would it not also happen that the constituent assembly would be elected on a minority vote?

**Shri Palkhivala:** It is possible. I am not claiming for my point of view infallibility, and all that I am begging of you is not to claim that for your point of view. In other words, there are these various considerations. After all, the constituent assembly may not represent the majority wishes of the people. That is perfectly conceivable. Similarly, even if a Bill is passed through Parliament with the consensus of opinion of all political parties, believe me it may still not express the majority view of the countrymen as it would if you have a referendum. Therefore, those possibilities I fully appreciate and it is precisely because of the extraordinarily complex issues involved that I was suggesting that we may give ourselves a little time.

**Shri Kunte:** For the sake of argument we agree that time be given, therefore it need not be reiterated.

If the new constituent assembly which is being contemplated is allowed merely to pass any constitutional

amendment by a mere majority vote, don't you think that it will be given more unlimited powers than are laid down in the present Constitution whereby a constitutional amendment has to, first of all, get a two-third majority and later has to be ratified by more than half the States?

**Shri Palkhivala:** I have to be frank because otherwise I am really wasting your time. In the mater of jurisprudence, in a matter which involves the entire development of the constitution of the country, numbers by themselves do not count. You can have a certain point of view shared by only 10 men in the country on an issue like this which may still be the right point of view. You can have a point of view. which the large masses share on a matter like this, and yet in the last analysis it may not be the right point of view. When the Nazis were in power, they had a majority, theirs was the majority point of view. I am only giving an example how political developments throw up theories which may be shared by the majority but may not be the right theories. I am only pointing out that on a matter of this fundamental importance, it is not as if the masses can decide the development of constitutional jurisprudence. The people who are equipped to conceive of the future development, the dangers, the hazards facing the country, are perhaps the people better qualified than the people who merely would vote on a issue like this on political considerations. So, I do not think numbers count here. If a matter of this importance went to a body where people of the highest quality were selected by the hon. members of Parliament, and they applied their mind, I would have more confidence in that particular decision than in a decision reached by mere numbers.

**Shri Kunte:** A reference was made to France. Do we not find that the Third Republic gave room to the Fourth Republic and now we have the Fifth Republic which has really changed the structure and constitution of France? Has it not in a way created an abridgment of the rights enjoyed by the French public?

**Shri Palkhivala:** What the hon. member says frankly I think does support my point of view that just as fashions come and go in clothes, so also ideas come and go in political thinking. One view is held to be right, it is exploded after 30 years. You have socio-economic doctrines created, discussed, exploded, substituted etc. In France this process of trial and error has gone on. No doubt we shall cover the same process of trial and error, but what I find a little difficult to understand in our country is the extreme haste with which the process is sought to be accelerated. In matters of this importance I am only pointing out that no doubt after considering this matter you may through a process of trial and error, come to certain conclusions, but to say that because a certain number of people hold a certain view that in the view of the majority of the nation, I think, would not be a right inference.

**Shri Kunte:** I am afraid, I want to know whether my fear is justified, that my friend is trying to read something more in Shri Nath Pai's Bill, because he seems to be afraid that immediately certain legislation abridging fundamental rights would be undertaken, but Shri Nath Pai only wants to clarify the position as to who can amend the Constitution.

**Shri Palkhivala:** So far as Mr. Nath Pai is concerned, I have such respect for his transparent honesty and intellectual integrity that I do not believe for a moment that he would say one thing and actually have something else at the back of his mind. I have no doubt that the object of the mover of this Bill is nothing other than to clarify what he regards as the correct constitutional position, and if under the law of the

country as laid down today it is not the correct position, let it be declared to be the correct position. That is the only object of the Bill. But once the Bill is passed, it is not within the power of the mover to decide the future evolution of constitutional law as a result of the Bill. He goes out of the picture and political forces are in the saddle. And looking around the country, with my limited insight, I am inclined to think that, though the object of the mover is laudable, he would be the last man to tinker with the basic rights like freedom of expression etc., but this may be frustrated in the years to come by the people who work out the consequences of this Bill.

**Shri Kunte:** Do I understand that you feel that though the mover is honest enough, he is going on a wrong judgment and creating dangerous situations?

**Shri Palkhivala:** It would be presumptuous on my part to pit my judgment against that of such an experienced public figure as the mover of the Bill. All that I can say is that I am convinced in my own mind beyond a shadow of a doubt that we would be well advised to give ourselves time over a measure of the most far-reaching importance.

**Shri Kunte:** If it were suggested that in addition to the present procedure provided under the Constitution, such constitutional amendment should also go to the country for a referendum wherein unles a clear 51% or more vote is obtained in favour of the amendment, the amendment should not form part of the Constitution, would it help meet the difficulty that you are envisaging?

**Shri Palkhivala:** If a referendum were made—let me make it clear that I am not in favour of a present referendum because as I have said there are so many pressing problems facing the country that I do not think we should fritter away our energies on a matter of this sort just now, but assuming for the sake of argument that you did want to make a decision here and now—if any one wants to speak in the name of the people, he would be better fortified it there had been a referendum by which the views of the people were ascertained, because I have a feeling, I may be wrong because I am not an expert in reading the public mind, that if the implications of the fundamental rights were explained to the people in simple language, the language which they understand and they were told the pros and cons, they would decide that it is worthwhile to live with the fundamental rights that they have, with the devil that they know, rather than with the fundamental rights which they do not know, the devil that they don't know.

**Shri K. Chandrasekharan:** In your view, does the term 'law' in article 13(2) include a constitutional amendment also?

**Shri Palkhivala:** Yes.

**Shri K. Chandrasekharan:** Would you think that article 13(2) is the over-riding provision in the Constitution?

**Shri Palkhivala:** I would not say say that. Articles 13(1) and 13(2) have to be read together.

**Shri K. Chandrasekharan:** Do you think that any law initiated or action taken or order passed under articles 358 and 359 against the provisions of Part III would stand in spite of the provisions contained in article 13(2)?

**Shri Palkhivala:** Yes, because article 58 is the exception to the fundamental rights.

**Shri K. Chandrasekharan:** You believe article 358 is the only exception to the fundamental rights?

**Shri Palkhivala:** I would not say that. There are various other exceptions for the Armed Forces, etc.

**Shri Jairamdas Daulatram:** How do you say it is an exception to fundamental rights when Part III itself provides for that?

**Shri Palkhivala:** In the legal sense, you are quite right. The word 'exception' is wrong. Proviso is a better word.

**Shri K. Chandrasekharan:** Do you think under article 368 Parliament can pass a law amending the provisions contained in Part III so as to restrict the fundamental rights?

**Shri Palkhivala:** Not under article 358.

**Shri K. Chandrasekharan:** As the provisions of the Constitution stand now, you think there is no provision at all which enables Parliament to restrict fundamental rights by way of constitutional amendment?

**Shri Palkhivala:** That is right.

**Shri K. Chandrasekharan:** You said that the Constituent Assembly will be a better forum than Parliament for the purpose of amending he provisions of Part III by restricting them?

**Shri Palkhivala:** By that I did not mean a Constituent Assembly consisting of individuals other than Members of Parliament. What I mean is, this issue requires a detached, concentrated, single-minded attention, which things being what they are, Parliament, however well-intentioned, cannot possibly bestow on this Bill.

**Shri K. Chandrasekharan:** Can a Constituent Assembly consisting of members of both Houses of Parliament be formed for amending the Constitution?

**Shri Palkhivala:** I will not pretend that I have examined all the possible pros and cons of the formation of a Constituent Assembly. So, I am not in a position to express any definite opinion. But I would say tentatively that it should be possible for Parliament to evolve a procedure by which a separate body—call it Constituent Assembly or any other name—would be established, which would look after this question that is agitating our minds today.

**Shri K. Chandrasekharan:** You referred to the question of disrespect to the Supreme Court. Do you think the provisions contained in article 31B and Ninth Schedule have in any way placed the Supreme Court in any disrespectful position because they are directly against the Supreme Court judgments?

**Shri Palkhivala:** I would not say that. I do not suggest for a moment that every time you are legislating to supersede a Supreme Court or High Court judgment, you are showing disrespect to the court. It is perfectly within your right to do so. In fact, you will be failing in your duty if you do not supersede a judgment which lays down something which you think is not in the interests of the country. But I am only confining my remark to an issue of this magnitude. Having regard to the repercussions involved, I am suggesting that it would not be respectful within a few months to have a Bill introduced which would supersede the judgment.

**Shri K. Chandrasekharan:** I appreciate the distinction you made with regard to property rights and rights with regard to freedom of speech, etc. With regard to property rights, I believe an urgent situation has arisen on account of the fact that land reform legislation cannot be implemented in any of the States except by an amendment to the Ninth Schedule. That is not possible by virtue of the Supreme Court judgment. Do you believe that there is a state of urgency so far as implementation of land reforms legislation is concerned?

**Shri Palkhivala:** If your major premise were right, *viz.*, under the

Constitution as it stands today, agrarian reform cannot be achieved, I would whole-heartedly agree with you that fundamental rights should be abridged. But I am confident that one can satisfy any open-minded person that under the law as it stands today, any agrarian reform you have in mind can be implemented. In other words, the fundamental right with regard to property has already been abridged; that abridgement stands, under which all the agrarian reforms you have in mind can be implemented. Frankly, the necessity is not that of more legislation, but of implementing the existing legislation.

**Shri K. Chandrasekharan:** You referred to the law laid down by the Supreme Court judgment. Let me put it to you that the law laid down under article 141 will yet be subject to Parliament's legislative powers. What is your view?

**Shri Palkhivala:** That is correct.

**Shri Nath Pai:** I would first apologise to the Committee because I reached late. The Committee should show its usual indulgence, because unexpectedly a very large body of Kashmiri pandits came in and it would not have been proper for me to tell them that I have a committee and I have to go. I tried to give a hint, but they wanted to tell their distressing and agonising story. Therefore, I was held up and I apologise to the Committee and to Mr. Palkhivala.

You, Mr. Palkhivala, have been very kind in your references to me and I thank you for that. I will put a few questions which your testimony before us raises. Yours is a very brilliant exposition on a very wrong assumption. The lucidity, eloquence and sincerity with which you spoke convinces us that what has been a gain for the High Court of Bombay has been a loss for Parliament. I personally hope that the hopes which at least a part of the electorate of Bombay were having will one day be fulfilled. We have seen today what a good liberal should be, because though your disagreement with us is so fundamental, you did not try to express it in the manner in which some other enthusiasts have tried to criticise me.

Before I put my question, I would like to mention a small fact to clear a lingering doubt in the mind of my hon. friend. He pertinently asked a question as to why at this particular time—he has in mind many disturbing things, occurrences and developments in the country—this is being brought. He thinks if at this time fundamental rights are abridged the whole fabric may begin to crumble. In the first place, if the origin of the Bill is known it will help you perhaps to reassess. There was no such thing as our wanting, in the first place, to abridge the fundamental rights. My record, as is the record of many of us here, has been one of resisting every single, even remotely, move on the part of the executive to curtail the fundamental rights. You may be interested in knowing that when the Eighteenth Amendment was moved, during the time of the first Prime Minister of India, providing indemnity for the acts of the executive under the emergency, it was the concerted attack only by a few of us which made Pandit Jawaharlal Nehru, who was a liberal of his time, when he has told that the effect of it may be like the Enabling Act, withdraw the Bill in the same afternoon.

How did this Bill come? I was lying in the hospital, in the famous Willingdon Nursing Home, with a heart attack. I was restrained from doing anything. This judgment was brought to me by a barrister friend. I read it. I was disturbed by it. I drafted many amendments and sent them to the Lok Sabha Secretariat. This was the one which accidentally won the first ballot and therefore this came to be moved. There was no such plan, as some critics have been indicating and insinuating, to abridge the fun-

demental rights. This was my reaction, lying in hospital, to the judgment of the Supreme Court, and being deprived of my basic duty of working in Parliament I was itching to do something. In that process I was trying to send to Parliament many notices, letters and questions. This was one of them.

I think you made a very brilliant exposition to the point of almost convincing some of us. But, as the Chairman said, may I say this that there is a basic conflict here in the judgment of the Supreme Court and one should venture to take a different view. Let us try to understand the issue. Some of us have a faith in the right judgment of our people. The Bill never talks of sovereignty of Parliament. The sovereignty is vested in the people of India. That sovereignty is to be exercised on behalf of the people of India by the chosen representatives of the people themselves. The Bill talks of supremacy in the field of legislation. I think, and a majority of us think, that Parliament is supreme in the field of legislation and the Supreme Court is supreme in the field of interpretation. We must respect the jurisdiction under the Constitution. We shall not seek to interpret and the Supreme Court should not seek to legislate.

We have not made sovereignty to Parliament. The origin of sovereignty, the repository of sovereignty is the people of India. We temporarily exercise it on their behalf because in the record of history the people seldom directly exercised their sovereignty. They elect their representatives and give them the mandate to exercise that sovereignty.

But this conflict that arises is this. We believe in the right judgment, though falteringly and fumblingly, of the people. You are against totalitarian tendencies. The basic conflict is that a small elite thinks to be above the people, that five judges know what is good for freedom better than the people themselves. This is actually the philosophy of a particular brand, a determined minority, a small leadership of five to seven who tell the people all the things. This philosophy has arisen. Then when the Supreme Court says that Parliament cannot be trusted they are distrusting basically the people themselves. In this famous judgment this alarming sentence appears that intrinsically the Parliament cannot be trusted. What they are expressing is a philosophy where they say that the people cannot be trusted. They say sliding towards totalitarianism must be resisted. I would not say this is totalitarianism, but this is a proclamation of faith in a small elite, a few learned and wise men. If there are parties whose ideology is that a small minority knows better you resist it, but you claim it for a few persons. If you deny it to a few political parties and you claim it for a few judges sitting in the Supreme Court, that they know better what is good for freedom, what is good for the good of the country, than the people themselves, I think this is underlying conflict I absolutely believe in the Jeffersonian tradition and have infinite faith in the people. He said there is no greater repository of a judgment with a nation than the fumbling, faltering judgment of the people themselves. Do you agree this is a conflict?

**Shri Palkhivala:** Thank you very much for a very clear elucidation of your point of view. So far as my views which have been expressed against this Bill are concerned, they do not proceed on the assumption either that the Supreme Court is the repository of wisdom in contradistinction to the people or that a group of wise men, which the Supreme Court judges may or may not be, can decide what the future development of the Constitution should be. I fully agree with you when you say that the ultimate test of a political creed is its capacity to hold its own in the market place. Let the

people by their collective voice ultimately uphold a certain point of view. They may be wrong, they may be right, but the truth will ultimately emerge as a result of free talk, freedom of voting and expression of views among the people.

While I fully appreciate and subscribe to your view that the last word must be with the people, what I am suggesting is only this that the effect of the Supreme Court judgment will be that these fundamental rights today will not be liable to be abridged by Parliament. Does it deny to Parliament its legitimate right in the field of legislation? Suppose, for the purpose of argument, this Bill is passed into law and you do not take action in pursuance of the Act and do not abridge any fundamental right, still there are parliamentary legislative limits, namely, that Parliament will have to work outside the limits regarding fundamental rights. If, therefore, the limits to Parliament's powers will remain even after the Bill is passed, after the Bill is passed Parliament must still respect the fundamental rights as they remain at a given point of time. If their limitations are clearly laid down in the Constitution itself, the Supreme Court has to say that Parliament cannot transgress those limits. Then would you be saying that there is a basic fallacy underlying this argument, namely, that the people who ultimately gave themselves the Constitution have reserved for themselves certain rights? No doubt, having selected representatives may perhaps be the right process of doing something to the Constitution which the Constituent Assembly has given. They may say we would not have so many rights, we will take something less or something more. Unfortunately, I did not have a chance of discussing this matter with Shri Nath Pai; I wish I had it. I fully appreciate what you said. Some sentences in the judgment many not be well-worded.

**Shri Nath Pai:** It says that it could not implicitly trust the representatives of the people; that is the philosophy running through the judgment. The representatives of the people are ill-educated, emotional, unbalanced, carried away by the moment, but a small body of people can be depended upon—yes, I admit, in the interpretation of law. This is what the Supreme Court is saying about the representatives of the people.

**Shri Palkhivala:** Your command of the language, if I may say so, is far superior to that of many judges, and the way you are able to correct—when I say "exception" you say it is "proviso"—show that you are able to comprehend the nuances of the words. While fully conceding that what you are saying has this merit, namely, that you want to uphold the sovereignty of the people and hon. Members have a wide vision—forget for the moment if an observation here or there in the judgment is not well considered or well-worded—I ask a basic question. Suppose there was no such observation, suppose the judgment has said that they have full confidence in the elected representatives of the people, but, after all, the people have to decide with regard to the framework of the Constitution, would you still say that you would be in favour of permitting the fundamental rights to be abridged?

**Shri A. N. Mulla:** Could you not relate these observations to the conclusions which they gave? Does it not indicate the line of reasoning which prompted them to come to this conclusion?

**Shri Palkhivala:** Shri Nath Pai told me that I have made my exposition on wrong analysis. It may be possible that the Supreme Court has come to the right conclusion with a wrong philosophy.

**Shri Nath Pai:** In the first place, it was neither in my mind nor in the minds of my hon. colleagues here that a Bill of this nature should come before Parliament. If it comes it will be judged on its merits. Now

I will link it up with your basic thinking. You asked: should a law be uncertain? It is a very important question. A law should not be uncertain. That is what you said earlier. I submit to you that we are not doing anything to unsettle law. We are trying to get a kind of certain degree of permanence to the Constitution of India. As a brilliant scholar of law—you did not like the word "jurist" but this is a term which you cannot resist, even though you want to be humble—you know in England it used to be said that equity changes according to the length of the shoes of the Lord Chancellor. Will the rights of the people of India be changing according to who happens to be the Chief Justice of India? Or, shall we give a degree of certitude and permanence to the rights of the people of India? Will it be good if we have a position where if it is Justice Kanya I have one right, if it is Justice Gajendragadkar I have another right and if it is Justice Subba Rao a third right? Is it not a dangerous thing? Who has introduced this uncertain element regarding the rights of the people of India? It is the reading of an individual. It is not the conviction of the people. You quoted Justice Holmes with great reverence. Shall I also quote him, though I do not pretend to be as versatile? He said "the Constitution of a nation is not what the judges say; it is what the people want it to be". I want to ask: who introduced the uncertain link in this? Till the 26th of February 1967 I knew my fundamental rights as a citizen, as an Indian. It was decided by the Constitution, confirmed by the interpretation of the Supreme Court, not once but twice, once by unanimity and the second time by a preponderance of votes; these were the judgements in Sajjan Singh and Sankari Prasad where they said that Parliament has the power; that is the law of India, the law as written and interpreted. Who changed it suddenly? Who changed the Constitution of India? Did we light-heartedly change the Constitution or is it the Supreme Court? I do not say light-heartedly but by a dangerous majority of 6 against 5 the Supreme Court changed the whole picture of the law. We are not unsettling the law. We are trying to resuscitate the law, as it stood on the 26th February. Do you agree with me that my declaratory amendment is not for unsettling the law but to give back to the people of India the Constitution which was there even according to two judgments of the Supreme Court? May I know your reaction to this submission of mine?

**Shri Palkhivala:** My answer, with great respect, is this. You are right in saying that this judgment of the Supreme Court has unsettled the law, as it was understood before this judgment came. Therefore, if any unsettling is done, the question was, should the blame be at the doors of Parliament or the judiciary. I follow that question. I concede straightway that this judgment does give a new direction to the thinking which has prevailed for seventeen years. But may I point out, not with a view to bandying words but merely with a view to clarify my own point, that this is not the effect of the Supreme Court judgment? You rightly say that you do not want your basic right to be changed by one judge as compared to another. In other words, your basic rights cannot change whether they come from Justice A or Justice B. But may I point out that the whole effect of the Supreme Court judgement is precisely what you want in the fie'd of political activity. They do not want the basic rights of the people to change from one politician to another. They do not want the basic fundamental rights of the people to be X if A party is in power and Y if B party is in power. Therefore, the judgment will have the effect of giving some stability to the fundamental rights, so as not to make them change from party to party. When one party is in power for years you may say there is some stability. I personally like change. I want free

play of different political forces, not a monolithic force round one party. The point is, just as stability is needed in judicial interpretation, a *fortiori* it is needed in fundamental rights, and the whole effect of the judgement is to give that degree of stability in fundamental rights which will make it not vary from party to party. Otherwise, whenever a fresh Parliament is elected, if one carries this to its logical conclusion, under different parties people will have different fundamental rights. Therefore, while I fully concede the force of your remark, namely, that the Supreme Court has taken a different view and, to that extent, it has unsettled the law, once the unsettled law can continue for a while it will result in stability of the fundamental rights.

**Shri Nath Pai:** I hope you are aware of Bacon's dictum for a judge. A judge shall interpret but shall not legislate. I will now invite your attention to another aspect. Besides the fundamental rights, there are some other clauses of the Constitution which, you would readily agree with me, are equally important. According to the present decision of the Supreme Court the only thing which Parliament under article 368 is not empowered, is incompetent to touch is those rights which are adumbrated in Part III of the Constitution. Since we believe in fundamental rights, the existence of a strong, independent and objective Supreme Court is more important. I hope you agree with me there.

**Shri Palkhivala:** Yes.

**Shri Nath Pai:** Article 124, which relates to the Supreme Court, is not an entrenched law. It simply says:

> "There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges."

We provided more judges because we want an independent judiciary which will discharge its duties. See the funny situation. Article 124, which creates the Supreme Court, the guardian of the rights of the people, that article can be changed by us by an ordinary process, but we cannot do it in the case of fundamental rights. You can see the anomaly I am pointing out. The Supreme Court says that these rights shall not be touched by Parliament. But here is a far more important right, the right to have a judiciary, which is very very important because ultimately all the rights must be upheld by the judiciary, which can be changed by Parliament. We can change the very existence of the judiciary. But have we done it? Are we likely to do it? No. You said that Parliament cannot create a monarchry by law. The *London Times* wrote a brilliant article which said that Parliament can make a law saying that all babies born with blue eyes shall be drowned in the Thames. But, though this is the law, it cannot be done.

Why do we not do away with the Supreme Court or establish a monarchy? Legally and constitutionally it is feasible, but realistically it is impossible because the ultimate sanction is the people of India and their visions. If the people of India become so plient as to allow or give Parliament a majority which will abrogate their fundamental rights, freedom is already destroyed, not in Parliament but because freedom has decomposed in the minds of our people. Liberty and rights are not preserved by bodies but their ultimate temple is the awakened faith in the hearts of the people. It is a little philosophical, not technical; but this is my abiding faith which has brought forward this Bill.

**Shri Palkhivala:** As to your question whether under article 124 Parliament can so affect the structure of the Supreme Court as to change its character, may I point out that one of the fundamental rights is article 32 and article 32 is the fundamental right to move the Supreme Court for the enforcement of various rights.

Therefore, that right to move the Supreme Court being itself a fundamental right, if the Supreme Court judgment is right, it would not be open to change the character or structure of that right so as to undermine the judicial dignity which we all know today. Therefore the Supreme Court must stand; otherwise, where will people go to enforce their rights?

Then, you are quite right in saying that ultimately the guarantee of liberty and rights etc. is the quality of the people and their representatives. But may I point out, again without meaning to flatter you, that for every one liberal that you have and for every one of your intellectual capacity, there are several others, naturally, because these qualities of mind and heart are not shared by everybody; it is a rare quality. Just as you would not let the Supreme Court dictate what the rights should be, likewise, to your way of thinking—you know the political situation very well—would it not be better that we have that stability at least for the time being for the fundamental rights which does not derogate from the people's sovereignty or the people's right to do what they want. As I understand the Supreme Court judgment, it merely comes to this that the people having reserved to themselves certain rights and they shall not be changed.

If I might put just one plain question in all humility to you, would you regard the political development of this country being jeopardised if the fundamental rights, at least for the time being, remain what they are? Even assuming your point of view of the Parliament's right is correct and mine wrong, which possibility I do envisage because I do not regard myself as infallible in this matter, I am just appealing to you, because I think much will depend on you and if I get your support I have won the battle, whether you will find it convenient to let this matter of far-reaching importance be placed before you and I will give you a detailed memorandum on what I regard the position. I know, if you are intellectually convinced, nothing will shake you one way or the other. But if you are intellectually convinced, that this matter needs a little consideration, may I appeal to you that Parliament is still young; it has some years to go and that you may take up this question at a later date in the life of this very Parliament if you are satisfied on the facts and submissions that there is a case for giving some fresh reconsideration? I fully appreciate your reaction to some of the sentences in the Supreme Court judgment, but I am appealing to you to test the validity of the conclusion on its own without reference to what you have rightly called the political philosophy behind it. I do not think the Supreme Court judgment is any affront to the people in the sense that it does not mean that the people cannot change it; on the contrary, the Supreme Court itself suggests that the Constituent Assembly may possibly be a way out. So, they have not said that the people cannot do it; they have only said that this is not the way in which it can be done.

**Shri Nath Pai:** May I say that what moved me to bring forward this was a desire to promote a healthy debate in the country. Democracy without discussion, without debate, without dissent is not thinkable to me. One of the tragedies of India has been that there is a tendency to pontificate either for judges or for politicians. There is hardly a major debate. Somebody says that there shall not be an atom bomb and the matter ends there; there is not even a debate on such a matter of life and death. This is, as you say, a most far-reaching subject but there was hardly any worth while major debate in the universities or the bar associations. The apathy is so great. The Bill has done the great service of provoking opinion which was otherwise acquiescing in a new position. I think, it was important. I am not in the least interested whether it is passed or not. But I

wanted to provoke a debate and assert my view. I think, I am right but I always recognise the possibility that those who disagree with me may be right too. That haunts me always. This is the general approach of most of us.

Now, coming to my question, do you not think that Parts III and IV are a coherent, composite scheme of things? Suppose, there is a conflict between the Directive Principles and the Fundamental Rights, what are we supposed to do? Shall rights prevail or shall duties do so? The Supreme Court has avoided this issue by answering that there will never be a conflict between the duties under the Directive Principles and the rights under Fundamental Rights. I think, this is wrong. The amendment came because there was a conflict between the rights and the Directive Principles. I, therefore, want to know from you as to what should be the duty of Parliament when the Directive Principles are crying for implementation and sometimes some of the Fundamental Rights come in the way. I want the freedom of speech to be even more. I want the freedom of association, the freedom of the press, freedom of thought and the vigilance of the people. I think, this country enjoys greater freedom than many older countries in the world. The testimony of that is the respect and deference with which we sought you and want to be helped and enlightened by you. What do we do? Shall we again behave as we did in the past? Shall we say, like the Manusmriti, they shall not be touched? The Manusmriti became a great stumbling block. I think, the Manusmriti ought to have been amended long back and India would never have been conquered by petty little nations; but it was not. Therefore, let us learn from that. I want to know what your attitude is.

Then, my hon. friend opposite thinks that he has the right to gherao. He thinks that it is fundamental, basic right to fight against inequality and injustice and to remove this by peaceful demonstration. Is there a right to gherao? Is it not a fundamental right of the employee, who is denied equity, to protest in this way?

So, what is your reaction to gherao, to the conflict between the Directive Principles and Fundamental Rights and Manusmriti being untouchable, that is, it must be sacrosanct? I very much appreciate what you say and the spirit in which you say it. Let me assure you on behalf of all of us that so far as your fear that nothing must be done which may curtail the liberty of our people is concerned; we share your anxiety in full measure and shall do all that vigilance can do. I have done.

**Shri Palkhivala:** Thank you.

As to whether Parts III and IV go together and they have to be read in harmony, I have just two things to say. Firstly, we have worked the Constitution for 17 years. Our cherished goals have been the same all along though with varying degrees of success we have tried to implement them. Wherever the Fundamental Rights were found to be too wide to admit of the Directive Principles being accomplished, we have abridged already the Fundamental Rights. May I appeal to you to give a trial for such period as you think right to this particular point of view which has been placed before the country, namely, try and work your Fundamental Rights in such a way—and the belief is that you can—that you can give effect to the Directive Principles of State Policy?

**Shri Nath Pai:** Would there be any harm in trying it that way? Do you want to do away with Part III?

**Shri Palkhivala:** There are two points: Firstly, you have got the experience of 17 years. Secondly, it is necessary to give it a period of trial. This is what I have in mind. To me personally, the right to move

out freely of my house, my office, is more valuable than all the amenities which any welfare State can possibly give me. I would rather starve if I am a free man and can go about rather than be dominated and dictated by 200 people surrounding my house. Suppose, that party which believes in 'gheraos' today comes into power in a particular State, the Criminal law can be amended.

I know, Sir, what you feel. Your views are known to me. I have been closely following all your teachings and all your philosophy. What I say is: can you conceive with equanimity a situation when in any particular State people who believe in 'gherao' will amend the Criminal law, and say all right 'gherao' will be legal. When the fundamental rights there, they are not only for Parliament, they are for each State legislature. Once the Indian Panel Code is amended no Court can decide that 'gherao' is an illegitimate weapon of industrial battle. I think 'gherao' is the most opposite example of what importance is to be attached to fundamental rights.

**Shri Jairamdas Daulatram:** I appreciate the sincerety and clarity with which you have expressed your views. My question really is in a different direction. On the assumption that the Select Committee and the Parliament passes or wants to pass the Bill as proposed by Mr. Nath Pai, are there any safeguards which are, in your view, to prevent hasty legislation to breach the fundamental rights, whether at the Parliamentary level or at the State level or any other level? What are the various suggestions which you can make to prevent hasty legislation or wrong legislation, ill-considered legislation and ensure that minimum harm from your point of view is done in case after the passing of this Bill fundamental rights come up for amendment. In this matter possibly I have taken you in a direction for which you may not have been prepared.

**Shri Palkhivala:** I must confess, Sir, frankly that I have not applied my mind to the question which you have raised and which question would undoubtedly become relative at the very time the Bill is passed.

**Shri Jairamdas Daulatram:** Not after the Bill is passed but when the Bill is being considered.

**Mr. Chairman:** When the final shape is given to the Bill.

**Shri Palkhivala:** Yes, when the final shape is given to the Bill.

**Shri Nath Pai:** As the Chairman said yesterday, the consensus was that we want as many jurists as possible to come here and give us the honour of their views in the matter. Previously, it was intended to give our report to the Lok Sabha on the 1st day of the next session, *i.e.* on the 13th. But now we have agreed that discussion should continue till the last day of the next session, *i.e.* up to the 22nd of December, so that we can have the benefit of views, particularly of jurists and scholars like you.

**Shri Jairamdas Daulatram:** In this context, I would urge you to consider the desirability or necessity of having different provisions relating to different sections of Chapter III because some rights are which all citizens must enjoy; there are other rights which are given to sections of people, etc. Our nation is a very composite nation. I would like to have your views as to the various safeguards which can prevent hasty legislation.

**Shri Palkhivala:** I would request you to give me a little more time. I will give a memorandum on this.

**Shri A. P. Chatterjee:** I would not bother you about political questions on which, I think, we are as different as poles as under. But I would ask you this: You have stated that you are not against power being given to Parliament even to amend fundamental rights. But you are against

this power being given to Parliament at the present moment.

**Shri Palkhivala:** I think the correct presentation of my point of view would be, if I may put it in my own words, that I am against the power to amend the fundamental rights being given; but I am not saying that this is a rule which must hold good for eternity. I can only say that looking around, I have no doubt in my mind that it is undesirable to have this amendment of the Constitution today. But kindly do not take me as saying it is politically expedient or it is constitutionally possible for Parliament to have the power at some other date to amend the fundamental rights.

**Shri Jairamdas Daulatram:** There is probably some misunderstanding. Under the Constitution, the Parliament has some power to amend the Constitution but not to amend in the direction of abridging the fundamental rights. The Parliament can amend Chapter III; it may enlarge it. Here, we should be clear that the intention of the Constitution makers was that the fundamental rights must not be abridged or taken away. The Parliament can amend the Chapter III but cannot abridge the fundamental rights.

**Shri Palkhivala:** I always use it in the sense of abridging the fundamental rights.

**Shri A. P. Chatterjee:** You have said that the present moment is inopportune for such a Bill as this because, as you have said, there are tremendous divergences in the different ideologies and you have said that pressures and counter-pressures may be brought to bear on Parliament. May I take it that the people in India are now in a state of flux as far as ideologies are concerned, as far as opinions are concerned and, therefore, you take this moment as inopportune for such a Bill like this?

**Shri Palkhivala:** Yes, Sir. This is on of my points of objections to the Bill.

**Shri A. P. Chatterjee:** Don't you think that when the people are in a mood to change the whole order in order to give place to new, the people are in the most creative of moods in their history?

**Shri Palkhivala:** Creative or destructive; it may be one or the other.

**Shri A. P. Chatterjee:** You also agree that no creation is possible unless there is destruction of the rubbish and the weeds?

**Shri Palkhivala:** I think, creation is possible without destruction.

**Shri A. P. Chatterjee:** Do you agree or not that at the present moment when the people of India are now grappling with different ideologies, so much so that they have toppled down the monolithic party system in many of the States, this is a situation in the country where the people are in the best of moods for accepting or rejecting what is best and what is worse for them?

**Shri Palkhivala:** I am inclined to think that this may be the moment creating a new order. But many steps may be taken which may be difficult to retrace. I think, the statesmanship would lie in rejecting what may be of dubious consequences and in accepting what is of certain benefit. Therefore, while I agree that at a time like this, when regimes have been toppled in different States, it is good to perform something new, I also think that this is also an excellent time to agree upon certain basic principles which will hold the country together because, as I see it, there is a definite risk of the Constitution and the unity of the country being peopardised. That is my—I speak for myself as a citizen—there should be some common basic rights on which all parties would be agreed.

**Shri A. P. Chatterjee:** You have seen the Preamble of the Constitution on which also the Judges in the Golak Nath case have also placed

some relevance. That Preamble is that we, the people of India have given to ourselves this Constitution and these Fundamental Rights. It is apparent from what you say that the people of India have woken up for good or for evil—I say, for good and you say, for evil....

**Shri Palkhivala:** I don't say, for evil.

**Shri A. P. Chatterjee:** If the people who have woken up now begin to think that Part III of the Fundamental Rights requires to be drastically amended, will you deny that right to the people by those rights the judgment itself swears?

**Shri Palkhivala:** If I may say so, without any disrespect, I think, there is perhaps a tendency for a man in public life to identify his own personal views with the views of the people. Sometimes, identification may be right; sometimes, it may wrong. I can understand if there is a public clamour for giving Parliament to abridge Fundamental Rights. I am not aware of any such public clamour.

**Shri A. P. Chatterjee:** You have not followed my question. It is not a question of public clamour or public opinion. What I am putting to you is this. Supposing the people of India want to drastically amend Part III of the Fundamental Rights, by public opinion or whatever it is, would you or would you not concede to the people's right to amend Part III of the Fundamental Rights?

**Shri Palkhivala.** I would. If the people unitedly say, "we do not want any Fundamental Rights", I think, it is the right of the people.

**Shri A. P. Chatterjee:** I have not said that they deny themselves the entire gamut of fundamental rights; they have the right to drastically restrict the fundamental rights.

**Shri Palkhivala:** Yes.

**Shri A. P. Chatterjee:** Would you tell this Committee how the people could in their woken-up mood express their opinion upon any part of the Constitution or upon the necessity to amend any part of the Constitution apart from. What you have said about the referendum and the constituent assembly? Have you any further suggestions to make?

**Shri Palkhivala:** Apart from the constituent assembly and the referendum I do not know how in this country, with the present degree of illiteracy, it could be done. Mr. Nath Pai said that there is a somewhat dormant public reaction. You could possibly understand what public opinion is. The referendum, the constituent assembly and the general discussion, the open debate, etc. are the only ways by which you can possibly understand what the public feeling about fundamental rights is.

**Shri A. P. Chatterjee:** Would you or would you not agree that certain Judges sitting in their ivory tower of legal luminary would reflect the public opinion more than the Members of Parliament who are so to say the conduits of public opinion through which public opinion is, does and can influence the administration of the State.

**Shri Palkhivala:** The very fact that loyalties shift and change within the houses of legislatures, members crossing the floor, persons elected in one election getting defeated in another election, shows that this kind of somewhat a definite public opinion on which you could put your finger is perhaps non-existent. I think, it is right to say that there are fluctuating views and points of views, etc. and the liberals understand that there may be a truth in all the different points of view. But I would not subscribe to the theory that if a particular person is elected from a certain constituency, what he says is necessarily the public opinion even in that constituency. I would only say that he is to be listened with respect

because he is elected by the people and, possibly, is more right than a Judge—that I concede—but I would not lay it down a necessary rule that he is bound to be right.

**Shri A. P. Chatterjee:** Relatively speaking, the Parliament with representatives of the people elected by an adult suffrage would be more responsive to and would be more reflecting public opinion than a number of Judges who have no such contact with the people.

**Shri Palkhivala:** May I say that the Supreme Court judgment was not a judgment on what public opinion is? The Supreme Court judgment was a judgment on what the Constitution says. I think, there may be a little confusion of that. The Supreme Court judgment does not purport to say that the people of India want this and, therefore, they decided this way. The Supreme Court judgment merely says, "We have a written Constitution; we have looked at it and we find this is the right construction." Therefore, the question of public opinion coinciding or not coinciding with the judgment does not arise. All that one can say is that the Supreme Court judgment has put a particular interpretation on the Constitution. But that would be different from saying that the judgment must reflect the public opinion. No judgment need reflect the public opinion. I quite agree that the public opinion will mould and fashion the judgment this way that the public opinion decides what is a reasonable restriction in the public interest. To some extent, therefore, a Judge will have to take the normal thinking into account in deciding whether a particular piece of legislation is right or wrong. To that extent, the public opinion goes to mould the judgment but not in a matter of the construction of the Constitution.

**Shri A. P. Chatterjee:** As far as the legal side of the judgment is concerned, I will come to it later. I was only highlighting your point of view whether at the present moment this Bill, which is now under our consideration, would be conducive to public interest or not. I think that your opinion was that the Supreme Court judgment, whether consciously or unconsciously, reflects public opinion and interest more than what this Bill which we are now considering does.

**Shri Palkhivala:** No. I have only said this, and I do say, that if a referendum were taken today, for example, and the people were asked to say, each one having a vote, as to whether he wanted this chapter on fundamental rights to remain and if the pros and cons were explained to them in the language in which they understand, I have a feeling that the majority would vote for continuing the fundamental rights.

**Shri A. P. Chatterjee:** That is your feeling. Therefore, you are not sure that as far as the Supreme Court's judgment is concerned, that necessarily reflects public opinion.

**Shri Palkhivala:** In fact, I would not say that the Supreme Court judgment is right or wrong according as it reflects or does not reflect public opinion.

**Shri A. P. Chatterjee:** Therefore, the Bill of Mr. Nath Pai, which is now for consideration before us, may be best conducive to public interest and may be reflecting public opinion. In any case, you are not sure either way.

**Shri Palkhivala:** No one can be sure. First of all, half the nation would not be even aware that such an issue has to be decided; of the other half which is aware of that, half would not have the requisite equipment and knowledge to understand. But the point is that in a properly organized democracy, the wider the spread of knowledge and understanding of the problems and the more active part people take in general discussion, the greater are the chances of politicians arriving at the truth. That theory, I subscribe to.

**Shri A. P. Chatterjee:** You have also said that this Bill which is for our consideration is not urgent and that it can wait for some time.

**Shri Palkhivala:** Yes.

**Shri A. P. Chatterjee:** The Bill, which is now for our consideration, does not immediately restrict or amend the fundamental rights or amend Part III of the Constitution, but this Bill only seeks to give the power to Parliament. What the Supreme Court judgment has, in effect, done is to take away the power to amend Part III of the Constitution from Parliament. Do you think that taking away of the power of the supreme legislative body is of such an urgent one that it cannot brook a moment's delay, but the Parliament must look into it and try to find out whether it can or should or should not tolerate this state of things—I mean, the absence of power which has been predicated by the judgment....

**Shri Palkhivala:** I think, it really brings me to a crucial point which perhaps I should have touched in my opening remarks myself. The real question is this. If you did not pass the Bill today, you can pass it in any other year. But if you pass it today and afterwards you find that it works somewhat disastrously, assuming that it happens in certain States at least, then to retrace your steps would be impossible. In other words, to undo what the Supreme Court has done is always within your power, but once you have taken the step, to undo that step would be politically impossible. I cannot conceive of any subsequent Parliament saying that Parliament shall not have the right to abridge the fundamental rights. Today it is within your power, but your decision, once made, will become irrevocable. This is a tremendous responsibility. Having regard to that responsibility, I am at least clear in my mind that there is no such urgency that this responsibility should be discharged in the way as suggested by the Bill. In short, you have two foxes sitting on the wall of the well and one of them just jumps and the other thinks that it would be impossible for him to get out once he jumps and, therefore, he decides that he would wait and consider before jumping into it. In other words, it is not an ordinary type of measure which you can change by passing another law, etc. This is practically an irrevocable measure and that is the great significance of this Bill. As I said, I am not going to thrust my views against yours. You are better judges of what is public opinion. I can only say that I am so overpowered by the tremendous responsibility you are taking upon yourselves that I am only asking you to give yourselves, in fairness to yourselves and also to the nation, some time. Suppose, for two years you do not pass this Bill—you yourself say that you will not amend the fundamental rights—and after two years when you have analysed the pros and cons—you will have to organize public opinion and see which way it goes—if you so decide what is the harm? Whereas if you decide now and later on find that it is harmful, then what will you do? Will you amend the Constitution again? Some hon. Member spoke about possible safeguards. If we find the safeguards to be inadequate, what will we do? What I am saying is this. Pitted against the lack of urgency is this consideration of overpowering responsibility of any one who amends the Constitution. I am inclined to think that there is no such urgency as to dictate an immediate decision.

**Shri A. P. Chatterjee:** I do not understand this. Do you think that the supreme legislative body of the country, which has been given the supreme responsibility of legislating for the entire country, will function better if it did not take upon itself heavy responsibilities? Do you mean to say that Parliament would work better if it is a sleeping body?

**Shri Palkhivala:** I think, Parliament would be doing a better service to

the nation if sometimes it took a little more time in the matter of laws it passes.

**Shri A. P. Chatterjee:** Am I to take it that, according to your view, Parliament would do good to the country if it hybernated a little now and then?

**Shri Palkhivala:** I think, there is a difference between hybernation and contemplation. I think, what is needed is a little more reflection, a little more contemplation, which is a state of active awakening; it is not a state of hybernation at all. I want all the minds to be alert and not hybernate and to apply themselves to problems and ultimately come to decisions.

**Shri A. P. Chatterjee:** You are so eloquent about culture, but you are not eloquent about the culture of the people. You said that collectively the people of India are foolish, but individually they are wise.

**Shri Palkhivala:** What I said was that we, Indians, are individually intelligent and collectively foolish.

**Shri A. P. Chatterjee:** You certainly include yourself in that. You are collectively foolish, but individually wise?

**Shri Palkhivala:** I did not say anything about myself.

**Shri A. P. Chatterjee:** What I put to you is this. As far as the question of legislating in regard to fundamental rights is concerned, would you or would you not be satisfied with the power being given to Parliament? No question at the present moment of the exercise of power arises. As Mr. Nath Pai said, the question of exercise of power does not arise at the moment. We only want to take the power to amend any part of the Constitution, including Part III. It is not wrong to have the giant's strength. It would be wrong only if we use it like a giant. It is the supreme legislative body of the country. Why do you not concede that it should have the giant's strength in order to legislate in regard to varying complex problems of the country?

**Shri Palkhivala:** If you were right, the whole chapter on fundamental rights should be absolutely deleted. The whole philosophy of having fundamental rights is that men are liable to err—all men, judges, lawyers, politicians and every one. If your theory were right, then the logical conclusion and the inevitable conclusion would be that there should not be even a single fundamental right, give the giants strength to all the legislators and trust them not to use it as giants.

**Shri A. P. Chatterjee:** My question was not whether we should amend Part III of the Constitution or not. My question was whether we should or should not have the power to amend any part of the Constitution. Even if we have the power to amend any part of the Constitution we may not use that power. But you cannot deny to the supreme legislative body the power to legislate throughout the territory of India with respect of any problem that may arise before it. If you deny that to Parliament, you will be emasculating it. Don't you agree with me there?

**Shri Palkhivala:** I am not inclined to agree. Fundamental rights are nothing but what are regarded by some minds, well-furnished minds, as basic rights. Can you trust Parliament to legislate wisely without this safeguard of basic rights? The argument in favour of enabling parliament to take away fundamental rights is no different from the argument in favour of taking away fundamental rights. It is a different thing if you can trust parliament not to encroach upon the basic rights of the people. In England there are no fundamental rights. The British parliament is trusted not to encroach on fundamental rights. Some republics have been conceived in the belief that it is better to have those safeguards for the people which will protect the people from the changing, shifting political ideologies. That is the philosophy underlining the chapter on

fundamental rights. It is a wise philosophy.

**Shri A. P. Chatterjee:** You will not like the Parliament to be as sovereign as we like.

**Shri Palkhivala:** I am all for the people being sovereign, every theory being tested in the market place. But I am not for letting only a particular party for the moment able to have the power of doing away with the basic rights of the people. That is why I am inclined to think that this particular thing requires some fuller consideration.

**Shri A. P. Chatterjee:** The action of judges quite often unconsciously reflects the attitude of the conservative elements of the society, as in the matter of striking down legislation on the property rights.

**Shri Palkhivala:** I do not agree.

**Shri A. P. Chatterjee:** As far as fundamental rights are concerned, certain rights like freedom of speech and expression, liberty, etc. have now been curtailed by certain legislations like Preventive Detention Act, Defence of India Act etc. Supreme Court has not struck down that legislation. But Supreme Court has struck down property rights.

**Shri Palkhivala:** About the right of personal liberty and right of freedom of expression, Parliament has never curtailed them. The Government might have curtailed them, not Parliament. Therefore the question of the Supreme Court striking down does not arise. There is more freedom of speech in this country than in many other democracies. Parliament has not curtailed them.

**Shri A. P. Chatterjee:** Do you agree that some of the judgments of the supreme court are evidence of the existence of conservative elements?

**Shri Palkhivala:** I do not agree. My view is not relevant to the Bill. Just as different parliaments have discharged their duties, each supreme court has discharged its duty in their own light.

**Shri A. P. Chatterjee:** Regarding right to property is concerned you do not mind if they are restricted?

**Shri Palkhivala:** In my individual capacity I do not mind, so long as the other basic rights are protected.

**Shri A. P. Chatterjee:** We are concerned with establishment of socialist pattern of society. You have to restrict property rights. Articles 31, 31A and 31B, as they are, may have to be drastically curtailed to bring out the objective.

**Shri Palkhivala:** I do not agree that these articles have to be further curtailed.

**Shri A. P. Chatterjee:** For curtailing right to property, certain provisions of the constitution have to be amended. You do not allow that to be done.

**Shri Palkhivala:** So far as it affects me, I am not enamoured of the right to property. But we have to think of the common people. Without a certain right to property there cannot be incentives to the individual and the country cannot economically advance. That is why the right to property, in that limited sense, is important to the country as a whole. I am talking not absolutely, but in the abridged form in which it stands today.

**Shri A. P. Chatterjee:** You have the judgment on Golakh Nath case. It is based upon this. Article 13 sub-article (2) includes also amendment of the constitution. Amendments of the constitution which seek to take away fundamental rights would be affected. They may say, law including such and such things, but does not include amendment of the constitution. If Parliament adopted such amendment, would it be open, according to you, to the courts to strike down any legislation taking away fundamental rights?

**Shri Palkhivala:** It would be open to the court to consider whether the Bill passed by Parliament amending the Constitution on these lines is valid or not.

**Shri A. P. Chatterjee:** Would an amendment of Art. 13 (2) to say that the law must include this, but does not include an amendment of the Constitution—that amendment also....

**Shri Palkhivala:** ....can be challenged successfully or unsuccessfully in the court.

**Shri Tenneti Viswanatham:** I must congratulate you on the very lucid way you stated your case. There is very much in what you have stated and of course there will be general agreement on many points. One of your points is that legislation should not be undertaken now because there is no need for it immediately. The need would have arisen if the Bill proposed contained any amendment of the Constitution affecting the fundamental rights. That I believe, is your point The judgment by itself has not created any difficulty because it has validated all the existing laws. "In future we will strike it down." That is what it says. We do not know what the Bill will be in future and on what basis they will strike it down. So, that part of the judgment is only *obitter dicta* and not a judgment. Do you agree?

**Shri Palkhivala:** Yes, except to this extent that it is a binding law of the country today that Parliament cannot abridge fundamental rights. Therefore it may not be obiter. The operative part of the judgment is the law.

**Shri Tenneti Viswanatham:** But having said that, at the same time they said that they are not going to invalidate any law. Anyway there is no legislation before them for them to have said that it will be invalidated. They have simply said that if, in future an amendment of the fundamental rights is brought before the Parliament and the Parliament has passed it and then if it comes before them they will declare it invalid.

**Shri Nath Pai:** As from the day of this judgment, any Act, any legislation infringing those rights is invalid. That is what they said.

**Shri Tenneti Viswanatham:** Whether it infrings or not has to be gone into. There is no automatic declaration that it will be invalid. That has practically no binding effect. Your point is that legislation is not necessary and perhaps it might even be fraught with mischievous consequences. You know that in America there is legislation governing the mode of legislation. In India we have none. Do you think it adviseable that in India we should have some legislation covering this point?

**Shri Palkhivala:** I have now come to the conclusion that what we need is less laws and not more. We have enough of laws. Perhaps we could do better if instead of passing laws we could attend to the implementation aspect of the laws already passed.

**Shri Tenneti Viswanatham:** You said that there are some basic rights in the Constitution and they are embodied in the fundamental rights. There are other basic features in the Constitution, but the Constitution has laid more stress on what is embodied in Part III. You say that they are inviolable because unless they are enforced the society would not endure. Is that your opinion?

**Shri Palkhiwala:** Yes.

**Mr. Chairman:** Before adjourning I want to tell you one thing. Mr. Jairamdas Daulatram who is a stalwart and who was a member of the Constituent Assembly put a question that was in my mind. When this Bill came before Parliament for consideration, I made some observations. I said that after the Constituent Assembly for the first time a debate on fundamental issue is being raised by

introduction of this Bill. Constitution is the cornerstone of our nation. At this juncture I find after all these questions, being a good liberal you are not sure—if I may make that observation—about the grounds which you placed before us in the beginning. In fact this Select Committee is a miniature Constituent Assembly for this purpose. The Constituent Assembly followed certain traditions for reaching a concensus. Now that you have stated your case, I would like you to give some thought to one aspect. In case we reach a concensus that the power to amend Part III which has been taken away by the Supreme Court judgment needs to be restored, what is the best method that should be followed keeping in view all the safeguards that you think necessary? Now it is too late and the members are restless. But would you like to apply your mind to this aspect and co-operate with the Committee by submitting a memorandum which wou'd help in our deliberations?

**Shri Palkhivala:** I would certainly do so. But may I just clarify one point? If I have understood you correctly, you said that I was not very sure of the grounds. But I think I must say—I think I have already said that—that in my opinion the fundamental rights should remain and the reason why I am asking for time for consideration of the Bill is that I am hopeful of being able to persuade people like the honourable Chairman and the honourable mover of the Bill and other honourable members—with a little more time I am confident I can do that—that this is not the right time in our country's history when the fundamental rights should be open to adjustment by Parliament. So my plea for postponing this Bill is actuated by the frank desire—I am expressing it frankly—to persuade the libera'-minded honourable members that in the larger interests of the country it is not desirable for Parliament to take power to abridge fundamental rights. This is frankly my thinking and that is why I am asking for time.

As regards the other point, I will certainly assist you in such way as I can, if you ultimately decide to go ahead, to see that the Bill is ultimately framed in such a shape that it can meet the point of view contrary to the point of view of those who are in favour of the Bill.

**Mr. Chairman:** May I express my hearty thanks for the lucid exposition of your case and for the frank discussion?

**Shri Palkhivala:** It has been my privilege to appear before this honourable Committee. I am most grateful to you for the patient hearing you have given me.

*(The witness then withdrew)*

*(The Committee then adjourned)*

MINUTES OF EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1967 BY SHRI NATH PAI, M.P.

*Wednesday, the 25th October, 1967 at 11.00 hours.*

PRESENT

Shri R. K. Khadilkar—*Chairman.*

MEMBERS

*Lok Sabha*

2. Shri R. S. Arumugam
3. Shri Ram Krishan Gupta
4. Shri Kameshwar Singh
5. Shri V. Viswanatha Menon
6. Shri Jugal Mondal
7. Shri Nath Pai
8. Shri P. Parthasarthy
9. Shri Deorao S. Patil
10. Shri Mohammad Yunus Saleem
11. Shri Anand Narain Mulla
12. Shri Dwaipayan Sen
13. Shri Digvijaya Narain Singh
14. Shri Tenneti Viswanatham.

*Rajya Sabha*

15. Shri Kota Punnaiah
16. Shri M. P. Bhargava
17. Shri K. Chandrasekharan
18. Shri A. P. Chatterjee
19. Shri Jairamdas Daulatram
20. Shri G. H. Valimohmed Momin
21. Shri G. R. Patil
22. Shri J. Sivashanmugam Pillai
23. Shri Jogendra Singh
24. Shri Triloki Singh.

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri K. K. Sundaram, *Additional Legislative Counsel.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES

THE INDIAN SOCIETY OF INTERNATIONAL LAW, NEW DELHI.

1. Dr. B. S. N. Murti—*Director.*
2. Shri P. Chandrasekhara Rao.
3. Shri M. Chandrasekharan.

THE INDIAN SOCIETY OF INTERNATIONAL LAW, NEW DELHI.

*Spokesmen:*

(1) Shri B. S. N. Murti—*Director.*
(2) Shri P. Chandrasekhara Rao.
(3) Shri M. Chandrasekharan.

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(*The witnesses were called in and they took their seats*).

**Mr. Chairman:** It was good of you to have submitted a memorandum. It has been circulated to the Members already. To begin with, if you want to say something, you are welcome.

**Dr. Murthi:** We are indeed happy to have this occasion to appear before this august Joint Committee to say a few words and share our thoughts. The Committee must have already heard a number of eminent constitutional lawyers on this subject, but we would like to add our mite.

There are three points in our memorandum. At present Shri Nath Pai's Bill is trying to amend article 368 of the Constitution, but we feel that in addition to this, article 13(2) might also be considered for amendment. Here, I would like to say a few more things on this. As we have seen, in the Supreme Court judgment of Golakhnath's case, the Supreme Court said that article 368 is only a procedural article. According to it articles 245 and 248 are the legislative provisions which give the right to amend or make laws. But article 245 starts with the expression "subject to the provisions of this Constitution". That includes, according to the Supreme Court, article 13(2) which specifically prohibits any law made affecting fundamental rights. The Supreme Court noted that the expression 'law in the proviso to article 13(2) does not expressly exclude constitutional amendments. Consequently it came to the conclusion that Parliament has no power to abridge or take away fundamental rights.

Basically, as our memorandum says, we feel that Parliament alone should have the right to amend the Constitution. In view of this, it may be considered whether the expression 'law' may not be amended so as to mean that constitutional amendments are not covered by it. We could possibly use the words 'but shall not include constitutional amendments' which may be added to paragraph 3(a) in article 13. Without that it might be possible that the Supreme Court on any future occasion might raise the same question whether 'law' in article 13 excludes Constitutional amendments or not. We have said that this also may be considered by way of abundaant precaution. It may not be necessary, but it may be more appropriate as a measure of abundant precaution to amend this also.

We find—it is more a technical thing—that the marginal note to article 368 says, "procedure for amendment of the Constitution". If, according to the proposed amendment, we are going to add that any provision of the Constitution can be amended and add it as the first sentence of the proposed article 368, it might create a problem if the marginal note still remains to be "procedure for

amendment of the Constitution". According to the Supreme Court Judgment, this marginal note also indicated that Article 368 presumably is a procedural article. As we are going to confer a constituent power on Parliament to amend any provision of the Constitution by amending article 368, it is for the Committee to consider whether this marginal note also should be suitably amended.

On the first point, we mentioned, that Parliament alone should be authorised to amend the Constitution, I have noted down a few things and if the Committee would like we can later on give our reactions on various other suggestions made. For the time being I only want to point out that we have also mentioned that the fundamental rights in the Constitution should be placed on a little higher footing than what is contemplated in the Constitution or what is being contemplated in the proposed amendment to the Constitution. As you are all aware, at present the trend the world over is towards increasing the basic minimum fundamental rights. In support of this I would like to draw the attention of the Committee to the UN charter, the Universal Declaration of Human Rights and the two recent covenants on human rights which are awaiting ratification by States. They all provide for the enlargement of the basic fundamental rights. If we are trying to curtail or abridge the fundamental rights it may not be in consonance with the international trend. However, while agreeing that Parliament should have the right to amend the fundamental rights, we feel that a provision should be included in the proviso to article 368 to include therein Part III of the Constitution. At present a Constitution amendment could be carried out by a special majority of Parliament. But we feel that in view of the fact that fundamental rights are fundamental and they are the basic minimum rights given to the people of this country, they should be at least included in the proviso whereby a large majority of the State legislatures have also to approve of it.

Lastly, we have mentioned about the setting up of a Constitution Review Committee. This may not be directly concerned with the present amending bill before Parliament. But we would, as an organisation dealing with international law, like the Committee to know our view on the subject. We have been going through various documents, opinions expressed and writings of various people. We feel there is an apprehension in the minds of the people that Parliament is rushing through constitutional amendments as and when there is an inconvenient decision made by any court, particularly the Supreme Court. As the Committee most probably is well aware, in the United States of America during the last 180 years only 25 amendments of the Constitution were carried out. In India in the last 16 years we have carried out 21 amendments. May be the economic and social circumstances in this country and the largeness of the Constitution presumably justify them, but there is this apprehension in the minds of the people in this country. We do not subscribe to that view because we feel that Parliament as a chosen instrument of the people of this country would not behave irresponsibly. To avoid any apprehension in the minds of the people, our suggestion is that either by an amendment of the Constitution or through an Act of Parliament a committee or a conference—the UN Charter says 'A General Conference'—for review of the Constitution may be created as a permanent body. So that, periodically, say, every three or four years, they could sit together, with all the political parties represented. They could take all the judicial decisions, both of the High Courts and the Supreme Court, discuss them and see the need or otherwise of amending the relevant provisions of the Constitution. At present, we are making that

review as and when an amendment Bill is brought out. We feel that the Joint Committee could consider recommending a body or committee to review the constitutional development during a particular period. That could be a creature of Parliament which could recommend to Parliament what should or should not be done. It will give Parliament the benefit of the opinions of various political parties which would make it easier to take further action.

**Mr. Chairman:** What is your idea about the composition or constitution of such a review committee?

**Dr. Murti:** It could be on the United Nations pattern, the Parliament sitting as a committee so that all political parties and viewpoints are represented. After every three or four years all the decisions of the Supreme Court and the High Courts could be taken into consideration by such a body and recommendations made to Parliament.

**Shri Nath Pai:** How does my judgment of the problem or the contribution I make change materially and in quality when only the nomenclature given to me is different? Now I sit in Parliament; then I will sit in Parliament as a committee.

**Dr. Murti:** In our memorandum we have suggested two different ways. It can be either the whole Parliament converted into a committee, or it could be a committee appointed by Parliament where representatives of all political parties are present, like a Joint Select Committee. It should be done periodically, every three or four years, not as and when the Supreme Court gives a decision. As Shri Nath Pai has mentioned, it is true that the same members would be there both in Parliament and in the Committees, but, then, the atmosphere would be different in a committee.

**Mr. Chairman:** If I have understood you correct, it should be either Parliament converting itself into a committee or a small body elected on the basis of proportional representation.

**Shri Nath Pai:** Do you want some experts to be represented in that committee?

**Dr. Murti:** If they so desire, they can add a few experts also. But it should be a periodic review.

**Shri Nath Pai:** Could not the Law Commission do this duty?

**Dr. Murti:** While we have great respect for the Law Commission and the valuable advice and expertise they give, it happens to be a governmental body where the political viewpoints and party viewpoints are not represented. We feel that it would be better if we have the party viewpoint also represented in this committee so that it could thrash out various aspects.

**Shri P. Chandrasekhara Rao:** I want to add only one sentence. In the United Nations Charter there are two provisions—one allowing the Security Council and the General Assembly to amend the Constitution and another providing for a review conference. The review conference is also entitled to amend the Constitution.

**Mr. Chairman:** But that may not be applicable to a sovereign State and Parliament like ours. We can look at it for guidance, but the composition, functions and forces and factors at work are different in the case of United Nations.

**Dr. Murti:** This is our idea.

**Mr. Chairman:** It is good you have stated your views and, if I may say so, you have lent good support to the Bill sponsored by Shri Nath Pai. But in your deposition you have not met the criticism of those who hold that Parliament should act after some time has elapsed and not now.

**Dr. Murti:** I would definitely meet this criticism. Basically, even the Supreme Court never questioned the amendment of the Constitution as such. It only questioned the right of Parliament to amend the fundamental rights.

**Shri Nath Pai:** Do you concede that Parliament, to use your nice phrase, as the chosen instrument of the people of India, is the ultimate authority with the necessary competence?

**Dr. Murti:** It should be.

**Shri Nath Pai:** You only added in parenthesis that this should be safeguarded by incorporating a proviso to article 368 to the effect that when there is an amendment of the fundamental rights, it should be ratified by a majority of States. That is the only safeguard which you have suggested.

**Dr. Murti:** Yes, Sir. We cannot accept the contention of the Supreme Court that Parliament cannot amend the fundamental rights.

**Shri Nath Pai:** "Parliament cannot be trusted", that is what the court says.

**Dr. Murti:** We do not agree with them there.

**Mr. Chairman:** You are questioning the wisdom of the court?

**Dr. Murti:** We do not want to question their wisdom but on one point I am rather constrained to do so. In the course of the judgment the Chief Justice as well as one of the judges mentioned that Parliament cannot amend the fundamental rights but it can create a body, a Constituent Assembly, which can in turn amend the Constitution. As Shri Nath Pai has put it, if a body cannot be depended upon to amend the fundamental rights, it is inconceivable that this very body could create another body which can amend it by a simple majority. We do not subscribe to that view. Various methods have been suggested to get over this. One is that a plebiscite should be held.

**Shri Nath Pai:** Referendum.

**Dr. Murti:** Not referendum. I will come to that later. We do not agree with the view of the Supreme Court about the creation of a Constituent Assembly because if Parliament cannot amend the Constitution, how could a body created by it do so? Further, as Shri Setalvad and other legal experts say, there is no provision in the Constitution which says that it can be done.

Then, there is the plebiscite or referendum idea. According to international law, a plebiscite is held only where questions relating to the status of land are involved. In this case there is no question of invoking a plebiscite.

**Mr. Chairman:** Perhaps, they were more concerned with the valuation of the land.

**Dr. Murti:** When we come to the idea of a referendum, we feel that it is a possible method. In our knowledge and wisdom we feel that there is nothing really wrong or there is no legal inhibitions about holding a referendum. But our considerations are based more on practical grounds. A referendum involves, like a general election, both time and money. It is very expensive and time-consuming. The very idea frightens us. If every time Parliament wants to amend the Constitution it were to go before the people, it would take enormous time and would involve a great deal of money.

**Shri M. Y. Saleem:** Not the entire Constitution but only Part III.

**Dr. Murti:** During the last 20 years we have held four general elections and during the last 16 years we have amended Part III five times.

**Shri M. Y. Saleem:** Not abridged four times.

**Dr. Murti:** Once it was amended to accept the Supreme Court's recommendation.

The other point is legal and that is whether, in view of the fact that there is no provision that Parliament by an Act or Ordinance can hold a referendum, the Supreme Court would accept the people's verdict binding as a constituent power or authority. It is not certain whether a Constitution Bill approved by the people would be considered as legal by the Supreme Court and in conformity with the Constitution.

These are our doubts about the validity of the idea of a referendum.

**Shri Jairamdas Daulatram:** I think, the idea of those who suggested referendum was that subsequent to the result of the referendum having been ascertained, Parliament would legislate so that the legislation of Parliament would come before the Supreme Court and not the verdict of the referendum.

**Dr. Murti:** If that is the contention, the problem remains the same. After all, now we are discussing a situation where the Supreme Court is questioning the right of Parliament to legislate about this.

**Shri Jairamdas Daulatram:** I am talking in terms of the suggestion of the Supreme Court that some other body, vaster than Parliament and more or less constituted not as a result of a general election based on certain election manifestoes, gives a certain opinion on the specific issue. In terms of that opinion Parliament passes some law abridging the fundamental rights. That would be in terms of what the Supreme Court has suggested.

**Shri P. Chandrasekhara Rao:** The Supreme Court did not say that. That is not the unanimous view of the majority judges. That is only what justice Hidayatulla said. We are not sure whether the Supreme Court would approve that idea when a case goes before the Supreme Court later on. It is an individual opinion expressed.

**Dr. Murti:** There is another viewpoint that this matter should be referred to the advisory jurisdiction of the Supreme Court. In the previous two cases they said that Parliament has the right to amend, whereas in the present one they say that Parliament is not the authority to do this. To avoid all this complicated thinking, the view is: Why not we seek an advisory opinion from the Supreme Court?

Here I have noted two points. May be, the first one is not really that important. The Supreme Court is not obliged to give advisory opinion on matters under article 143(1). The President may or may not—it is in his discretion—refer it to the Supreme Court for an advisory opinion. In the same way, the Supreme Court is not obliged to give an advisory opinion. But taking it for granted that the President requests the Supreme Court to give its advisory opinion—I do not think in their wisdom they would refuse to give the opinion—they give the opinion, it is not really binding on anybody, not even on the Supreme Court itself. The Supreme Court gives the advisory opinion after the parties who are interested in it appear before it and argue the case. They are not even bound by their previous judgments. In view of that they could very well come out with a completely different judgement. So, in view of this, as mentioned in my note. I do not know how they are going to act and this is rather uncertain.

**Mr. Chairman:** Even in an advisory opinion can there be a difference of opinion, five judges on one side and six on another side? Is it possible?

**Dr. Murti:** It is possible.

**Shri P. Chandrasekhara Rao:** I suppose, there were advisory opinion with dissenting opinions.

**Shri Nath Pai:** There may be as many opinions as the number of judges sitting on the Bench.

**Dr. Murti:** Then, there is another viewpoint. People say: Why not afford another opportunity to the Supreme Court? As they have revised their judgment thrice before, they might come round with a revision of the present judgment. There our feeling is that this is very uncertain and not a particularly satisfactory method. Recently, there has been a development in the international law field. They are really making a study of the socio-economic background of the judiciary. But if one were to depend on the changes the composition of the Supreme Court and the attitudes depending on the socio-economic background of the judges, we would be completely leaving the whole thing in the lurch. That is what we feel.

As I have already submitted, all these methods suggested are not actually facing the issue straight. The Supreme Court in Sajan Singh and Shankari Prasad cases has upheld the right of Parliament to amend the Constitution. They even went to the extent of saying, "Article 368 is good enough; you need not touch even Article 13." We feel that we might think of amending Article 13 to add that this excludes constitutional amendment. But the very Supreme Court in its third decision, has said that Art. 368 is a procedural article and that it should not be done.

We are of the view that Parliament alone should have the power to amend the Constitution as has been stated by the Supreme Court in pre-Golak Nath cases. It has said so twice before and we want that position to be restored. We are convinced that Shri Nath Pai's Bill with the few suggestions of ours could really meet the situation. This is our submission.

**Shri M . Y. Saleem:** On p. 2 of your Memorandum, you have mentioned that a hasty adoption of an amendment of this type should be avoided. Will you please illustrate what do you mean by saying it is a hasty amendment and what would be the appropriate time when this amendment should be taken up by Parliament?

**Dr. Murti:** This I have already clarified at length. But I would reiterate our stand. As I mentioned earlier, there should be ratification by the States because the present article 368, even after taking into consideration the amendment suggested by Shri Nath Pai, would still mean that a special majority could amend the fundamental rights. We feel, in view of the fact that the fundamental rights have a special position, this should be ratified by the States also. This is the first submission.

The second submission is that we are thinking of having a constitutional review committee. But it is only a safeguard.

**Shri M. Y. Saleem:** In Article 368, there is a proviso which prescribes the procedure of introducing an amendment to the Constitution and in certain cases it has been prescribed that at least one-half of the States should express their opinion in regard to the Bill proposed to be adopted by the Parliament. In this context, in para 3 of your Memorandum, you have said that the fundamental rights should be treated at a higher footing. What I understand from the working of this paragraph is that when article 368 provides about other articles to be amended in the Constitution, you want that if any article from Part III of the Constitution is to be amended, it should receive some special treatment by obtaining the consensus of the people or by some other method and that it should not be adopted by a simple majority.

**Dr. Murti:** That is true.

**Shri M. Y. Saleem:** It means that the provision of article 368 is not sufficient to give a higher status to the fundamental rights as you propose in paragraph 3 of your Memorandum.

**Dr. Murti:** It is not so. The proviso in article 368 is there and we are for it. But the only thing is that, unfortunately, Part III of the Constitution dealing with the fundamental rights is not include in it. At present, that is excluded from it. So, with a special majority Parliament can pass an amendment concernnig Part III of the Constitution. So what we have suggested is that if at any time Parliament feels like amending the fundamental rights, the amendment should also be covered by the proviso. It is not there at present.

**Shri M. Y. Saleem:** Certain Chapters and the provisions of the Constitution are to be governed by this proviso. You say that the Fundamental Rights Chapter of the Constitution should be treated on a high level. If the same proviso which is in existence is also utilised for an amendment of the Fundamental Rights Chapter, according to you, it means you are treating the provisions of Chapter III at par with other provisions of the Constitution. There is the question of preferential treatment.

**Shri P. Chandrasekhara Rao:** We want preference in the sense that Part III should be included in the proviso to article 368. That is what we mean by preference. It is not preferential treatment over the other provisions of the Constitution.

**Shri M. Y. Saleem:** If it receives the approval of one-half of the States, that will be sufficient.

**Shri P. Chandrasekhara Rao:** Yes; besides that, we have asked for a constitutional review committee. It can look into the matter. That also will serve as a safeguard.

**Shri A. N. Mulla:** When we are at the point of interpreting Article 368, I would like to know whether it is a fact that the Articles mentioned in the proviso to Art. 368 mostly deal with the constitution of the judiciary and the rights of the judiciary.

**Shri P. Chandrasekhara Rao:** Yes.

**Shri A. N. Mulla:** Therefore, the constitution of the judiciary and the rights of the judiciary are perhaps even more important than the fundamental rights.

**Shri P. Chandrasekhara Rao.** We do not subscribe to that view.

**Shri A. N. Mulla:** I am submitting the reason. After all, it is the judiciary which would ultimately decide whether a certain Act is to be declared void or not. Therefore, you will at last accept that it cannot be put on a lower footing than the fundamental rights.

**Shri P. Chandrasekhara Rao:** Yes, we do agree.

**Shri A. N. Mulla:** If you include the fundamental rights also in the orbit of the proviso, it will be giving a preferential treatment not only to the fundamental rights but also to the other rights which are equally important as the fundamental rights.

**Shri P. Chandrasekhara Rao:** We are not giving any preferential treatment to the other provisions. That special treatment to them has been given by the Constitution-makers themselves.

**Shri A. N. Mulla:** What I say is that if we do it now, we will be giving a preferential treatment to the fundamental rights.

**Shri P. Chandrasekhara Rao:** Yes.

**Dr. Murti:** Yes; we subscribe to that view.

**Shri A. N. Mulla.** You were talking about having a Review Committee of Parliament. I take it that the purpose before us is that the fundamental rights should not be easily taken away, it should be difficult to take away these fundamental rights. I think, we agree there.

**Shri P. Chandrasekhara Rao:** Yes.

**Shri A. N. Mulla.** Now keeping that in mind, do you think that if the Parliament converts itself into a Review Committee and by a mere majo-

rity decides to amend the fundamental rights, that would be a greater safeguard for the preservation of the fundamental rights than the existing conditions in which two-thirds majority have to vote and the two-thirds majority who vote have to decide? Which is the greater safeguard?

**Shri P. Chandrasekhara Rao:** The Review Committee will only make recommendations to Parliament, which will not be binding. It only affords an opportunity to Parliament to look into the expert opinion.

**Shri A. N. Mulla:** I take it that you want to introduce the Review Committee as an added step before the matter comes before the Parliament.

**Shri P. Chandrasekhara Rao:** Yes; the expert opinion on the subject will be available.

**Shri A. N. Mulla:** That means, another hurdle which has to be crossed before the matter comes to the Parliament.

**Shri P. Chandrasekhara Rao:** Not a hurdle. It will be another Committee like this.

**Dr. Murti:** It definitely adds, but not hinders.

**Shri A. N. Mulla:** I did not say, 'hinder'. That will be one added step to be taken before the matter can come before the Parliament.

**Shri P. Chandrasekhara Rao:** Yes.

**Shri Nath Pai:** Did you mean it to be a temporary or a permanent body? I think, you said that it will be a permanent body constantly reviewing the working of the Constitution and giving its reactions as an expert body and that the Parliament may accept or modify or reject them. This is how I have understood.

**Shri P. Chandrasekhara Rao:** Yes; that is what we meant.

**Shri A. N. Mulla:** Therefore, your position is this. There is a permanent Committee which is keeping its eye on the Constitutional position making its suggestions and recommendations, and then those recommendations come before the Parliament. But does it take away the right of the Member to raise that issue, by himself without referring it to the Committee? If a Member wants to suggest any Constitutional amendment, should he send it to the Committee first?

**Shri P. Chandrasekhara Rao:** According to us, Parliament should send that matter to that Committee.

**Shri A. N. Mulla:** Therefore, as I said, it is an added step which you suggest. Now a Member can bring forward a Constitutional amendment. According to your suggestion, if he intends doing so, it will first go before the Review Committee; the Review Committee will give its opinion on it and then it will come before the Parliament.

**Mr. Chairman:** I would like to get a clarification. Once you said when Mr. Nath Pai interrupted that the Review Committee will be a sort of a permanent body of experts as well as representatives of the people, looking to the working of the Constitution and the desirability of introducing certain measures to make it more smooth. But, as Mr. Mulla suggested, if some Member desires some amendment to be introduced, the procedure is that he will frame the Bill; if he is a private Member, the Bill will come before a Committee of Parliament and that Parliamentary Committee is an independent one; it might refer it to the Review Committee or it might directly refer it to the House itself. So, your concept of the Review Committee must be properly defined.

**Dr. Murti:** There are two ways of looking at it. We envisage a provision to create a Committee consisting of the representatives of different political parties and a few experts on the subject. It could be inscribed in the Constitution itself. It would review the progress of the Constitution periodically....

**Shri A. N. Mulla:** The matter is still not quite clear. One procedure

would be that the Private Member's suggestion, when it comes before the Parliamentary Sub-Committee would be sent to the suggested Review Committee; in that case, the hands of the Parliamentary Committee would be tied down and it must send it to the Review Commoittee. Another procedure would be that the Parliamentary Committee would retain the option of sending it to the Review Committee or following the normal course.

**Dr. Murti:** As the Chairman has corrected, every Member of Parliament has a right to submit an amendment or Bill or anything. We do not want to curtail that right of any Member in any of our suggestions. What we are suggesting is this. If any Member wants to bring forward an amendment, he is welcome to do it. Whether it should go to the Review Committee or not, I suppose, we should work out the details a little more closely after consulting the Rules of Procedure in Parliament. What we have suggested is a general idea. You might consider creation of Review Committee or, as they call, Review Conference or whatever it is. The members of the Review Committee may be nominated by the Parliament. It may include some experts and representatives of various political parties.

**Shri A. N. Mulla:** You have said and some other witnesses have also said that we have introduced too many amendments in a short time. Have you studied these constitutional amendments? Have you come to any conclusion that any of these amendments do not represent the wish of the people? Do the people resent those amendments?

**Dr. Murti:** In 16 years time 21 amendments have been made. They may be necessary in view of the fact that we are in the beginning and it is a growing society. They are necessary. We had a discussion about it and we found that there were 25 amendments in the United States spread over 189 years. Out of that 25, 10 were carried out in a period of 3 years' time. I am not at all one of those who is particularly worried that Parliament is going on amending the constitution.

**Shri A. N. Mulla:** On behalf of an international body you have come here. Can you say that the concept of fundamental rights which should be present in the minds of Members of Parliament have been flagrantly violated in any particular instance?

**Dr. Murti:** We do not say that Parliament has ignored fundamental rights.

**Shri A. N. Mulla:** Merely because of amendments, it does not indicate that the sanctity given to fundamental rights was ignored by Parliament.

**Mr. Chairman:** I would like to have one clarification. People say that so many amendments have been passed in short periods. There should be amendment if any new language is to be introduced in the Constitution. The amendments must be analysed to see such of the amendments as are of a substantial nature. How many are they? There are amendments again to give effect to the judicial verdict also. That also must be taken into consideration. We have respected the judicial verdicts also. In order to have a democratic society, for removing certain feudal restraints, certain two or three amendments have been done and they are substantial amendments. The question of fundamental rights leads to this question whether the property is supreme or the human being is supreme. That is the main question. Only substantial amendments are two or three.

**Dr. Murti:** 5 amendments. Out of that one happens to be that on public order in Art. 19. It is not really a controversial one.

**Shri A. N. Mulla:** The conduct of Parliament has not been such that it could create a feeling of panic in the minds of any one.

**Dr. Murti:** That is true.

**Shri Triloki Singh:** Supreme Court has delivered three judgments. The third one differs from the first two. As a student of international law, in your opinion, which of the judgments are correct? First two or the last one?

**Dr. Murti:** First two are correct.

**Shri M. P. Bhargava:** What type of constitutional review committee did you have in mind when you wrote this note? You had nothing in your mind about technical experts. You mentioned about setting up a constitutional committee consisting of all the members of Parliament or a selected number of them as may be decided upon by Parliament. What was the idea behind this? Parliament in its own right could consider the amendments. Why it should convert itself into constitutional review committee?

**Dr. Murti:** It was an idea. How it should be composed that is a matter for consideration.

**Shri M. P. Bhargava:** Am I to take it that the note you submitted is not to let the Committee know your views but you wanted the note to be used as a base for knowing our views.

**Mr. Chairman:** The idea was thrown.

**Dr. Murti:** The note was given bringing this idea before the Committee for their discussion.

**Shri M. P. Bhargava:** In your note you are not clear whether this constitutional review committee should be a temporary or permenent committee. You refer to article 109 of the United Nations Charter. That provides for a general conference of the members of UN for the purpose of reviewing the Charter at stated periods. That Art. 109 which you have referred to is only *ad hoc* body or committee to be formed periodically for reviewing the Charter. It is not a permanent body as you seem to suggest for constitutional review committee. So the whole idea in your note is not quite consistent. You are not clear what type of committee should be there. You are not clear whether it is to be temporary or permanent, its terms of reference or what it is expected to do.

**Shri P. Chandrasekhara Rao:** There was a certain seminar held in India International Centre. We had the opportunity to participate in their deliberations. Some MPs. expressed the view that constitutional amendments are being taken up in Parliament along with amendments to other ordinary enactments. You don't have that necessary and elevated atmosphere.

**Shri M. P. Bhargava:** Will you further elucidate? There is no mix-up of constitutional and other amendments in Parliament.

**Shri Chandrasekhara Rao:** It is not a mix-up. Mr. Kripalani said about that when you take up amendments, you take some municipal enactment or the other, you discuss it and dispose off it and then pass on to constitutional amendment and then to some other topic. So, you do not have that necessary and required elevated atmosphere that gives sanctity to a constitutional amendment.

**Mr. Chairman:** Then you suggest a special procedure.

**Shri Nath Pai:** I think what has happened is this: They have tossed an idea. It is only a process of loud thinking. This is not a concrete proposal. This is a good idea. Beyond that, I do not think they have themselves applied their mind to it. We need to work that idea.

**Shri M. P. Bhargava:** If it is a definite idea, I have to question them. If it is only a loud thinking, I will stop.

**Dr. Murti:** It was an idea that came to our mind. But then we hesitated to put it in our memorandum because we thought that it may not be directly concerned with the Amendment Bill before the Select Committee. But then we thought that this idea would be a good idea and so we put it before the Committee.

**Shri M. P. Bhargava:** Now I come to Mr. Nath Pai's Bill. From your note it appears that you think that Mr. Nath Pai's amendment will not meet the situation and something further than this Bill is necessary to meet the situation. Is that your view?

**Dr. Murti:** Explaining it I have mentioned that the amendment to Art. 368 as proposed by Shri Nath Pai at present may not meet all the possible criticism and objections. That is why we felt 13(2) also might be amended.

**Shri A. N. Mulla:** For that you can change the terminology of the amendment.

**Shri P. Chandrasekhara Rao:** The Supreme Court has in Gokaknath's case taken the view that Article 368 is only as procedural provision and the legislative power is to be found in Articles 245—248 read with the relevant Entry in List I of the Constitution. That being the position, we thought....

**Shri A. N. Mulla:** It all depends upon the terminology of the amendment. If 13(2) can be kept under suspension by the powers given in emergency, obviously the terminology can be introduced even in 368 which will make 13(2) ineffective.

**Shri P. Chandrasekhara Rao:** As long as the view that 368 is only a procedural provision holds the field, any change in 868 alone will not suffice. As long as that view prevails there is no use of amending the provision as such.

**Shri Kameshwar Singh:** I would like to know from the witness as to what he meant by 'elevated atmosphere'.

**Shri P. Chandrasekhara Rao:** I used it in the sense that you are amending the Constitution and not, as Ivor Jennings put it, a Cat's Act or a Dog's Act. That is all what I meant.

**Shri Kameshwar Singh:** I think you have also said that in the Constituent Assembly we had a different atmosphere. All of you are stressing more on the atmosphere than on anything else.

**Shri P. Chandrasekhara Rao:** That body takes stock of the progress of the Constitution and sees whether some more changes have to be introduced. That body applies its mind only to Constitutional matters.

**Shri M. Chandrasekharan:** Even in the United Nations Charter the General Review Conference consists of all the members. It may be the same members sitting in both the assemblies—General Assembly and the Conference. Similarly in the case of the Constituent Assembly.

**Shri Kameshwar Singh:** There is no need to bring in the United Nations here.

**Shri M. Chandrasekharan:** I was only citing an example.

**Shri Kameshwar Singh:** You have referred to the word 'plebiscite'.

**Shri P. Chandrasekhara Rao:** It is not relevant in this connection. That is applicable only when questions relating to the status of land are involved.

**Dr. Murti:** We did not bring in the word 'plebiscite'. When the honourable Chairman asked whether there are any other ways I took various suggestions that have been made one by one and in that context the word 'plebiscite' occurred. It is not from us.

**Shri Kameshwar Singh:** Otherwise I thought it is a dangerous thing to bring in plebiscite.

**Dr. Murti:** We did not agree with that idea.

**Shri Kameshwar Singh:** Do you stand for the amendment or not?

**Dr. Murti:** We do with a little more additions.

**Shri Kameshwar Singh:** You have stated in your note that "having committed ourselves to place these rights at the relatively higher footing, it is but legitimate that we make their amendability more stringent than what prevails now". From these lines I darw the inference that you do not stand for the amendment because you want to make it more stringent.

**Shri P. Chandrasekhara Rao:** That has nothing to do with the power of Parliament to amend the Constitution.

**Dr. Murti:** While accepting that this amendment is necessary we said that the fundamental rights in Part III of the Constitution should be inserted in the proviso to Art. 368. In other words their amendment should be made a little more stringent to the extent that you require ratification by the States also.

**Shri Viswanatha Menon:** You were saying here that Parliament has got the power to amend the fundamental rights. But to that statement you made two qualifications. One is that it should be made at the instance of the majority. First it must be ratified by the majority of the State legislature and the second is that there should be a review Committee. This is what I understand from the deliberations. About the review committee others have asked questions. Regarding the first point, I would like to point out that Parliament includes Rajya Sabha and the Rajya Sabha members are elected by State legislatures. Is it not enough that these people take part in the deliberations and then take a decision....

**Dr. Murti:** As Justice Mulla has very rightly mentioned the framers of the Constitution themselves....

**Shri Viswanatha Menon:** That proviso is there, I quite agree.

**Dr. Murti:** They have already indicated the provisions which require ratification by the States. We feel that in view of the importance of fundamental rights, they also should be brought into this proviso; not that we are questioning the right of Parliament to amend the Constitution.

**Shri Viswanatha Menon:** I want to be more clear about that. What more contributions can State legislatures give on the question of fundamental rights? You please explain your point without reference to the proviso.

**Dr. Murti:** I was reading the rule for witnesses appearing before this Committee. I do not want to sound flippant, I am very careful about that. But, the point is that whatever be the reasons, the Constitution-makers felt it necessary to include clauses (a) to (e) in the proviso. We feel that fundamental rights also are very important. In our view, they also deserve that much consideration by this Committee.

**Shri Viswanatha Menon:** According to you, the Parliament has not got that unconditional right to amend the fundamental rights. Is that your opinion?

**Shri P. Chandrasekhara Rao:** One view is that the fact that certain provisions have been incorporated in the proviso does not mean that the Constitution-makers did not trust Parliament to take decisions on these matters.

**Shri Viswanatha Menon:** I am not on that point. I am only at your opinion about the fundamental rights. According to you, the Parliament has got the power to amend the fundamental rights. Then you put two qualifications with regard to procedure. When it comes to actual facts,

naturally, you do not agree that the sovereign rights of Parliament should be given to them to amend the fundamental rights. You want some restrictions like agreements of the State Legislatures and all that.

**Dr. Murti:** Excuse me. What we have submitted in a very humble way are not restrictions on the right of Parliament but only safeguards.

**Shri K. Chandrasekharan:** You have stated in your note something about Art. 13(2) in the second paragraph. Do you think that if an amendment to Art. 368 were to be made, that amendment were to include some restrictions on fundamental rights also? If the words "notwithstanding anything contained in Art. 13(2)" are incorporated in Art. 368, would that amendment not be adequate?

**Shri P. Chandrasekhara Rao:** No, Sir. We have already explained that point. The Supreme Court has taken the view that Art. 368 is only a procedural provision. The mere incorporation of the word 'notwithstanding' may not help.

**Shri K. Chandrasekharan:** By virtue of the provisions under Art. 368 and 359, the President may promulgate a law or issue an order or action be taken in respect of Art. 19 or any other provisions in Part III. If the President so declares, the Art. 13(2) would not hit any law promulgated or action taken or order issued. What is your view regarding this?

**Shri P. Chandrasekhara Rao:** It is a constitutional matter on which we are not certain.

**Shri K. Chandrasekharan:** So far as Art. 368 with restrictions that you have thought off are concerned, you have told us what the restrictions should be. You also know that with regard to certain provisions and amendments thereof, there is a proviso in Art. 368. Do you think that if 60% of the State Legislatures concur to such an amendment relating to restriction of Part III, that would be all right? What is your opinion on that?

**Dr. Murti:** We would not like that to be called restriction but a safeguard. We feel that that would really meet the requirements to some extent.

**Shri K. Chandrasekharan:** If a Constituent Assembly were to be convened, do you think that that Constituent Assembly can be constituted by Members of both Houses of Parliament?

**Shri P. Chandrasekhara Rao:** It appears that the Constitution does not permit Parliament to convene a Constituent Assembly. That is not to be read into the residuary powers of Parliament according to some constitutional experts. And we do subscribe to that view.

**Shri K. Chandrasekharan:** I am not at the question of residuary powers. I am just referring to the majority judgment of the Supreme Court. Even if such a contingency arises, the residuary powers of Parliament may be relied upon than to call for a Constituent Assembly for making a new constitutional change or changing that radically.

Then, Justice Hidayatullah has specifically said about that. If a Constituent Assembly were to be convened, do you think that Constituent Assembly consisting of the Members of both the Houses of Parliament would be adequate? What is your view if at all you have any?

**Shri P. Chandrasekhara Rao:** We do not believe in the necessity of convening a Constituent Assembly at all.

**Shri K. Chandrasekharan:** That is why I put this hypothetical question.

**Dr. Murti:** If both Houses of Parliament decide to constitute them-

selves as a Constituent Assembly, we have no objection or quarrel over that hypothesis at all. We have mentioned in our submission that the present Parliament itself has the right and authority to take those amendments in their own stride.

**Shri K. Chandrasekharan:** You do not approve of the method of referendum for a constitutional amendment relating to Part III.

**Dr. Murti:** We have no particular objection for that. It is possible. And there is nothing legally objectionable about that. But what I mentioned in my submission while explaining that position was that it was expensive and time-consuming and also that it would raise some doubt whether the Supreme Court would accept the legality of any verdict given by the people in a referendum.

**Shri K. Chandrasekharan:** Do you think that provisions in Chapter IV of the Constitution stand on a par with these contained in Chapter III?

**Dr. Murti:** We agree with the Supreme Court that when there is conflict between Part III and Part IV, the former prevails. Part IV is also equally important in our view.

**Shri K. Chandrasekharan:** What is your view with regard to the marginal notes?

**Dr. Murti:** It may create a problem. On the basis of the marginal note, presumably, the Supreme Court felt that Art. 368 was a procedural provision. This amendment would make it clear that Parliament has power to amend every provision in the Constitution. I have already mentioned that.

**Shri G. R. Patil:** You have mentioned in your memorandum that oft-repated tendency of the Legislature to annul the effect of the Supreme Court judgment by the constitutional amendments at short notice without much deliberation has been deprecated by various circles as not conducive to the establishment of democratic traditions, in that, they would appear to represent an area of conflicts between the judiciary and the Legislature. May I know, by accepting Mr. Nath Pai's amendment to the Constitution, whether a conflict will arise between the judiciary and the Legislature?

**Dr. Murti:** Actually, this is an opinion given by somebody. To offset that we suggested that we should accept Shri Nath Pai's amendment. There is no possibility of a conflict between the judiciary and the Legislature.

**श्री दे० शि० पाटिल** : श्री नाथ पाई के संशोधन द्वारा यह स्पष्ट करने का प्रयत्न किया जा रहा है कि संविधान की धारा 368 के अनुसार जो भी कानून पार्लियामेंट बनायेगी वह आर्टिकल 13 (2) के अन्तर्गत विधि नहीं होगा। सुप्रीम कोर्ट के निर्णय के बाद ऐसा जान पड़ता है कि संविधान इसके बारे में पूरा नहीं है और इसलिए 13 (2) का संशोधन करना चाहिये। मैं पूछना चाहता हूं कि श्री नाथ पै के विधेयक धारा 364 में संशोधन इस प्रकार कर दिया जाय कि :

'any provision of this Constitution including the provisions in Part III'.

तो इस प्रकार हमारा काम चल जायेगा ?

**Dr. Murti:** Pardon me. I won't be able to answer you in Hindi. I have to reply to your question in English.

**Shri Deorao S. Patil:** Do you understand my question?

**Dr. Murti:** On this point, as has already been clarified by the Chairman as well as Shri Nath Pai and other Members, if by putting the wording of the amendment in such a way as to cover or offset the effect of article 245, which says 'Subject to the provisions of the Constitution', if that can be added, presumably you could, by proper wording of the amendment, avoid touching Art. 13(2).

**श्री वे० शि० पाटिल :** दूसरा प्रश्न यह है कि सुप्रीम कोर्ट ने कांस्टिच्यूशन अमेंडमेंट नम्बर नन और कांस्टिट्यूशन अमेंडमेंट सेवनटीन अवैध घोषित नहीं किया है । इसलिए इसमें कोई बाधा तो नहीं है कि सुप्रीम कोर्ट ने जो निर्णय दिया है उसको पब्लिक ओपीनियन के लिए जैसा एक सुझाव आया है दो साल के लिये प्रचारित किया जाय और उस समय तक इस विधेयक का स्थगित रखा जाये ?

**Dr. Murti:** That we have mentioned. But this almost comes to referendum. We have already submitted and I agree that there is no urgency, but presumably Shri Nath Pai and all those who support this feel that a Joint Select Committee . . .

**Shri M. P. Bhargava:** How will 2 years' postponement amount to referendum?

**Dr. Murti:** He said about eliciting public opinion.

**श्री वे० शि० पाटिल :** सुप्रीम कोर्ट ने जो निर्णय दिया है उसका तालुक सिर्फ उन लोगों तक नहीं है जो कानून जानते हैं । फंडामेंटल राइट्स का तो तमाम इंडिया के सिटिजेन्स से ताल्लुक है । इस लिये जो यह सुप्रीम कोर्ट का डिसिजन है उसकी इन्फर्मेशन लोगों को मिले और उनकी राय आये, इसके लिये कोई अवसर देने की आवश्यकता नहीं है ?

**Mr. Chairman:** There you will have to give some thought to the other aspects of the judgment. What is your view regarding the new innovation that has been introduced by their Lordships, i.e. the doctrine of prospective over-ruling. If that doctrine is not accepted, what would happen? Is that doctrine likely to be accepted by judicial verdict next time? That is also a problem. Have you given some thought to it?

**Shri P. Chandrasekhara Rao:** About that doctrine, it is not the opinion of the majority of the Judges because Justice Hidayatullah does not subscribe to that view. He subscribes to the doctrine of acquiescence. We cannot say that it has been accepted by the Supreme Court.

**Mr. Chairman:** To that extent it is correct.

**Shri Nath Pai:** The Chief Justice has, to save the disastrous consequences of the majority judgment, resorted to the doctrine of prospective over-ruling, for the first time, introducing it in the Indian judicial system. This is a doctrine mainly prevalent in the United States, but if the judgment was to be applied, a judgment which over-rules everything previously given by the court, that is, the sanctity of the Supreme Court judgment, in order to get out of this predicament, the Supreme Court, therefore, adumbrated, for the first time, the doctrine of prospective over-ruling, but, as the witness is testifying, this is subscribed to, out of 11 Judges, by five judges; Justice Hidayatullah has written a separate judgment. *Starre decisis* would have been the real thing, but that was not accepted.

Now, I do not want to ask any question. For two days my proposal was being assailed very independently and very effectively. As a change we had the honour of listening to some one who was strongly, as I said, supporting my amendment. I appreciate this support from those who are making a special study of the Constitution.

Do I understand you clearly:

(a) that you regard Parliament as a competent body to amend any part of the Constitution including Part III in which the fundamental rights are incorporated?

**Dr. Murti:** I have already said 'Yes'.

**Shri Nath Pai:** You think that the present amendment proposed by Shri Nath Pai is necessary, that it needs certain modifications further in order to obviate the possibility of the amendment being struck down by the Supreme Court on the possible ground that it conflicts with Art. 13(2)?

**Dr. Murti:** Yes, Sir.

**Shri Nath Pai:** And, finally, you would like to make two submissions: one regarding the amendment, that the amendment, when carried, is required to-day under proviso to Art. 368, to be ratified by the States and you would like any amendment to Part III also to be subject to such ratification?

**Dr. Murti:** Yes, Sir.

**Shri Nath Pai:** You have a constructive proposal in an embryonic stage. I am not so quite sure. I deliberately left out whether the amendment of the marginal note is really called for, but that is a different thing. In any way under Marshall's canon of interpretation it is only of minor significance. The Chairman is right in drawing our attention to it. It is the substance that we are dealing with.

**Shri A. N. Mulla:** When Art. 368 is amended, the marginal note has to be amended in accordance with the contents.

**Shri Nath Pai:** You have, in an embryonic stage, a suggestion that you have placed before us that there should be a body which should be charged with the task of permanently observing, scrutinising, evaluating and assessing the working of the Constitution. You yourself would like to give some time to formulate your idea in more precise terms. But to-day you want that the Parliament should have the benefit of expert advice available to it on the working of the Constitution. How this body should be composed of, how this body should work—you may need time. May I, therefore, suggest to you that you should give some more thought to it yourself and try to give this Committee—though it is not strictly material to the Bill before us— a useful suggestion, a more concrete proposal on those lines?

**Dr. Murti:** Thank you.

**Shri Nath Pai:** Thank you very much. I have done.

**Shri A. P. Chatterjee:** I preface my question with this observation that I agree with the suggestion made in your comments that perhaps Art. 13(3) should also be amended. But my question is directed merely to elucidate certain problems that may arise out of this. Now, I will refer you to an opinion given before us by a learned witness, that even if Art. 13, sub-article (3) is amended to say that 'law' does not include amendment of the Constitution, that amendment may also be liable to be challenged in the Supreme Court.

**Dr. Murti:** Yes, Sir.

**Shri A. P. Chatterjee:** What is your opinion in regard to that?

**Shri P. Chandrasekhara Rao:** Perhaps that doubt has some basis in the sense that Chief Justice Kania in Gopalan's case has pointed out that Art. 13 is there only by way of abundant caution and that even in the absence of that provision, the Supreme Court will have the same rights to declare Acts of Parliament unconstitutional if they are found to be inconsistent with provisions of Part III. We are not very sure.

**Shri A. P. Chatterjee:** In the majority judgment it is said that if the amendment made or to be made under Article 368 conflicts with Article 13(2), then it is *ultra vires*. The *raison d'etre* of the amendment is bad because it wants to restrict the Fundamental Rights. The *raison d'etre* is it conflicts with Article 13(2) because law includes amendment of Constitution and under article 13(2) you cannot make any law which restricts the fundamental rights. In view of that, if article 13(2) is made innocuous by providing that law does not include amendment of the Constitution, then could any amendment under Article 368 be effectively challenged in the Supreme Court?

**Dr. Murti:** We were discussing this problem before coming to this Committee. Actually there is a predominant view that article 13(2) need not be touched at all if we amend Article 368 in a proper way; it can be obviated. If we amend article 13(2) saying that law does not include constitutional amendments, whether the Supreme Court would accept it or not, I cannot possibly visualise. But there is a possibility . . .

**Shri Nath Pai:** Mr. Chatterjee has very cogently put forward his argument. Article 368 is controlled by 13(2) which precludes any amendment. Under that judgment 13(2) cannot be amended. This is a very important point which Mr. Chatterjee has raised. Article 13(2) is the controlling article. The question is not that we cannot amend any Fundamental Rights, but Article 13(2) prevents from doing it in a positive manner. Therefore, it is suggested by some friends that we shall have to amend Article 13(2) by interpolation or incorporation of the words "law does not mean constituent law or amendment of the Constitution".

**Shri A. N. Mulla:** In the body of the majority judgment no mention has been made that amendment of Part III can be made. They have visualised the possibility of a mention being made in 368 of an amendment.

**Shri Nath Pai:** According to this judgment Part III is not amendable. If that be the case, how do we amend 13(2)? The Supreme Court holds that we are not competent to amend 13(2). Part III is not amendable by Parliament. Once you accept that, how do you get the competence to amend 13(2)?

**Shri A. N. Mulla:** Once you amend Article 368, then the Supreme Court will have to consider how it affects Article 13(2).

**Shri A. P. Chatterjee:** The difficulty in amending Article 13(2) has been raised here by learned witnesses who have given evidence yesterday and day before. Actually the Supreme Court has said that the fundamental rights cannot be amended not because they are fundamental rights but because 13(2) is there. If 13(2) is amended to say that law here does not mean amendment of the Constitution can it be rationally said that Article 13(2) cannot be amended because of Article 13(2)?

**Shri P. Chandrasekhara Rao:** There is one important point. Article 13(2) has been brought into the picture because of Article 245. Article 245 confers legislative powers on Parliament. Perhaps that Article itself could be amended to obviate the difficulties.

**Shri A. P. Chatterjee:** That will not solve the problem.

**Shri Jairamdas Daulatram:** The matter is so complicated and the witnesses must be given time to formulate their views; they represent a responsible body.

**Shri A. P. Chatterjee:** Will you look into this matter thoroughly and submit your comments before the Committee concludes its judgment.

**Dr. Murti:** We will do that.

**Shri A. P. Chatterjee:** In the penultimate para of your comments you have talked about setting up a Constitutional Review Committee. Do I understand you to mean that there should be a permanent Standing Committee like the PAC or the Estimates Committee of Parliament?

**Dr. Murti:** This point has been summarised by Shri Nath Pai and this was discussed at length and we have agreed to look into this keeping in view the rules of procedure of Parliament, how Parliamentary Committees are appointed etc.

**Shri Jairamdas Daulatram:** One kind of Committee will be which will be continuously, constantly

studying and examining and suggesting. There is another kind of Committee which is more like a reference committee; it goes into the matter when an issue is brought to its notice. If there is a Committee continually sitting and observing what is happening, then there is likely to be an element of instability in the decisions and it may create an atmosphere which in my opinion may not be wise; it may not be desirable to have such a committee.

**Shri A. P. Chatterjee:** In the same penultimate para you have said that such a Joint Committee might secure valuable guidance from Article 109 of the Charter of the United Nations, which provides for a General Conference of the members of the United Nations for the purpose of reviewing the Charter at stated periods. The analogy if all to the United Nations lies in this fact that we are a union of States. On that analogy, do I understand you to mean that before the Constitution is amended, there should be a general conference of the legislators of all the legislatures of different States.

**Dr. Murti:** No, Sir. This point also was discussed at length. That was not our intention. As we have mentioned, we were told the analogy to the United Nations does not really conform to what we have in India. The analogy was taken from the United Nations Charter, so we just mentioned that one. It does not really apply *in toto* to what the system is in India.

**Shri A. P. Chatterjee:** In conclusion, I also must say, as Mr. Nath Pai has also said, that you are the very healthy exception, in my view, to the evidence that we have been hearing so far exception in favour of the Bil' introduced by Mr. Nath Pai.

**Shri Tenneti Viswanatham:** I don't want to express an opinion on the nature of the evidence given. There is a possibility of wide difference of opinion upon this. Having regard to the adjectives which are being used, I would refer to the judgment. It says: "The aforesaid discussion leads to the following results...." About 'prospective over-ruling', the judgment said in clause (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".

That is to say even in case of any difference of opinion as regards other decisions, so far as the validity of amendments accepted till the Seventeenth Amendment is concerned, that will stand good for all times. Am I right in that inference?

**Dr. Murti:** Yes, Sir.

**Shri Tenneti Viswanatham:** There will not be any kind of action.

**Shri P. Chandrasekhara Rao:** We are not sure.

**Shri Nath Pai:** I am saying about this part of it. It is a very important question. The Judgement says that judgments were wrong. It is clearly stated that the judgments are erroneous.

**Shri Tenneti Viswanatham:** We set aside a law but action taken under the law is always not set aside. That is why the Judges were very careful in saying "on the application of the doctrine of 'prospective overruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid". You agree with that.

**Dr. Murti:** Yes.

**Shri Tenneti Viswanatham:** Then in the last paragraph the conclusion that they draw is this; "As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned acts, namely so and so, cannot be questioned.

What is the effect of this sentence? This is the 6th conclusion drawn by them in the Judgment.

**Dr. Murti:** Unfortunately, we were never given that Judgment which you are reading. What we have are extracts from the judgment.

**Shri Tenneti Viswanatham:** Is it not yet reported?

**Dr. Murti:** It has not been reported—not the full text of the judgment.

**Shri Tenneti Viswanatham:** No Law Report has given it.

**Dr. Murti:** No.

**Shri Tenneti Viswanatham:** It says 17th amendment holds the field. I want to know the implication of this. Is the 17th amendment valid now or it is invalid today?

**Shri P. Chandrasekhara Rao:** A view has been expressed that they will be valid only until the date of the judgment.

**Shri Nath Pai:** It will not be fair to continue with the questioning. It is a very important question and they have not seen that judgment.

**Shri Tenneti Viswanatham:** The tenor of questions has been proceeding on a particular basis. Unless the witnesses as well as all of us know fully the implications of the judgment, there is no point in hurling questions.

**Shri A. P. Chatterjee:** May I interrupt. You must not forget that the application of Golak Nath was dismissed by the Supreme Court and the application of Golak Nath related to the question whether 17th amendment is *ultra vires* or not. When the Supreme Court dismissed that application, naturally Supreme Court legally did not declare 17th amendment *ultra vires*. The 17th amendment holds the field. What they have said is that by virtue of 'prospective over-ruling', any further amendment of fundamental rights under Art. 368 will be bad.

**Shri P. Chandrasekhara Rao:** I do not look at it from that point of view. If I have understood the judgment correctly, it has been stated by many writers that Supreme Court merely said that the 17th amendment is valid only until the date of judgment.

**Shri Nath Pai:** No. No.

**Shri Tenneti Viswanatham:** Since the judgment was not before you, I do not want to pursue that aspect. I will ask questions on one or two general aspects, because we have covered the field.

**Mr. Chairman:** It says: "As the Constitution (Seventeenth Amendment) Act holds the field, 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".

**Shri Tenneti Viswanatham:** I want to know something about fundamental rights. Why do you call them 'fundamental'!

**Shri P. Chandrasekhara Rao:** Because they are basic, which people in a democratic society should enjoy. They are the minimum rights. They have been declared fundamental by the international community also in several documents—Universal Declaration of Human Rights, the two international covenants etc.

**Shri Tenneti Viswanatham:** Therefore, they are, in the language of the famous American fighter for independence "inalienable rights".

**Shri P. Chandrasekhara Rao:** We don't say 'inalienable' in the sense that they cannot be taken away under any circumstances.

**Shri Tenneti Viswanatham:** The word 'inalienable' was used by an American patriot. Do you know it was also used by Jawaharlal Nehru in the 'Quit India' Resolution that people have got certain inalienable rights. Will I be right in saying that at the time of framing the Constitution, therefore, the substratum of inalienable rights was reduced to fundamental rights?

**Shri P. Chandrasekhara Rao:** Once again I would say, they are minimum in the sense that they are absolutely fundamental, but we do not accept the view that they are fundamental in the sense that they should not be taken away under any circumstances.

**Shri Tenneti Viswanatham:** Therefore, although they are fundamental, although they are the minimum rights that the people should have, they can be taken away. The Constitution says that it is the people who give this Constitution unto themselves, and in so doing they reserve certain rights as fundamental rights. Therefore, will it be right to say that only the people who have reserved those rights must take them away, not Parliament which is only one wing of the sovereign body functioning.

**Dr. Murti:** People have the right, but after all Parliament represents the people.

**Shri Tenneti Viswanatham:** Therefore, people have always got a machinery through which they can exercise sovereignty. Parliament is one of the instruments.

**Dr. Murti:** Yes, Sir.

**Shri Tenneti Viswanatham:** So far as the legislation is concerned, it is the only instrument. If they want to take it away, the people who have reserved those rights must tell the Parliament that these rights hereafter will be taken away, because it is stated: We give this to ourselves.

**Shri P. Chandrasekhara Rao:** How will they express their will to Parliament?

**Shri Tenneti Viswanatham:** That is why I am going step by step. Therefore, they gave those certain rights. They have created three wings: the administrative wing, the judiciary and the legislature. And according to the people who gave this Constitution all these are equally fundamental. One cannot function without the other.

**Shri P. Chandrasekhara Rao:** Yes.

**Shri Tenneti Viswanatham:** If that is so, then why do you say that fundamental rights have got a higher status than the others.

**Dr. Murti:** Art. 368 is an amending process. This should be treated like any other Parliament Act.

**Shri Tenneti Viswanatham:** After all they were interpreting the Constitution. There are two aspects. We are also mixing them up. One is absolutely legal, *i.e.* the interpretation of the Constitution. The other is the view of the life. This constitution governs our life. Our life moulds the shape of the Constitution. The legal interpretation also is different. But sometimes we are likely to mix them up.

**Shri P. Chandrasekhara Rao:** But they were concentrating on what may be called the constitutional, the legal aspect, not the other.

**Shri Tenneti Viswanatham:** I was about to say that. The whole interpretation arose not on social factors, not on economic factors. The entire judgment I read twice in order to see whether the judges were influenced by social, economic considerations or only they were merely 'cold-blooded' when they were analysing the various Articles of the Constitution. We accept their interpretation and therefore it is our intention to give substantive power to the Parliament and this amendment is there. To that extent you

are agreeable. The only question is that if it is done, then what is the position of fundamental rights? If you bring them into the proviso under Article 368, are you lowering the status of fundamental rights or are you giving them a higher status.

**Shri P. Chandrasekhara Rao:** Higher status.

**Shri Tenneti Viswanatham:** The Constitution has given a higher status; you are lowering them. Although they are fundamental rights, they can be reduced.

**Dr. Murti:** They can be amended.

**Shri P. Chandrasekhara Rao:** To enlarge the scope.

**Shri Tenneti Viswanatham:** What is enlargement to one will be a reduction to another. What are fundamental rights? They are the rights of the people against the rights of the State. Therefore, if you extend the people's rights, the State rights are decreased.

One of the witnesses stated that the Constitution cannot be amended at all under this, unless you create another machinery and he suggested that under Article 248 we can have a referendum because 248 gives you complete residuary power on any subject which is not covered by the Concurrent List or the Union List. Therefore, he suggested referendum. What is your opinion on that?

**Dr. Murti:** As far as referendum is concerned, there is no particular difficulty and there is no legal objection.

**Shri Tenneti Viswanatham:** Your only objection is that it is costly.

**Dr. Murti:** This takes time and money.

**Mr. Chairman:** Will our electorate understand the issue? Will they be capable of grasping it or they might be swayed by just emotions.

**Dr. Murti:** We also thought of that, but I avoided using this argument for the simple reason that the very electorate has elected all of you as their representatives, I could not possibly think of doubting their integrity or intellectual ability to decide the questions involved.

**Mr. Chairman:** Have they enough wisdom to grasp these complexities?

**Dr. Murti:** We thought of that, but we did not want to put ourselves in that situation, questioning their intellectual ability.

**Mr. Chairman:** Why people cannot question us?

**Dr. Murti:** People can question you, Sir.

**Mr. Chairman:** You have helped the deliberations of the Committee, no doubt. I thank you Mr. Murti and Mr. Chandrasekhara Rao. If after some time you can give us some concrete suggestions, the Committee would welcome them. You can give some more thought to it.

**Dr. Murti:** Thank you.

*(The witnesses then withdrew)*

*(The Committee then adjourned)*

MINUTES OF EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1967 BY SHRI NATH PAI, M.P.

*Thursday, the 26th October, 1967 at 11.00 hours.*

PRESENT

Shri R. K. Khadilkar—*Chairman.*

MEMBERS

*Lok Sabha*

2. Shri R. S. Arumugam
3. Shri N. C. Chatterjee
4. Shri S. M. Joshi
5. Shri Kameshwar Singh
6. Shri V. Viswanatha Menon
7. Shri Mohammad Yusuf
8. Shri Jugal Mondal
9. Shri Nath Pai
10. Shri P. Parthasarthy
11. Shri Deorao S. Patil
12. Shri Mohammad Yunus Saleem
13. Shri Anand Narain Mulla
14. Shri Dwaipayan Sen
15. Shri Digvijaya Narain Singh
16. Shri Tenneti Viswanatham.

*Rajya Sabha*

17. Shri Kota Punnaiah
18. Shri M. P. Bhargava
19. Shri K. Chandrasekharan
20. Shri A. P. Chatterjee
21. Shri Jairamdas Daulatram
22. Shri G. H. Valimohmed Momin
23. Shri G. R. Patil
24. Shri J. Sivashanmugam Pillai
25. Shri Jogendra Singh
26. Shri Triloki Singh.

REPRESENTATIVES OF THE MINISTRY OF LAW

Shri V. N. Bhatia, *Secretary, Legislative Department.*

Shri K. K. Sundaram, *Additional Legislative Counsel.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESS EXAMINED

Shri R. S. Gae, *Secretary, Department of Legal Affairs, Ministry of Law, Government of India, New Delhi.*

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**Shri R. S. Gae:**

(*The witness was called in and he took his seat*):

**Mr. Chairman:** I am glad, Mr. Gae, that you have offered to give us the benefit of your views in your personal capacity. I would like to inform you that your evidence shall be treated as public and is liable to be published, unless you specifically desire that all or any part of it is to be treated as confidential. Even then, it is liable to be made available to the Members of Parliament.

You have studied the recent judgment of the Supreme Court. From your speeches that are reported in the press, it seems you have some suggestions to offer so that the intentions of the founding fathers of our Constitution would be maintained. We would like to know your views about this constitutional amendment in all its aspects.

**Shri Gae:** Mr. Chairman and members of the Committee, I take this opportunity of thanking you for giving me a chance to express my views regarding the Supreme Court judgment on the Golak Nath case and regarding the various remedies which could be adopted to solve the difficulty. I would make it clear that the views I am going to express are in my individual capacity, as a citizen of India and as a student of constitutional law and they should not be considered in any way as reflecting the views of the Government of India, though I am connected with it as the Head of the Department of Legal Affairs.

Before coming to the recent judgment in which the Supreme Court had the occasion to consider the constitutional validity of the First, Fourth and Seventeenth Amendment Acts, I would like to tell briefly the reasons why Parliament deemed it necessary to enact those Amendment Acts. The first amendment Act was passed by Parliament in 1951. Soon after the commencement of the Constitution, it was brought to the notice of the Central Government by some State Governments that judgments given by some High Courts like those of Patna, Allahabad and Nagpur, came in the way of agrarian reform policy of the Central and State Governments, which is adumbrated more or less in the Directive Principles contained in article 39. Some High Courts took the views that the agrarian land reform legislation violated article 13(2). Some States and land owners moved the Supreme Court in the matter and 3 cases were pending before the Supreme Court in 1951. Subsequently, to avoid any further delay, a request was made to the Central Government to amend the Constitution. This led to the First Amendment Act of 1951. Briefly, that amendment inserted two new articles 31A and 31B. Article 31A deals with the saving of laws providing for acquisition of estates, etc. and article 31B was inserved for safeguarding certain Acts, and regulations specified in the Ninth Schedule from being challenged on the ground that they violate the provisions of article 13(2). By this method 13 Acts and Regulations were inserted in the Ninth Schedule implying that they were immune from challenge in a court of law as violating the provisions contained in Part III.

Subsequently in 1951 the validity of the Constitution (First Amend-

ment) Act itself came before the Supreme Court in Sankari Prasad's case. After careful examination, the Supreme Court took the view that articles 13(2) and 368 must be construed having regard to the well-known principle of harmonious construction, so that article 13(2) must be read subject to article 368. On that basis, the Supreme Court held that the word 'law' referred to in article 13(2) meant rules and regulations made by Parliament and State Legislatures in the exercise of their ordinary legislative power and not an amendment of the Constitution made by Parliament in exercise of its constituent power. In other words, the Supreme Court drew a distinction between making of law by the ordinary legislative procedure on the one hand and the amendment of the Constitution by following the procedure laid down in article 368 on the other. Thus the Constitution (First Amendment) Act was declared *intra vires* by the Supreme Court.

Now I will come to the Constitution (Fourth Amendment) Act, 1955. This Act became necessary in view of the Supreme Court judgment in the well-known Bela Banerjee case. In this case, the Supreme Court took the view that compensation payable for compulsory acquisition of property under article 31(2) is the just equivalent of what the owner has been deprived of at or about the time of acquisition of the property. When this judgment was given by the Supreme Court, various State Government and the Central Government found a great deal of difficulty in giving effect to the social pattern of life on which our Constitution is based. It was considered that this judgment came in the way and, therefore, something should be done, whereby the question of compensation payable on the basis of the Supreme Court interpretation of the expression "compensation" could be avoided. In view thereof, the Constitution (Fourth Amendment) Act was enacted which virtually provided that the quantum of compensation payable for the land acquired shall not be a justiciable issue and, therefore, cannot be questioned in a court of law. Seven more Acts were added in the Ninth Schedule to the Constitution. The second amendment made was that by "acquisition" is meant only the taking away of the property, either by the State or by a corporation owned or controlled by the State. There are important amendments made by the Constitution (Fourth Amendment) Act.

Now I come briefly to the Constitution (Seventeenth Amendment) Act, 1964. In two cases, one from Madras and another from Kerala, the Supreme Court took the view that the word "estate" as defined in article 31A must be given a narrow construction. In view thereof, it was felt by some of the State Governments that this interpretation again came in the way of giving effect to the socialist pattern of society based on our Constitution. So, they requested the Government of India to move in the matter and that led to the amendment of the Constitution, called the Constitution (Seventeenth Amendment) Act whereby the definition of "estate" was expanded and, further, 44 more Acts were included in the Ninth Schedule, making them thereby immune from challenge as violating any of the provisions contained in part III of the Constitution. The validity of this Act was upheld in Sujjan Singh's case.

From the summary of these three Amendment Acts I am just trying to point out that these Acts became necessary in view of the fact that some of the judgments given by the Supreme Court, in the light of the provisions contained in Part III of the Constitution, came in the way of the Directive Principles of State Policy contained in Part IV. In other words, these amendments, which primarily related to the fundamental right to property, became necessary with a view to harmonising the provisions of Directive Principles of State Policy contained in Part IV with the provisions on Fundamental Rights

contained in Part III. In other words, the amendments were made by Parliament in its wisdom to avoid conflict between the provisions contained in Part IV and Part III.

Now I will come to the judgment of the Supreme Court in Golak Nath's case. As you all know, this judgment given by the Supreme Court makes history or landmark in the entire country. It was for the first time in the history of India that the Full Court of 11 judges was constituted; but, unfortunately, the judgment given by the judges is not unanimous. Six judges gave a majority judgment and the remaining 5 judges gave what is known as the minority judgment. Now I will tell in a nutshell what is the majority judgment and then offer my comments on the alternative methods which can be availed of by Parliament to get over the difficulty in the matter.

The first point held by the Supreme Court is that articles 368 is an article merely dealing with the procedure to amend the Constitution. In other words, according to the Supreme Court, the power to amend the Constitution is not contained in article 368. The next point made by the Supreme Court is that the power to amend the Constitution is contained in the residuary power of legislation available to Parliament under article 248 and entry 97 of the Union List. It was further held by the Supreme Court that the definition of "law" as contained in article 13(2) of the Constitution should be construed as meaning not only the rules and regulations made by Parliament in exercise of its ordinary legislative power but also any amendment of the Constitution made by Parliament in exercise of its constituent power. In other words, the Supreme Court over-ruled its previous decisions in the case of Sankari Prasad and Sajjan Singh, where the court had taken the view that law does not mean amendment of the Constitution.

The next point held by the Supreme Court is that the amendment of the Constitution, if it is made hereafter, that is, after the date of the judgment of the Supreme Court, namely, 27th February 1967, such amendment, in so far as it takes away or abridges any of the fundamental rights guaranteed by Part III. must conform to the requirements of article 13(2) of the Constitution. In other words, after the 27th February 1967 Parliament cannot amend the Constitution, taking away or abridging the fundamental rights guaranteed by Part III of the Constitution. That is the main point on which we have to examine the matter in detail, in all aspects.

The Supreme Court further held that the Constitution First, Fourth and Seventeenth Amendment Acts were *ultra vires* in the sense they violated the provisions contained in article 13(2) of the Constitution and, therefore, void; but, at the same time, though the Supreme Court held that these three Acts are void, by relying on the doctrine of "prospective over-ruling", it took the view that they must be treated as valid and subsisting, but henceforth, in future. it would not be open to Parliament to amend the Constitution so as to, take away or abridge in any way the fundamental rights guaranteed by Part III of the Constitution. In other words, these three amendment Acts were safe from challenge under articles 13(2) of the Constitution, according to the majority view of the Supreme Court.

Now I will tell in a nutshell what is the effect of the majority decision. According to the majority decision, the Constitution First Amendment, Fourth Amendment and Seventeenth Amendment Acts are valid, even though they violated the provisions contained in article 13(2) of the Constitution. Inasmuch as these three Acts have been declared by the Supreme Court as valid, it follows that any statutes enacted either by Parliament or by State Legislatures in pursuance of these three Amendment Acts would also be valid and effective in law. It further follows that

any action taken either by the Central Government or the State Governments in pursuance of these three Amendment Acts, or statutes enacted in pursuance thereof would be valid and effective. But a mandate has been laid down by the Supreme Court that in future Parliament shall not pass any law which has the effect of taking away or abridging the fundamental rights guaranteed by Part III of the Constitution.

With great respect to the Supreme Court, I feel that while giving this judgment the Supreme Court has not carefully considered the impact or Part IV or the Constitution in relation to Part III of the Constitution. I have already pointed out that the Constitution First Fourth and Seventeenth Amendment Acts were enacted by Parliament primarily with a view to giving effect to the land reforms and other policies of the Government so as to avoid conflict between the provisions contained in Part IV and Part III of the Constitution. It is a matter of regret that even though this aspect of the matter was fully argued before the Supreme Court, the Chief Justice pointed out that it might be possible that Part III and Part IV could be harmonised and reasonably enforced.

It is just merely begging the question; if I may say so with due respect to the Supreme Court, the Supreme Court has not paid proper attention as to how these two Parts could be made to harmonise with each other.

Now, I will make a few observations regarding the doctrine of "prospective overruling". According to the Supreme Court, even though these three Amendment Acts are bad, inasmuch as they went against the provisions of articles 13(2), on the doctrine of "prospective overruling" they should be treated as valid and effective in law. They further held that henceforth no amendment should be made to the Constitution which would be affected or hit by the provisions of article 13(2) of the Constitution.

Here also, with due respect to the Supreme Court, I beg to differ on the point. Article 13(2) says:

> "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 clauses shall, to the extent of the contravention, be void."

That means, the mandate given by article 13(2) is that a law affecting the fundamental rights is void and void means, void *ab initio*, as if it is no existing in the statute book.

In this connection I may bring to the notice of the Chairman and hon. Members the observations made by Professor Cooley in his well known book on Constitutional Limitations wherein he observes:—

> "A statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection. but must be re-enacted".

I may further add that the observations made by this well known author have been quoted with approval by the Supreme Court itself in the Saghir Ahmed's case. Wherein, the Supreme Court took the view that if any law enacted by Parliament came in conflict with the provisions contained in article 13(2) of the Constitution, such law must be treated as non-existent and considered as if it was dead for all times. Knowing fully well that this is the position, it is surprising that the Supreme Court in Golak Nath's case took the view by adopting the doctrine of "prospective overruling" applicable in the USA that these three Amendment Acts should continue to be valid. The well-known principle is that the function of a Court, including the Supreme Court, is just to construe or interpret the Constitution and not to legislate in the matter. With due

respect, I feel that the construction given by the Supreme Court as aforesaid has virtually the effect of adding something in article 13(2), which specifically says that a law made by Parliament going against the fundamental rights is *void*. My strong feeling is that this amounts to making of Law or legislation which, with due respect, is not the function of the Supreme Court but only the function of Parliament.

The Supreme Court has held that 'law' as used in article 13(2) must be construed as referring not merely to law made by Legislature or Parliament in the exercise of its ordinary legislating power but also including an amendment of the Constitution made having regard to the procedure contained in article 368. Here also, with due respect, I feel that the view taken by the Supreme Court is not sound and requires reconsideration.

First of all, this view goes against the unanimous view taken by five Judges of the Supreme Court in Sankari Prasad's case and also by the majority Judges, namely, three Judges, in Sajjan Singh's case. This is also against the view taken by five minority Judges in Golak Nath's case. In other words, this is the view taken by six Judges in Golak Nath's case and two Judges in Sajjan Singh's case, that means, this is a view taken by eight Judges *vis-a-vis* the view taken by 13 Judges, if we look to the number of Judges in all the three cases.

Be that as it may, as the view has been expressed by the Supreme Court as the Full Court, we have to look only at the majority and the view at present is that the definition of 'law' as contained in article 13(2) includes the amendment of the Constitution.

**Shri Nath Pai:** There were not 21 Judges but only 19 Judges because two Judges, namely, Mr. Justice Wanchoo and Mr. Justice Hidayatulla, were common. So, 12 Judges are for what I hold and 7 against.

**Shri Gae:** I might stand corrected in the matter.

I may further point out that, when it is contemplated that some legislation should be enacted by Parliament the Constitution framers have made an express legislative procedure contained in articles 107 to 117 includes in Chapter II of Part V of the constitution. I am just bringing to your notice that the legislative procedure for making laws is contained in articles 107 to 117 of the Constitution, but the procedure for an amendment of the Constitution, it is significant to note, is not included in Chapter II of Part V of the Constitution but is included in a separate part by itself, namely, Part XX of the Constitution which is headed "Amendment of the Constitution".

In other words, according to my view, the framers of the Constitution considered that the making of a law in exercise of the ordinary legislative powers of Parliament and State Legislatures is quite separate and distinct from the amendment of the Constitution which is specifically provided for in Part XX of the Constitution. My view therefore is that 'law' as used in article 13(2) should be construed as meaning merely law enacted by Parliament or State Legislatures in exercise of their ordinary legislative powers' and not an amendment of the Constitution made by Parliament in exercise of its constituent power contained in article 368 of the Constitution.

Now I am coming to the most important part. What are the alternatives available to Parliament for the purpose? I wish, first of all, to specify five alternatives which, in my view, are relevant for the purpose of our consideration and then offer my comments as to which alternative should be treated as the most expedient in the circumstances of the case.

**Shri Jairamdas Daulatram:** Would you not just deal with that alternative instead of going to the others?

**Shri Gae:** Day before yesterday I noticed that some of the hon. Members raised questions about the various alternatives; so, I thought, I might explain in a nutshell the five alernatives and point out how far these alternatives are relevant or not.

**Shri M. Y. Saleem:** That you have given in your memorandum. If you want to add anything, we have no objection.

**Shri Gae:** I will tell it in a nutshell.

The first alternative is to move the Supreme Court to reconsider its decision in Golak Nath's case. My feeling is that it is too premature at this stage to move the Supreme Court in the matter. The judgment has been given as recently as on the 27th February, 1967, and no special circumstances have occurred since then which might be treated as inducive or conclusive to induce the Supreme Court to reconsider its judgments. When a judgement is required to be reconsidered there must be a likelihood in the mind of the authorities concerned, of obtaining a unanimous or practically unanimous view from the Supreme Court in respect of a matter about which a review or revision is asked for. In the present case the majority being six to five, it is extremely difficult at this stage to persuade the Supreme Court to give a revised judgment, if any application is made for that purpose. From that point of view, my feeling is that we should, try to find out some ways and means by which the rigour of the Supreme Court decision be reduced in the first instance and then examine whether the Supreme Court should be moved for that purpose or not. From this point of view, my submission is that this course is not practicable at the present time.

The second course which was been raised by some of the jurists and Parliamentarians is to request the President to make a reference to the Supreme Court under Article 143(1) of the Constitution. This course also, I would submit, is not sound for some reasons which I shall briefly give now. The very first thing is that when the Supreme Court exercises jurisdiction under Art. 143(1), its jurisdiction is merely an advisory one; the opinion given by the Supreme Court is just treated as an opinion and is not treated as the judgment of the Supreme Court given in a case decided by it. There is a possibility that the Supreme Court might refuse to give an opinion because Art. 143(1) itself does not impose an obligation to give such an opinion; it is left to the discretion of the Supreme Court whether an opinion should be given or not, and in case the Supreme Sourt, in its wisdom, refuses to give an opinion, then we might not be wiser in any way by moving the Supreme Court in the matter. At the same time, it is extremely difficult to conceive that, by the adoption of this course, the Supreme Court could be persuaded to set aside or review or revise the decision given by the Full Court of 11 judges, though the decision is by 6 to 5. In other words, I do not think that, by the adoption of this course, the Supreme Court could be persuaded to set aside the majority judgment in Golaknath's case.

The third course is to ask the Parliament to make a law under Art. 248 and Entry 97 of the Union List providing for the convenig of the Constituent Assembly and thereafter the Constituent Assembly may amend the Constitution. In this connection, I may point out that the view expressed by the Supreme Court should not be treated as the view of the majority judges, namely, six judges. If we look to the view of the five judges headed by the ex-Chief Justice of India. Justice Subba Rao, it has been made specifically clear that they are not expressing any final view on the subject. In other words, what has been stated by him, and four other judges concurring with him, is merely by way of observations made by them. Only one judge, Justice Hidayatullah, has made some categorical observa-

tions in this behalf, and has thought that it is possible to adopt this course. So, it should not be treated as the view of the majority judges that Parliament could convene a Constituent Assembly and that Constituent Assembly could amend the Constitution.

Now, the Supreme Court has, by a majority judgment, invoked the provisions contained in Article 248 and Entry 97 of the Union List on the plea that there is no other provision elsewhere in the Constitution whereby the Constitution could be amended. Pausing here for a moment, I will ask the question: is it ever conceivable that the framers of the Constitution, when they framed the Constitution in the year 1949, were not aware of including a provision for an amendment of the Constitution? Several foreign jurists have criticised that the Indian Constitution is rather too long and contains several provisions which ought not to be included therein. There might be some truth in it. At the same time I just wonder whether, when our Constitution-makers had taken ample care to include so many minute provisions in the Constitution, they were so absent-minded as not to include any specific provision regarding the amendment of the Constitution itself; for example, the Constituent Assembly took care to include as many as 97 entries in the Union List, as many as 66 entries in the State List and as many as 47 entries in the Concurrent List. That shows the thoroughness with which the Constituent Assembly went into details with a view to seeing that nothing was left over. If it is permissible to look to the Constituent Assembly debates, it will be seen from the speeches made by Dr. Ambedkar and other leaders of those times that it was contemplated by the framers of the Constitution that Art. 368 itself should be treated as dealing with the power to amend the Constitution and not merely the procedure to amend the Constitution. Here about the residuary power, I would like to make one general observation. It is just a chance that the Constituent Assembly included Entry 97 in the Union List. It was open to it to include the entry, if it is so desired, in the State List, in which case, it to include the entry, if it is so desirlature was competent to make law in respect of that matter. In this connection, I would like to invite the attention of the Chairman and the hon'ble members of the Committee that Section 140 of the Government of India Act, 1935, empowered the Governor-General by public notification, to direct whether the Dominion Legislature or the Provincial Legislature should enact a law with respect to the residuary matter. I am pointing out this to indicate that the residuary power, given in Art. 248 as well as in Entry 97 of the Union List, is just a chance. It could have been easily given to the President of India just as Section 104 of 1935 Act gave to the Governor-General, or it could have been given to the State Legislature. Therefore, to quote Entry 97 of the Union List and Art. 248 for the purpose is not very appropriate in the circumstances of the case.

Assuming for the sake of argument that the Parliament is competent to make a law under Art. 248 for the purpose and by that law, a Constituent Assembly is convened to amend the Constitution, it is conceivable that the amendement of the Constitution so made by the Constituent Assembly convened as contemplated above may even provide for anything to be done by a simple majority. In other words, it is open to the Constituent Assembly so convened even to amend the provisions contained in Part III of the Constitution by a simple majority, even though it may be abriding or taking away the fundamental rights. If that is done, that will whittle down completely the effect of Art. 368 whereby the Constituent Assembly expressly gave power to Parliament to amend the Constitution by a special majority and also by ratification by one-half of the State Legislature in certain cases. It is also conceivable that the Constituent Assembly so formed might even abrogate Part III of the Constitution by

a simple majority. I am just pointing out the anomalies which would arise if this course is adopted.

I would like to submit one more point. According to the Supreme Court's majority decision, Parliament which is a constituted body and cannot amend the Constitution taking away or abridging the fundamental rights having regard to the provisions contained in Art. 13(2) of the Constitution. Then the question arises if Parliament itself is not competent to amend the Constitution, how can it arrogate to itself the power to make a law and create another body, which will be a constituents body having power higher than that which is possessed by the Parliament itself? It is a well known principle in law that a delegate cannot have power higher than that of the delegating authority. The Constituent assembly convened in circumstances mentioned above cannot have any higher power than that possessed by Parliament itself.

I would like to pinpoint another issue. Even after the decision of the Supreme Court in Golak Nath's case, the Supreme Court gave another important judgment in the Rajasthan Electricity Board case. The Supreme Court had occasion to construe the definition of the word 'State' in article 12 of the constitution. Supreme Court held that the State in article 12 was wide enough to include every authority, created by a Statute and functioning within the territory of India or under the control of the Government of India. Even if it is permissible to make law for the purpose under article 248, the Constituent Assembly convened would be "The State" in view of the interpretation in this judgment. The amendment of the Constitution made by such Constituent Assembly would amount to "law" and be subject to the principles contained in article 13(2) of the Constitution. I have given there grounds to indicate that the view suggested by the Supreme Court is with due respect not sound and requires to be reconsidered. I feel that this course should not be adopted in view of the various anomalies pointed out by me just now. The fourth course suggested by some of the jurists and Parliamentarians is the course of holding a referendum. The framers of the Constitution did not contemplate making any provision for referendum in the Constitution. If we look carefully we find no provision regarding the referendum. The Constitution of some foreign countries like Switzerland and Australia contains provisions for Referendum. Suppose it is possible to hold a referendum. It will be required to be referred to all the members of the electorate. The number of the electorate under the Constitution runs into 250 million voters. If referendum is to be made that would have to be made to as many as 250 million voters. What expenditure will have to be incurred and what labour involved? Every time the question of amending the Constitution regarding fundamental rights is considered should we have a referendum for the purpose? Suppose this is to be done. We have to consider as to whether it would be approporiate to do so, especially when the opinions of Parliamentarians, advocates and jurists are divided. The electorate is not so educated and cultured as in some foreign countries, to express a considered opinion on the complicated issue as to whether fundamental rights could be amended in the sense of restricting or taking away the rights contained in Part III. From the practical point of view, I submit, referendum is not the appropriate course.

If all the above four courses are not appropriate, then, what is the appropriate course? The appropriate course is in my view to amend Article 368 about which the hon. Member sitting next to me has moved the Bill. So many difficulties have been pointed out by me in the matter. I think, that Art. 368 should be amended in such a way as to remove the hardships or difficulties which have arisen from the majority decision of the Supreme Court. The article itself must provide that Parliament shall

have exclusive power to amend any provision of the Constitution. This submission is made by me in view of the fact that the majority judges took the view that Art. 368 is merely procedural in nature. I don't want to dilate upon the issue as to whether it is procedural or not. The way in which it is worded, it is not procedural. It contains power to amend the constitution. This is quite clear from the heading *"Amendment of the Constitution"*. It is also clear from the commencement of the article saying, "Amendment of this Constitution," and "this Constitution," menas the Constitution, indulging *ipso facto*, Part III.

This is also clear from the provisions in the substantive part of the article, viz., *"the Constitution shall stand amended"*. When the Constituent Assembly took care to include so many provisions, speaking for myself, I have no doubt that article 368 Contains power to amend the Constitution. When the majority decision has held that the power is not there, I would submit that article 368 should be amended, providing that that article itself contains the power to amend. One more amendment should be made. The power exercised by Parliament under Art. 368 is a constituent power—and not merely a legislative power. I say this because the Supreme Court has, at various places, drawn distinction while giving the meaning of the word 'law' indicatin that the ordinary legislature power of Parliament is quite distinct from the power which the Parliament has, for amending the Constitution. The amendment may provide that the power exercised is the constituent power of Parliament and not its ordinary legislative power. We must include Part. III of the Constitution in the proviso to the article. Supreme Court has pointed out that the provisions contained in the proviso do not say anything about Part III. There is a great deal of force in what the Supreme Court has stated in this behalf. Proviso to Art. 368 *inter alia* provides that amendment of Chapter V of Part VI would require ratification by one-half of the State Legislatures. If we examine this Chapter it includes article 226. Article 32 which itself is a fundamental right, is contained in part III but is unfortunately not included in the proviso to Article 368 of the Constitution. The difficulty was pointed out by one of the judges on Sajjan Singh's case, namely Chief Justice Gajendragadkar. Fundamental rights should be treated on a higher level than other rights in the Constitution I therefore submit that an express provision should be included in the proviso to Art. 368 regarding amendment of Part III.

Article 368 may be further amended providing that that an amendment of the Constitution made under Article. 368 shall not be deemed to be a "law" within the meaning of Art. 13 (2) of the Constitution. Now, the question arises as to whether in spite of such a provision being made the matter could not be challenged in a Court of law. I may in this connection point out that I am fully conscious and aware that whatever course Parliament may adopt is liable to be challenged in the Supreme Court. My feeling is that we should try to find out ways and means whereby this danger could be minimised.

Art. 13(2) says that the State shall not make any law which takes away or abridges the fundamental rights. I may point out that this provision in Art. 13 (2) in Part III was included by way of abundant caution. As a matter of fact in Gopalan's case Kania, C. J., held that the provisions in Art. 13 (2) are merely by way of abundant caution. Even in their absence, the general principle of law applicable would be the same. From that point of view in spite of the existence of Article 13(2) and (3) of the Constiution, Parliament should not be deterred from amending Art. 368 bravely on the lines mentioned by me as above.

The majority decision of Supreme Court has pointed out that "funds-

mental rights are given a transcendental position under our Constitution and should be kept beyond the reach of Parliament." Here, with due respect I beg to differ from the Supreme Court decision and consider that this requires reconsideration. Even if it is intended that fundamental rights should be given a higher position, as they ought to be, I would make one more observation, viz, that the fundamental rights should be treated as separate and distinct from the provisions contained clauses (a) to (e) in the proviso to Art. 368 (1) of the Constitution. My point is this. For amendment of any of the provisions contained in these five clauses, the proviso requires that, besides the special majority as required by the operative part of this Article, the amendment should be ratified by at least one half of the State legislatures. If it is intended—as it ought to be—that fundamental rights should have a higher footing, I would submit that instead of ratification by one half of the State legislatures Parliament may provide for ratification by two-thirds of the State legislatures, so that it may be still more difficult for Parliament to amend Part III of the Constitution.

Another point is that the Supreme Court majority decision pointed out that the procedure for amending the Constitution as laid down in Art. 368 is more or less the same as the procedure for making an ordinary law. It may be so. But it does not follow therefrom that Art. 368 does not give Parliament power to amend the Constitution. If it is intended that the Supreme Court's objection in this behalf should be softened down it is open to Parliament, if it is so minded, to specifically provide that the assent of the President which is required for every legislative measure need not be required in respect of the amendment of the Constitution, under Art. 368. I may also point out that a somewhat similar provision to that effect exists in the Constitutions of Ireland and also, I think, of the USA. In other words the assent of the President should not be a *sine quo non*, for amendment of the Constitution. This observation is made by me only with a view to reducing the rigour of the majority decision of the Supreme Court which said that the procedure laid down to amend the Constitution is more or less the same as that provided to make an ordinary law. If it is so, Parliament may in its wisdom consider whether for the purpose some special procedure like the joint sitting of both Houses to consider the Bill should not be suggested. This is for the Joint Committee and the Parliament to consider and decide.

I have to make one more observation regarding amendment of Art. 368. The Supreme Court relied on the marginal note to Article 368—"Procedure for amendment of the Constitution." No doubt the marginal note says so. The marginal note, it is well settled, cannot affect the operative part of the Article. If the Article itself provides for power to amend the Constitution, we cannot rely merely on the marginal note. Marginal note may be accordingly amended.

Thus, I have briefly given seven or eight suggestion to amend Art. 368 primarily with a view to reducing the rigour of the majority decision of the Supreme Court.

Now I will come to a very important issue. Day before yesterday a question was raised as to whether it is really necessary to amend the Constitution. I will submit that it is absolutely necessary and essential that as early as possible the Constitution should be amended. Permit me, Mr. Chairman and hon. Members, to expand this idea as to why I think so.

In two or three recent cases the Supreme Court had to consider the provisions of the Land Acquisition Act, 1894 from the point of view of Part III of the Constitution. In the very recent judgment in Vishnu Prasad Sharma's Case the Supreme Court had the occasion to examine 4 and 6 of the Land Acquisition Act. In

a nut-shell Sec. 4 authorises the Government to issue notification that land is likely to be needed for a public purpose.—Enquiries under Section 5 A are thereafter made and a report is then made by the Collector. Section 6 authorises the Government after considering the report to issue a declaration that any particular land is needed for a public purpose. The Act further provides that the compensation payable for land acquired under the Land Acquisition Act shall be the market value of the land on the date of publication of Sec. 4 notification. In Sharma's case the Supreme Court held that once a declaration is made regarding any land under Sec. 6 that exhausts notification under Section 4, as it has served its purpose. There can be no successive notifications under Sec. 6 with respect to a land in a locality specified in one notification under Sec. 4 suppose, for example, the notification under Sec. 4 says that ten acres of land are needed for a public purpose and the declaration issued under Sec. 6 thereafter says that only three acres of land are needed for public purpose. According to the Supreme Court the notification under Sec. 4 regarding the balance of seven acres lapses. Subsequently if the Central Government or the State Government intends to issue a further declaration or, declaration under sec. 6 to acquire these seven acres of land, according to the Supreme Court, this can be done only after fresh a notification or notifications under Sec. 4 are issued in respect of such land. This would virtually mean that after the declaration under Sec. 6 is issued regarding part of the land notified under Section 4, a fresh notification or notifications under Sec. 4 will be required to be issued for the balance of the land, because in such a case the notification under Sec. 4 is exhausted. Experience shows that between the declaration under Sec. 6 and the notification under Sec. 4 there is usually a long time-lag. In some cases the time-lag extends to 10 to 15 years. Be that as it may, so long as the Supreme Court's judgment stands, whenever a fresh notification or notifications under Sec. 4 are required to be issued for the land to be acquired, that will be the date which will determine the compensation payable under Sec. 23 for the land acquired. In other words, when such a notification or notifications are issued under Sec. 4 the market value for the land acquired will be as on the subsequent date or dates of such notifications. Thousands of acres of land have been acquired by both the Central Government and the State Governments. So long as the Supreme Court's judgment stands, I have not the slightest doubt in my mind that the Central Government and the State Governments will have to face a large number of writ petitions and suits in the High Courts and the Supreme Court whereby the previous owners of land would claim payment of compensation at the enhanced rate and such claims might succeed.

Having regard to the present economic situation in the country, it would be extremely difficult, if not impossible, both for the Central Government and State Governments to meet this situation. As a matter of fact, I may add that some writ petitions are actually pending before the Supreme Court. And they are likely to come up for hearing in the course of this week or next week. The same issue has been raised in view of the decision in Vishnu Prasad's case. The argument advanced will be that in view of the judgment given in that case the compensation for the land acquired should be at the rate prevailing on the date of subsequent notifications under section 4. The Supreme Court is likely to accept this contention regarding the compensation payable for land acquired. Further in Vajravelu Mudaliar's case, the Supreme Court held that "compensation" under 31 (2) means the just equivalent of what the owner has been deprived of at or about the time of acquisition of the land. In view of this, it is open to the Supreme Court to consider as to whether the compensation offered is or is not the just equivalent of what

was deprived of from the owner while acquiring the land and the issue is justiciable in spite of the said article. Serious difficulties have thus arisen with regard to payment of compensation for acquiring lands in the case of Vishnu Prasad and Vajravelu Mudaliar's cases required to above.

Having regard to all the difficulties pointed out by me just now I feel that the amendment of the Constitution for the purpose should be considered is really essential in the national interest. I have not the slightest doubt that Parliament, in its wisdom, would consider whether the situation should be saved by suitably amending the Constitution for the purpose. Parliament has recently enacted the Land Acquisition (Amendment and Validation) Act, 1967 whereby the previous acquisitions made in violation of the principle laid down by the Supreme Court have been validated, however it is liable to be in view of, the Supreme Court's decision regarding "compensation" payable under Art. 31(2) challenged referred to above. This no doubt is a constitutional issue. I have no hesitation saying that amendment of the constitution for the purpose is essential. This can be done, after amendment of Art 368, as proposed above by including the Land Acquisition (Amendment and Validation) Act, 1967 in the Ninth Schedule, making it immune from challenge as violating Art. 13 (2) of the Constitution.

**Mr. Chairman:** Mr. Gae, here I would suggest that you have been very exhaustive in dealing with the Supreme Court's judgment. You have also suggested various alternatives and ultimately pleaded for the amendment. What I would suggest is that let the members put some questions to you. That would be better also for you to clarify your position further. Would it be all right?

**Shri Gae:** In connection with the amendment of Art. 368, my submission is that we should act in such a way that there should be no conflict between the Supreme Court on the one hand and the Parliament on the other. The Constitution should be so construed that the Supreme Court and the Parliament do not come in conflict with each other.

**Shri M. Y. Saleem:** We are more interested in the Fundamental Rights than in the Land Acquisition Proceedings. The Government has got to pay compensation for the lands acquired. Do you agree?

**Shri Gae:** I agree, however, some provisions in Part III of the Constitution which are important require consideration, *e.g.*, whether we should amend Art. 31(2) 31B to meet the situation.

**Shri Nath Pai:** Mr. Gae, the hon. Member draws your attention on the elaboration of your views to the basic freedom, freedom of association etc. That is the real thing that causes some apprehension in the minds of the hon. Members.

**Shri Gae:** My submission is, that several cases relating to fundamental rights to property have gone before the Supreme Court. The Supreme Court has given judgments in these cases in relation to right to property The rights to property can not be treated lightly. They are also important fundamental rights just like rights as to freedom of speech, association etc. Now that we have got the Supreme Court's judgments, we have to abide by them.

**Shri Nath Pai:** That may be the accidental thing that the Supreme Court had given its opinion on matters relating to property rights and the compensation that is involved thereon. But, my amendment seeks to amend all the provisions incorporated in Part III of the Constitution. The hon. Member who just spoke is not so much bothered about the rights to property. The hon. Members here are more concerned with the powers to be required by Parliament if my amendment is passed.

We would like to have your benefit of evidence on this. So, for the time being you forget about the rights to property. But concentrate on my Bill viz., seeking powers to amend all provisions incorporated in part III of the Constitution by Parliament.

**Shri Gae:** I would say that the power to amend the Constitution must be available to Parliament by amending article 368 in respect of fundamental rights. Once the powers is available for amending Part III of the Constitution, subsequently, it should be left to Parliament to decide as to whether any amendments should be made to Fundamental rights to property or to the rights relating to freedom of speech, expression, etc. The truth of the matter is that in view of the Supreme Court's judgment, there is at present no power available to Parliament to amend the Constitution so far as Part III is concerned. Therefore, as the hon. Member pointed out specifically, Parliament must first of all have the power to amend Part III. Once the power is given to Parliament to amend Part III it is subsequently for Parliament to decide whether Art. 31(2), 19 or any other Article—in Part III relating to fundamental rights guaranteed under the Constitution should in fact be amended. Let the power be given to Parliament firstly, and let the Parliament decide subsequently as to fundamental rights ought to be amended. If this power were in existence, the difficulty of amending the fundamental rights would not have arisen. The crux of the matter is that in view of the majority judgment of the Supreme Court in Golak Nath's case. The real difficulty has arisen in the matter.

**Shri M. Y. Saleem:** Articles 21 and 22 deal with freedom and personal liberty of people. My question is this. Do you think that it would be desirable that in a country where there is a written Constitution, such valuable rights should be subject to the whims and fancies of a party in power having a majority in the Parliament as also in the State Legislatures?

**Shri Gae:** My submission is: that what portions of Part III should or should not be amended is entirely a matter for Parliament to decide. I fully concede that in the past the Constitution was amended many times.

**Shri M. Y. Saleem:** Then in Part III it has been provided as to what is the mode of amendment and how far the rights given in Part III will be amended.

**Shri Gae:** If I may say so when the Constitution was amended in the past, criticism was made in various quarters with which I am not just now concerned at this stage. I may point out that having regard to the Constitution of the present Parliament, especially, the Lok Sabha, it would be improper to say that the Constitution can be amended easily, when the amendment has to be passed by a majority of the total membership of the House and by a majority of not less than two-thirds of the members present and voting. Over and above that, my submission, as I already mentioned, is that so far as amendment of Part III is concerned, it should be included in the proviso to art 368 requiring thereby ratification, by one half of the State legislatures. and in order to give a still higher sanctity to fundamental rights I went a step further and suggested that instead of having one-half majority, there should be two-thirds majority so far as ratification by State legislatures is concerned so that amendment to fundamental rights becomes still more difficult. It is quite conceivable that on account of the present situation, more so, having regard to our neighbours who are not friendly with us, in the larger interests of the nation some of the fundamental rights might require to be restricted and in such a case, Parliament in its wisdom may, with a special majority and with the ratification by one-half or two-thirds of the State legislatures, enact a law amending fundamental rights in the Constitution. Then it must be

considered whether in the national interest the amendment is called for. At the same time I do not want to undermine the importance or sanctity of fundamental rights, but we must not be absent-minded to the fact that circumstances might arise in future whereby amendment of fundamental rights to a certain extent might be called for. We must leave it to, Parliamentarians to decide as to how that should be done.

**Shri M. Y. Saleem:** What will be the fate of Part III of the Constitution if history repeats itself and one Party comes into power at the Centre as well as in all the States?

**Shri Gae:** To that my answer is: Art. 368 itself provides a safeguard by requiring a special majority—*i.e.* absolute majority and two-thirds of Members present and voting—and over and above that ratification by one-half or if necessary by two-thirds of the State Legislatures as I suggested above. If this precaution is taken, if I may say so, that will go to meet the point or issue raised by hon'ble Members because I think and I submit that it will be extremely difficult in future to amend the Constitution when Art. 368 requires such high majority and ratification as contemplated by me just now. But, at the same time if I may repeat again, their might be a situation in future, bearing in mind our neighbours as they are, whereby, in the larger national interest amendment of Part III may be really essential. Hence if once power is given as contemplated in the Bill of the hon'ble mover, that power should be available and remain in the statute book thereafter. It may then be left to Parliament to consider as to how far, and if so, which of the fundamental rights in Part III should be restricted or modified.

**Shri M. Y. Saleem:** Do you attach any significance to this aspect of the Constitution that in Part III there is Art. 32 which itself is a fundamental right whereas in Part IV which is the Directive Principles Chapter there is Art. 37 which says that the Directive Principles will not be enforceable by a court of law?

**Shri Gae:** It is true that Part Art. 37 contained in Part IV which refers to Directive Principles specifically provides that the provisions contained therein shall not be enforceable by any court. But, at the same time, the framers of the Constitution have expressly provided that the Principles contained in Part IV are nevertheless fundamental in the governance of the country and further a duty has been imposed on the State including thereby Parliament, State Legislatures, Central Government, State Governments, etc., to apply these principles in making laws. As I have already explained, if we take the Constitution First Amendment, Fourth Amendment and the Seventeenth Amendment, Acts they all became necessary, in view of the fact that the provisions contained in Part III came in conflict with the Directive Principles contained in Part IV. With a view to avoiding that conflict and having regard to the socialist pattern of society on which our Constitution is based, the above Amendment Acts dealing with fundamental rights to property came into existence.

**Shri M. Y. Saleem:** Does it not mean that the framers of the Constitution wanted to place Part III at a higher level than Part IV?

**Shri Gae:** I entirely agree with the hon'ble Member that the framers of the constitution concede that Part III should be placed on a higher footing. At the same time we must take care to see that the provisions of the Constitution, namely, the provisions contained in Part III and Part IV are construed in a harmonious manner, having regard to the principle of harmonious construction. If we do not construe the Parts in a harmonious way virtually that would mean that the efficacy or the effect of the principles contained in Part IV is practically whittled down. Such construction should not be favoured, more so, when the framers of

the Constitution imposed a duty on the State to apply the principles contained in Part IV in making laws.

**Shri M. Y. Saleem:** What is the position if any Article in Part IV comes into conflict with an Article in Part III?

**Shri Gae:** Part III will prevail in that case. Parliament will have to consider in its own wisdom as to whether a particular Directive Principle of State Policy contained in Part IV should be applied in such a way that it is harmoniously construed with provisions of Part III. If necessary that can be done by suitably amending Part III of the Constitution, as was done in the past.

**Shri A. N. Mulla:** I have a few questions in my mind, but after this heavy onslaught I need some rest and all those questions have gone out of my mind. I would not put any question to-day.

**Shri M. P. Bhargava:** I will follow suit.

**Shri N. C. Chatterjee:** Justice Hidayatullah had expressed the view that there should be a Constituent Aseembly for the purpose of making any abridgement or modification of fundamental rights. Now that would be under the residuary power given in the last item of List I of the Seventh Schedule. Is it not so?

**Shri Gae:** That would be so.

**Shri N. C. Chatterjee:** That would be also a law to be covered by Art. 13?

**Shri Gae:** That would also be a law.

**Shri N. C. Chatterjee:** That would also be illegal.

**Shri Gae:** That would also be liable to challenge as going against the Supreme Court's majority decision. If I may repeat, I have already mentioned 5 courses. Any course out of these five, if it is adopted, is liable to be challenged before the Supreme Court. In view thereof let us find out the course where the objection may be the least. My submission is that that course is the amendment of Art. 368. If any other course is adopted, the risk of challenge, in case the matter is taken back to the Supreme Court would still be much more than what it would be if Art. 368 is amended.

**Shri N. C. Chatterjee:** In some Constitutions, the procedure for amendment is laid down and the judges have ruled that this implies power to amend the Constitution. Don't you think the same principle should be invoked in the case of Art. 368?

**Shri Gae:** My reading of the Constitution is that Art. 368 itself contains the power to amend the Constitution. However the Supreme Court in its wisdom by a majority decision has held that Art. 368 is merely procedural in nature and has taken the view that there is no provision contained in the Constitution giving expressly the power to amend the Constitution. In view thereof the Supreme Court thought that the only course is to have recourse to Art. 248, or the residuary power contained in entry 97 of the Union List. It is just a chance that such power is included in the Union List. It could have been included, if the framers so desired, in the State List. In that case, could it have been open to the Supreme Court to say that for the purpose the power is available to the State Legislature? Could it have been open in such a case for the State Legislature to make a law and thereby convene a Constituent Assembly? This, in my view, would lead to absurd results, requiring thereby reconsideration by the Supreme Court of its decision at the earliest possible opportunity.

**Shri N. C. Chatterjee:** Take Art. 15(4). That is the First Constitutional Amendment which was made by Parliament under Art. 368. It says:

"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.

Supreme Court struck down the communal GO and that is why this article was put in. Therefore, the amendment that is sought to be made under Art. 15, although obviously trying to limit the rights was really made for the Scheduled Castes and Scheduled Tribes and backward people. Therefore, it was done really for helping the down-trodden people.

**Shri Gae:** I agree with the hon'ble member.

**Shri N. C. Chatterjee:** Therefore, some modifications of fundamental rights are made not for the purpose of actually giving some additional power or facility to the well-to-do or the propertied classes, but really to help people who are helpless, people who are down-trodden, people who have been kept very low in the social field for centuries.

**Shri Gae:** What the Supreme Court has held is that the amendment of the Constitution, in so far as it restricts, limits, abridges or takes away the fundamental rights, is void. Supreme Court does not preclude amendment by way of expansion of a fundamental right. The Supreme Court judgment in Golak Nath's case does not come in the way for that purpose.

**Shri N. C. Chatterjee:** Look at Art. 15(4). According to Chief Justice Subba Rao's judgment, Art. 15(4) would have been illegal, because it infringes the fundamental rights.

**Shri Gae:** To that my submission would be that unless and until there is some power whereby Part III of the Constitution could be amended, we are completely faced with a dilemma. It would not be possible to proceed anywhere further. In view of the concept of socialistic pattern of society, to which we are wedded, which is laid down in the Preamble and which has also been laid down in the policies of the various States Government and also the Central Government, my first submission is this. Let there be power given to the Parliament to amend Part III of the Constitution. At present there is a vacuum. According to the Supreme Court, there is no such power to amend. In view thereof, with due respect to the hon'ble Mover of this Bill, I would say that the Bill is appropriate, for the purpose the Bill must expressly provide for the power to amend Part III of the Constitution and make some suitable provision whereby the power could be exercised. Once that power is available, leave it to Parliament to consider and decide as to what fundamental rights guaranteed in Part III should be limited, how and in what manner these rights should be restricted etc. As already pointed out by me, now an amendment by way restriction or limitation of fundamental rights would be an uphill task. Parliament need not deter by what has happened in the past.

**Shri A. N. Mulla:** We should understand the point of the Supreme Court majority judgment correctly. I think their view is not that these laws are good for all times. Their view is that the provisos under Art. 19 in the original Constitution are sufficient to provide an evolutionary process and we should confine to those provisos when bringing in any new laws and should not seek any new amendment. So should we not know why those provisos are not sufficent and why other powers should be given.

**Shri Gae:** Supreme Court had occasion to consider this on more than one occasion. For example, take the 7 freedoms given by Art. 19(1). No

doubt these freedoms that are given by Art. 19(1), are absolute. At the same time the framers of the Constitution contemplated that if these freedoms remained absolute without any limitation, it might be extremely difficult for the State, including the Parliament and State Legislatures, Central Government and the State Governments, to make the laws and to run the administration of the country. In view thereof, in respect of each of these freedoms contained in Art. 19(1) (a) to (g), the framers of Constitution have imposed certain restrictions and limitations.

**Shri N. C. Chatterjee:** Therefore Art. 19 itself as framed originally stipulated the correlation between the rights of the individual citizens and the rights of State operating in the same field.

**Shri Gae:** Correlation has to be done. First the seven freedoms are given and the other clauses say where they can be restricted and under what conditions they can be restricted.

**Shri N. C. Chatterjee:** Look at Art. 19(2). Supposing we find that that there is no danger from China and from Pakistan and from any other State and we want to delete clause (2). That would be permissible under the Supreme Court judgment.

**Shri Gae:** That might be, if the assumption that there is no danger is correct.

**Shri N. C. Chatterjee:** Supposing Parliament is convened. If anybody wants to delete clause (2), there is no objection.

**Shri Gae:** This should be left to the wisdom of Parliament. I am quite positive that Parliamentarians in their wisdom would consider and decide as to what is in the larger interests of the country.

**Shri N. C. Chatterjee:** Theoretically I am pointing out, that legally it is permissible. That will not be unconstitutional.

**Shri Gae:** I agree theoretically it would be permissible.

**Shri N. C. Chatterjee:** Under the majority judgment, it is prefectly proper to delete clause (2). It is legally proper.

**Shri Gae:** Theoretically it may be permissible. If we follow the majority judgment and convene a Constituent Assembly by invoking Art. 248, as I pointed out, that Constituent Assembly can even by simple majority go into the entire Part III of the Constitution.

**Shri N. C. Chatterjee:** It is not a question of Constituent Assembly. Constituent Assembly is needed if I want to abridge or limit the fundamental rights. If I want to expand the freedom of speech, freedom of expression etc. by removing all the fetters in that article, that can be deleted under that Judgment.

**Shri Gae:** I agree. Supreme Court judgment does not come in the way.

**Shri N. C. Chatterjee:** Supposing the circumstances change and there is danger felt that there is need for restoration of the same clause, it cannot be done. You must convene a Constituent Assembly under Golak Nath. I am talking purely of the legal aspect. Say 10 years later, the circumstances may change.

**Shri Gae:** If it is intended to restore the same clause, certainly there must be power to amend Part III of the Constitution specifically given to Parliament, as contemplated by the hon'ble Mover of this Bill. Therefore, unless and until there is power to amend Part III, all the difficulties which are now being pointed out will arise.

**Shri N. C. Chatterjee:** Supreme Court has not said that they cannot amend the Constitution, but they cannot abridge or delimit the fundamental rights. If I want to expand the fundamental rights by deleting clause

(2), the preventive clause, it can be done.

**Shri Gae:** If it is intended to give some new right or that the fundamental rights should be extended, that judgment does not come in the way.

**Shri N. C. Chatterjee:** That cannot be done according to this judgment...

**Shri A. N. Mulla:** You are not understanding the question of Mr. Chatterjee. The question posed by Shri Chatterjee is very simple that where rights are extended, the present judgment, the majority judgment, does not stand in the way of the present Parliament to extend the rights. But supposing you extend the rights today and 20 years hence you feel the necessity for re-imposing those restrictions, then according to the majority judgment of the Supreme Court, that would become impossible.

**Shri Gae:** To that my answer is that would be so.

**Shri N. C. Chatterjee:** I cannot understand how the Parliament, as it is constituted, cannot itself abridge any fundamental rights. How is it empowered to appoint a Constituent Assembly?

**Shri Gae:** I have already pointed out what Parliament can do and what Parliament cannot do.

**Mr. Chairman:** I would like to put a question in this connection. They have not spelt out the Constituent Assembly. They have just mentioned that if we want to pass a law we shall convert ourselves into the Constituent Assembly.

**Shri Gae:** If we pass a law converting Parliament into a Constituent Assembly, I still feel that Article 368 is there. If an amendment of the Constitution is to be made, that can be made only as provided by that article. Art. 13(2) also needs consideration.

**Shri N. C. Chatterjee:** Supposing the Parliament declares that we make ourselves a Constituent Assembly tomorrow, and we shall discuss this Bill and pass it.

**Shri Gae:** This has been pointed out by only one judge, not by six judges. It would be open to Constituent Assembly even to completely nullify all the provisions contained in Part III even by a simple majority. That would be disastrous.

**Shri N. C. Chatterjee:** Suppose you declare that the Constituent Assembly shall consist of the following.

**Mr. Chairman:** He has already stated.

**Shri Gae:** My submission is that the Constituent Assembly so convened cannot have any power higher than the power possessed by Parliament creating such Assembly.

**Mr. Chairman:** If tomorrow we convert ourselves into a Constituent Assembly and amend the Constitution, by a simple majority it can be done.

**Shri Gae:** My submission is that the Constituent Assembly cannot have any higher power than Parliament itself has.

**Mr. Chairman:** That is the procedure.

**Shri Nath Pai:** It is more dangerous. It will be by a simple majority.

**Mr. Chairman:** He has not agreed. Any more questions?

**Shri Kameshwar Singh:** You have observed on page 2 of your memorandum: "The validity of the Seventeenth Amendment was upheld by the Supreme Court in Sajjan Singh's case, wherein it was held that the power to amend the Constitution available under article 368 was wide enough to include the power to take away or abridge the fundamental rights guaranteed by Part III of the Constitution."

Do you agree with this para?

**Shri Gae:** My submission is, with due respect, the view taken by the Supreme Court in Shankari Prasad's case and the Sajjan Singh's case regarding interpretation of articles 13(2) and 368 is, in my opinion, the correct view, and not the view taken by the majority decision in Golak Nath's case.....

**Shri Kameshwar Singh:** Very simple thing is: whether this will abridge or take away the fundamental rights guaranteed by the Constitution. My question is very clear: whether by the amendment of this 368, people will have something to lose or to gain.

**Shri Gae:** It is open to Parliament to do so. The point is that in some extraordinary cases, it might become necessary, in the larger interests of the country, that fundamental rights be restricted or taken away.

**Shri Kameshwar Singh:** You are a little confused.

**Mr. Chairman:** Depends upon the consequences of the amendment.

**Shri Gae:** This depends upon the scope and nature of the amendment proposed.

**Shri KameshWar Singh:** That means that you are not very clear on this point. It is a simple question which I have put.

**Shri Gae:** If I may say so, it will depend on the nature of the amendment and the scope of the amendment. It is only having regard to the nature and scope of the amendment that one can say whether the people will gain or lose.

**Shri Kameshwar Singh:** You have stated that the referendum will be costly and so on. Can you apply this cost factor and quietly take away the rights of the people?

**Shri Gae:** I know that cost is just one aspect of the matter. There are so many other difficulties. First of all, we shall have to get the opinion of as many as 250 million voters. The question itself is a complicated question namely whether the amendment of fundamental rights can be made in one way or the other. On this question, even jurists, parliamentarians and others have got differing views. Would it be conceivable to say that the electorate of this country, knowing them as we do, would be in a position to understand the implications of any such proposal regarding the referendum from the point of view of amending the Constitution? I think we would be expecting too much from the electorate if we consider this question of having a referendum in the matter.

**Shri Kameshwar Singh:** You have said that 250 million people will not be able to understand the implications of the referendum. As regards the opinion poll in Goa, you know how complicated a matter was explained to the people. So, things could be explained to the people in a very simple manner in this case also, from the point of view of whether it is good for them or bad for them. We need not explain to them the whole procedure and other complications of the amendment, but we can tell them whether it is good for them or bad for them.

**Shri Gae:** My submission is that the question of the opinion poll in Goa is on a different footing. Parliament enacted the Goa, Daman and Diu (Opinion Poll) Act, 1967 in exercise of the residuary power conferred by article 248, asking the electorate whether they would like to merge with one State or another. Even assuming that some decision were to be taken, it would still become necessary from that point of view to enact a law under articles 3 and 4.

In the present case, we are not concerned with articles 3 and 4. We are only concerned with amendment of the Constitution, and for that purpose, the only article relevant is article 368.

From that point of view, in my view the analogy adopted by the Supreme Court, regarding the opinion poll in Goa, Daman and Diu is with due respect not apt.

**Shri Kameshwar Singh:** It may not be apt in your view, but I mentioned it only for one reason. I had referred to it because you had said that people would not be able to understand it.

**Shri Gae:** This could also be said in support of what has been already said that the people did not understand what the issue was. Therefore, that could also be advanced as an argument against the referendum.

**Shri Nath Pai:** Our contention is that they had made a wrong choice. Otherwise, they would have joined Maharashtra.

**Shri Gae:** Assuming that as regards Goa, the people did not understand the implications of the opinion poll, here the issue is a much more difficult one.

**Shri Kameshwar Singh:** I do not want to go into the good or bad aspects of the Goa poll or whether it was right or wrong. I am only on the point how it was explained to the people. One party said that they were getting so many crores from Government which worked out to so many rupees per head. Another party said that they would get such and such benefits and so on. People understood where they were gaining. That was the simple way in which it was explained to the people.

In regard to the question of referendum here also, in the same manner, the people can be told whether it is good for them or bad for them, and surely the people will vote for what they think is good for them, because everyone certainly knows what is good or bad for him. I do not think that anyone will have any difficulty in deciding that.

**Shri Gae:** If as regards Goa, Daman and Diu, the people of the area did not understand what was actually meant by the referendum, my submission is that regarding the amendment of Part III of the Constitution, the difficulty will be even more, and it would be extremely difficult to expect the ordinary electorate to understand whether for the purpose something should be done by one way of amendment or another. Therefore, in my view, this is not at all the proper course to adopt in the matter.

**Mr. Chairman:** We must draw a lesson from the Goa opinion poll.

**Shri Kameshwar Singh:** The first course that you have suggested is that we should have the Supreme Court requested to reconsider the majority judgment in Golak Nath's case by raising a similar case before them. I think you agree that it should be referred back to the Supreme Court under article 143?

**Shri Gae:** No, not under article 143. I have mentioned these courses with the observation that this is not the right or opportune moment to refer the matter to the Supreme Court and persuade it to reconsider its decision. My submission is that first of all, let us try to find out ways and means whereby the rigour of the majority decision could be reduced. After reducing the rigour by a suitable amendment of article 368, in the manner mentioned by me just now or otherwise, we may have an appropriate case taken up before the Supreme Court so that the Supreme Court may be required to constitute the Full Court and be persuaded to reconsider the majority decision in Golak Nath's case, having regard to article 368 as amended with regard to fundamental rights mentioned by me as aforesaid. If I might repeat, my submission is that first of all let us reduce the rigour of the majority decision by amending article 368 and then approach the Supreme Court to reconsider its majority decision.

**Shri Kameshwar Singh:** Do you stand for the fact that the people should be deprived of their rights?

**Shri Gae:** By rights you mean 'fundamental rights'?

**Shri Kameshwar Singh:** Yes.

**Shri Gae:** My submission is that let power be first given to Parliament to amend Part III of the Constitution. At present, there is no such power as held by the Supreme Court, so far as Part III is concerned. After that, let us leave it to the people and the Parliamentarians to decide as to what fundamental rights should be restricted or limited and so on. I am sure we must be guided in such case by the wisdom of the Parliamentarians elected on the adult franchise basis.

**Shri Kameshwar Singh:** What is your opinion? Should the people be deprived of their rights or not?

**Shri Gae:** That will depend upon what rights are under consideration.

**श्री एस० एम जोशी :** सुप्रीम कोर्ट का विरोध इस बात को लेकर है कि हमारे अधिकारों का विस्तार न हो। वह चाहता है कि हमारे अधिकार कम हों। इस वास्ते कोई तरकीब निकालनी चाहिए जिससे हम अधिकारों को अधिक बढ़ा सकें, लोगों के अधिकारों को अधिक बढ़ा सकें। इसका कारण यह है कि पार्ट III का जो यह सवाल है वह जनता के अधिकारों का सवाल है, पार्लियामेंट के अधिकारों का सवाल नहीं है। हम लोगों को सुप्रीम कोर्ट बनाम पार्लियामेंट ऐसा झगड़ा भी नहीं करना है। हम समझते हैं कि सबसे बड़ा अधिकार जनता का अधिकार होना चाहिये। जनता के अधिकारों को हम बढ़ायेंगे तो मैं समझता हूं कि उसमें सुप्रीम कोर्ट को कोई एतराज नहीं होगा।

**Shri Gae:** I entirely agree that according to the majority decision, there is no objection to expanding the fundamental rights guaranteed by Part III of the Constitution.

**Mr. Chairman:** Can you incorporate gherao as a fundamental right in this Part?

**Shri Gae:** That will depend first of all on what is meant by gherao.

**Mr. Chairman:** I think that has been defined by the High Court.

**Shri A. P. Chatterjee:** The Calcutta High Court has held that gherao as such is not illegal but gherao if it leads to certain criminal offences is illegal.

**Shri Gae:** If you would permit me to say so, 'gherao' by itself is not an offence, but 'gherao' when followed by acts of unlawful confinement and other offences or such other things would become an offence punishable under the IPC.

**श्री एस० एम० जोशी :** जो आर्टिकल 368 है उसके बारे में सुप्रीम कोर्ट का कहना यह है कि यह पद्धति है, प्रोसीजर है, सब-स्टेंटिव नहीं है। अगर हम प्रोसीजर में लिख दें कोई बात जिससे लोगों के अधिकार बढ़ जायें तब तो कोई एतराज नहीं होना होगा ?

**Shri Gae:** If I have understood your question aright, as held by the Supreme Court, article 368 is only procedural in nature. If that is so, then having regard to what I have tried to impress and what I have repeated more than once, let that view of the Supreme Court be dealt with first and let it be made quite clear that article 368 is not merely procedural but contains the substantive power to amend the Constitution. The hon'ble Mover's Bill which provides for amendment of article 368 should be carefully considered from that point of view. Unless and until

power is given to Parliament to amend Part III of the Constitution we shall be faced with an impasse in certain cases.

**श्री एस० एम० जोशी** : 368 के अंडर अगर जनता को ज्यादा पावर दें तो उसके लिए तो कोई विरोध नहीं होना चाहिये।

**Shri Gae:** If it is intended to give more power to the public, the majority decision will not come in the way. Amendment of article 368 is merely an enabling provision. It gives power to Parliament to amend Part III of the Constitution. How far that power should be exercised, in what way fundamental rights could be abridged, taken away etc., is a different issue for Parliament to consider at the appropriate time.

**श्री एस० एम० जोशी** : 2/3 की जगह अगर 3/4 रख दें तो उसको क्या समझेंगे ?

**Shri Gae:** That should naturally be left to the discretion of Parliament, whether the majority should be 2/3 or 3/4.

**श्री एस० एम० जोशी** : उसका मतलब होता है कि हमने लोगों की पावर को बढ़ाया है।

**Shri Gae:** That does not by itself mean that the power of the public is enhanced.

**श्री एस० एम० जोशी** : मूलभूत अधिकारों को स्पर्श न करें। साथ ही लोगों के अधिकारों को भी महफूज रखना है न। उनको और ज्यादा महफूज हम कर देते हैं तो सुप्रीम कोर्ट को कोई उज्र नहीं होना चाहिये। क्या होगा ?

**Shri Gae:** From that point of view, I had already said that fundamental rights may be treated as a class by themselves and amendment of Part III may be added in the proviso to article 368. If Parliament so desires, it may specifically provide that amendment of Part III should be ratified by the legislatures of not less than two-thirds of the States, instead of one half.

**श्री एस० एम० जोशी** : संविधान में रेफेंडम का जिक्र नहीं है । कोई कंस्टीट्यूएंट असेम्बली के बारे में नहीं किया गया है। 368 में अगर हम लिख दें कि 2/3 से पास करो और फिर जनता के पास जाओ और उससे पूछो कि वह यह चाहती है या नहीं चाहती है तो इसके बारे में आपका क्या विचार है। आपका क्या ख्याल है कि हमारे पास इसके बारे में अधिकार है या नहीं है ?

**Shri Gae:** If it is so desired, it could be specifically provided that after obtaining the two-thirds majority, there should be a referendum. But the question is whether it is advisable or wise to do so.

**श्री एस० एम० जोशी** : इस चीज को अगर करेंगे तो सुप्रीम कोर्ट इसको प्रोसीजर समझेगी या अधिकारों का बढ़ाना समझेगी ?

**Shri Gae:** That is hypothetical. Much will depend upon how article 368 is amended. First of all, let power be given to Parliament to amend Part III of the Constitution. Then let Parliament decide which fundamental right should be abridged and if so, in what manner.

**श्री एस० एम० जोशी**: वह समझते हैं कि पार्लियामेंट की पावर में नहीं है। हम समझते हैं कि है और लोगों से पूछ लिया जाए। लोगों की अदालत से बड़ी अदालत कौन सी है।

**Shri Gae:** I have already explained what is the view of the Supreme Court in the matter. We have to find out ways and means whereby we may try to get out of the impasse created by the judgment. In my view, the only

appropriate course is to suitably amend article 368 specifically giving power to Parliament to amend Part III of the Constitution.

**श्री एस० एम० जोशी** : यह अगर किया तब क्या करेंगे ?

**Shri Gae:** If article 368 is amended on the lines mentioned by me, it is quite likely that some person will move the Supreme Court. In my view that should not deter Parliament from considering any amendment to article 368 as proposed above.

**श्री एस० एम० जोशी** : हमने किया और उन्होंने कहा कि गलत है तो क्या करेंगे ?

**Shri Gae:** That is again hypothetical. Let first of all power be given to Parliament to amend Part III and then persuade the Supreme Court to reconsider its majority decision.

**श्री एस० एम० जोशी** : इसलिये बेहतर यह होगा कि ऐसा कानून बनाया जाए जिससे सुप्रीम कोर्ट का भी विरोध कम से कम हो।

**Shri Gae:** Whatever course we may consider, that is liable to be challenged in the Supreme Court. But Parliament should not be deterred from proceeding further to amend article 368 for the purpose.

**श्री एस० एम० जोशी** : कांस्टीट्यूशन बनाने वाले जो लोग थे उन्होंने फंडेमेंटल राइट्स को कुछ ज्यादा महत्व दिया दूसरी प्राविजेंज के मुकाबले में या नहीं दिया ?

**Shri Gae:** I entirely agree that fundamental rights stand on a higher pedestal. They can be included in the proviso to article 368.

**श्री एस० एम० जोशी** : अगर प्राविसो एड करेंगे तो वह सिर्फ प्रोसीजरल होगा या सबस्टैंटिव होगा ?

**Shri Gae:** It would be a substantive one; but, our main idea should be to amend article 368 in such a way that power is given to Parliament to amend Part III of the Constitution.

**Shri K. Chandrasekharan:** According to you, there appears to be no amendment which will meet with the requirements of the Supreme Court judgment?

**Shri Gae:** The question is which is the most appropriate course. Amendment of article 368 seems to be the most appropriate course.

**Shri K. Chandrasekharan:** Do you think the advisory jurisdiction of the Supreme Court can be invoked in so far as the Constituent Assembly aspect put forward by Justice Hidayatullah is concerned?

**Shri Gae:** The President can invoke it under article 143, but the jurisdiction of Supreme Court under article 143 is of a limited nature as already observed by me.

**Shri K. Chandrasekharan:** Instead of touching article 368, would a mere amendment of article 13(2) to the effect that 'law' in article 13(2) would not include Constitutional law suffice?

**Shri Gae:** It would not suffice, because according to the majority decision, there is no power vested in Parliament to amend Part III of the Constitution. Let us first have the power available to Parliament.

**Shri K. Chandrasekharan:** Do you think a Constituent Assembly can be formed by the members of the two Houses of Parliament together?

**Shri Gae:** Whether such an Assembly would have a higher status than the present Parliament requires consideration.

**Shri A. P. Chatterjee:** That is a different question. The question is

whether the two Houses of Parliament can be together constituted into a Constituent Assembly.

**Shri Gae:** That would require appropriate legislation.

**श्री दे० शि० पाटिल :** पार्ट III में मूलभूत अधिकार दिये हुए हैं जो कि व्यक्ति की उन्नति के लिये और उसकी आर्थिक उन्नति के लिए हैं जब कि डायरेक्टिव प्रिंसिपल्ज जो हैं वे देश की उन्नति के लिए और देश की आर्थिक प्रगति के लिए राज्य द्वारा जो नीति अपनाई जानी है उसके सिद्धांत हैं। मैं जानना चाहता हूं कि आप इन दोनों में किस को ऊंचा स्थान देते हैं ?

**Shri Gae:** Between Part III and Part IV, Part III no doubt stands on a higher footing. But we must interpret the Constitution in such a way that Part IV also is given due effect and weight.

**श्री दे० शि० पाटिल :** आपने लिखा है :

"....the amendment of article 368 on the lines referred to above is suggested with a view to minimising the difficulties arising in view of the majority decision in Golak Nath's case."

क्या आप कोई डेफीनिट व्यू नहीं दे सकते हैं ?

**Shri Gae:** I have already said that whatever course is adopted, it is liable to be challenged. But I feel that amendment of article 368 is the most effective course.

**श्री दे० शि० पाटिल** यह भी सजैस्ट किया गया है कि आर्टिकल 13 को एमेंड किया जाए न कि 368 को। आपका इस बारे में क्या विचार है ?

**Shri Gae:** If article 13 is amended only to provide that an amendment of the Constitution shall not be deemed to be "law", that will again leave open the question whether there is power in Parliament to amend Part III of the Constitution. From that point of view I consider that amendment of article 368 is the *sine qua non* in the present case.

**Shri Nath Pai:** I have nothing to ask of the learned witness. I will just make this observation. There was a meeting in Paddington Borough to be addressed by Bernard Shaw. There were other speakers too. The meeting went on for 2½ hours and then came the turn of Bernard Shaw to address the audience. This is what he said "Mr. Chairman, ladies and gentlemen, the subject is not exhausted, but I am exhausted" and he sat down. That is my condition. So, I do not ask any question.

**Shri Tenneti Viswanatham:** How long have you been Law Secretary?

**Shri Gae:** I am the Law Secretary for the last three years. But, I have already mentioned that I am appearing before the Joint Committee as a student of the constitutional law and not in my capacity as a Government servant.

**Shri Tenneti Viswanatham:** You said that the residual power, that is, entry 97 or article 248, are accidentally placed where they have been placed.

**Shri Gae:** I said so.

**Shri Tenneti Viswanatham:** At the same time, you said that the constitution-makers gave a good deal of thought to this while framing the Constitution but almost by chance threw or placed this here.

**Shri Gae:** The possibility is there. I advanced that argument to indicate that it was open to the framers of the Constitution to put that provision in the State List instead of the Union List. In that case, would it be open to the Supreme Court to suggest the convening of a Constituent Assembly?

**Shri Tenneti Viswanatham:** I suppose you have followed the discussions in the Constituent Assembly also. Was there not a discussion about the residuary power, in whom it should vest? Then they came to the deliberate conclusion that it must vest in the Centre.

**Shri Gae:** I entirely agree.

**Shri Tenneti Viswanatham:** Therefore, it is not by chance.

**Shri Gae:** I did not say by chance it is there. I said that it was open to the Constituent Assembly to give power for that purpose to the States by including it in the State List. Suppose that had been done, what answer would the Supreme Court have given about convening a Constituent Assembly? To pin-point the issue I mentioned that it was by chance.

**Shri Tenneti Viswanatham:** So, the word "chance" was used somewhat loosely. In evaluating judgements as Law Secretary, do you go into the number of judges who gave the judgment? Do you evaluate the value of law passed by Parliament by the number of votes in favour of it?

**Shri Gae:** The number of Judges deciding a case plays an important part. In the present case out of 11 judges 6 judges took one view and 5 judges another view.

**Shri Tenneti Viswanatham:** Will you give a legal advice that this judgment need not be given very much weight or value?

**Shri Gae:** I would not say so. The law declared by the Supreme Court is binding on all Courts in the country. Therefore, we all are bound to follow the law—including Parliament and Government. We must now find out ways and means by which the rigour of the majority decision could be reduced.

**Shri Tenneti Viswanatham:** If men in top positions refer in terms of number of judges in favour of a decision and so on, it will confuse the people. It should not be done.

**Shri Gae:** But that is the way of our judiciary by which cases are decided. If there are 5 judges, a majority of 3 will prevail over the minority of 2.

**Shri Tenneti Viswanatham:** Such things can be written in text-books. Now, although your argument was long and you raised several controversial questions, in the end you came to a fairly correct conclusion, as a permanent official, that the only way is to accept the decision of the Supreme Court and do the best you could. I also agree with you that under article 368 Parliament should get the power. That is also the purpose of the Bill. You suggested quite a number of other amendments also to make the thing a little more smooth. Referring to the Shankari Prasad case you said that the Supreme Court gave a harmonious construction by saying that Part III is subject to Part IV.

**Shri Gae:** If I may say so, the Supreme Court said that harmonious construction requires that article 13(2) should be read subject to article 368. The Supreme Court was not actually concerned with considering harmonious construction between Part III and Part IV.

**Shri Tenneti Viswanatham:** You said that article 368 is subject to article 13(2).

**Shri Gae:** I said that article 13(2) must be read subject to article 368 and not *vice versa*.

**Shri Tenneti Viswanatham:** In the Golak Nath case it is the other way round and it is not harmonious.

**Shri Gae:** After all, it is for the Supreme Court to consider whether to apply the doctrine of *stare decisis*, when the previous decision given by it is not accepted. The Supreme

Court by a majority took the view that article 13(2) is not subject to article 368. Just the contrary view was taken in Shankari Prasad and Sajjan Singh's cases.

**Shri Tenneti Viswanatham:** The people while giving this constitution to themselves have given certain powers to the Supreme Court. One such power is the right to interpret the law. They have also given some powers to Parliament. If Parliament does not agree with that interpretation, it is open to the Parliament to change the law. That is the final conclusion you have come to.

**Shri Gae:** My submission is that all the three organs under the Constitution must function within the sphere of powers given by the Constitution. The main sphere of Parliament is to make law and the sphere of the Supreme Court is to interpret law; it is not in its sphere to make law.

**Shri Tenneti Viswanatham:** Where did it make law?

**Shri Gae:** When the Supreme Court held that the First, Fourth and Seventeenth Amendment Act are void but, at the same time, held that they should be treated as continuing to be valid, that, in my view, amounts to making law, *viz.* amending article 13(2), by adding thereto something which does not find a place there.

**Shri Tenneti Viswanatham:** That is the adoption of the doctrine of prospective invalidation.

**Shri Gae:** My submission is that the doctrine of prospective overruling, as applied in the USA, does not apply in the present case, where we are concerned with article 13(2). In the Constitution of the USA, there is no article corresponding to article 13(2). In view thereof, the adoption of the prospective overruling doctrine is not apt in the present case, if I may say so with due respect to the Supreme Court.

**Shri Tenneti Viswanatham:** You have said that there is not a single article in the American Constitution corresponding to our article 13(2). But the provisions of our article 13(2) are there in the American constitution, spread over a number of articles.

**Shri Gae:** American Constitution does not contain a provision corresponding to our article 13(2). Our article 13(2) says clearly that the State shall not take away or abridge any of the fundamental rights and that if any law is made in consistent with Part III it is void; "void" means non-existent, void *ab initio*. How can we say that it shall continue to be valid even though it is void in view of article 13(2)?

**Shri Tenneti Viswanatham:** How many leading cases have you in support of the proposition that when a law is declared void, it should be treated as totally non-existent and all acts proceeding under the Act should be treated as nullity?

**Shri Gae:** There are several decisions of the Supreme Court. There is Deep Chand's case in which Justice Subba Rao himself has made some observations that a law made not in conformity with article 13(2) should be treated as still born and non-existent. I think it was Chief Justice Das who applied the doctrine of eclipse in the matter. But that doctrine has not been followed in subsequent cases. One of the judges concerned with the above case was Justice Subba Rao and it was held that a law made in violation of article 13(2) should be treated as non-existent and void *ab initio*.

**Shri Tenneti Viswanatham:** In English law also there are a number of cases in which the judgments are over-ruled after a long time. Can you show any cases where those judgments held that all the action that proceeded under the over-ruled Acts should be treated as nullity? You can make a search and give us a few such cases.

**Shri Gae:** The English law stands on a different footing. In England there is no written Constitution. We have a written Constitution including article 13(2).

**Shri Tenneti Viswanatham:** I am not talking of written Constitution. I am talking of the value of decisions, judgments, value of over-ruled judgements. Where is the question of written Constitution in this? We are following only some legal or juristic concepts. Have you got any such case?

**Shri Gae:** Our Supreme Court itself has held in Saghir Ahmed's case that any law made in violation of article 13(2) should be treated as void, dead and non-existent.

**Shri Tenneti Viswanatham:** But those acts stand.

**Shri Gae:** If the act is dead, how can we say that it is resuscitated?

**Shri Tenneti Viswanatham:** They cannot be erased out of history.

**Shri Nath Pai:** I think, this point is very important. I think, the learned witness has misunderstood the point. Over-ruling of previous judgements by the Court of Appeal in England—the Lords as they are called; Lords of Appeal sitting in the House of Lords—which is the highest appellate authority, means that any previous judgement is gone. Shri Viswanatham has rightly pointed out that the supremacy of the judiciary means that. But here is a really different point. It is not that the judgments go, but the Court declares the acts *ultra vires* at one stage but then says that they will be continuing. An *ultra vires* act can be validated only by the Legislature and not by the courts. About the judgments I agree cent per cent; the Supreme Court can strike down any judgment including its own. But here what they have done is different. You have raised that point but now you have missed it. He is now asking, if an act is declared *ultra vires* by the highest tribunal in the country then who validates it. It is done by the Legislature. But the Supreme Court here brings in the doctrine of prospective overruling and validates those acts.

**Shri Tenneti Viswanatham:** It has not validated anything.

**Mr. Chairman:** They have become inoperative.

**Shri Nath Pai:** These acts will be operative.

**Shri Tenneti Viswanatham:** The old Act is operative and the action taken under it is operative. So far as prospective overruling is concerned, they could not overrule any Act or statute which was not before them. They held that I, IV and XVII Amendments are valid. They also said that all action or laws based under those statutes are valid. But they have said that hereafter if any Act is passed or any change is made which is against these amendments, these amendments will continue.

**Shri Jairamdas Daulatram:** In one part of the judgment the Supreme Court says that these Amendment Acts are invalid. In the subsequent sentence it says that they are valid and action taken under that will be considered valid.

**Shri Tenneti Viswanatham:** Excuse me, it is not like that. They discussed these things and in the end they said:—

> "The aforesaid discussion leads to the following results:
>
> * * * * *
>
> (4) On the application of the doctrine of 'prospective overruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid."

Therefore today the Seventeenth Amendment still holds and is still there.

**Shri Jairamdas Daulatram:** Why do they have to say that it is valid? It is because they have declared it invalid.

**Shri Tenneti Viswanatham:** They have had recourse to the doctrine of prospective overruling because in this case both sides took extreme positions. This is the language used by them:—

> "Should we now give retrospectivity to our decision, it would introduce chaos"—

We not only pass law but by judicial processes also we give flesh and blood to the law that is passed and that is what was done by prospective overruling. They are explaining:—

> "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 the 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."

It is not that they did not consider this. It is to meet this extra-ordinary situation that they fell back on the doctrine of prospective overruling.

**Shri Gae:** In the first instance, the Supreme Court has held that the First, Fourth and Seventeenth Amendment Acts are void on the ground that they go against article 13(2); at the same time, relying on the doctrine of prospective overruling, it held that the said Amendment Acts will continue to be valid. Does it not mean that the Supreme Court is itself making the law or is legislating for that purpose?

**Shri Tenneti Viswanatham:** I am sorry, I have wasted the time of the Committee by reading out those sentences.

**Shri Gae:** We come to the same argument.

**Shri Tenneti Viswanatham:** They are trying to push this argument to the logical extreme and say that we must find out a way out of this. They have found some support for this kind of expansion of juristic concept and they fell back on the doctrine of prospective overruling. That is how any sensible court should function.

**Shri Gae:** Does the doctrine apply in view of article 13(2)?

**Shri Tenneti Viswanatham:** Please go through the judgment once again. It is true that we can take every position logically to its logical extreme. But this world does not consist of mere logic. We have to harmonise various things, just as you are trying to harmonise the fundamental rights with the Directive Principles, the rights of the people with the rights of the State, the right of the executive with the right of Parliament, the rights of Parliament with the right of the people. If each man goes to the logical extreme, life would not proceed. That is why the courts also have to have some judicial way of looking at things.

**Shri Jairamdas Daulatram:** This means that we are evolving a new legal principle, which may be sound, that, when we lay down the doctrine that the Supreme Court can only interpret, by this decision we are giving certain additional powers to the Supreme Court to get out of a situation of this type. Whether it is interpreted as legislating is another matter. I am supporting what you are saying. The Supreme Court feels it as its duty, as the top rung of the judiciary, to find a way out of the difficulty. When their judgment says that this particular thing is wrong but other wrong things arise as a result of the decision, they advise a way. Therefore India may be said to be evolving, just as America has evolved, a certain principle which we are quoting. After all, India is not only to copy. On account of its special circumstances, conditions and events it has to evolve something. So, it may be said that the Supreme Court has evolved a new principle after invalidating the law so as to get over the evil consequences of that.

**Shri Tenneti Viswanatham:** Shall I tell you why it was obliged to do so? It was because the Constitution was not clear. It is the fault of the Constituent Assembly; they were not clear. Why do you blame the judges? Let us be clear now at any rate. When you give a law, they have to make a harmonious interpretation. Now you give a better law. The law should not only be correctly understood by the reasonable man but also not be misunderstood by the unreasonable man.

**Mr. Chairman:** Shall we adjourn now? Thank you, Mr. Gae.

*(The witness then withdrew)*

*(The Committee then adjourned)*

MINUTES OF EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1967 BY SHRI NATH PAI, M.P.

*Friday, the 27th October, 1967 at 11.00 hours.*

PRESENT

Shri R. K. Khadilkar—*Chairman.*

MEMBERS

*Lok Sabha*

2. Shri N. C. Chatterjee
3. Shri S. M. Joshi
4. Shri Kameshwar Singh
5. Shri V. Viswanatha Menon
6. Shri Mohammad Yusuf
7. Shri Jugal Mondal
8. Shri Nath Pai
9. Shri P. Parthasarthy
10. Shri Deorao S. Patil
11. Shri Mohammad Yunus Saleem
12. Shri Anand Narain Mulla
13. Shri Dwaipayan Sen
14. Shri Prakash Vir Shastri
15. Shri Digvijaya Narain Singh
16. Shri Sunder Lal
17. Shri Tenneti Viswanatham

17A. Shri R. S. Arumugam.

*Rajya Sabha*

18. Shri Kota Punnaiah
19. Shri M. P. Bhargava
20. Shri K. Chandrasekharan
21. Shri A. P. Chatterjee
22. Shri Jairamdas Daulatram
23. Shri G. H. Valimohmed Momin
24. Shri G. R. Patil
25. Shri J. Sivashanmugam Pillai
26. Shri Jogendra Singh
27. Shri Triloki Singh

REPRESENTATIVES OF THE MINISTRY OF LAW

1. Shri V. N. Bhatia, *Secretary, Legislative Department.*
2. Shri R. S. Gae, *Secretary, Department of Legal Affairs.*

3. Shri K. K. Sundaram, *Additional Legislative Counsel.*

4. Shri S. K. Maitra, *Additional Legislative Counsel.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESS

Shri H. M. Seervai, *Advocate-General of Maharashtra.*

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(*The witness was called in and he took his seat*).

**Mr. Chairman:** We are happy that Mr. Seervai, the Advocate-General of Maharashtra, who is an eminent jurist of India as well as of international fame is appearing before us. Now as you all know he has written almost a classical book on Constitutional law of India very recently and in the last Chapter he has very exhaustively dealt with the recent judgment of the Supreme Court. First, there are many aspects of the judgment which we are to consider here in order to reach some conclusions in the light of deliberations on the proposed measure brought forward by my friend, Shri Nath Pai.

Therefore, before requesting him, perhaps you are aware of it as you must have appeared before many Committees, but I am supposed to bring to your notice one section. I will just read it out:

> "Where witnesses appear before a Committee to give evidence, the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published, unless they specifically desire that all or any part of the evidence tendered by them is to be treated as confidential. It shall, however, be explained to the witnesses that even though they might desire their evidence to be treated as confidential such evidence is liable to be made available to the members of Parliament."

**Shri H. M. Seervai:** Well, Sir, if there is something which I am willing to say here, I have no objection to its being published as I held that what a man is not ashamed to say, he should not be ashamed to have published.

**Mr. Chairman:** As I said in the beginning, Mr. Seervai would be enlightening us on many points which we are debatig here. Certain arguments are advanced. The judgment has started almost a nation-wide debate and there is a clear-cut division, one section advocating 'Where is the hurry of undertaking a legislation of this nature?' This is one argument, very forcefully advanced. The other argument is that whatever decision the Supreme Court has given while interpreting the Constitution, for exercising their right of review they have not made out an attempt to lay down the law. These are two major issues before us. Now we would welcome your views on all aspects of the matter.

**Shri H. M. Seervai:** Mr. Chairman, I would like to say that in considering the Bill of Mr. Nath Pai, we have to go back a little and I would ask the question: when the Constitution was framed, was it intended that the whole of it should be capable of amendment by the procedure prescribed in Art. 368? I have had the pleasure of meeting one of the Members who was a Member of the Constituent Assembly and I have not had the advantage which he had, of personal knowledge, but, on the relevant portion, I have studied the debates of the Constituent Assembly and I have studied the draft Constitution which was published and, speaking for myself, there is no doubt whatever that the whole Constitution was meant or was capable of being amended by the procedure prescribed by Art. 368. There are many reasons for making this statement. Hon'ble Members will know that there was a grave difference of opinion on what is now Art. 31 of the Constitution which provides for com-

pensatin for acquisition of property. I will mention the relevant date. A copy of the draft Constitution forwarded by a letter of Dr. Ambedker was sent in February 1948. When the original Article 24 came to be debated, Pandit Nehru said, well, we want to discuss this matter further, and after a very long gap on 10th September 1949 he moved a draft article which he said represented a just compromise. Now, I am not going to take up any of your time in dealing with that article. But what Pandit Nehru said on that occasion as regards the amendability of the Constitution is relevant and he made it clear that so far as the Congress was concerned they were committed 100 per cent to honouring the abolition of zamindaris by legislation. He said, no Court and no judicial body can sit in final judgment over the policies of the legislature. He said that after all the Constitution was the creature of the Parliament. It was not a very precise phrase, but what he meant was clear, namely, that power had been given to Parliament to amend the Constitution. If I may be permitted to say so he was a very great democrat. I cannot resist the feeling that free institutions work because he was there. He said that it was a very unsatisfactory way of amending the Constitution to appoint judges who will give you their verdict: that is not a good way. The straightforward way is that Court Interpeets law. Parliament, if it comes to the conclusion that the law has not been correctly interpreted, proceeds to give effect to its intention. So the function of the Court is to interpret; the function of the legislature is to legislate.

One ought not to legislate in a hurry. That is true because legislation in a hurry will overlook things. But that is a question for a sovereign Parliament to decide. So when the judgment in Golaknath's case referred to Pandit Nehru as stating that fundamental rights are unamendable, in my submission that is clearly negatived by his speech on draft Article 24, which specifically dealt with the Fundamental Right. So that is one reason why I say that the whole Constitution including Fundamental Rights is amendable. The second reason is, that, if hon. members will look at the draft Constitution and our present Constitution the basic scheme of the distribution of legislative power, the allocation of residuary power to the Union and not to the States, the precise title of the Chapter relating to amendment of the nature, procedure for amendment, on the procedure being followed the Constitution shall stand amended, the draft article and the present article are identical in language and they form part of Constitutions which are similar in all material respects.

Now, draft article 305 appears to have been overlooked by the Supreme Court of India because that article shows that if the Constitution was not to be amended in respect of one small material for a period of 10 years an express provision was made to that effect. Merely as a matter of convenience and not for any other reason, I would read out that article. Draft article 305 reads as follows:

Reservation of seats for minorities to remain in force for only 10 years and less continue in operation by amendment of the Constitution. Notwithstanding anything contained in Article 304 of this Constitution, the provisions of this Constitution relating to the reservation of seats for muslims, the scheduled castes, the scheduled tribes or the Indian Christians either in Parliament or in the legislatures of a State, for the time being specified in Part I of the First Schedule, shall not be amended during the period of ten years from the commencement of the Constitution.

So in a part of the Constitution which dealt with only amendment and contained two draft articles, 304 and 305, the only portion which was made unamendable is the one which I have read the hon. members just now.

As a matter of construction, it was clear to the draftsmen of the Constitution that if any portion was to be unamendable either absolutely or for a limited period of time such a provision would be necessary. Now, in my opinion draft article 304 is extremely important because it destroys the whole basis of the majority judgment in Golaknath's case, namely that the power to amend the Constitution is a residuary power. I will go into the residuary power business a little later in detail. But it destroys that arguments because the State Governments under draft article 304 had a very limited power of amending and the States have no residuary power. If I may be permitted to refer to the draft article which is relevant, draft article 304, first part, which gave power to Parliament, it is in language much the same as we have got today. But draft article 2 is relevant; that is on residuary power.

"Notwithstanding anything in the last preceding clause, an amendment of the Constitution seeking to make any change in the provision of this Constitution relating to the method of choosing a Governor or the number of houses of the Legislature in any State, for the time being specified in Part I of the first schedule, may be initiated by the introduction of a Bill for the purpose in the legislative Assembly of the State or where the State has a legislative council in every house of the legislature of the State and when the bill is passed by the legislative assembly or where the State has the legislative council by both houses of the State by a majority of the total membership of the Assembly or each house as the case may be, it shall be submitted to Parliament for ratification. The argument that the power to amend the Constitution is a residuary power is clearly, unmistakably negatived by draft Article 304, sub-article (2) which conferred the power to amend the Constitution on the Legislatures of the States. It is true that there is no such article in the Constitution as finally passed, but we are asking ourselves the question: did the draftsman in using the language which he has done in draft Article 304(1) believe that the article itself contained the power to amend, and that it contained the power to amend is clear from sub-article (2) which gave that power to the Legislatures of the States.

This is the previous legislative history which it is permissible to look at in case of any doubt or difficulty. We have first seen was it intended that the whole Constitution should be capable of amendment by the procedure, and it seems to me, looking at the debates, looking at the history, it clearly was the intention.

The next question that arises is what is the meaning to be given to the expression "Fundamental Rights". Could it be intended that that which is fundamental can change? First of all, it is quite clear that the Legislature of India, namely Parliament, has taken the view and has acted on it that fundamental rights can be changed and as I said a little earlier, the Prime Minister in introducing Article 31, said that ultimately if any obstacle was put in the way of Zamindari reforms, the necessary amendment could always be effected by Parliament. So that is a fact. The importance of the fact is that even the Supreme Court cannot overlook the vast revolution which has been brought about by the amendment of Article 31, Article 31A and Article 31B. They look upon it as something inevitable, something so vast that the thing cannot be undone. So the necessities of the case showed the wisdom of amendment, because its wisdom is not disputed.

Then comes the question of two judgments of the Supreme Court—one at the very beginning. As the hon'ble members will know the history of land legislation, the main fear in the Constituent Assembly was, would compensation be justiciable. But in the first Dharbhanga case, the law was struck down not on compensation but

as violating equality, because compensation to bigger Zamindars was on one basis and compensation to small land-holders was on a different basis and the Patna High Court held that Art. 14 was violated. It was in that context that Article 31A was introduced and Article 31B was introduced. That article came before a very strong Bench of the Supreme Court and unanimously the Bench held and, if I may be permitted to say so, in my opinion quite rightly that there is a distinction between the legislative power, that is to say power exercised as granted by the Constitution under the Constitution, and the power to alter the Constitution itself and it said in ordinary law, in constitutional law, a power to amend the constitution is called "constituent power", a power to make laws under the Constitution is called "legislative power". Therefore, though the legislative power is subject to all the provisions of the Constitution, when it comes to amending the Constitution, the only thing to look to is the amending article. So as far back as 1951, directly in relation to Article 31, the power of Parliament to amend fundamental rights was affirmed. It was affirmed again in connection with the 17th Constitution Amendment and it is a measure of the distance travelled between the First Amendment and the Seventeenth Amendment that for the first time not only was inadequate compensation upto a point modified but an express provision was made that land personally cultivated within the ceiling limit can only be acquired at a price not less than the market value. That again was affirmed 3 to 2. Mr. Justice Hidayatullah suggested some doubts. Mr. Justice Madholkar did suggest doubts but reading the judgment as a whole, he merely wanted a fuller argument. I don't read that judgment to mean that he thought that there should be no power.

Coming again to fundamental rights, the popular mind looks upon fundamental rights as something solid, like a book which you hold. It is not so and whether a particlar right which is a fundamental right has been violated or not is a matter of opinion, of facts, of times and of seasons. Now let me give you one illustration of a fundamental right where in my opinion if the judgment of the Supreme Court, to which I will refer, is not reversed, Parliament may well wish to amend that right. I am referring to the right of freedom of speech, and freedom of association. Now the Supreme Court has held that in public service, interests of discipline do not justify a curtailment of the right of freedom of speech or right of freedom of association, because they say Article 33 which deals with the Armed Forces provides that they should be abridged or abrogated in the interests of discipline. You may ask yourself the question, did the Supreme Court ever contemplate that a Deputy Secretary in a service could write an article in a newspaper without making any use of his private knowledge containing a destructive criticism of the political party which is the party in power? Can a person in the Parliamentary Secretariat do likewise? Well, probably, you have the privileges of Parliament and you would be protected, not because of any general law but because of the privileges of Parliament. Now it is possible that the Supreme Court may revise its decision. The implication of Article 330 is clearly wrong. The Supreme Court has held that for admission into Government service considerations of discipline are necessary. But supposing the Supreme Court does not choose to reverse its decision, is it not open to Parliament to say that the discipline of public service is being undermined and a wrong implication is drawn from that Article and we will set the thing right. So, fundamental right is not something solid. It depends upon the view you take of it and one of the cardinal reasons for providing for the amending power is judicial error. Several times, judicial error has been openly and publicly admitted. Parliament had to pass an Act and amendment of the Constitu-

tion in order to give effect to the Beru Bari Union. Mr. Gajendragadkar who delivered the judgment said that Union Territories were not included in the definition of a 'State' and that was a very important fact. Parliament, by law, could not do it. He admitted in a subsequent judgement that the definition of the General Clauses Act had been inadvertently overlooked. He then put his main judgment on the ground that the power to create a territory was not a power under the Constitution but was a power outside the Constitution. It can be demonstrated that the learned judge overlooked the residuary power of Parliament and therefore under the Indian Constitution no power which is not in List II or III can be outside the Constitution. Now the whole basis of the judgment is gone and if the Supreme Court still persists in it, could not Parliament effect and amendment? So one of the reasons for providing for a power to amend is that the intention of the framers of the Act may be defeated by a judicial interpretation which is wrong but which is incapable of correction unless the court wishes to do so itself. The most serious case of judicial determination barring all avenues of peaceful solution is the decision of the Supreme Court of the USA holding that a slave was the property of his master and that property and its obligations could not be impaired throughout the territory of the USA. Attempt had been made through compromise to keep existing slave States to prevent its expansion, hoping that in course of time slavery would disappear even in the slave States. But the Chief Justice forestalled the results of election by a judgment and historians of the US Constitutions are of opinion that they led the nation into a Civil War. So the power to amend not only gives you the power to effectuate your intention to guard against judicial error, which is incapable of being set right, more especially in case of Article 141, which provides that the law declared by the Supreme Court shall be binding on all courts. Sir, fundamental rights are very important rights. But they are not sacroscant, sacred or things like that, because as hon. Members will know, originally the freedom of trade and commerce was a fundamental right; it was in the draft Chapter relating to fundamental rights. It was transferred to another chapter, and Mr. Krishnaswamy Aiyer, a distinguished lawyer and a jurist said that all rights conferred by the Constitution are valuable rights. No right conferred by the Constitution can be abrogated, except by Parliament, and therefore the only advantage, broadly speaking, of a fundamental right is a procedural right, namely you could move the Supreme Court as a matter of right for the enforcement of fundamental rights.

Mr. Justice Subba Rao and other judges have observed that it is surprising that fundamental rights can be amended by Parliament by majority but that certain items which affect the States require ratification of the States.

Now, as regards fundamental rights and the amendment by Parliament, there is a very clear safeguard included in the amending process itself. For the purpose of amendment, each House, the Lok Sabha and the Rajya Sabha is treated as a separate entity, and in the Lok Sabha an absolute majority of the House, but two-thirds of those present and voting are required to amend. I will come to the Rajya Sabha later. Now, it means that two-thirds of the House must support the amendment, because unless you have a two-thirds majority, you cannot pass it even in that House. Now, there is another safeguard, of a radically different character. The Rajya Sabha is a perpetual body, renewed every two years. It is indirectly elected by legislature throughout the territory of India, apart from a small nomination element, which is there. Now, therefore, it means that an absolute majority of the Rajya Sabha and two-thirds majority of those

present and voting, would ensure that the representatives of various States who constitute the Rajya Sabha by a majority of two-thirds, approve of the amendment. So the safeguards that fundamental rights and rights in other part of the Constitution, which is not in the proviso to Article 368, are in my submission known. Substantially, in the earlier days with one party ever whelmingly in power in all the States, amendment appeared to be easy. But the safeguards are real. You must convert to your view two-thirds of the members of the Rajya Sabha, a body renewed every two years, and representatives of elected representatives of the various States. Now, the reason for ratification by the States in respect of the matters mentioned in the proviso is that whatever value the Supreme Court may attach to fundamental rights, in a federation, the most important thing is the relative position of the State and the Unions, and that position has to be safeguarded. So if legislative lists are to be amended, if the power to elect the President or the Vice-President is to be amended, and any matters which directly affect the States vis-a-vis the Federation, the ratification by not less than half the number of States is provided, meaning thereby.... Thereby it is meant that more than half the States are willing that the Constitution shou'd stand amended even when it affects the States. It may increase the power of the States; it may decrease the power of the States. The experience of countries like Australia, Canada and the USA show that central power or strength of central power is necessary because there are certain things which the Centre can do, which the States by themselves are unable to do. So, this is the present scheme.

It is difficult to say that the safeguards provided here are not adequate, or that things can be done in haste and hurry. Coming to the actual amendments which have been made, apart from consistent amendments of article 31 and its sister articles namely articles 31A and 31B, it is difficult to say that we have amended the Constitution too often. I used to receive much sympathy, everybody saying that by the time my book was completed I would have to be writing on a new Constitution. No such catastrophe has over taken the country and no such catastrophe has overtaken a relatively small person when he was writing a book.

On giving to the court the final word in amendments, and to show how dangerous it is, Mr. Justice Patanjali Sastri, who was a very distinguished judge said that the whole basis of the Constitution was respect for the rights to property. He cited eminent American writers to that effect. We have the spectacle of Mr. Justice Hidayatullah telling us 'Why did you ever put it in? Rights to property ought to have found no place in the Constitution.'. Surely, it is extremely unsafe to leave political doctrines to courts of law. Political doctrines ought to be enunciated in a place where it is proper, namely the legislature, and if a law is passed by a free government, that is, if you persuade a sufficiently large majority of people to a particular view, that view must prevail.

You are, however, now confronted, and everyone is confronted with a situation where the Supreme Court says that in future you cannot amend any fundamental rights, and the Supreme Court makes a slightly larger claim that judges make law and says "All old theories are exploded; we say that since chaos would result if the old amendments were treated as unlawful or as bad law, let them continue. But if a future Parliament finds it necessary to say that unless they pass a law, chaos would result, Parliament is not free to do so.". That broadly is the picture. I have just put forward my view. Hon. Members can then question me. I have now

given only a rough outline of the position as I see it.

About residuary power, because in my submission it is basic to know it, I would say this. Where does the power to amend the Constitution reside in the Constitution of India? Till the majority in Golak Nath's case found the power in residuary power, nobody ever dreamt of finding it there. It is in the article. Why do I say that it cannot be in the residuary power? First of all, the residuary power is a power belonging to Parliament and it is an exclusive power of legislation. But the power to amend the Constitution is not exclusively vested in Parliament. Parliament can amend all parts of the Constitution other than those mentioned in the proviso. But the proviso requires ratification by not less than half the States, so that Parliament by itself cannot amend the Constitution in matters covered by the proviso. So, it s obvious that it cannot be the residuary power which is an exclusive power of legislation, because the power of Parliament, under the proviso to article 368 is, if one use the word, concurrent with at least half the number of the legislatures, and is at any rate not exclusive.

Secondly, the whole history of residuary power in India makes it impossible that it would be found there. For, as hon. Members know, under the Government of India Act, they did not want to give the residue either to the States or to the Provinces. So, Sir Maurice Gwyer, a great draftsman and a greater judge said that with a view to avoid final allocation of residuary power, every conceivable subject of legislation was thought out and put in one list or the other. That scheme has been retained, and we have enlarged the items in the list. To put it mildly, it appears odd that a subject which receives a whole part of the Constitution to itself would be forgotten in framing the legislatives entries. In my opinion, there is no foundation for finding the power of amendment in the residuary power.

Why did they go to the residuary power? They went to the residuary power because if they did not find the power in article 368 and they did not find it also in the residuary power, there was no power to amend at all, which would have been absured. This is broadly the legal position as I see it. I have no doubt that there are many objections or various things which may be said on the practical part of it.

Supposing the Supreme Court is wrong, we are now relegated to a larger question. Should fundamental rights be amended at all? The answer broadly is that in a free society, it is for the society to determine that the power to amend is wisely exercised. But it is the characteristic of all power that once conferred it can be used for good or for evil. As I read the majority judgment of the Supreme Court, they seem to think that in the past in smashing up large landed estates and so on, the power has been exercised for good. Well, if it has been exercised for good, it may be exercised for evil also. But I would in any discussions submit that the question of exercise of the power and the existence of the power must be kept radically separate. There are many powers which exist, powers of taxation and so on, which can be very unwisely used and which may be destructive of a good deal of the well-being and the happiness of the State but we do not withhold the power because it may be abused. Similarly the power to amend may be abused, but in a free society the safeguard is that the public opinion an organisation of political parties is there to exercise a check so far as it lies within it.

I would welcome any questions that maybe put to me.

**Shri A. N. Mulla:** Let me first thank you on behalf of the members of the committee for your learned and lucid exposition of the various articles of the Constitution and the intentions of the framers of the Constitution.

You started by saying that in their judgment, the Supreme Court have referred to a particular extract from the speech of Pandit Jawaharlal Nehru on the basis of which they have tried to interpret that the intention of the framers of the Constitution was to make these rights permanent. I will place before you a later extract from the speech of Pandit Jawaharlal Nehru for your consideration whether that is not a correct exposition of what was in his mind:

> "While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitutions. There should be a flexibility. If you make anything rigid as permanent, you stop the nation's growth, the growth of a living vital organic people. In any event, we could not make this Constitution so rigid that it cannot be adapted to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what may be good today may not be wholly applicable tomorrow."

Do I take it that this is a correct exposition of what a Constitution should be in a democratic State?

**Shri H. M. Seervai:** I would respectfully agree that it is correct. But in a conflict of general observations on the same thing, I would prefer the speech of Pandit Nehru on article 24 for this reason that directly in connection with fundamental rights, he says that the Constitution is a creature of Parliament. Mr. Justice Hidayatullah has sited a part of the passage. I have given the whole of it in my book. Therefore, the emphasis is on stability. Constitutions are not changed every second day. But as the hon. member quoted, that which was good at one time may cease to be good at another time. For example, the US Supreme Court in the equality clause had orginally said, equal but separate. If there are two schools one for Negroes and one for the Whites of a thousand students each, if you spend the same amount on building, teachers, salaries, etc., equality is not violated. Let us assume that in the written Constitution there was a proviso saying, provided that if blacks and whites are treated equally but separately, there shall be no violation of equality. Could that clause be no changed now when the modern concept accepted by the US Supreme Court is equal but separate will not do? So, what Pandit Nehru said was the teaching of experience. It is the teaching of judicial systems which had worked out and you had only to put certain things in the Constitution to see whether they should be immutable. Take trial by jury. In America it is a fundamental constitutional right. But in the country from which it is borrowed. this practice has dropped out. If American experience shows that all juries can be corrupted and the majority verdict thwarted, cannot the Bill of Rights be amended so as to drop out trial by jury? I respectfully agree that the

view indicated in the passage read out by the hon. member shows the teaching of experience can be reinforced by examples from judicial decisions.

**Shri A. N. Mulla:** I think you will agree that article 5 of the American Constitution is almost analogous to article 13 of our Constitution. I am quoting from page 19 of the decision of Justice Hidayatullah in Sajjan Singh's case:

> "The meaning of article 13 thus depends on the sense in which the word 'law' in article 13(2) is to be understood. If an amendment can be said to fall within the term 'Law', the fundamental rights become "eternal and inviolate" to borrow the language of the Japanese Constitution. Article 13 is thus on par with article 5 of the American Federal Constitution in its immutable prohibition as long as it stands."

If it is true that article 5 of the American Constitution stands on the same footing as article 13 of our Constitution, is it not a fact that the Supreme Court of America and the US Government have devised a special jurisdic conception of police powers of the State by which they prefer the interest of the community over the fundamental rights of the individual?

**Shri H. M. Seervai:** With great respect to the learned judge, article 13(2) has been held by Chief Justice Kania, and rightly, to say nothing more than that a law contrary to the Constitution is void.

If you strike out that article, the result would be precisely the same.

**Shri A. N. Mulla:** Is there any provision of residual power in the American Constitution?

**Shri H. M. Seervai:** In the American Constitution the residual powers are with the States. Apart from Sajjan Singh's case, Mr. Justice Hidayatulla has delivered an extraordinarily learned judgment in Golaknath's case. He says that it is true that the Supreme Court of the United States has brushed aside all limitations on the power to amend, but he would like to know the reason. The reason is simple. The power to amend this Constitution must mean the power to amend the whole. But the point raised by Mr. Justice Hidayatulla requires a little discussion, and that is where, a law under the Constitution—legislative power—and law amending the Constitution—constituent power becomes relevant.

**Shri A. N. Mulla:** I may read a Commentator's account on the American Constitution and then ask your opinion about the way the fundamental rights are being abridged to a certain extent even in America. He says:

> "It was soon realised that for the maintenace of public order and other things some restrictions must be imposed upon the liberty of the individual. The Supreme Court of America therefore invented the doctrine of police power of the State under which the State has the inherent right and power to cirmumscribe fundamental rights which are necessary to protect the common good."

Therefore, even if you accept the position taken by Justice Hidayatulla that the restrictions in the American Constitution are to the same extent as they exst in our Constitution, yet the courts of America have found the doctrine by which, in the interests of public good, they think that the fundamental rights can be abridged.

**Shri H. M. Seervai:** That is correct. But there is one thing I wish to say that in America deliberately large legislative powers were left to the judges. Their appointment is political. It has to be ratified by the Senate,

which is a legislative body. But if I may be permitted to call the attention of this hon. Committee, it is to a judgment of the Privy Council which Mr. Subba Rao has cited in his judgment, and in my respectful submission it puts an end to the theory which he propounds. If you look at the judgment you will not get the whole section as it exists in Ceylon. But the Ceylon Constitution furnishes a complete replica of the power to amend, including article 13 (2). I may be permitted to call attention to the section in the Ceylon Constitution and then tell you brifly what the Privy Council has said.

The whole section is set out in my book, footnote at page 1102.

This Privy Council judgment is extremely important because it clearly shows the distinction which the majority judgment blurs.

"S. 18. Save as otherwise provided in sub-section (4) of section 29, any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting. The President or Speaker or other person presiding shall not vote in the first instance but shall have and exercise a casting vote in the event of an equality of votes."

Now comes an extremely important section and I wish to show this that it is apparent and the Privy Council so treated it, that it guarantees the rights of religious minorities. They are not called fundamental rghts but from the very nature of the provisions it is clear that they are treated as fundamental unless amended by the appropriate process.

S. 29: "(1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island. (2) No such law shall—(a) prohibit or restrict the free exercise of any religion; or (b) make persons of any community religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any community or religion any privilege or advantage whch is not conferred on persons of other communities or religions; or (d) alter the constitution of any religious body except with the consent of the governing authority of that body: Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body."

Now comes sub-clause (3), which corresponds to article 13 (2).

"(3) Any law made in contravention of sub-section (2) of this section shall, to the extent of such contravention, be void. (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of His Majesty in its application to the Island; Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for 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 including those not present)."

This provision corresponds to article 13(2). What did the Privy Council hold? Mr. Justice Subba Rao cites it for the collateral reason that Privy Council said that Constitution could be amended by law and they did not refer to "constituent power." But he

forgot that the Privy Council consistently distinguished between ordinary process of legislation and special procedure prescribed for amendment, and the Privy Council said these rights are rights of minorities which you can take away but only by the special procedure. When it was argued that Ceylon was an independent sovereign State and its sovereignty was affected, they said "No, produce your majority and you can take away the rights. The Constitution provided that the special machinery for amendment of the Contitution requires two-thirds majority." So, the Privy Council judgment is a direct authority for the proposition that some of the most valuable rights of men, rights to religious freedom, can be taken away by a two-third majority as there prescribed. Instead of going inferentially from two Constitutions which are different because, as the hon. Members know, when the United States Constitution was enacted, the Bill of Rights was not in it—it came two and a half years later—so, the Constitution of the United States started without a Bill of Rights, on an undertaking or guarantee by George Washington that "we will put it later" and it came two and a half years later I would say that the Privy Council judgment, if read as a whole and read along with its statutory provision, not the first sub-section and the last sub-section only puts an end to the argument that even religious rights cannot be amended by requisite majority.

**Shri A. N. Mulla:** I think that any interpretation of the articles of the Constitution that circumscribe the right of the people to live under a system of law of their own choice is basically a non-recognition of the basic principles of a democratic State.

**Shri H. N. Seervai:** On the whole and in the round, yes; but, in fairness, since it is a matter of knowledge, I ought to say that in some countries, like Canada, the difficulty of the provinces agreeing to the alteration of the Constitution is so great that all attempts to amend the Constitution of Canada have failed due to historical reasons of a strong French minority or majority in Quebec and in Montreal. But that is historical. Since they were independent states which had surrendered only a limited power to the Central Government, due to fortuitous circumstances the Constitution of Canada has become unamendable. Tomorrow the British Parliament would pass without an alteration of a comma a total alteration of the Canadian Constitution. Repeated attempts to do so have failed. So, whilst admitting that it is a negation of democracy, in certain historical circumstances it has happened in countries which are democratic.

**Shri Jairamdas Daulatram:** That means, apart from the theoretical meaning of it, while following the general principle of democracy, the face, content or features of democracy have to be related or fitted to what arise out of the facts of life of each nation's history and conditions. Just as you mentioned Canada or the United States, each country is dealing with the facts of its own life while keeping the democratic principle before it and gives to the democratic structure a face, features, aspect, content which are relevant to the facts of its life.

**Shri H. M. Seervai:** Put generally that way, it may be generally accepted but the importance of Canada is that in a democratic country a federal constitution cannot be altered without the consent of its constituents; but a democratic constitution which leaves it to the people to decide what they should do broadly involves the freedom to change it, and to change it in a manner even opposed to the original scheme. For instance, if tomorrow we convert sufficient number of provinces in India that a unitary government is the desideratum and not a federation, nothing either in the democratic process or in the provisions of the Constitution prevents it. If the argument is that under certain circumstances rights should remain immutable, I do

not think that that is the democratic process. But if people who are originally separated have come together on a compact that on this basis we join and not on another, then that compact may have the effect of overriding the democratic principle.

**Shri A. N. Mulla:** I put it this way. The right of the people to change the laws according to their own urge and their own needs would be present in every democratic state; but what would constitute the understandable urge of the people? There may be different systems and different ways of finding out as to what is the urge of the people in various democracies.

**Shri H. M. Seervai:** That is correct.

**Shri A. N. Mulla:** Therefore, when we come back to our own Constitution, is there this feeling in your heart also or not—I have that type of feeling in my heart—that the framers of the Constitution in our country felt that where the safeguards mentioned in article 368 of the Constitution are fulfilled, it would amount to the revoicing of the opinion of the people and it can be taken as the voice of the people?

**Shri H. M. Seervai:** If I may say so, you have put it very felicitously and accurately. Putting it in more prosaic language, I would say that when two-thirds of the elected representatives in the Lok Sabha vote for a change and when two-thirds of the elected representatives of State Legislatures also want the same change, there is sufficient guarantee against hasty or impulsive action, because after all the urge of the people may be due to a momentary fit of passion. So, all written Constitutions are meant to guard against it. Bearing in mind that State-Centre relations would be affected also in a good many things if the Constitution is to be radically altered, the urge of the people is given the fullest play in article 368 if you convert a sufficient number of people, but it imposes sufficient time and safeguards to secure delay, time for reflection and thought. That is how I would put it.

**Shri A. N. Mulla:** I have also a feeling—I do not know whether you share it or not—that there is no other conceivable system which at the moment appears to be a better safeguard than the safeguard provided in the Constitution itself.

**Shri H. M. Seervai:** Yes, Sir, on the whole, I think, you are right. But I ought to say, because I re-read some of the debates in the Constituent Assembly before coming to Delhi, if hon. Members will permit me to say, the discussion on amendment of the Constitution in Austin's book on India, *The Cornerstone of a Nation,* is extremely helpful. Originally, distinguished lawyers suggested that even the Fundamental Rights and their alteration should be ratified by a certain number of States. That view was decisively rejected in the Constituent Assembly and though no very clear reason appears, it seems to me that having regard to the composition of the Rajya Sabha, the indirect endorsement by the elected representatives of the States and about two-thirds in number is already there.

**Shri A. N. Mulla:** I think, there can be another reason, that is, those measures which are directly affecting the States also, they were put in the proviso, but those matters which did not directly affect the States at all, it was not considered necessary that they should also be subject to that proviso.

**Shri H. M. Seervai:** Correct.

**Shri A. N. Mulla:** I am very grateful to you for helping me.

**Shri M. P. Bhargava:** You have mentioned that there is enough safeguard with the Rajya Sabha vote. Now take the case today. Does the vote in Rajya Sabha represent the true state of affairs in the States?

**Shri H. M. Seervai:** When you are dealing with a body which is being renewed every two years. . . .

**Shri M. P. Bhargava:** Only one-thirds is renewed every two years.

**Shri H. M. Seervai:** Yes. Therefor, it may be that at any particular period of time the direct reflection of the State Legislatures may not be found in the Rajya Sabha. That must be conceded. But that is the scheme taken presumably from the Senate of the United States where one-thirds of the body goes out every two years, and it is a factor of stability normally because the immediate overwhelming emotion of the moment is not in its totality reflected in the Centre; it will be reflected in course of time.

**Shri Jairamdas Daulatram:** I also happen to be a Member of the Rajya Sabha. The parties cut across States. In the Rajya Sabha, the Members do not necessarily vote according to the dictates or instructions of their respective State. Normally they are selected by the State Legislatures, but in functioning, in most of the matters which come up for vote, the Members whatever may be the State to which they belong, and sometimes even within each State, they vote according to the Parties. The Party for which they vote may not be in majority in the State. Therefore, the Party vote cuts across the representation of the State. Whatever might have been the original intention, that the Rajya Sabha should represent the States, that is only theoretical and the actual fact of life is that Parties cut across States.

**Shri H. M. Seervai:** On the political plane; I would not, even remotely, wish to controvert this proposition. But all that it means is that, so far as the State-Centre relations are concerned, it directly affects the State. As regards the general rights of citizens or non-citizens, because there are several Fundamental Rights like Equality conferred on all the inhabitants of India, all that you can say is that the climate in a particular State is not such as to leave its Members either to oppose or to support. So, you are right that it may cut through it. Members may vote according to Parties, but we assume that all parties try to represent the people whose suffrage they ask for, and if those people do not want the Fundamental Rights to be amended or have very strong objection, I believe, they will make that view prevail with the Party.

**Shri Jairamdas Daulatram:** It may be the minority view in that State.

**Shri H. M. Seervai:** It happens. When all is said and done, when you put faith in numbers and decide that it is better to count the heads rather than break them. Of course, you do run a certain amount of risk.

**Shri Jairamdas Daulatram:** I have got the other provisions too which we can discuss later.

**Shri Trilok Singh:** If I am not mistaken, the present situation has arisen as a result of the provisions of Art. 13(2). If somehow it could be possible for the Parliament to delete Art. 13(2) altogether, the Legislative powers of the Parliament or the State Legislatures would not be impaired; they will continue to be subject to the provisions of the Constitution. As was perhaps rightly held by the ex-Chief Justice of India, Art. 13(2) is redundant. Could you suggest a way out as to how it would be possible for the Parliament to delete the provisions of Art. 13(2)?

**Shri H. M. Seervai:** My answer to the hon. Member would be that even if Art. 13(2) was not there, the Court would proceed to act as though it was there. Our deleting Art. 13(2) does not help. But my short answer is that the whole reasoning that the power is a residuary power and, therefore, everything can be amended but not Fundamental Rights, is destroyed by the fact that if it was a

legislative power, it is subject to the provisions of the Constitution, and Justice Subba Rao was confronted with that difficulty. He has given an answer which is odd. He asks: how can it be said that an amended Article is inconsistent with the Constitution? The whole question is: can you amend an Article? If you can amend all parts except the Fundamental Rights, though the legislative power is subject to the other provisions of the Constitution, it must follow automatically that you can amend Art. 13(2). But by merely deleting Art. 13(2), you neither enlarge the powers of the Legislature nor control them because to say that something is by way of caution means that every Court will act on it even if it is not there. How will our deleting help? Our deleting it might be injurious in other ways. They might attribute to Parliament an intention that hereafter laws should not be declared void. It is not the intention of the Parliament. As long as you keep a written Constitution, under our theory of law, any law which contravenes the Constitution is void. That is why, Chief Justice Kania said that it would be so even if this was not there; the Government of India Act did not contain such provisions and yet, laws inconsistent with the Government of India Act were void. The correct thing is to say that the whole basis of the judgement is inconsistent and contradictory, but the difficulty of the Mover is this: once the Supreme Court has spoken with the voice of the whole Court, what will you do? Therefore, his Bill seeks expressly to confer the power and when he puts me questions, I hope to suggest if it may not be disrespectful to do so, that he should add to the opening part of his amending clause of the provision, "Notwithstanding anything contained in the Constitution, Parliament shall have the power . . ", so that, nobody will say that Art. 13(2) bars it or the Fundamental Rights bar it. He could add at the beginning of the clause, "Notwithstanding anything contained in the Constitution, Parliament shall have the power. . ." The absence of these words has been commented upon by the majority judgment. I had left this, but since the hon. Member put it to me, I thought I should mention this a little out of turn.

**Shri N. C. Chatterjee:** I think, in your thoughtful chapter on the amendment of the Constitution, you have pointed out that Parliament can pass a law reconstituting the States under Arts. 2 and 3 and forming States.

**Shri H. M. Seervai:** Yes.

**Shri N. C. Chatterjee:** Therefore that is permissible by a simple majority in Parliament.

**Shri H. M. Seervai:** Yes.

**Shri N. C. Chatterjee:** Under Art. 179, Parliament can also abolish the Legislative Council in a State.

**Shri H. M. Seervai:** Yes; on the request of the State.

**Shri N. C. Chatterjee:** That would not require any special majority.

**Shri H. M. Seervai:** No; it would not.

**Shri N. C. Chatterjee:** It can also constitute a new Legislative Council.

**Shri H. M. Seervai:** Yes; on the request of the State.

**Shri N. C. Chatterjee:** I take it that, when a Constitution is enacted, it represents for the time being the solution of the problems facing the framers of the Constitution for the time being. But certain things develop, socio-economic conditions change and new problems come up which have to be tackled. Therefore, amendability is absolutely essential in a developing State.

**Shri H. M. Seervai:** Yes. For the first and only time in my book, I permitted myself a little sarcasm that it would appear that a modern democra-

tic and dynamic society enables the judges to amend the Constitution, but that dynamic society goes with a Constitution, part of which is static. Nothing can be immutable that way. Your ideas change for better or worse and if people want the better or the worse, then given a little time and reflection they must, in the end, prevail.

**Shri N. C. Chatterjee:** You have also pointed out that mere procedure of amendment is embodied in some Constitution and that that itself carries with it the power to amend.

**Shri H. M. Seervai:** Yes; it does, in America and Australia, and it is clear that it does here also because as the minority pointed out, the operative words are:

> "....upon such assent being given to the Bill, the Constitution shall stand amended...."

So, the power is in it. They merely lift the marginal note and talk of procedure but the procedure carries with it the power.

**Shri N. C. Chatterjee:** Therefore, the procedure itself does not restrict the power of amendability; it only indicates the method, but the result is also there.

**Shri H. M. Seervai:** Yes.

**Shri N. C. Chatterjee:** I want to understand one thing. You have seen Mr. Nath Pai's Bill.

**Shri H. M. Seervai:** Yes; I have.

**Shri N. C. Chatterjee:** Apart from the introduction of the "Notwithstanding...." etc., clause, do you think that anything more should be done?

**Shri H. M. Seervai:** If I may be permitted to make a suggestion which is contingent, if the Select Committee or a substantial majority of it recommend that this Bill be passed or at any stage Government considers supporting the Bill, then, in my opinion, the most satisfactory thing to do, and to do without much delay, is to refer such a draft Bill for the advisory opinion of the Supreme Court of India before going through the elaborate formality of passing it and going through the elaborate procedure of ratification by eight States and it seems to me that the Bill so framed, it is unlikely in the last degree,....would be held void.

**Shri N. C. Chatterjee:** You may remember, I submitted a Memorandum to the President demanding a reference under Art. 143 and the President was himself considering the same, but..

**Shri H. M. Seervai:** If you will permit me to say so, it is very difficult before the same Bench and the same Court without any change in any situation at all, to say, "review your judgement". There are grounds for asking it if the Court wants to stretch a point. For instance, I am quite certain that the judgement of the Privy Council and its statutory provisions have not been read and it is equally clear to me that the Articles of the draft Constitution and their impact have not been realised. Mr. Nath Pai's Bill radically alters the situation. It says to the Supreme Court: "You say, we did not confer the power. We confer it. We make it clear that notwithstanding anything said in any other part of the constitution we shall do it."

**Shri N. C. Chatterjee:** The Bill is here. We consider it. Will it be proper to recommend a review of the whole thing by the Supreme Court to give their authoritative opinion?

**Shri H. M. Seervai:** Not on the Article but on the Bill, which you mentioned.

**Shri N. C. Chatterjee:** This was urged in Shankari Prasad case. Supreme Court said that unanimously. They rejected it. That was the law.

**Shri H. M. Seervai:** One of the judges in the dissenting judgement pointed out one thing. Every single judge of the Supreme Court or High Court dealing with article 32 and 226

says that no ordinary law can take away the power; as long as the Constitution is not amended ordinary law cannot touch it. Every single judge assumed that the amendment of the Constitution could deprive the Supreme Court of its power and authority, could deprive High Court of its power under art. 226.

**Shri N. C. Chatterjee:** This point was urged by Justice Patanjali Sastri. Consciously the framers of our Constitution thought of remedial right and made it fundamental right. Nobody wanted to take away that remedial right. If you look at the first amendment of the Constitution you will see this. The State can make special provisions for the advancement of any socially and economically backward classes the scheduled castes and the scheduled tribes. Technically it may be called an infringement or abridgement of the doctrine of fundamental rights. It was done for the purpose of speeding up, improvement of the oppressed and suppressed classes. Sometimes fundamental rights have got to be changed for the greater good of the people, who have got to be pushed up, under our directive principles.

**Shri H. M. Seervai:** That is the abstract theory of equality for people who are not otherwise equal and such special provisions in their favour were made. But I am not quite sure that even without it, a special provision for women and children could not be upheld on the ground that there is a valid classification. A person who is lame cannot be treated on the same footing as a person who is in possession of his limbs.

**Shri N. C. Chatterjee:** We had the case of the Communal G.O. being struck down as illegal. So we had to make special provision for the backward classes.

**Shri H. M. Seervai:** Your proposition is correct.

**Shri N. C. Chatterjee:** Article 31 had to be altered because of the judgment of the Supreme Court. I represented the West Bengal Government with Mr. Setalwad in that case. Lot of refugees from East Pakistan were settled in the outskirts of Calcutta because they could not go back. Their settlement had to be regularised. West Bengal Government went out of its way to give reasonable compensation. The Special Land Acquisition Act was passed. That was struck down as illegal. We had to amend the Constitution so as to get rid of the difficulty that was there in helping the oppressed and depressed people who were facing this difficult situation.

**Shri H. M. Seervai:** I don't dispute that. There are very harsh necessities imposed sometimes. I recollect that when Pandit Nehru introduced the 4th amendment, one of its clauses was this: Your and my plot of land could be taken away in order to ensure house for a refugees. I ventured to say that only in *Alice in Wonderland* would citizens be made refugees in order that refugees may become citizens. The clause was dropped out.

**Shri N. C. Chatterjee:** You quoted Dr. Ambedkar's speech. I think Justice Bachwat quoted it.

**Shri H. M. Seervai:** I do not attach much importance to what Dr. Ambedkar said. He has been saying a large number of things which lawyer won't easily accept in the constitutional debates. I have studied them very carefully. He was neither a politician of great standing nor a lawyer of high standing. He is neither a great lawyer nor a great politician. I would refer to what Pandit Nehru said. He never deviated from it. He said that that constitution is meant to endure. Things which are for the welfare of the people must be secured. This is sound politics from whatever source it comes.

**Shri N. C. Chatterjee:** The so-called theory that any abridgement of fundamental rights would really be a violation of the basic human rights and would really be trampling upon the people's cherished freedom is not quite correct.

**Shri H. M. Seervai:** I respectfully agree.

**Shri N. C. Chatterjee:** I am now reading one passage from Dr. Ambedkar's speech in the Constituent Assembly. Possibly you are thinking of that speech in support of your thesis:

> "I challenge anyone of the critics of our 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."

Therefore, as one of the framers and makers of the Constitution, he did not want to make it so rigid that fundamental rights would never be touched.

**Shri H. M. Seervai:** That is correct.

**Shri N. C. Chatterjee:** Pandit Nehru, on the 11th November, 1948, said this and Mr. Mulla was also probably thinking of this:

> "There must 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 got to be flexible."

**Shri H. M. Seervai:** That is correct.

**Mr. Chairman:** He has accepted all your points. Shall we move forward? Mr. Joshi.

**Shri S. M. Joshi:** I want to know this from you because it is exercising the minds of ordinary people. In the Constitution certain rights have been described as fundamental rights. The other rights which accrue from other Articles or other laws are not treated as fundamental rights, though they will be protected by courts. If any law that is passed in this country is violated, I must have a remedy. But for the fundamental rights the only distinguishing feature according to you seems to be that we have a remedial right, that is, direct approach to the Supreme Court. Is that the only distinction? If that is so, then would that particular provision which gives me the right of direct approach be amended under the same provision—Art. 368—that this will be removed? Therefore, an ordinary man feels that there should be a further guarantee that these rights will not be touched without going through a particular, special procedure like the one which has been prescribed for those subjects which are concerned with the State's rights. Have I made myself clear?

**Shri H. M. Seervai:** Absolutely clear. First of all, so far as these rights of approaching the Supreme Court are concerned, it must not be forgotten that for one person who goes directly to the Supreme Court, there are ten persons or, maybe, 50 persons who go to the High Courts under Art. 226 and the right to move the High Court is not a guaranteed fundamental right. If people want to make the Constitution more difficult of amendment when it comes to fundamental rights, they can do so. But when you say that a right can be taken away, you are dealing with power. Is there any reason to believe that the general persons who are so anxious that the right to approach the Supreme Court should not be taken away, will readily acquiesce in? The Bill of Rights in England, which was passed in 1688, can be amended like a dog Act tomorrow, but it has survived two wars and nobody has dreamt of repealing the Bill of Rights. So, we are con-

sidering power and if people think that going to the Supreme Court turns out to be so harassing, that the fundamental rights should be for going to the High Court and not to the Supreme Court, people can have their way. I admit that people set a value to a procedural right. As regards fundamental rights—we have a distinguished Judge in our midst and he will tell you that—it must be rare indeed in which a person complaining of violation of fundamental rights has been turned away from the High Court on technicalities. It has been done some time, but after the Supreme Court said that, once the violation of fundamental rights is established it will hear the matter, take evidence and finish the case. The High Court, as far as I can see, has always taken the view that once there is clear infraction of fundamental rights or any constitutional right, the High Court will intervene. But on the popular thing, because leaders represent the people, but they also instruct the people, would you say that the right of freedom of trade and commerce guaranteed by Art. 301 is less important than the right to carry on trade or business guaranteed by Art. 19(1) (g), or the right not to tax goods in inter-State trade and commerce is less important than the right which is kept out of Art. 31? So, while admitting it, it only means that the Supreme Court must command such respect from the people that the elected representatives will not ask for an amendment of Art. 32. But if they do it with two-thirds of the Rajya Sabha, is there anything to suggest, if that stage is reached, that eight States will not ratify?

Secondly, you must consider that the longer the process between amendment and the finished product, the more unsatisfactory it is. The whole law is brought to a standstill and all Governmental activities come to a standstill. So, it is desirable that once a reform is thought of, it should be put through without much delay and the Congress of the United States now prescribes a period for ratification by the States you do the thing which will lapse. There are more aspects than one and I don't think that anybody is likely to interfere with Art. 32. But the general feeling is so strong that even if 32 is to be amended, I don't think that ratification safeguard is really effective. Theoretically it is possible. But, practically, that is unlikely.

**Shri K. Chandrasekharan:** You have referred to the necessity for a clause in this Bill. I think you also suggest that the provisions of this Bill be included within the proviso to Art. 368. You have also suggested that there should be a Presidential reference. These are the three things that you have suggested with regard to the Bill which we are considering. Apart from these three aspects, I would like to know whether you have got anything more constructive than this.

**Shri H. M. Seervai:** If Supreme Court says that you cannot do, then the only constructive thing will be to rest that with the Legislature. If it comes up again before the Court, we must use foresight that the legislation would not be open to challenge. If you say "notwithstanding anything contained in the Constitution", it will take in the fundamental rights; it will take in Art. 13(2). The Parliament shall have the powers by following the procedure. You had the power which has not been implied. They have refused to imply. The power is already there in the Section. You do not have to repeat. The Supreme Court says where is the power; this is only a procedure. They also say that Art. 13 (2) is all-pervasive. Already there is a clause 'Notwithstanding anything contained in this Constitution' which is more constructive in the sense that it is helpful. I do not know whether it will be helpful in a court of law.

**Shri K. Chandrasekharan:** You know the suggestions made by Justice Hidayatullah for the Constituent Assembly.

**Shri H. M. Seervai:** I am very glad that you have mentioned it. I wish to say—I have already said that in my Book—that by what legal process can you set up a Constituent Assembly? To-day your rights are safeguarded by absolute majority of the House and 2|3rds being present at the time of voting. In the case of ratification, by at least eight States. Let us assume that tomorrow the hon. Members in the capacity of Legislators convene a Constituent Assembly and pass a Constituent Assembly Act and say that the decision shall be by a bare majority. What would Mr. Justice Hidayatullah say to that? So, if Parliament itself by the requisite majority cannot enact the law to amend the Constitution, to suggest that you can set up another body and arm it with the power which you do not possess is to put it mildly rather 'odd'. Mr. Justice Subba Rao wished to make that flourish. You see the reservation that "we do not express a final opinion". In my submission no final court can say that it is the method. I won't deal with it because if the method turns out to be impraticable this has an immediate impact on the construction of power. If the power is anywhere in existence, you may put one construction on the law. If two or three powers exist, somewhere else you may put another construction. So, the majority judgment says 'we throw out this suggestion I have dealt with it in my book. Daman, Diu, Goa Bill Act was passed in exercise of ordinary residuary powers. Tomorrow you can redraw the map of India. You followed the democratic process. "Let us ask and find out these things." In the result, what happens? No law was necessary. So, Constituent Assembly has no resemblance to the Daman and Diu Poll Act. Supposing you had disregarded the vote and given Goa to Maharashtra. Would that law have been void? So, instead of exercising the absolute power subject to consultation with the Legislatures, you followed the democratic process. If the people want a change, do it. If they do not want a change, let it remain where it is. So, the Constituent Assembly is either legally an impossibility or wholly unnecessary.

**Shri K. Chandrasekharan:** Do you think that an amendment to Art. 13 (2) to the effect that the law under Art. 13 (2) would not include Constituent law is necessary?

**Shri H. M. Seervai:** Well, since they have already said that 368 is not a constituent law, you are only inviting a second defeat. They say that the power to make law is not in 368. It is only procedural. So, the constituent law being anywhere and the power to amend being an ordinary legal power, amendment to 13 (2) on these lines won't help.

**Shri Triloki Singh:** What do you say if we go in for a referendum to amend the fundamental rights?

**Shri H. M. Seervai:** On the referendum part, we must not forget the enormous expenditure involved in the preparation of electoral rolls and the challenging of rolls which are so made. After all you had normal referendum when the voting was by limited franchise. Now, if every adult male can vote at a Parliamentary election or at a State election, I do not think that there is anything to be gained by a referendum. The whole business of the States gets disorganized. The hon. Member will appreciate that to organise an All India referendum it involves dislocation of governmental and other business. It takes place at the time of each election and it also involves an enormous amount of expense and litigation too. There is no gain. You know only the members who are elected by an universal adult franchise can vote.

**Shri Triloki Singh:** If I mistake not, this referendum can only be gone through only under the residuary powers.

**Shri H. M. Seervai:** What the hon. Member put to me was: Would you

prefer the referendum as part of the amending process to solve the problem.

**Shri Triloki Singh:** You know the referendum can be resorted to only under the residuary powers.

**Shri H. M. Seervai:** No. Suppose he suggests in his dissenting minute—I am only giving you this as an example—that in 368 of Mr. Nath Pai's Bill, add a further clause "provided that if the Legislature passes this, it should be submitted to the referendum of the people." This is what I think he was meaning.

**Shri Kameshwar Singh:** What is your view about the Constituent Assembly?

**Shri H. M. Seervai:** My view about the Constituent Assembly is that it is legally impossible or wholly unnecessary.

**Shri Kota Punnaiah:** Mr. Seervai, Rajya Sabha consists of Members selected by the Legislatures and nominated Members. Don't you draw any distinction between the two? If you draw any distinction, how do you explain the position of Rajya Sabha in relation to States?

**Shri H. M. Seervai:** When the nominated Members are small in number—12 in number—I do not know whether they are entitled to vote on a thing like this. They do not vote in the amendment. Elected member is the requirement I think; but the distinction is this: that we have considered that persons possessing certain special qualifications ought to be available to assist a Senate or a Rajya Sabha so that persons who will not stand for election, who are not politicians ordinarily, their services are not lost to the nation. That is what the framers of the Constitution thought in their wisdom. I think there is much to be said in favour of it.

**Shri Viswanatha Menon:** You were suggesting that the Bill should be referred for the opinion of the Supreme Court. Do you expect a unanimous opinion of the Supreme Court about this Bill?

**Shri H. M. Seervai:** Not being a prophet, I would not venture on it. But I personally think that if you remove the legal objection which has been urged—short of a person saying that you cannot amend the amending Article itself—it is a theoretical possibility, but speaking for myself, I think that the chances of succeeding in the Supreme Court ought to be high. But I wish to say this that if the Supreme Court turn it down they would precipitate a conflict which would ultimately do for the Supreme Court of India what President Roosevelt did for the Supreme Court of the United States where a threat to alter its organisation led the Supreme Court to reverse the totality of its decision because in my respectful opinion it is no part of a Judge's function to talk politics, whether Governments are going fast with reform or going slow with reform. This is a question of power and whether erosion of fundamental rights and totalitarianism are the same thing or are different things is, in my opinion, not the function of the Court and I must confess that I was very glad that Mr. Mohan Kumaramangalam told the Court. "As I sit here listening to the court, it appeared to me that we were talking politics and not law."

**श्री वे० शि० पाटिल :** आप हमारे धन्यवाद के पात्र हैं। आपने इस महत्वपूर्ण विषय पर काफी प्रकाश डाला है। आपने बताया है कि ऐसा कठोर संविधान हम नहीं चाहते जिस में कभी भी संशोधन न किया जा सके।

आप देखें कि सुप्रीम कोर्ट ने यह कहा है :

The fundamental rights cannot be amended not because they are fundamental but because Art. 13 (2) is there; 13 (2) में

"but shall not include constitutional amendments."

ऐसा अगर संशोधन कर दिया जाय तो अच्छा हो जाऐगा या नहीं ?

**Shri H. M. Seervai:** No. I have dealt with that in answering the other question. The hon'ble Member is putting it in a slightly different way. He assumes that that is the only objective. The real difficulty is that they do not find the legal power in Art. 368. They say it is only a procedure. The legal power is to be found in the residuary power. Now nothing which you say about residuary power will make it a constituent power because the residuary power includes not only amending the Constitution but levying taxes, passing of legislation on subjects which are not included in Lists 2 and 3.

**Shri Deorao S. Patil:** Because so many legal experts expressed their view that the fundamental rights cannot be amended.

**Shri H. M. Seervai:** I ought to say this that lawyers as a whole who belong to my generation read only Dicey; so they acquired a profound distaste for constitutional amendment and I shared it in 1952, but one reading of Prof. Wheare's book on Federal Government will convince any dispassionate observer that amendments to Constitution have been made by the oldest Federal Republic. There are about 37 amendments made in about 40 years or 45 years by the Swiss Federal Government. And you must not forget that in Switzerland no law passed by the Federal Legislature can be declared void by the Court. The only remedy is that people can ask for a referendum, but no Court is given the power in Switzerland to declare a Federal law void.

**Shri Deorao S. Patil.** As an ordinary citizen I would like to submit that people who have given themselves this Constitution can also reject it.

**श्री दे० शि० पाटिल :** सुप्रीम कोर्ट का जो डिसिशन है वह जो अब तक पास हो चुका है, उसकी टच नहीं करता है। उन्होंने जो डिसिशन दिया है उसमें कहा है :

"We have arrived at the conclusion namely that the Parliament has no power to amend Part III of the Constitution."

उन्होंने यह भी कहा है कि एमेंडमेंट नम्बर 1 और 17 वायड नहीं हैं।

**Shri H. M. Seervai.** Correct.

**श्री दे० शि० पाटिल :** यह भी कहा है कि उसका इफेक्ट आगे जो है वह वैसा ही रहेगा।

**Mr. Chairman:** He is saying about the prospective doctrine.

**Shri H. M. Seervai:** Correct, but that doctrine is so complicated that I do not wish to trouble hon'ble Members with it.

**श्री दे० शि० पाटिल :** कानून अच्छा है या बुरा है, यह तो वे कहें लेकिन कानून तो बुरा है और प्रेक्टिस में अच्छा है, एज ए कामन सिटिजन यह जो डिसिशन उन्होंने दिया है ऐसा डिसिशन देना उनके अधिकार क्षेत्र में आता है या नहीं आता है यह मैं नहीं समझ पाया हूं।

**Shri H. M. Seervai:** All that the hon'ble Member says is that it surprises him to say that which was beyond power can continue for all time. Now the reason why the Supreme Court did it is that it is not within human power to go back to the stage from which we have advanced. We have advanced so much we cannot think of now abolishing the huge hydro-electric projects, factories, land ceiling legislation and so on. So the Supreme Court could not have wished to pass a judgment incapable of enforcement. Therefore, they were deterred by the consequences and they did not do it. Otherwise as Mr. Nambiar said, in any court in the world has anybody said that the law is bad but will continue good for all time?

**Shri Nath Pai:** I know, Mr. Chairman, we all agree not to tax Mr. Seervai.

**Shri H. M. Seervai:** I wish to say this. I have come specially for this business in Delhi and subject to the time of the hon'ble Members I am entirely at your disposal.

**Shri Nath Pai:** I would not like to tax him much. He has been generous enough to make him available to us as long as we would like to have him.

I would first like to endorse the sentiments as to how much we benefit by discussing with you such outstanding and complicated issues. I have first had the benefit of your monumental work, the first of its kind, on Constitutional Law.

Now, after having had the benefit of listening to you personally, I have little disagreement which I submit to you very respectfully, is *obiter dicta* on the part of both of us. That is with regard to Dr. Ambedkar. You are more eminent and qualified to pass a judgment and I will say that you are a profound student of law. I do not know anything else but as a politician, I think, Dr. Ambedkar did a great service to this country by giving his faith to the 66 million people, the most abused people in the whole world.

**Shri H. M. Seervai:** I respectfully agree that Dr. Ambedkar's services to his community and to the country at large in respect of these people and his overcoming formidable odds in attaining the position is beyond dispute.

**Shri Nath Pai:** Since you say about a man with whom as a young Congressman I radically disagreed and fought, but as I matured, I began to respect, admire and love him because his contribution to India's Democracy, when history will be written, will be regarded a little higher than anybody else's as, if he had given the wrong path of rebellion and violence to the 66 million untouchables of this country, God alone knows what would have been the consequences to the democracy to which Dr. Ambedkar gave stability and the faith of the only section of India which had a right even to go into rebellion in the ultimate. To the unity and the freedom of India his services are unrivalled and this is not a dispute between us.

**Shri H. M. Seervai:** I readily agree with you.

**Shri Nath Pai:** I will just read a little thing. I did not have the benefit of consulting you earlier or for that matter any friend, even Barrister friends from Bombay. The Bill which is before the Committee now was drafted in the sick bed while I was in the nursing home because you will appreciate that if I had the benefit of talking to a lawyer or Barrister friend or fellow student who studied with me in England, I would have taken care of that lacuna. But I got this kind of advice after the Bill was moved and when I returned to Bombay after my convalescence. Actually, I did not have benefit of the counsel of the Advocates. Regarding taking of the opinion of the Supreme Court, that conflicts with my very basic concept. I am prepared to submit to the Judgment of the Supreme Court any time and then come back for the rectification of the law because that law has not been interpreted in a manner to give force to the intention of the legislature. I am not rejecting your idea—I want to assure this to our distinguished witness; I value everything he says and give the greatest consideration and I will continue to give. I am only voicing my immediate reaction. You suggested that it may be desirable that we submit this Bill for the opinion of the Supreme Court. I think you may be right that the Supreme Court in its wisdom may be pleased to give an opinion. It may be inclined to avoid a conflict, but I may say that it is hypothetical that that opinion will be in favour of the Bill.

Secondly, I will read out only four sentences from my speech in the Lok Sabha.

> "I am saying that the Supreme Court is supreme in the matter of interpretation and Parliament is

and must always remain supreme in the field of legislation. An independent judiciary must act as a brake on likely excesses by an over-enthusiastic executive, but it must never try to act as a brake on the forward march of the people dedicated to an ideal. It transgresses its legitimate field of interpretation and under the garb and ruse of interpretation tries to usurp the function of Parliament, that is legislation; that effort needs to be resisted."

I submit to you that under its legitimate right of interpretation in the case of Golaknath's case the Supreme Court has overstepped its own field and made inroads into the field of legislation. Firstly it called the two acts *ultra vires* and then it introduced the doctrine of prospective overruling; though they remain bad in law they will remain valid. I would like to know your views on this.

**Shri H. M. Seervai:** As regards the question which has been raised by the hon. Mover of the Bill, it is perfectly true that the Supreme Court is not bound to give an advisory opinion. But, we have had 4 or 5 cases in which, following the example of the Privy Council, the Court did not refuse to give an opinion in a matter of importance, especially when the Constitution provides for it. The Kerala Education Bill which raised far-reaching questions is an example in point. Nobody can say that the Supreme Court is bound to give an opinion. Notwithstanding an occasional dissent by Mohammad Zafrullah Khan, in the past such a consultation has resulted in valuable opinions being given by the Supreme Court. Secondly, while I fully appreciate the learned mover's anxiety as to what would happen if the Court bars all orderly progress, initially I want to concede the right of judicature. This question will arise if the Supreme Court bars all orderly progress. But when the matter is fresh, when the matter will not have to be argued before an entirely unknown body, it would be much better to get their advisory opinion. I don't mean to say that it will be entirely a new body. There is no logical change in the position of the bench by just one person going out and another coming in. Secondly, you pass a law now under your amending power and nothing may happen. But still everything becomes suspect because we don't know what the Supreme Court will say. It would be much better to have their view in advance. If they themselves say it is valid, the matter ends. If they say it is invalid, then the question of first magnitude would arise. It is precisely because of this, I envisaged that when I referred to the American experience—how President Roosevelt dealt with the claim of the Court as a super legislature. But we need not anticipate things which may not happen. This is the easiest, the simplest and the shortest way. The time of Parliament would not be consumed in debating things. The time of the legislatures of States in ratifying it would not be consumed, if it turns out that the whole thing is not legal. If you are told that there is this power with you, then in your wisdom you may go on with your Bill.

**Shri Nath Pai:** If they don't say that, what will happen?

**Shri H. M. Seervai:** Then, much requires to be done. I have gone on record as saying that no Government, no country will acquiesce in a Court putting brakes on progressive measures.

**Mr. Chairman:** Arising out of this, if this advice is in our favour will that over-rule Golaknath's case?

**Shri H. M. Seervai:** It will not over-rule, because you are altering the law. In my opinion that judgment is completely wrong. The judg-

ment would have to be treated right in theory then—I don't worry about theories—, but now the situation has changed and it is not so now. The Supreme Court would not overrule. It would say that the judgment was right at that time and now the situation is not the same.

**Shri M. Y. Saleem:** The advisory opinion would bind any subsequent bench.

**Shri H. M. Seervai:** Theoretically no, practically yes. In practice it has not happend. There have been advisory opinions given and when a full argument is presented, this is a pure question of law. At the time when the question of fact arises, it is altogether different.

**Shri Nath Pai:** It will be impertinent on my part to ask you to agree with me. You don't have to agree, but I would like to have your opinion. I submit that the Supreme Court had overruled its two previous judgments, one unanimously and in the other by proponderance of the Bench has by interpreting Article 368 actually amended Article 368. I would like to know your opinion.

**Shri H. M. Seervai:** Justic Bachawat has put it clearly, firmly and tersely that to do so is amending the Constitution and no such powers have been given to the judges of the Supreme Court. I follow the good examples of letting one Judge answer the point raised by another judge. I have given five quotations at the beginning of that discussion. I have said this involves a question of political theory with which I am not concerned. But I did it precisely for the reason that if I said something, it is only a lawyer talking, but if a Judge says something it is a Judge delivering a judgment.

**Shri Nath Pai:** I thank you very much. Actually Justice Bachawat's quotations I used in my speech from your book. Till then I had not got the original document. It was during the reply to the debate that I cited the original and I benefited by your quotation. So you agree that my bill is not a bill to amend the Constitution but to restitute the Constitution as it stood before it was amended by the Supreme Court in Golak Nath's case.

**Shri H. M. Seervai:** Broadly speaking, that is correct.

**Shri Jairamdas Daulatram:** I don't propose to take much of your time. But I do want to make a suggestion at this stage. Chapter 33 of the book gives Mr. Seervai's views on the judgment which we are discussing. Can it not be circulated to us?

**Mr. Chairman:** I thought everybody has seen it. Everybody has referred to it while speaking on the floor of the House. We will keep some copies in the Library.

**Shri Jairamdas Daulatram:** That won't help. The book cannot be kept in the library. I have been trying to get it but could not get it. We can make a request to him that since he could not submit a memorandum, this may be circulated.

**Mr. Chairman:** This is more than a Memorandum.

**Shri Jairamdas Daulatram:** It is only, I think 20 pages or so.

**Shri Chawla:** About 31 pages.

**Shri H. M. Seervai:** It will be about 44 cycostyled pages.

**Mr. Chairman:** If you have no objection, because it is copyright.

**Shri H. M. Seervai:** If the members want it for their personal use, I have no objection. This is copyright, of course.

**Mr. Chairman:** We will try to circulate.

**Shri Nath Pai:** I think it should be circulated.

**Shri H. M. Seervai:** I have no objection.

**Shri Jairamdas Daulatram:** We are concerned with his views on the issue. Those views have been explained to a great extent by his evidence, but there are many other things, you see. Otherwise he would have given a Memorandum. We should treat that as a Memorandum.

**Shri H. M. Seervai:** I have not written this book to make money. It involved much loss of money to write it. I am willing if members want to have cyclostyled copies for use for this purpose.

**Shri A. P. Chatterjee:** Mr. Seervai, of course as the Chairman has said I have missed your very valuable evidence, but I have heard something of it in the course of questions and answers and I have also glanced through the very illuminating and provocating —I should say provocative—chapter in your constitution. I would ask only some questions, because on those matters my mind is a little exercised, if it does not inconvenience you in any way. You have already answered some questions in regard to Art. 13 sub-article (2). Excuse me if it is a little repetitive, but I am just asking it because, as I said, I am a little exercised over it.

The majority judgement, if I have understood it, seems to me to be to this effect that the 17th amendment, for example, is *ultra vires* the Constitution because it violates Art. 13(2) of the Constitution. Majority of the Judges of the Supreme Court have not said that the 17th amendment is *ultra vires* because it amends fundamental rights as such but because it violates article 13(2). They say law there means also amendment of the Constitution. If that is the position, then what would you think if we amend Art. 13(2) to mean that law may include all those things which are said to be included but does not include amendment of the Constitution. What is your opinion?

**Shri H. M. Seervai:** This question was twice put to me and I have answered it in this way. Though you are right in saying that they have laid the emphasis on Art. 13(2), the real crux of the whole matter is that they look upon a power to amend the Constitution as a "legislative" power. If it is a legislative power where is it to be found? Art. 248, Seventh Schedule, List No. 1, entry 97. The moment, you try to say that Art. 13(2) shall apply to an amendment of the Constitution, you are up against the difficulty, where is the legal power to amend the Constitution. Therefore, Mr. Nath Pai's bill makes it clear that the legal power to amend the Constitution is not to be found in the residuary power but in the amending article itself, and in order that neither Art. 13(2), nor the content of fundamental rights, nor the theory of democracy or anything stands in the way, you say "Notwithstanding anything contained in the Constitution, Parliament shall have power to amend the Constitution by following the following procedure". Altering Art. 13(2) or altering Art. 13 will not touch it, because the judgement of the Supreme Court has two foundations. The power is a legislative power. You may say that the judgement is inconsistent. If it is a legislative power, no article of the Constitution can be amended. But the Supreme Court has said, you can amend everything except this.

**Shri A. P. Chatterjee:** Of course I do not certainly find any objection to both the articles, namely Art. 13(2) as well as Art. 368, being amended. But supposing Art. 368 only is amended. Then the position would be this. In Art. 368 of the Constitution you say that notwithstanding anything else in the Constitution any part or provision of the Constitution can be amended. But side by side with it in an earlier portion of the Constitution—Art. 13(2) —it is laid down that you cannot make any law to whittle down fundamental rights. The Supreme Court in its majority judgement has stated

that, apart from the question whether Art. 368 is merely procedural and does not give the power to amend the constitution, law under Art. 13(2) means and includes amendment of the Constitution, because on principle any law amending the Constitution is also in the nature of an ordinary law and it cannot have any higher status than other laws. Therefore, there will be this contradiction even after the amendment of Art. 368 between Art. 13(2) and Art. 368. Do you not think there will be such a contradiction?

**Shri H. M. Seervai:** I do not think there would be. But if you apprehend such a contradiction, you may say in Art. 13(1) & (2) that subject to the provisions of Art 368....but you see "notwithstanding" part of it would have to be deleted. You would have to say that subject to the provisions of Article 368, any law violating fundamental rights shall be void. But when you are amending a whole Article, you are conferring a power and you are negativing the effect of any other provision. It is not a contradiction. Ordinarily, the real contradiction is that if anything is excluded, then that is not covered by 13(2). 13(2)just would not apply. For instance, the Supreme Court has jurisdiction to hear all matters notwithstanding anything contained in the Constitution. It cannot interpret or entertain disputes regarding treaties entered with Princes and so on.

**Shri A. P. Chatterjee:** The next question which I put you, Mr. Seervai, is that there has been some apprehension, which is being given expression to by some of the hon. Members here. That apprehension is this: the power to amend fundamental rights—I mean, such fundamental rights as freedom of speech, freedom of expression, freedom of assembly—if it is given in a clear way to the Parliament, may lead to undesirable consequences? As far as my opinion goes, these freedoms are also so restricted by these other clauses that really no further restriction is possible. Further restriction means extinction. Would it be possible to amend Article 368 in such a fashion that we can say that Articles relating to freedom of speech, freedom of expression, freedom of assembly, etc., might not be amended or could not be amended, but than the rights of property can be amended by Parliament. Would it be possible to create such a dichotomy as this? In my view, it is not possible. I just want your opinion.

**Shri H. M. Seervai:** Problems relating to the freedom of speech and association are not incapable of amendment. Maybe you did not hear that part of evidence. But the Supreme Court has, in substance, said that if an Under Secretary of the Government, without using his official language, gives a destructive account of the political party to which the Government belongs, there is nothing which anybody can do and he can remain in service. I do not think the Supreme Court has realised the consequences. But supposing you find people using their freedom of speech by criticising their superiors and criticising the party of the Government of the day, and if Parliament comes to the conclusion that this is detrimental to Public Service and Legislatures come to the conclusion that it is detrimental to Public Service, an amendment of freedom of speech by persons occupying official position may be introduced. It exists in America by a judicial decision. So it is not incapable of amendment. Secondly, at what stage the freedom of speech and association may be abused in a manner which you cannot think of now, is difficult to determine. Normally we belong to a democratic free society. If we price this freedom, the popular love of this freedom will be enough to secure it. And I may add that by experience the democracies in the East, barring India, have learnt that order and security of the State must be there before people can enjoy the freedom of speech. Otherwise you would not find a provision relating to Preventive Detention. So this is the basis. Even in America of bodies pledged to subver-

sion of the State by forcible means. And the Constitution made it necessary to say that there should be an ordered society before freedom can survive. This freedom even in our own Constitution is subordinated to the security of the State I think the European experience and Eastern experience after the Second World War shows that our Constitution was wisely framed.

**Shri A. P. Chatterjee:** So even if we decide to make such a dichotomy, that would not be wise.

**Shri H. M. Seervai:** It would be wise, but I do not think it is easy to make it because there is no particular freedom which is higher than another.

**Shri A. P. Chatterjee:** As far as Article 141 of the Constitution is concerned, that says that law as declared by the Supreme Court will be binding. Now, of course, I do not know whether it has ever been raised in any court of law or not. But looking at the issue under consideration, you have three judgments, Shankar Prasad's, Sajjan Singh's and the latest Golak Nath's. If we take the number of judges, who have given their view, one way or the other, we will find that the majority of the judges of the Supreme Court, if number is at all concerned, have given their verdict in favour of the power of the Parliament to amend the Constitution. Now, Article 141—would it mean which has been declared by the majority of the judges.

**Shri H. M. Seervai:** The answer is no, because very early the Supreme Court interpreted Article 141 to mean that the law declared by the Supreme Court is binding on all courts except itself. I find on the whole that is a correct interpretation, and therefore being not binding on the Supreme Court, the Supreme Court by majority says that Shanker Prasad's case and Sajjan Singh's case were wrongly decided. Unless the Supreme Court reverses it or the Legislature amends the Constitution, that is the law binding.

**Shri A. P. Chatterjee:** Last question. According to the provisions of the Constitution, the Parliament possesses the same powers as the House of Commons.

**Shri H. M. Seervai:** In certain respects.

**Shri A. P. Chatterjee:** Privileges of Parliament. On this occasion, the House of Commons very often acts, according to May's Parliamentary Practice rather theoretically acts as the High Court of Parliament. Supreme Court is there. But can that analogy of Parliament being the highest court in the land be imported here by virtue of that provision in the Constitution which says that Parliament possesses the powers of the House of Commons?

**Shri H. M. Seervai:** You possess the privileges but not the historical status of a court. You can commit a person for contempt. It is a function normally done by a court. But you are not a court in any other sense of the term. And then in England, as I have stated in my Chapter on Privileges, the foundation for it rests more on the necessities of the case than on Parliament being the High Court of Parliament, though such observations are to be found. But the clearest case is that the Australian Courts, Canadian courts, courts of England and South Wales are not the High Courts of Parliament in that sense. So I do not think it helps.

**Shri M. Y. Saleem:** I would like to put certain questions to you on points which were not clear to me. In your opening statement you have said that article 31 of the Constitution is the amended form of article 24 of the draft Constitution. Is it not a fact that the provisions existing in clause 5(b) of article 31 were added with a view to deal with situations between the Government of India and the Government of another country with respect to property

which could be declared by law as evacuee property?

**Shri H. M. Seervai:** I wish to clarify the first position. What I said was that originally article 24 was proposed. Then it was moved in the Constituent Assembly and it was said that they would not debate it. A new article was brought in by Pandit Nehru in September, 1949, and he said that it would be a just compromise, and in respect of it, he said 'We have taken advice, we do not think that we shall run into trouble, but if we run into trouble, then no court and nobody can hold it up.'. That was the context in which I spoke.

You are referring to the law relating to evacuee property?

**Shri M. Y. Saleem:** I am saying that the present article 31 of the Constitution is not what it was proposed there in article 24 of the draft Constitution.

**Shri H. M. Seervai:** Probably.

**Shri M. Y. Saleem:** There have been certain substantial changes in the present article as it stands now.

**Shri H. M. Seervai:** It may be so.

**Shri M. Y. Saleem:** What was the spirit behind the framers and what was it that weighed in the minds of the framers of the Constitution when they introduced a certain new clause which previously did not exist in article 24 of the Constitution?

**Shri H. M. Seervai:** The answer would be probably that till a good long time the Constitution did not envisage particular situations, but when this evacuee property business became dominant . . .

**Shri M. Y. Saleem:** I am talking of clauses 4 and 6 of article 31.

**Shri H. M. Seervai:** The reason is simple and it is this. Eminent lawyers like Shri K. M. Munshi and Sir Alladi Krishnaswami Aiyar thought that compensation did not mean full compensation and we could lay down what principles we liked. But there were certain measures which were either actually passed into law or certain measures which were proposed to be passed into law, and the distinguished assembly did not wish to stake their legislation on opinions of lawyers; and so, they made it beyond challenge by saying that laws which have already been passed eighteen months before the commencement of the Constitution or laws which were introduced and had received a certificate from the President could not be called into question on the ground that they were *ultra vires*.

**Shri M. Y. Saleem:** Is it not a fact that clauses 4 and 6 were added as it was evidently felt necessary that provisions should be made to protect particular kinds of legislation from any attack on the ground of contravention of clause 2 of article 31 of the Constitution

**Shri H. M. Seervai:** That is correct.

**Shri M. Y. Saleem:** Had these provisos not been provided, they would have come within the mischief of clause 2 of article 31?

**Shri H. M. Seervai:** Yes, they would have. That is correct.

**Shri M. Y. Saleem:** Therefore, does it not follow that these provisions were deliberately included only because the framers of the Constitution intended that the rights guaranteed under article 31 (1) and 31 (2) were fundamental in a very real sense and should be permanent in the Constitution and as such should not come within the purview of the amendment of the Constitution?

**Shri H. M. Seervai:** It is quite clear from the debates in the Constituent

Assembly that so far as compensation was concerned, Pandit Nehru described it as ordinary acquisition of land for which there was a recognised norm, that is, of land acquired in abolishing zamindaries or for social engineering, as he called it, and they believed on eminent legal opinion that the compensation could be determined without reference to the market price. So, if you say that the market price was intended to be a real genuine right, then the debates of the Assembly show that it was not meant to be so; and the Bombay legislation, *viz.*, Forfeited Lands Act relating to the Bardoli land of one Parsi called Ghaddar was taken as an example. You can lay down the principle that if a man bought land for Rs. 20, you would give him Rs. 40 or double the value, or 4 per cent increase for each year and so on, and eminent lawyers believe that that would be the position. But they did not wish to rely on legal opinion; therefore, they put in clauses 4 and 6. But the fact that they did not want to pay full compensation for large portions of land which would be acquired was apparent from the debates of the Constituent Assembly. For ordinary plots of land, say, yours or mine, thousand square yards or so in extent, the Supreme Court has now arrived at that conclusion by saying that it is not an estate.

**Shri Jairamdas Daulatram:** Is it not also clear from the debates that at one stage it was intended to put down a figure and say that the law must fix the amount of compensation, and then the phraseology was changed so that the principles could be laid down? So, the idea was not to pay full compensation?

**Shri H. M. Seervai:** That is so even now. We either fix the compensation or lay down the principles.

**Shri Jairamdas Daulatram:** That means that the idea was not to give full compensation. When we say 'fix the compensation' it means something which is not the market value.

**Mr. Chairman:** The issue before the committee is something very different. Let us, be very clear about the issue before us.

**Shri H. M. Seervai:** I shall clarify it.

The position here seems to be that there is internal evidence—I think that is what the hon. Member says—that this is unamendable. The answer is 'No.' If you look at the debates in the Constituent Assembly, that will become clear.

**Shri M. Y. Saleem:** If the intention of the framers of the Constitution was that the rights under article 31 (2) should not be considered to be fundamental, where was the special urgency or reason or purpose in including clauses 4 and 6 in article 31 of the Constitution, because article 368 could have served the purpose?

**Shri H. M. Seervai:** But you must have regard to the policy also. The first point is that it would be unwise to do by way of amendment what you can do in the beginning. Secondly, these measures were sponsored by very distinguished men like Shri Govind Vallabh Pant. He had the U. P. Zamindari Abolition Bill; there were several other zamindari Bills and things on the anvil, either actually passed or intended to be passed. Rather than run the risk of an adverse verdict if the lawyers should go wrong, the Constituent Assembly said that they would put it beyond challenge. But that does not mean that the other parts were not amendable under article 368. This was the danger foreseen and guarded against, though the danger that the Supreme Court would hold that compensation meant a just equivalent was considered so remote because two lawyers of the highest standing had said that it did not mean it.

**Shri M. Y. Saleem:** Do you concede that it is a well-settled rule of interpretation of law that vested rights

are not affected or destroyed unless the language is explicit, and clear?

**Shri H. M. Seervai:** Yes, that is the principle to be applied to every law, but vested rights can be taken away by the legislature making it clear that they are being taken away and there is no vested right in the Constitution which is and was intended to be incapable of amendment.

**Shri M. Y. Saleem:** Do you also concede that the rule of strict construction should be applied in such cases, which only means that the real purpose and intention should be gathered from the words actually used.

**Shri H. M. Seervai:** It is well-settled that the rule of construction of a Constitution is not the rule of strict construction but of wide and liberal construction, because a law made under a Constitution must expressly take away rights. But if that power is not found in the Constitution, you would have the strange spectacle of the State or Parliament lacking power altogether. Therefore, constitutional provisions must be widely construed, if anything in favour of power and not against it.

**Shri M. Y. Saleem:** It has been observed by the Supreme Court that there is a wider distinction between the provisions of Part III and Part IV and that the provisions of Part IV cannot control the fundamental rights containing Part III. Are you aware of that pronouncement of the Supreme Court?

**Shri H. M. Seervai:** I am quite aware of it. I think that judgment is correct, but it does not lead to the conclusion that in order to implement the Directive Principles you cannot amend the Constitution if the existing fundamental rights stand in its way. It only means, today if there is a conflict between Directive Principles and fundamental right, fundamental right prevails, though even now you must make an attempt to harmonise the two and only if you fail to harmonise, can you prefer fundamental rights to Directive Principles.

**Shri M. Y. Saleem:** Don't you think that the supremacy of the judiciary should be recognised in order to maintain the rule of law in the country?

**Shri H. M. Seervai:** I broadly agree that there should be an independent judiciary, but the case of America shows that there can be judicial usurpation of power, as there can be legislative or executive usurpation of power. Therefore, the question is not that those who wish to amend the Constitution want to destroy the Supreme Court. On the contrary, amendment means, you respect the judgement, but you say that our intention was otherwise and we make that intention effective.

**Shri M. Y. Saleem:** Articles 20, 21 and 22 deal with the freedom of personal liberty. Do you think it would be advisable or desirable in a civilised society with a written Constitution that such valuable rights should subject to the wishes and fancies of a party in power, having a majority in Parliament and also in States?

**Shri H. M. Seervai:** On the broad political question, opinions may differ but the personal liberty guaranteed under our Constitution has been made subject to the security of the State. If the party in power is able to satisfy the court that that freedom can be taken away well and good. If it wants to take away that freedom by an amendment of the Constitution, I do not see by what procedure we can make the will of the majority inoperative.

**Shri M. Y. Saleem:** Our Constitution guarantees certain rights of the minorities concerning language, culture and religion. Is it not a fact that the interpretation now sought to be placed on article 368 would have the effect of enabling the Parliament by

a majority to destroy the whole concept of secular State?

**Shri H. M. Seervai:** The judgment of the Privy Council and the Constitution of Ceylon which I read out showed that they were valuable religious rights. They could only be taken away, only by a two-thirds majority. But a State which has guaranteed that right, particularly a State like India, with its well-known tolerance of all types of religion, is unlikely to take it away. But if the vast majority of people do not want those rights to exist, though I belong to a minority community, I cannot say that the court or anybody can put a permanent impediment on it. But it must not be forgotten that there are what are called external sanctions. Tomorrow the British Parliament can pass a law that every person who has a child shall kill it, but any government which attempted to do things of that kind will not survive for a few minutes. Because of external sanctions, the good sense of the people and the fact that we belong to the same nation, there is a normal repugnance to interfere with the religious, cultural and linguistic rights of the people.

**Shri M. Y. Saleem:** But there are some fanatics.

**Shri H. M. Seervai:** But there would not be a majority of fanatics in all the States and in Parliament.

**Shri Nath Pai:** The quota of fanatics in this country is not greater than in other countries.

**Shri Tenneti Viswanatham:** The power to amend the Constitution is not explicitly stated in article 368.

**Shri H. M. Seervai:** I think it is explicitly stated.

**Shri Tenneti Viswanatham:** The power to legislate is given under the Constitution and the procedure is given in the Rules of Procedure. According to the last sentence, upon the President giving assent to the Bill, it become an Act.

**Shri H. M. Seervai:** Therefore, the law-making power is to be found under articles 245 and 246 and that is procedure simplicit.

**Shri Tenneti Viswanatham:** Therefore, the power to legislate is given in article 245 and the procedure is given in article 368.

**Shri H. M. Seervai:** I respectfully differ from that construction. I am quite clear in my mind. That is exactly the Australian Constitution and that is the United States Constitution. We have framed our Constitution with full knowledge of this.

**Shri Tenneti Viswanatham:** Therefore, you depend on the last sentence that it becomes an Act when it is assented to.

**Shri H. M. Seervai:** The Chapter itself is "Amendment of the Constitution", not procedure.

**The Tenneti Viswanatham:** The heading of that chapter is not authoritative, I told you.

**Shri H. M. Seervai:** It is more authoritative than a marginal note.

**Shri Tenneti Viswanatham:** Neither the marginal note, nor the heading of the Chapter, is authoritative.

**Shri H. M. Seervai:** There is a judgment of the Supreme Court that a heading is authoritative.

**Shri Tenneti Viswanatham:** Where it is convenient, we say that they are authoritative; sometimes we say that they are not part of the Act. Therefore, it is much better for us not to depend either on the heading or on the marginal note. The best thing is to see the language of the section or article itself. In the language of the article we do not find explicitly

any provision to amend the Constitution. That is why the Supreme Court has said it. In the end you were correct in saying that in order to clear all these doubts it is much better to have a substantive power included, in addition to what Shri Nath Pai has proposed.

**Shri H. M. Seervai:** But I must not be taken to agree with you that the express power is not there. But assuming it is not express in the sense that the word "amend" is not used, it has been held by the Supreme Court more than once that in the eye of the law that which is necessarily implied is equivalent to what is expressed. So, assuming that your construction is correct that it is not expressly mentioned, it is necessarily implied and that, in the eye of law, is equivalent to its being expressly stated.

**Shri Tenneti Viswanatham:** In Madras there is an Act called the Land Revenue Recovery Act. After the Constitution came into force a point was raised that land revenue is not leviable under that Act, because it is only a procedural Act, and the matter went to the Hyderabad High Court and Justice Mohan Reddy ruled that it is not expressly written and so it is only a procedural law. Anyway, that is your view. You said that the last sentence has explicit power in it.

**Shri H. M. Seervai:** I said that the history of draft articles 304 and 305 show beyond a shadow of doubt that the draftsmen of the Constitution found that the power was here, not in the residuary power, because otherwise the States could not amend it.

**Shri Tenneti Viswanatham:** If the judgment is so wrong, why should we worry about amending the Constitution?

**Shri H. M. Seervai:** Because under the Constitution there is nothing which you can do except amending it.

**Shri Tenneti Viswanatham:** You can have re-agitation.

**Shri H. M. Seervai:** Re-agitation of the judgment of the Supreme Court on facts not materially different from those which were before the Court at the time of giving the judgment would only mean they will say "we uphold the judgment". We have no power of compelling a review. If a review was possible, I would have asked for a review.

**Shri Tenneti Viswanatham:** If you are so sure that the judgment is so wrong, why should we go to the length of amending the Constitution?

**Shri H. M. Seervai:** Because we have supremacy of the judiciary in the matter of interpretation.

**Shri Tenneti Viswanatham:** I think there is some lacuna in the argument.

**Shri Nath Pai:** May I give a reply? What he asks is very interesting. He asks: why not go to the court for redressal, which is the normal course. A review is asked for in such cases either by a present aggrieved party or a future aggrieved party. I am saying here that I am an aggrieved party, as one charged by the electorate with certain duties. Now those duties are denied to me. I am following the course of redressing those grievances of mine through the course given to me under the Constitution. That is my humble submission.

**Shri Tenneti Viswanatham:** You say that a blanket power is given to amend, and naturally that power to amend is given to Parliament, to amend any article or part of the Constitution.

**Shri H. M. Seervai:** Yes. By blanket power is only meant the power to amend all articles, subject to the provisions contained in article 368.

**Shri Tenneti Viswanatham:** What is that provision?

**Shri H. M. Seervai:** Absolute majority of the House and two-thirds of the Members present and voting.

**Shri Tenneti Viswanatham:** You also said that it is a very long drawn out process and the States may take their own time therefore, it is much better if Parliament has some quicker remedy.

**Shri H. M. Seervai:** What I suggested was that if you go to the Supreme Court for an advisory opinion and ask them about the validity of it and if the Supreme Court say "Yes, such a law is not open to constitutional objection", then all the trouble which Parliament and the State Legislatures took would be justified.

**Shri Tenneti Viswanatham:** We can do it only if our Rules of Procedure permit it. Unless the Bill is withdrawn, we cannot ask for it.

**Shri H. M. Seervai:** If the Select Committee recommends, Government can sponsor it and President can refer it. Parliament would not come into the picture.

**Shri Tenneti Viswanatham:** The President would not come into the picture when the Bill is before the Select Committee.

**Shri H. M. Seervai:** Since my evidence was meant to be helpful to you, with your permission, I make a suggestion. I have no power to implement it.

**Shri Tenneti Viswanatham:** Our Constitution is based upon the concept of democracy and we cherish it. We would not like it to be whittled down. The Constitution is intended to keep the democratic spirit of the Constitution as permanent as possible.

**Shri H. M. Seervai:** As permanent as possible means permanent but with the power to amend.

**Shri Tenneti Viswanatham:** Even the Supreme Court never said that these powers are eternal. They only said they are permanent but not eternal.

**Shri H. M. Seervai:** I make a little fun of the words "permanent but not eternal".

**Shri Tenneti Viswanatham:** A permanent official is not an eternal official. Anyhow, we should not make fun of it. It is better to understand it.

**Shri H. M. Seervai:** Sometimes making fun of it make people understand it better. Lord Keynes used to say that violent language is the assault of thought on the unthinking, though I do not myself like violent language.

**Shri Tenneti Viswanatham:** Another poet has said that a little nonsense now and then pleases the wisest men. You said that there is a political aspect and a legal aspect. All the time you are talking of the political aspect. As a matter of fact, the Constitution is itself based on a political aspect and it is meant to safeguard the political concept imbeded in the Constitution, and that is democracy. Now, if this blanket power is given, as my hon. friend was saying, if article after article is amended easily, what is the purpose of having article 32? That article will be protecting only a shell. Therefore, it is that we must have some safeguards while giving this blanket power to amend to the Parliament.

**Shri H. M. Seervai:** But the belief that external checks prevent a body

of people from having their way, if they are determined on it, is ill-founded. Secondly, it ill-behoves a democratic constitution if it does not inspire the people to preserve the freedom. As I said, in England they can abrogate the Bill of Rights or Magna Carta. Yet, successive wars and religious feuds have not led to the abrogation of those cherished liberties.

**Shri Tenneti Vishwanatham:** Therefore, your view is that we need not depend upon the words of the Constitution, we can depend upon external sanctions.

**Shri H. M. Seervai:** Yes, Sir Parliament has the power to re-draw the map of India. But is it practical?

**Shri Tenneti Viswanatham:** That is the difference between authoritarianism and democracy. We do not want the Parliament to walk in the direction of authoritarianism. That is what has to be prevented.

**Shri H. M. Seervai:** But if the question is asked "suppose the power to amend is abused?", I never said that it cannot be abused.

**Shri Tenneti Vishwanatham:** Therefore, the power to amend must be given, but with sufficient safeguards to preserve the democratic spirit.

**Shri H. M. Seervai:** In my view there are sufficient safeguards already.

**Shri Tenneti Viswanatham:** If there are sufficient safeguards, why amend the Constitution?

**Shri H. M. Seervai:** Because in regard to the amendment of the Constitution it has been held by the Supreme Court that you cannot amend the fundamental rights. In my view, for amending the fundamental rights the present procedural and other requirements provide sufficient safeguards.

**Shri Tenneti Viswanatham:** I am also on the same point. If you are giving the power to amend the fundamental rights in the way in which some other articles are amended, by the special majority of two-thirds and all that, would it not lead to the very destruction of the democratic basis?

**Shri H. M. Seervai:** No, I do not think so.

**Shri Tenneti Viswanatham:** You depend on the external sanction.

**Shri H. M. Seervai:** I depend both on the good sense of Parliament and on external sanction. If you treated Parliament as bent on destroying people's freedom if they have the power, then nothing will prevent . . .

**Shri Tenneti Viswanatham:** If you base the Constitution on such an attempt, such a long Constitution would not have been written. They distrusted the people, they distrusted the States and they distrusted the court; therefore, they limited the powers.

**Shri H. M. Seervai:** It is not distrust; it is limitaton of power.

**Shri Tenneti Viswanatham:** Therefore, it is wrong to say that you must depend on the good sense of Parliament. The question of dependence or non-dependence does not arise because the powers are delimited.

**Shri H. M. Seervai:** But if there was power to amend and a large number of Judges found the power, surely that power itself modifies every right.

**Shri Tenneti Viswanatham:** Therefore, the power of amendment also must be hedged in with proper safeguards. Would you agree?

**Shri H. M. Seervai:** Yes, but in my opinion they are hedged in with sufficient safeguards. I cannot carry the matter further.

**Mr. Chairman:** On behalf of the Committee, I think, all Members will share my views—we express our grateful thanks to the distinguished witness who spared his valuable time today to help us.

**Shri H. M. Seervai:** I am very thankful to all the Members for the very kind way in which they have treated me.

**Mr. Chairman:** Before we adjourn, I take it that we are agreed regarding the printing of evidence and laying it on the Table of the two Houses.

As regards the Indian Chamber of Commerce, Calcutta, we gave them two days and every time they wanted a different date. We cannot alter our dates to suit their convenience any longer. So, we shall fix a date and if they come, well and good.

**Shri M. Y. Saleem:** What about Shri Setalvad?

**Mr. Chairman:** Shri Setalvad will be coming.

*(The witness then withdrew)*

*(The Committee then adjourned)*

MINUTES OF EVIDENCE GIVEN BEFORE THE JOINT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1967 BY SHRI NATH PAI, M.P.

*Saturday, the 18th November, 1967 at 10.00 hours.*

PRESENT

Shri R. K. Khadilkar—*Chairman.*

MEMBERS

*Lok Sabha*

2. Shri R. S. Arumugam
3. Shri Surendranath Dwivedy
4. Shri Kameshwar Singh
5. Shri D. K. Kunte
6. Shri Jugal Mondal
7. Shri Nath Pai
8. Shri Deorao S. Patil
9. Shri Khagapathi Pradhani
10. Shri K. Narayana Rao
11. Shri Mohammad Yunus Saleem
12. Shri Anand Narain Mulla
13. Shri Dwaipayan Sen
14. Shri Digvijaya Narain Singh
15. Shri Tenneti Viswanatham.

*Rajya Sabha*

16. Shri M. P. Bhargava
17. Shri K. Chandrasekharan
18. Shri A. P. Chatterjee
19. Shri Jairamdas Daulatram
20. Shri G. H. Valimohmed Momin
21. Shri G. R. Patil
22. Shri J. Sivashanmugam Pillai
23. Shri Triloki Singh.

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri K. K. Sundaram, *Additional Legislative Counsel.*

REPRESENTATIVE OF THE MINISTRY OF LAW

Shri K. K. Sundaram,
*Additional Legislative Council.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES EXAMINED

I. *Indian Chamber of Commerce, Calcutta*
*Spokesmen:*—

1. Shri I. M. Thapar, *President, Indian Chamber of Commerce.*
2. Shri G. K. Bhagat, *Senior Vice-President of the Chamber.*
3. Shri B. Kalyanasundaram, *Deputy Secretary of the Chamber.*

II. Shri S. Mohan Kumaramangalam, *Ex-Advocate-General, Madras.*

**I Indian Chamber of Commerce Calcutta.**
*Spokesmen:*

(1) Shri I. M. Thapar, President, Indian Chamber of Commerce.
(2) Shri G. K. Bhagat, Senior Vice President of the Chamber.
(3) Shri B. Kalyanasundaram, Deputy Secretary of the Chamber.

(*The witnesses were called in and they took their seats*)

**Mr. Chairman:** Now, let us begin with the witnesses. Will you mind introducing yourselves?

**Shri I. M. Thapar:** I am Thapar, President of the Chambers.

**Shri G. K. Bhagat:** I am Bhagat, Senior Vice-President.

**Shri B. Kalyanasundaram:** Kalyanasundaram, Deputy Secretary of the Chamber.

**Mr. Chairman:** I would like to point out, before we begin your deposition that "Where a witness appears before a committee to give evidence, the Chairman shall make it clear to the witness that his evidence shall be treated as public and is liable to be published, unless it is specifically desired that all or a part of the evidence should be treated as confidential. It should, however, be explained to the witnesses that even though they may desire their evidence to be treated as confidential, such evidence is liable to be made available to the Members of Parliament." This is the procedure that we follow and I am supposed to acquaint you with this procedure and the implications of it.

Now, it is good of your Chamber to have submitted a written memorandum and copies have been circulated already. So I would like first you to state the general approach to the Bill and something if you want to add. Then we will start other things.

**Shri I. M. Thapar:** The Bill is unnecessary and the fundamental rights should not be changed. The framers of the Constitution declared that the Supreme Court is there to deal with the fundamental rights. I do not think, therefore, that there is any necessity to make any change.

**Shri G. K. Bhagat:** First, we would like to thank you on behalf of the Chamber for giving this opportunity for oral evidence in support of our memorandum which was earlier placed before you. We would like to point out that Mr. B. P. Khaitan, our colleague in the Chamber and very proficient in legal matters, could not be present here. We would, therefore, not like to touch any legal issues.

**Shri Dwivedy:** This Constitutional law involves only legal matters.

**Shri G. K. Bhagat:** I would say most respectfully that we from the business side view it not purely from legal aspect. I would like to highlight one or two points which, I think, are very basic in their nature with respect to this Constitution (Amendment) Bill which Mr. Nath Pai has placed before Parliament.

First of all, Sir, I would like to highlight this important factor, viz.

that these basic rights,—fundamental rights—were vested with the people. These rights, in our opinion, are inalianable and hold good for all time and these are not vested with Parliament to amend or change as such.

Besides this, I would like to give you the example of American Constitution which is 150 years old wherein certain basic rights have been enshrined and these rights have never been amended or changed at all during this long period. We do feel, therefore, that it would be rather immature or imprompt to think that within the 20 years we should consider that these basic rights which are important should now be subjected to any change.

Now, in support of this point, the first thing that comes to my mind, Sir, is that it is we, the people, the citizens of India, who have certain rights. We feel that the Members of Parliament who are elected with the basic objective that they will make legislation which interprets their will exactly. At no time do we feel that these rights should become an issue for change. If you go through our memorandum in detail, the very nature of these rights is so basic and democratic that at no time people would ever think that those rights can ever be subjected to amendment. I think this is the main theme of our argument.

The other thing is that Article 32 clearly states that the right to move Supreme Court, by proper action, for the enforcement of the rights is guaranteed. Obviously, our Constitution makers when they made the Constitution, included this particular section or Article meant that these basic rights should be guaranteed to the people as they thought of that at that time. Therefore, if this particular clause is made as clause (1) in Article 368, it would mean that at any time, now or later. This right can also be amended. And if Article 32 ever gets amended, it would mean that this guarantee to the people is completely withdrawn. Another point to which I would like to draw your attention is Article 368 where, as you know fully well, there is the method of amending constitution—the procedure has been laid down—which states it can be amended by 2|3 majority of both the Houses. I would like to draw your attention also to most strict procedure which relates about matters which affect the States. In regard to that you would require the majority of State legislatures also to fall in line. Now, surely, while on matters which affect the States the Constitution-makers have put this strict procedure, about basic and fundemental rights also, which they have spelt out in great details, they would not have thought it fit that those could be amended by 2/3 majority of both the Houses. I am going more into the spirit of the matter because these are very basic things on which our whole Democracy and way of life is based.

Sir, the other point which I would like to say is we have territorial boundaries all over the world and you have a boundary for India and you have the boundaries for other countries; now, these boundaries, what do they mean? Does it mean that there is any law in the world—is there any judgement of the world—which makes secure these boundaries. It is the sovereignity of the people that comes out to depend the boundaries the people that want to live within these boundaries.

As such, Sir, I think that the sovereignity of the people and the sovereignity of the Constitution is far more fundamental and far more important and, therefore, it is this particular sovereign right or this feeling that we got when we won independence that we would like to guarantee fundamental rights for all time to come as enshrined in the Constitution.

**Mr. Chairman:** We have gone through your Memorandum. The main question—as your President has just said—is the question of Article 368, the right of Parliament to amend the Constitution. In your memoran-

dum in the concluding paragraph you have stated "The framers of our Constitution, in their superior wisdom, did foresee that over time, with the progress of the country, our Constitution must be plastic." Is this word 'plastic' wrongly typed or you want to say 'elastic' .

**Shri B. Kalyanasudaram:** No. It is 'plastic', Sir. The expression 'plastic' means pliable.

**Mr. Chairman:** But 'plastic' is a very hard material and is being used in the aircrafts.

The main question before us, as you have stated, is that in a changing society so many changes take place and if it need be Constitution—framers have provided to incorporate its social sanction—which includes also morale sanction—for a change if it is called for and justified by the circumstances. You represent business and not the industry. But even in business your own experience must have shown you that your methods have changed, business practices have changed and there is no question of law. Here the main question is about amending the fundamental rights, to correct the judgement, because under 368, as you have read out there is no mention that 50 per cent or more than half the States should concur in some cases in amending. So, whether do you consider that Article 368 as it is, part from the Constitution, precludes amendment to fundamental rights. All the three conflicts that the Supreme Court had to decide related to property. They have made a judgement that come what may right to property will not be touched by this sovereign Parliament.

You talked about moral sanction. When we are elected it is not simply votes. It is ultimately the popular sanction which means moral sanction and a moral authority. Now, whether, we the representatives in the sovereign body—we are competent to exercise that authority in the best interests of the society taking into consideration the changes that are inevitable. The rights that came in conflict were rights in agrarian property mostly. I do not think you represent the property brokers. You represent a business community and the business community in their own dealings had to make some changes. So the main question before the Committee is whether this sovereign body elected by the people—there is universal franchise—has the right—keeping in view the changing circumstances—to change or amend any section of the Constitution. On that point whatever you have got to say you have stated in your memorandum. Unfortunately, from legal and constitutional point of view your memorandum does not carry any conviction. That is all.

**Shri I. M. Thapar:** I want to say if any change takes place today the complex of Parliament may change after five years and then what will happen, Sir, to our right, to freedom of speech, right to property, etc. They may be taken away and our activity may be curbed. Therefore, it is my humble request that this should not be taken away by the Parliament. It should be left in the hands of the citizens. So far as the Parliament is concerned we send our representatives to the Parliament to look after the interests of the country and so far as the fundamental rights are concerned these should be left in the hands of the citizens.

**Mr. Chairman:** Then you should have only owners of property as voters. Only they should have been given power to vote. But today in India we are having universal franchise.

**Shri G. K. Bhagat:** You have said that by getting votes from the people there is moral authority. Correct. But, Sir, that does not mean to amend the basic fundamental rights that authority is inherent in the fact of being elected. We have clearly stated that that right is not there. There may be difference of opinion. In fact, no amendment to the Constitu-

tion can be made affecting fundametal rights.

**Mr. Chairman**: Where is it stated?

**Shri G. K. Bhagat**: This is my opinion.

**Shri Tenneti Viswanatham**: You are accustomed to Memorandum and Articles of Association; getting them registered and all that. Is it not?

**Shri I. M. Thapar**: Yes.

**Shri Tenneti Viswanatham**: Memorandum is the basic constitution of your Company which you want to start.

**Shri I. M. Thapar**: Yes.

**Shri Tenneti Viswanatham**: Ordinarily you do not expect it to be changed. But if it is suggested that Memorandum should be changed, then.

**Shri I. M. Thapar**: We only change when we feel necessary and that change can be done with the consent of the share-holders. When the share-holders do not agree, it cannot be changed.

**Shri Tenneti Viswanatham**: You change with the consent of the share-holders.

**Shri I. M. Thapar**: Yes, but for fundamental rights the people are the share-holders.

**Shri Nath Pai**: I am suggesting that the witnesses do not know us. The name of the Hon'ble member may be told who is questioning. Previously Shri T. Viswanatham was questioning and now Mr. Chatterjee, Member from Rajya Sabha will do it.

**Shri A. P. Chatterjee**: The Constitution provides the basic point of social behaviour. Sometimes because of the development of social behaviour. Constitution may be left behind and therefore, in order to catch up with evolving social behaviour, the Constitution should be amended.

**Shri G. K. Bhagat**: If you are referring to the Constitution, I may mention there is no flexibility because of the fact that there is no clause allowing amendment of fundamental rights. The courts from time to time interpret the provisions in the Constitution according to the dynamic movement, social behaviour. The Courts of Law interpret according to the spirit of that time. Just as the Articles can be changed by the share-holders, here the share-holders are the people—the people that vote or give the verdict. The fundamental rights can be changed then only. Otherwise we attack their freedom.

Articles 12 to 15 are very important. Voters feel that they have not given right to any one to change anything. The voter alone could take away the right which is vested in him.

**Shri A. P. Chatterjee**: We can go to the people to find out whether they want an amendment of the Constitution.

**Shri G. K. Bhagat**: Just as the Memorandum of the Company can be changed by the share-holders, here it is the people who can change or amend it.

**Shri A. P. Chatterjee**: If there is a question of amendment of the Constitution, that should be done by a referendum to the people.

**Shri G. K. Bhagat**: People decided it when the Constitution itself was framed and as such people decide to keep their rights within themselves.

**Shri A. P. Chatterjee**: So Parliament cannot amend the Constitution if social behaviour changes and we cannot go to the people for referendum.

**Shri G. K. Bhagat**: Section referring to the fundamental rights is not subject to amendment. In other words the provision under the Constitution is sacrosanct.

**Shri I. M. Thapar**: Parliament has power in the case of emergency. These fundamental rights can be suspended during the emergency period and after that these are again restored to our citizens. These rights are in the

hands of citizens and are the right of individuals and thus should not be disturbed.

**Shri A. P. Chatterjee:** You have said that the spirit of the time should be expressed through the courts.

**Shri G. K. Bhagat:** I do not say 'should have'. The Courts of Law are interpreting the laws of the land according to the spirit of the time.

**Shri A. P. Chatterjee:** So, according to you the spirit of the time can be interpreted by the courts. Is it your view?

**Shri G. K. Bhagat:** When it refers to the constitution.

**Shri A. P. Chatterjee:** You have raised in your memorandum itself that sometimes social behaviour changes i.e. the spirit of the time may require a change. It has fallen from you just now that as far as the spirit of the time is concerned, that can be interpreted and should be interpreted only through the courts. Do I understand you or not?

**Shri I. M. Thapar:** There is difference between social custom and fundamental right. There is a big difference. The fundamental rights are given to the citizens by the framers of the Constitution with a view to enjoy that liberty in democracy. If there is any change in the Constitution, if there is any change in fundamental rights, there will be practically in the change of complex of Parliament and that our rights may be taken away and then democracy will be in danger.

**Shri A. P. Chatterjee:** Have I understood you all right or not, that according to you, the spirit of the time, if it requires amendment of the Constitution, Parliament cannot do it?

**Shri G. K. Bhagat:** I have said earlier. I say again that the fundamental rights were rights enshrined in the Constitution given and taken by the people. These are not rights subject to amendment or alteration at any time.

**Shri A. P. Chatterjee:** If we take the spirit of the time, can amendments to the fundamental rights be made?

**Shri G. K. Bhagat:** As far as fundamental rights are concerned I told you clearly what I feel. I may clearly say that for every citizen these rights are very basic and as such we, from our side, will not want Parliament or any body else to have the right to amend these rights. These are enshrined in the Constitution and I personally feel that they do not change with the change in the spirit of time. They do not clash. They do not clash anyway with the changing spirit of the times. These rights must be guarded for all times to come.

**Mr. Chairman:** I will ask Justice Mulla to put a question.

**Shri A. N. Mulla:** I think your stand is this: You say that the fundamental rights are sacrosanct and Parliament about changes in the matter. All I said like even the people to touch them, and at the worst you would agree that the Courts of Law in this country, if need, arises, should consider whether any change is necessary in these rights or not.

**Shri G. K. Bhagat:** No, Sir. It is not our view that Courts should think about changes in the matter. All I said was this: The Courts of Law are there to interpret the Constitution for the people—not that Courts of Law can change—the Constitution. They cannot change. They cannot change the funamental rights. These are inalienable and basic rights which the people themselves have taken upon themselves.

**Shri A. N. Mulla:** I stand corrected. Your view is that the fundamental rights as mentioned in the Constitution are now the final words and niether the people nor the Courts nor the Parliament nor anyone else can touch them at all.

**Shri G. K. Bhagat:** How can I be expected to give my right which is

inherent—a right which the people have taken upon themselves? How would you like them to give to someone else? How can it be subjected to amendment at any time?

**Shri A. N. Mulla:** Your position is this that once the people have spoken that is the final word and even the people cannot modify what they have spoken themselves.

**Shri I. M. Thapar:** I am one of the citizens of the country and Mr. Bhagat has pointed out that I am a citizen of the country and we would not like this, that there should be any change and fundamental right should be taken away by Parliament.

**Shri A. N. Mulla:** Different opinions do not take us any further. The reason for putting questions is that various issues should be sufficiently clarified. We should have a dialogue, and it is not good my giving my opinion and your giving your opinion. Is it your proposition that the people, once they have spoken, cannot change their stand at all? Or do you concede that the people once having spoken can change their stand again?

**Shri G. K. Bhagat:** With regard to the fundamental rights we feel that those rights have not been given to Parliament to change.

**Shri A. N. Mulla:** I am not talking of the Parliament at all. I am talking of the people. Do you agree or not? Can the people modify their opinion?

**Shri I. M. Thapar:** As a citizen, no. We do not like that power to be given to Parliament to change these Rights.

**Shri A. N. Mulla:** I am talking of the people; I am not talking of Parliament.

**Shri B. Kalyanasundaram:** Sir, I am not an industrialist or a business man. Purely from the legal angle I wish to say some thing. It is just like this. A man goes into a room, shuts himself in and throws away the key. He cannot come out of it. Just like that when the people framed the Constitution they said that they shall have these fundamental rights given unto themselves. So the position is that even the people do not have the option to change it, that is, the Constitution.

**Shri A. N. Mulla:** Now you have answered one. According to you, the people once they have spoken cannot change.

**Shri B. Kalyanasundaram:** There is a certain amount of elasticity in it. I will explain. My point is this. There is one of the Articles which says about the freedom of the citizens of the country. There is a proviso which says that in the event of emergency the Parliament may pass Laws to restrain citizens, to detain them in the public interest, etc. Now today what we mean by public interest may be one thing. But tomorrow the conditions may change and public interest may have a completely different complexion altogether. That is a matter which Parliament cannot decide. That is a matter which Supreme Court can say in consonance with the trends of the times. There is thus a certain amount of elasticity.

**Shri A. N. Mulla:** Let us come to brass tacks. What is your stand about the amendment to the Constitution? The first stand is that even the people cannot alter it. That is position no. 1. Position no. 2 is this. Under extraordinary circumstances the people can speak only through the Courts of Law. Is that the position?

**Shri B. Kalyanasundaram:** I am not accepting this second position, the position that the people have given away the right to have the fundamental right amended at any time by anybody.

**Shri A. N. Mulla:** We come back to the same old position that the people cannot speak because they have spoken once and that is their final verdict.

**Shri B. Kalyanasundaram:** They themselves decided.

**Shri A. N. Mulla:** I don't want reasons I only want answers. Will you please tell me whether apart from our country is this the rule which is observed in any other country of the world where there is a written Constitution?

**Shri B. Kalyanasundaram:** When we adopted a Constitution we chose a different path. We chose that the Supreme Court shall be the guardian of fundamental rights. We entrusted fundamental rights to them. In certain respects we differ from the Constitution of other countries.

**Shri A. N. Mulla:** Again and again reference is being made to Supreme Court. I understand you agree that in grave circumstances the Supreme Court steps in to interpret the Constitution.

**Shri B. Kalyanasundaram:** Not in grave circumstances, but under any circumstances, even simple in circumstance where the citizen is aggrieved by a law passed by Parliament, he can go to Supreme Court and get it challenged.

**Shri A. N. Mulla:** I put the proposition in the beginning. You consider that the Supreme Court stands in a different position to the Parliament and to the people. The Supreme Court may interpret the Constitution which may tend to be a different interpretation than the existing interpretation of the Articles that govern the fundamental rights. Please speak in one voice. Let one member represent the views of your group.

**Shri B. Kalyanasundaram:** It was a legal issue. So I stepped in.

**Shri A. N. Mulla:** Whether it is a legal issue or any other issue please speak in one voice and not in three different vioces. We should not have three different opinions by three witnesses. We come to it that the Supreme Court under certain circumstances can interpret the Constitution. If you accept that position your stand is this. The Supreme Court having spoken once can modify its opinion by a second bench, but the people having spoken once cannot modify their opinion. Therefore the Supreme Court has the advantage of interpreting the law in different manners but the people have no right to speak again.

**Shri G. K. Bhagat:** I think this question itself is a bit confusing in our minds.

**Shri A. N. Mulla:** It would be confusing.

**Shri G. K. Bhagat:** First of all may I say respectfully that there are no three voices. We have one voice and we have clearly stated that we feel that Parliament does not have the power to change the fundamental rights. That is clear. Regarding the Supreme Court, it has a part to play. It has to interpret the Constitution. That is already enshrined in the Constitution. The other question was whether the people's voice is the final and whether that can be changed by them. I do not know how they will decide to give up the rights which they have taken upon themselves. That is a different matter and I do not think we are deliberating on that issue....

**Shri A. P. Chatterjee:** We are deliberating on that. In fact that is the crux of the matter. If you say that Parliament cannot amend the Constitution, you must also answer whether the people have the right to amend the Constitution.

**Shri I. M. Thapar:** We have stated our views.

**Shri Triloki Singh:** I would not ask the representatives to go into the question of the people, their wishes and desires. I would like to draw their attention to Art. 368 of the Constitution. The first sentence says:

> "An amendment of this Constitution...."

What do you mean by "this Constitution"? The word 'this' is very relevant. Does this Constitution exclude Part III of the Constitution? That is one question. The other point is about Art. 13(2) of the Constitution. It says:

> "The State shall not make any law which takes away or abridges the rights conferred by this Part".

There are so many instances where so many laws as passed by the State legislatures and here in the Parliament have been struck down by the High Courts and the Supreme Court because they were not in consonance with the provisions of the Constitution. Article 13(2) guarantees certain rights to the citizens of this country. Article 32 also guarantees to a citizen that in case of abridgement or curtailment or tampering with the rights he could go to the Supreme Court. So, Articles 13(2) and 32 are to be read together, if the rights conferred by Art. 13(2) are to be enforceable. Supposing there is tampering..

**Shri I. M. Tapar:** Since we are not lawyers it is very difficult to answer this. We leave it to you people.

**Shri Triloki Singh:** I might tell you that I am also not a lawyer.

**Shri B. Kalyanasundaram:** May I read with the first question? The first question was whether the word "this" in Art. 368 will exclude Part III. Apparently it will include all the provisions of the Constitution. But there is an illogicality in the interpretation of that. The substantive part of the Article says that an amendment can be made by two-thirds majority of members present and voting and a simple majority of all the members. But the proviso says that where it relates to State matters, it shall receive the concurrence of 50 per cent of the States. In other words, the illogicality is that where it is a question of amending the fundamental rights Parliament can do it by a simple majority and by two-thirds majority of the members present and voting, but where it is a question of amending something relating to the States, it will receive the concurrence of the States. The fundamental rights are more important and more basic for the people, but they can be changed by a simple majority, but in the other case it should receive the concurrence of the States.

**Shri A. N. Mulla:** Don't you realise that the subjects which relate to the States should have the concurrence of the States and the subjects which do not relate to the States particularly should not have their concurrence?

**Shri B. Kalyanasundaram:** Here I am expressing a personal view from the legal angle. Part III relates to fundamental rights and Part IV relates to directive principles of State policy. When the Constitution was framed, the people said to themselves: These are the powers that we reserve for ourselves and nobody shall touch them. Part IV indicates the way in which the State shall function. I believe that these things cannot be changed by Parliament or anybody else.

**Shri Triloki Singh:** According to the learned representatives of the Chamber of Commerce, there is an illogicality in the interpretation of Art. 368 because according to them "this Constitution" means the whole Constitution. Will you not agree that this illogicality should be removed once and for all as far as possible?

**Shri B. Kalyanasundaram:** When the people framed the Constitution, they made a provision for amendment of the Constitution. They said that this Constitution can be amended in such and such a manner by Parliament. What the present Bill proposes to do is to amend this Article itself. I believe that the legal position will be that the Parliament is trying to arrogate to itself a power which is not vested in it under Art. 368.

**Shri A. M. Mulla:** Their stand is even more rigid than the Supreme Court's stand. The Supreme Court says that people can amend it. But they say that people cannot amend it.

**Shri B. Kalyanasundaram:** Rigidity is admitted, but it flows from the Constitution.

**Shri Triloki Singh:** Art. 13(2) says that the State shall not make any law, etc. Regarding Art. 368 I would like to know from you whether an amendment of the Constitution is a law.

**Shri B. Kalyanasundaram:** No. If Parliament passes any law in exercise of its legislative powers and if that piece of legislation violates the fundamental rights, then that law should be invalid. That is what it says.

**Shri K. Chandrasekharan:** In answer to Mr. Viswanatham's question you stated that Articles of Association of a company are amended not by the Directors Board, but by the general body of shareholders probably drawing an analogy between Parliament and the Directors Board. Thus you concede that the general body of shareholders have got the power. In the same way have not the people got the power to amend the Constitution?

**Shri G. K. Bhagat:** The reason for my statement at that time was just to point out that there was no analogy between the Memorandum or Articles of Association of a company and the Constitution of India which deals with basic fundamental rights. That analogy to my mind is not the correct analogy because a company's Articles of Association do not deal with basic fundamental rights. I do not say that Board of Directors are equal to Parliament. When the Constitution was framed the people took upon themselves these basic fundamental rights. Therefore, we feel that these rights cannot be amended.

**Shri Sivashanmugam Pillai:** You said in answer to Mr. Viswanatham that the shareholders can amend the Memorandum.

**Shri G. K. Bhagat:** Yes.

**Shri Sivashanmugam Pillai:** Shareholders can change the Memorandum in proxy also.

**Shri G. K. Bhagat:** You are right.

**Shri Sivashanmugam Pillai:** We, the Members of Parliament, are the representatives of the people. That is why I asked that question.

**Shri G. K. Bhagat:** You are representatives of the people only for making laws for the good Government of the country, but not for changing fundamental right: that was exactly my point. You have not got the authority to change the rights of the people.

**Mr. Chairman:** May I now thank you all—the distinguished business community—for having come from Calcutta to appear before us and having submitted a written memorandum on the subject?

**Shri I. M. Thaper:** We all thank you very much for having given us the time to hear us.

*(The witness then withdrew)*

**II. Shri S. Mohan Kumaramangalam, Ex-Advocate-General of Madras.**

*(The witness was called in and he took his seat).*

**Mr. Chairman:** May I extend to you a warm welcome on behalf of this Committee for having come before this Committee to give your opinion? Most of the Members of this Committee know that you are a distinguished lawyer and have spared some time to come before this Committee to-day.

Before we begin, may I point out to you the procedural aspect of the Committee? Let me read out the relevant section to you:—

"Where witnesses appear before the Committee to give evidence, the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published unless they specifically desire that all or any part of the evidence given by them is to be treated as confidential.

"It shall, however, be explained to the witnesses that even though they might desire their evidence to be treated as confidential, such evidence is liable to be made available to the Members of Parliament."

This is the procedure that we adopt.

Most of us have gone through your articles and now a pamphlet is there regarding the amendment to our Constitution. It is not a question of

very correctly giving the interpretation to the Supreme Court's decision and your views about it. What we are confronted with is this *viz.*, the Supreme Court has deprived us of our right to touch a particular section.

We would like to know in what manner Parliament can take action to restore that right. That is the main question.

**Shri S. Mohan Kumaramangalam:** have suggested a course to be adopted with regard to the Supreme Court judgment. The best course would be to make a reference to the Supreme Court under Article 143. Regarding the power of Parliament to amend Article 368, there is no clear opinion because the mojority of the judges' opinion was only by these six judges. What course may be followed by Parliament to amend Part III of the Constitution, according to Justice Hidayatullah is to convene a Constituent Assembly by exercising the residuary powers vested in Parliament in List 1.

I think that after going through the Constitutional Amendment Bill it is a much better method than the one which I had proposed. We have to learn quickly rather than to learn slowly. I fully agree with the Constitutional Amendment Bill.

**Mr. Chairman:** Because there is a threat, we have to do a thing with great circumspection.

**Shri S. Mohan Kumaramangalam.** I am in full support of this Bill. I am quite confident that even if it is challenged in the Supreme Court, it can be justified. If there are any doubts in the minds of the Members, I shall be happy to resolve them.

**Shri Nath Pai:** There is an idea put forward by a distinguished colleague of yours who appeared before us. While he shared the view expressed by us in toto, he suggested that when the Bill is finally drafted—we have some ideas—one or two—which we would like to incorporate in the Bill—before the Parliament proceeds with that, it is desirable that the Select Committee before sending it to Parliament, should see that the Supreme Court should see this and seek their advice and opinion. What do you say to this? Mr. Seervai feels very confident that this is the way of avoiding a conflict and thereby showing the due deference to the Supreme Court. He thinks that that in such a case the Supreme Court will realise that Parliament is not trying to erode upon the rights of the Supreme Court in the matter of interpretation of the Constitution. What do you say to this?

**Shri S. Mohan Kumaramangalam:** I have no objection to that. It is quite a reasonable suggestion. The only reservation which I have about it is this. I do feel strongly that Parliament is the supreme authority and must be considered to be the supreme authority. I do not accept the position that the Constitution is the supreme authority because, the Constitution, after all, is only a set of rules that we have agreed upon as citizens and the Supreme Court is supreme in so far as interpretation of these rules are concerned. But, Parliament is supreme and they have got powers to change these rules. Ordinarily speaking, I would say that it is not proper to refer it to the Supreme Court because, Parliament has the power to do it and they should exercise that power. And the Supreme Court does not come into the picture. This is ordinarily speaking. Since there are two sides of the matter, we have to approach to this problem in this way. The extraordinary circumstances to-day, are such where there is an attempt made to put the Supreme Court against Parliament and the Parliament against the Supreme Court. But, in my opinion, there is no basis for this. You are not giving proper respect to the Supreme Court—that is a sort of charge against Parliament. You are riding rough shod. When Supreme Court decides something, you are always changing it by legislation, though, according to me, it is the

fundamental right of Parliament. Parliament passes a law. Supreme Court finds it is unconstitutional. So Parliament finds some other way to achieve the objective which it wants to achieve. It is quite proper. It means no disrespect to the Supreme Court. Supreme Court finds it violates the Constitution. Parliament tries some other method of reaching the socio-economic goal. There is nothing wrong in that. In this background of an attempt to pitch one against the other, the course suggested by Mr. Seervai is quite reasonable. I have no objection to it as such, although I am not very enthusiastic about it, because it tends to, if I may put it with great respect to the Judges of the Supreme Court, put the Supreme Court too high and put the Parliament down a little. But in the interest of harmonious working of the different parts of the system, it may be better to do it.

**Shri Nath Pai:** It amounts to acting with the previous sanction of Supreme Court. It may give the meaning that Parliament can act only with the consent of Supreme Court. You think so?

**Shri S. Mohan Kumaramangalam:** It does. But when we take a decision, we do not take a decision in the abstract, unrelated to the concrete circumstances of a particular situation. The concrete circumstance of this situation is that Supreme Court has held that Parliament does not have the power. It has held so, according to me in a most confused manner. I have said so quite sharply in whatever I have written on the subject. It has held that Parliament does not have the power to touch Part III of the Constitution. In those circumstances, to send the matter to the Supreme Court while making it clear that certainly the Parliament does not consider that every major constitutional question in which it has doubts should be sent to Supreme Court, is not wrong in principle.

**Mr. Chairman:** There is a hypothetical case. In case we submit it to the Supreme Court for their opinion and that opinion tries to modify the earlier opinion or goes against us, what happens. Are we not lowering the sovereignty of Parliament?

**Shri Nath Pai:** Not only that, it will be embarrassing for us.

**Mr. Chairman:** Yes, very embarrassing.

**Shri S. Mohan Kumaramangalam:** Ultimately if this is going to happen, you are really going to be faced with a constitutional crisis in the country. And if that is going to happen, then probably the only method would be to do what Justice Hidyatullah has said: transform Parliament into a Constituent Assembly. It is very simple. Then pass it by majority without any prohibition. The absurd part of the whole Supreme Court's approach is—in fact Justice Hidyatullah position is—that all the safeguards that have been provided very carefully by the founding fathers in Art. 368 are to be thrown into a dustbin and you are able to do it by a brute majority of the Congress Party which can ride rough shod and do whatever it likes.

**Shri Nath Pai:** That brute is not a manacing brute now. You know.

**Shri S. Mohan Kumaramangalam:** That I know. I am not using any expression of my own. It is an expression that is used by some of you, gentlemen, when you speak in Parliament.

**Shri A. N. Mulla:** Your advice is that the better way would be just to stoop to conquer and not to create a constitutional crisis and you seem to think that this method would bring about the desired results.

**Shri S. Mohan Kumaramangalam:** The position is this. If Parliament passes the bill that has been proposed by Mr. Nath Pai, what is the consequence? The consequence is that Art. 368 will be amended in accordance with the proposed amendment. Then nothing happens. Nobody can challenge that amendment immediately,

because there is nothing to challenge it with. It can only be challenged if Parliament makes a law later which you seek to justify, that is to say which the Govt. when it defends Parliament before the Supreme Court, seeks to justify in terms of the amendment. That is to say the Govt. brings a law before Parliament, which does infringe on fundamental rights but which is justified in terms of Art. 368. I think, therefore that the challenge will come much later and from another point of view let us have it much later. Why provoke a constitutional crisis. Let some more water go down under the bridge and let the matter be agitated in the Supreme Court, not now, but considerably later, because immediately the question will not arise. Supposing I am a citizen and I want to challenge the validity of an act which will be the 19th or 20th constitutional amendment—I am not sure. I cannot challenge the validity of that unless my right has been violated in some way. But that does not affect me today. That will be later if some other Act is sought to be justified in terms of the amendment of the Constitution, or you bring another constitutional act that touches Part III. It postpones any constitutional crisis in the sense that there is no constitutional conflict. Possibly all the gentlemen who are sitting today in the Supreme Court will not be sitting then. Some other gentlemen will come and sit there and they may take a more sensible and reasonable attitude. I am not taking up any dogmatic position. I have not to decide the matter. It is you who have to decide. It is a very arguable point of view. Let us postpone it and we will see it later.

**Shri A. N. Mulla:** Does not a recent decision of Supreme Court which we read in the papers a fortnight ago indicate that the Supreme Court is on the return journey?

**Shri S. Mohan Kumaramangalam:** It gives us a little hope. But why should we unnecessarily take a risk.

**Shri A. N. Mulla:** Does it not at least depart from Golak Nath's case to this extent that now they concede that there may be a type of law in the Constitution which does not come under the orbit of Art. 13(2) and which can be excluded from the operation of Art. 13 (2)?

**Shri S. Mohan Kumaramangalam:** I have not read the judgment becuse I have not received a copy of it. But the press reports would appear to indicate something of that kind. One has to be cautious in trying to come to conclusions without having the exact text.

**Shri A. N. Mulla:** It is a fact or not that the President of India comes into the picture so far as the administration of the country is concerned, or enacting any law is concerned, only under two conditions. One condition is where the voice of the people cannot be determined; and the other condition is where it would take time to go through the normal procedure and the emergent situation is such that some law must be enacted immediately. Only under these two conditions can the executive Head of the State step in.

**Shri S. Mohan Kumaramangalam:** You mean powers of the President Under article 143.

**Shri A. N. Mulla:** There are two main conditions. One is for example where the people's voice cannot be understood. Therefore, the President steps in because we cannot understand what the people want. The other is where an emergency arises, where it will take time for the people to give voice to their opinion, but the situation is emergent and, therefore, he must step in immediately to get it ratified by the representatives of the people later on.

**Shri S. Mohan Kumaramangalam:** I am not able to follow. You mean in relation to exercise of powers under Article 143. I don't think Article 143 contains any limitations like that. It is open to the President. It must be of course on the advice of

his Prime Minister. But whenever he needs the aid of the Supreme Court on the interpretation of any question, he can refer it to them. The President is advised by the Prime Minister and the Council of Ministers. I do not think there is any limitation; it is a question of policy there.

**Shri A. N. Mulla:** The question, therefore, is that where the President exercises powers in an emergent situation and passes certain laws curtailing the Fundamental Rights and within three months it should come before Parliament, and be ratified by the Parliament, does it not indicate that the Parliament is not put at a lower level than the Prseident. It is only because Parliament could not speak in that space of time which was necessary. Finally it is the people who sit there as the representatives who ratify it.

**Shri S. Mohan Kumaramangalam:** You are referring to the emergency provisions? There is no doubt. One of the provisions of the Constitution is that there is no question of suspension of the Constitution at the Centre. There is suspension of the Constitutional provisions so far as the States are concerned, but there is no question of displacing Parliament.

**Shri A. N. Mulla:** Therefore, the Parliament, by this proviso, put higher than the President? It can accept law made by the President; or it can reject it.

**Shri S. Mohan Kumaramangalam:** I do not think it puts it higher than the President. But it puts it higher than the Council of the Ministers headed by the Prime Minister.

**Shri A. N. Mulla:** Anyway, you will say that the Parliament is not at a lower level than the President?

**Shri S. Mohan Kumaramangalam:** I think there is no question of comparing them. The President is merely a Constitutional head. He merely expresses the decisions of the Parliament. And the Council of Ministers within their sphere are supreme and so on. The Council of Ministers are responsible to the Parliament.

**Shri A. N. Mulla:** The point I am trying to make is this: On the basis of the recent decision of the Supreme Court when the Parliament ratifies the suspension of certain Fundamental Rights during an emergency they say it is not a law within the meaning of Article 13(2). But when the Parliament functions not under the emergent provisions but otherwise, they have held in Golaknath's case that it would be doing something against....

**Shri S. Mohan Kumaramangalam:** It would appear to be. But I am not sure, because I have seen the judgment only in the press.

**Shri A. N. Mulla:** If this is the position, is it not a contradiction?

**Shri S. Mohan Kumaramangalam:** I think so.

**Shri A. N. Mulla:** That is what I want.

**Shri Jairamdas Daulatram:** 'Fundamental Right' has in some cases been qualified. So when any power is taken under a section or an Article for the President to declare emergency, it is provided in the Fundamental Rights.

**Shri S. Mohan Kumaramangalam:** I do not think there is any difficulty about emergency. That is also about suspension of Fundamental Rights and for coming back to Parliament within a certain period and getting Parliament's approval. That makes the Parliament's supremacy very clear. That is the main principle which, I think, shows the weakness of the approach of the Supreme Court in Golakhnath's case.

**Shri Triloki Singh:** May I ask you, Sir, whether any amendment of the Constitution is a law?

**Shri S. Mohan Kumaramangalam:** It is a law.

**Shri Triloki Singh:** Don't you think it comes within the provisions of Article 13(2)?

**Shri S. Mohan Kumaramangalam:** No, I don't think. It is a law but it does not come under that.

**Shri Triloki Singh:** So it is not a law in the ordinary sense of the word. It is not a legislative Act or procedure but it is a constituent Act. If that is so, under Article 368 has the Parliament got to pass any law under Fundamental Rights?

**Shri S. Mohan Kumaramangalam:** I do not think there is any difficulty from their point of view. I do not agree with the Supreme Court's judgement—I have expressed myself on that question; but let us assume for a moment that this judgment of the majority of judges is correct; than the position is this. The Residuary power is in List I; that is virtually the approach of the Supreme Court judgement. What Mr. Nath Pai is doing is that he is taking the power which is in List I and putting it in Art. 368. That is really the effect. You are not touching Part III thereby. Therefore, you are not utilizing the amending powers which exist in Parliament. You are passing a law which is an amendment of the Constitution in terms of Article 368 and you are removing the powers from one place and putting it at another.

**Shri K. Chandrasekharan:** Don't you think that it is necessary to introduce into this Bill a clause "Notwithstanding anything contained in this Constitution or notwithstanding anything contained in Article...." Would you suggest that there should be a clause like that in this Bill?

**Shri S. Mohan Kumaramangalam:** I do not think it is necessary.

**Shri K. Chandrasekharan:** The provision as now contained in Article 32 would not be in conflict?

**Shri S. Mohan Kumaramangalam:** I do not think so.

**Shri K. Chandrkseaharan:** Would you suggest Constitutional amendment as now proposed including the provisions of Part III? So far as the amendment of the provisions of Part III is concerned, it should be ratified by two-thirds of the legislatures. So far as Fundamental Rights are concerned, can it be by simple majority or by half of the members of the State Legislatures or be put at a slightly level—two-thirds of the State Legislatures?

**Shri S. Mohan Kumaramangalam:** I do not think there is any proposal of changing the position so far as bringing the Fundamental Rights within the entrenched positions is concerned? That is not the proposal now.

**Shri Nath Pai:** I have listened you with great attention and respect. I would like you to answer the point raised by Mr. Chandrasekharan to remove the possibility of a charge that in a huff we may tamper with the liberties of the people.

**Shri S. Mohan Kumaramangalam:** I am against it because in this very rapidly changing world one should not make the process of amending too difficult and in the present set-up in the country, I think, that there are enough political parties and sufficient balance of power among them to see to it that nobody get a brute majority at the Centre. What you will have will only be some additional stumbling block. I do think that in this fast moving world the Parliament of our country should have ordinarily fairly—I would not say easy.

**Shri A. N. Mulla:** Is it a fact or not that those things which are placed under the proviso directly deal with the States and, therefore, this proviso has been added. The conception of those who made the Constitution was—they made certain provisions as to how the Constitution could be amended—that those things which directly related to the States for them they made an added proviso. Therefore, it is not a question of adding further safeguards but merely because they related to the States that is why they have been put there.

**Shri S. Mohan Kumaramangalam:** That approach is very important even

in respect of constitutional crisis and I have expressed strongly that—one should respect the autonomy of the States. That apart one can extend it to the fundemental rights but I am against it because Parliament is wise enough to do what it should do to redress the grievances of the people.

**Shri K. Chandrasekharan:** Do you think or I would like to know your opinion as to whether 'the question of law' referred to in Article 143 of the Constitution would include a position regarding constitutional amendment or not?

**Shri S. Mohan Kumaramangalam:** "If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance..". So it is very wide. Not only a question of law but even a question of fact or anything which may appear difficult of answer to the Parliament and Council of Ministers then they can send it to the Supreme Court. There is no constitutional difficulty in referring the matter to the Supreme Court. I do not think that there is any inhibition. I think the Constitution-makers intentionally made it wide so that if you feel like getting the assistance of trained judicial minds who may look at the matter objectively as they thought—though I do not agree entirely—you send it there.

**Mr. Chairman:** Although it is not exactly relevant but out of this question—for instance, you passingly referred to the new situation—can at the instance of the State legislatures, the Council of Ministers, under this Section, the President could be moved to refer the matter to the Supreme Court?

**Shri S. Mohan Kumaramangalam:** I do not think so because President can do so only on the advice of the Council of Ministers headed by the Prime Minister as the Governor exists only for the State. I do not think the Chief Minister can demand it.

**Shri Kameshwar Singh:** You have said that in this very rapidly changing world one should not make the process of amendment too difficult but suppose today some party in power make some laws and change something in the fundamental rights and tomorrow some other political party comes and make certain other changes then the freedom of the people depends on the sweet will of those parties who come in power.

**Shri S. Mohan Kumaramangalam:** The freedom of the people always depend on the sweet-will and whim of the political parties in our country and in every country. I do not think there is any cause to be worried about that. One has to remember that to get 2|3 majority in Parliament is not so easy as people seem to imagine. Now, we know particularly that the party in power cannot muster that much majority and if any party musters that majority good-luck to them. That is what our founding fathers anticipated and why should we be frightened about it.

There was Schniederman's case of United States. He was a communist who took an oath of loyalty to the United States Constitution in 1928 or so. He was an immigrant who came into the United States. Then he was sought to be deprived of the United States nationality on the ground that he has falsely taken the oath and it was a fraudulent oath that he has taken because he believed in the dictatorship of the proletariat. The Supreme Court held that so long as he wished to achieve his changes in the Constitution of the United States by means of the amending process the ultimate objective which he wished to achieve is irrelevant.

**Mr. Chairman:** A similar case may I point out? In Georgia one member of the legislature who expressed his opinion against the present policy in Vietnam has been prevented to occupy his seat and this matter is likely to go to the Supreme Court. He has been prevented to occupy seat in the Chamber.

**Shri S. Mohan Kumaramangalam:** I am always very allergic about arguments based on fear that this may happen or that may happen; therefore put this block and that block. Our constitutional and democratic rights are not going to be destroyed through Article 368. History provides enough examples of these. It will be through other methods, if at all.

**Shri Kameshwar Singh:** The present state of affairs provides better safeguard for the people and not 'after the amendment'.

**Shri S. Mohan Kumaramangalam:** I feel the judgement of the Supreme Court (Article 368) was wrong and what Parliament is trying to do is to restore that position.

**Shri Kameshwar Singh:** What is your view about refrendum?

**Shri S. Mohan Kumaramangalam:** I am against it. It will introduce another block. I think in matters of amendment of the Constitution it will be difficult to get a considerate and careful decision from millions and millions of people. It will not be proper decision in matters of this character. If I mistrust Parliament, then I have to go for refrendum. I, for this purpose, trust Parliament with two-thirds majority. Therefore, I do not believe in refrendum.

**Shri Kameshwar Singh:** Now the electorate are intelligent. They know what is good or bad. They can vote well for their interest.

**Shri S. Mohan Kumaramangalam:** I do not think they are very wise and clear in this regard. I think that Parliament is representative enough for our people. Unless I have to come to the conclusion that Parliament is likely to be un-representative of the people, why should we think of pulting in an additional block. I am in favour of the process which will provide swifter disposal of thinks. We are in an atomic age. Things should move quickly. We are not in 18th or 19th century. We are in 20th century when man is going to sit on the moon. So, if Parliament wants, Parliament has to decide by 2/3rds majority. Why do you want further safeguard?

**Shri Kameshwar Singh:** If the land is required by the Government for power plant or a project, there is no difficulty to get land.

**Shri S. Mohan Kumaramangalam:** There are any number of projects which are being heldup because of writs having been field in respect of notifications under the Land Acquisition Act. The cases are going on for years together. So, I am in favour of amending the Constitution to take all matters concerning land out of Article 226.

In Madras Refinery case, there is an area of 1½ acres of land. Things are held up for three months. Why not take out of Article 226. May I go to refrendum? Oh! your property is going to be touched. I do not want that.

**Shri Kameshwar Singh:** You have quoted Madras Refinery case. I feel there is no difficulty in the case of Government.

**Shri A. P. Chatterjee:** In Calcutta matters had been pending for three years.

**Shri S. Mohan Kumaramangalam:** I do not want to get derailed because I am not here for that.

**Shri Nath Pai:** We have brochures before us which give the position very clearly. I for one feel that what he has said bears testimony before us what I have been grouping to-day. One question which he incidentally touched. I repeat. To amend the Constitution—I, right from the beginning, ever since I drafted the Bill, have taken the decision that it is the Supreme Court which has unilaterally amended the Constitution by using the process of interpretation. The Constitution in India, known to us and our under-

standing of it confirmed by the Supreme Court till the 26th of February was one document. It became different one on the 27th after the Supreme Court by a narrow majority in Golakh Nath's case decided. I am submitting to restore the Constitution as it stood before 27th. We are not amending it but we are restoring the Constitution as it stood before i.e. before the Supreme Court gave judgment. Do you agree with it?

**Shri S. Mohan Kumaramanglam:** Yes.

**Shri Sivashanmugam Pillai:** What about the judgment of Justice Hidyat Ullah?

**Shri S. Mohan Kumaramanglam:** The view is of Justice Hidyat Ullah. I do not subscribe.

**Shri K. Narayana Rao:** Is there any instance in the world where the right which has been given by the Constitution has been taken away by subsequent amendment?

**Shri S. Mohan Kumarmanglam:** I do not know.

**Shri K. Narayana Rao:** Would you like to draw a line between—suspension of right, restriction of right, regulation of right or taking away the right from the body of the Constitution?

**Shri S. Mohan Kumaramanglam:** There is obvious distinction so far as suspension of right is concerned as is laid down under emergency provisions.

**Shri K. Narayana Rao:** Shri Mulla has raised and referred to a decision of the Supreme Court which is relevant for emergency. That is a sort of suspension. Article 13 speaks very cautiously and meaningfully the words 'taking away right'. In the very charter you find reference to restriction of right in the exercise of those rights. So in the light of the various types of expressions used, do you, or do you not, think that these are rights which are supposed to be there for the people to enjoy without being taken away by the process of amendment.

**Shri S. Mohan Kumaramanglam:** I am not going to accept that position. The main point is—Part 3 and part 4. Part 3 is enforceable. Part 4 is not. What happens when Part 3 and Part 4 comes in conflict? You have to amend part 3 to enable implementation of part 4. Parliament knows that Part 3 is more important at a particular time; then it is not necessary to pursue Part 4. It is because Part 3 stands in the way, you cannot ignore Part 4.

**Shri K. Narayana Rao:** In framing Part III and IV at the same time could it not be the intention of the Constituent Assembly that Part IV could not be implemented without taking away any of the rights in Part III?

**Shri S. Mohan Kumaramanglam:** The Members of the Constituent Assembly may have started with Part 4. That Part 4 could be implemented without having contravening Part 3. But their view is not binding on me or you. Their view is not binding on you. They may be more conservative than you and me. We may like to proceed fast. If part III stands in our way we remove part III and amend it in the way provided under the amending process.

**Shri K. Narayanana Rao:** Would you prepared to accept the view that if any provision in part IV comes in the way of fuller exercise of part III you are prepared to go to the extent of stating that we can amend or delete certain things from Part IV?

**Shri S. Mohan Kumaramanglam:** If Parliament says it can amend. If we don't want a socialist society it is open to Parliament and they can say we want a monopoly capitalist society.

**Shri K. Narayana Rao:** Are you sure that the present Bill particularly conforms to Article 13 which has been given a particular meaning? Is it necessary that it should be brought within the purview of this present amendment?

**Shri S. Mohan Kumaramangalam:** I have had too many experience of judges, I cannot give a guarantee as to when it comes to Supreme Court what Supreme Court can do. If I am a judge I would do. So far as I am concerned speaking as a lawyer or a person who has knowledge of law I think that this is a perfectly valid amendment of the Constitution in terms of Article 368. That is all I can say.

**Shri K. Narayana Rao:** Chief Justice Gajendragadker said about the right of Parliament to amend. This is what he said in Sajjan Singh's case:

> "We would like to observe that Parliament may consider whether it would not be expedient and reasonable to include the provisions of part III in the proviso to Article 368."

In the light of these observations even a great judge like Justice Gajendragadkar who has socio-political background of socialism has said this. He has said about the necessity to keep our fundamental rights somewhat above the level of the ordinary provisions of the Constitution. Would you like to say that this safeguard should be allowed for the amendment of the fundamental rights?

**Shri S. Mohan Kumarmangalam:** Even the most progressive judges are very conservative in their approach. That is the comment I can make. We have followed a procedure of appointment of judges by which we are supposed to choose the most eminent lawyers, and yet the most eminent lawyers are usually the most conservative of men. Even the most progressive of the most eminent of lawyers who have become Chief Justices are like that.

**Shri Dwivedy:** Do you include yourself when you say "eminent lawyers"?

**Shri S. Mohan Kumaramangalam:** I don't include myself in the term "eminent lawyers". I don't accept Chief Justice Gajendragadkar's opinion for whom I have the greatest respect. Even Justice Subba Rao I may say. They have got that conservative approach. I consider that what Mr. Mulla said earlier comes under this. The entrenched provisions are there in Article 368. They only provide State autonomy. They are not concerned with anything else. Parliament is supreme so far as any change in the relationship between States and Centre and the Unions are concerned, the Constitution makers rightly thought. I entirely agree with that. I am one of those persons who feel that State autonomy must be upheld. That must be safeguarded. They should have their say on that. I don't agree with Chief Justice Gajendragadkar on this point.

**Shri K. Narayana Rao:** In your Article you said that property rights should not have been there in Part III and that is what Justice Hidayatullah also mentions. Are you prepared to retain the fundamental rights chapter as interpreted by the Court, if we remove the property right from chapter 3?

**Shri S. Mohan Kumaramangalam:** No. There may be a time when Parliament may consider that certain of the other fundamental rights need revision including right to property, the right to liberty for instance, it is not a fundamental right in the same sense. All these rights have to be binding from the point of view of socio progress. Nothing should be kept sacrosanct beyond the purview of Parliament's power. People have a right to decide how they should live.

**Shri A. P. Chatterjee:** You have mentioned that it will be possible for the President to make a reference under Article 143 of the Constitution

requesting the judges of the Supreme Court to clarify certain points. So I am asking you this particular question. After all do you not think that the Supreme Court really exercises advisory jurisdiction? What they decide in their advisory jurisdiction, would that be law within the meaning of Article 141? Suppose we refer this under Article 143 of the Constitution, that is; if President refers it to Supreme Court, whatever judgement the Court may give, will it amount to overriding the decision in Golak Nath's case?

**Shri S. Mohan Kumaramangalam:** Not in terms of Article 141. The advisory opinion under Article 143 is not a judgement in terms of Article 141. There is no difficulty about that. Everything is not necessarily decided only by what may be called rules and regulations. The moral weight of the decision so given under Article 143 would be sufficient to offset Golak Nath case, I have no doubt about it. If Supreme Court upholds its view of Article 168 we are nowhere. If it takes a different view from Golak Nath's case, whatever may be the exact Constitutional position—Article 143 and 141—the advisory opinion would have sufficient weight to push aside Golak Nath's case. After reading Mr. Nath Pai's Bill I have come to the conclusion that this is much better way of proceeding with it.

**Shri A. P. Chatterjee:** A suggestion has been made to us that Parliament may constitute itself into a constituent assembly. You have said that you do not approve that. If Parliament has to constitute itself into a constituent assembly will not the question arise that the main purpose of the Act by which Parliament constitutes itself into a constituent assembly is to set up the constituent assembly to amend the Constitution including the fundamental rights, can that Act be challenged saying that it is going to affect Article 13 sub-Article 2 of the Constitution?

**Shri S. Mohan Kumaramangalam:** Justice Hidayatullah's statement that you should not set up constituent assembly in exercise of the residuary legislative power under list I is thoroughly wrong. Such a law would be a law within the meaning of Article 13(2) even following from that. If Supreme Court sticks to its position, if and when the amendment suggested by Mr. Nath Pai is adopted by Parliament there will be the same treatment in Supreme Court and if there is no other way you can try that way. But I personally do not agree with that at all. Personally I think it is wrong. When I argued in the Supreme Court in the Golaknath case I said it? Supposing tomorrow the Parliament constitutes itself into a Constituent Assembly and passes a particular law—I think this time the landlords were agitated and Mr. Ashok Sen appeared for them which was a matter of surprise to me—what would be the result? The same landlords will challenge the validity of such a law. They will say that there is no provision in the Constitution for the convening of such a Constituent Assembly and therefore 'strike this law down'. I think they will succeed also at that stage. Therefore, I am thoroughly against that. I want to make it quite clear. Probably I did not make it quite clear. I am thoroughly against the Constituent Assembly being convened in terms of Justice Hidayatullah's suggestion. I only said that if everything fails, that is to say, if the Supreme Court strikes down this amendment, then we may think of that at that stage.

**Shri A. P. Chatterjee:** You have said that as far as Article 368 is concerned, because it does not immediately affect the rights of the citizens, this Bill may escape immediate judgment of the Supreme Court. Would it not also be appropriate to say similar thing in respect of an amendment to Art. 13(2)? Suppose we put in an amendment in this Bill and say that the law under Art. 13(2) does not include

amendment of the Constitution? I think I have made myself clear.

**Shri S. Mohan Kumaramangalam:** Yes; you are asking, by way of abundant caution, why not put it?

**Shri A. P. Chatterjee:** Yes. If we put it, would it run the risk of an immediate judgment?

**Shri S. Mohan Kumaramangalam:** It will be in the same position.

**Shri Tenneti Viswanatham:** You have referred to social progress and rapidity of social progress. What according to you is the index of social progress?

**Shri S. Mohan Kumaramangalam:** I think the capacity of the State to provide food, shelter, education and decent standard of life to the millions of our people is the index. We see all that in Part IV of the Constitution.

**Shri Tenneti Viswanatham:** Prior to our Constitution did not these problems agitate the mind of our Government?

**Shri S. Mohan Kumaramangalam:** In the 19th century, the approach was that the Government was merely responsible for holding the balance. It did not have the responsibility so far as social objectives were concerned. It was only in the twentieth century that Government got responsibility in this sphere.

**Shri Tenneti Viswanatham:** Do you mean to say that education and health were provided to people only in the 20th century and not earlier? Did not the Government feel itself obliged to provide education and help the sick before that?

**Shri S. Mohan Kumaramangalam:** You are going into very wide questions. I do not mind that.

**Shri Tenneti Viswanatham:** I am asking this because in this you have said about rapid social progress. We do not want the process of amendment of the Constitution to be difficult. We want to make it easy. You say that in this rapid social progress you combine the process of amending the Constitution.

**Shri S. Mohan Kumaramangalam:** Take, for instance, education. Macaulay was not interested in education of the people of our country. He was only interested in the education of a breed of persons who would do the job of the British who were then ruling our country. Social objectives only come in the twentieth century, after the birth of the Indian National Congress, after Swami Vivekananda, etc. I have got strong views on this question.

**Shri Tenneti Viswanatham:** Macaulay was not interested in education of Indians. But he was interested in education as such and the State had an obligation to educate everyone of its citizens....

**Shri S. Mohan Kumaramangalam:** I cannot agree with you. He was not interested in the State educating every citizen.

**Shri Tenneti Viswanatham:** I think both of us will have to read Macaulay.

**Shri S. Mohan Kumaramangalam:** I have read it.

**Shri Tenneti Viswanatham:** Anyway, you say that the process must be as easy as possible. Why do you stick to the procedure laid down by Art. 368 because two-thirds majority is not so easy and reference to the States is not easy. States may delay it. To that extent it stands in the way of rapid social progress. You want to bring about big changes and if you have sufficient trust in the wisdom of Parliament, why do you agree with the Constitution makers that we should have this obstruction in our way. We pass more important laws with 50 per cent majority of those who are present. We do not require even half of the House. We are passing several Bills with one-third of the House. Why do you agree with the Constitution makers

that there should be this two-thirds majority or ratification by the States? Why don't you agree with me that it is enough to have a simple majority.

**Shri S. Mohan Kumaramangalam:** There has always been in the field of Constitution making a debate as to how rigid or flexible a Constitution should be. The rigidity of the Constitution is tested by the difficulty in its amending process and the flexibility of the Constitution is tested by the facility with which the Constitution can be amended. I personally feel that Art. 368 as it stands is satisfactory because it is not so rigid as to prevent the amendment taking place when necessary. But at the same time it is better to have some safeguards beyond a simple majority as in the case of an ordinary law. Constitution is after all the supreme law with which we agree to govern ourselves. There should be therefore some checks. But those checks should not be more than what we have got at present. This is something like the Chancellor's foot. It is very difficult to decide how more or little it should be. But the experience in the last 17 years has convinced me that Art. 368 is quite sufficient as it stands. If I find that Art. 368 is not sufficient as it stands now, then I will come forward as a citizen of our country and say: You make it more flexible. The experience of the last 17 years does not teach me that it should be either more flexible or more rigid than what it is today.

**Shri Tenneti Viswanatham:** Past experience has shown that generally the Executive and legislatures are a little prone to tread upon the heel of the citizen.

**Shri S. Mohan Kumaramangalam:** I want to make it very clear that experience has not shown me that and I strongly object, with great respect, to ex-Chief Justice Subba Row's comment on this that the country is moving towards totalitarianism.

**Shri Tenneti Viswanatham:** Excuse me. We should for a moment forget about Subba Row's judgment because that produces allergy. Let us forget that. The experience has shown that the Executive and legislatures have got a tendency to tread on the rights of citizens. That is the reason why in 1950 in accepting this Constitution certain checks and safeguards against the activities of the legislatures and Executive and Judges and citizens were imposed. Is it not due to the experience gained from the history of mankind and Governments throughout the world that those checks were provided?

**Shri S. Mohan Kumaramangalam:** I agree. But I want to make one thing very clear. I will go by the experience of the last 17 years. The experience in the last 17 years does not convince me that there is any need to change Art. 368. I agree fully with what you said that we are only restoring Art. 368 to its original position.

**Shri Tenneti Viswanatham:** I want more flexibility. Many Constitutional measures had to be dropped because we did not have the requisite majority. I am interested in the rapid social progress and I have several bees in my bonnet and I want to get them passed. I do not want these hurdles. That is why I ask you this question. Going back to the other point the Constitution provides that as far as Part III is concerned, that prevails. They say that nothing happens to that. Part IV is only a guiding light to show in which direction the Government should proceed and to see that the steering wheel always goes in that direction and take care to see that Part III does not run that circle and the traffic islands and all that. In my opinion nothing will happen to this. So, why do you say so?

**Shri S. Mohan Kumaramangalam:** The Constitution-makers, I think, for instance, thought that as per the original draft of Art. 31, compensation should not be justiciable. That

was their idea. But, the Supreme Court held a different opinion. Since the Supreme Court held a different opinion, it is open to Parliament to amend Article 31 so as to conform to what the original idea of the Constitutional-makers was. I don't think there is any difficulty that comes in the way of Parliament to amend this. I don't also think there is any conflict. The conflict can be resolved in two ways. Parliament may say 'no'; we do not want to amend the fundamental rights because it is not so important. Parliament may also say that we shall amend that because we want to do that to achieve our objective.

**Shri Tenneti Viswanatham:** We are talking too much about property in Part III.

**Shri S. Mohan Kumaramangalam:** The whole controversy is with regard to the First, Fourth and the Seventeenth Amendment concerning the property.

**Shri A. P. Chatterjee:** That is what the Chairman also pointed out.

**Shri Tenneti Viswanatham:** That was because they had got the lawyers to go to the Supreme Court.

**Shri A. P. Chatterjee:** I object to this.

**Shri S. Mohan Kumaramangalam:** Anyway this is also a matter of opinion.

**Shri Tenneti Viswanatham:** According to me, the Constitution-makers said that certain articles were amendable. In regard to certain other articles they simply said that these were not amendable at all. They simply said that we could provide restrictions—reasonable restrictions. What are those reasonable restrictions? Who are the persons to decide upon the reasonableness of it? Is that the Supreme Court? If so, how they can say whether they are reasonable and are in public interest? According to me, the Constitution has provided for various contingencies. So far as Part III is concerned, they say that they shall not be separated or taken away. This is what Mr. Narayana Rao also was referring to. That is why, in the beginning, I started by saying as to what are the indicators of social progress? If we know as to what are the indicators of social progress, we can easily know whether Part IV comes in the way or not. It will also enable the people like me to decide immediately to do away with Part III altogether. In fact, in my opinion, Part III comes in the way of speech. You will call me to order in Parliament. I do not want even that restriction. What do you say to this?

**Shri S. Mohan Kumaramangalam:** We must have Part III. You may change with regard to Part IV when there is conflict with the social interests of the people.

**Shri Tenneti Viswanatham:** We must have clear ideas when we are talking about the amendment.

**Shri S. Mohan Kumaramangalam:** You have to know as to what you need at a particular time.

**Shri Tenneti Viswanatham:** What are the social interests are described in Part IV. And when it comes in conflict with the provisions of Art. IV, they say that Part III will prevail. What is the object of saying so? Does it mean that the Constitution-makers did not want the social considerations to come into play. Does it mean that these social considerations and progress also could be achieved by having Part III as it is or does it depend upon the imaginative way in which the Parliament proceeds?

**Shri S. Mohan Kumaramangalam:** I have no doubt that the Constitution-makers expected that the larger social objectives found in Part IV could be achieved without amending Part III. That is what they felt. We

have to understand that they themselves amended Part III which was the subject of con'roversy in Shankari Prasad's case. There was a Supreme Court's interpretation—there was actually no interpretation of the Supreme Court but the interpretation by the Patna and the Allahabad High Courts.

**Shri Tenneti Viswanatham:** I don't think the persons amended it at that time are the same now.

**Shri S. Mohan Kumaramangalam:** Though the people may be different then, phisically, they are the same people.

**Shri Tenneti Viswanatham:** You were commenting that the judges and the lawyers are conservatives. That may be prior to their coming here. At the moment we do not depend upon what is written in the law. The judges have got to interpret as to what was at the back of the mind when the Constitution was framed. The judges have, after all, got to interpret only the existing law. And if we find that this is conservative, it is upto Parliament to change it. Why do you club the lawyers also with the judges?

**Shri S. Mohan Kumaramangalam:** Because the lawyers and the judges to a large extent go together. You ask the Home Minister as to what was the criterion that he has in his mind in regard to appointment of a judge of the Supreme Court or the High Court. He has got some criteria in his mind ordinarily. There may be exceptions too—I am not going into that. Ordinarily, he keeps an idea in his mind as to who is at the top of the Bar whom he should recruit as judges. But how is it that you say that the judge becomes conservative?

**Shri Tenneti Viswanatham:** For example, you see the Article relating to the appointment of the High Court or the Supreme Court judges. This might also be changed so as to suit the requirements of appointing the judges by Government.

**Shri S. Mohan Kumaramangalam:** I don't think it is necessary to change the articles. I know very well. For instance, I was discussing that thing with an English Judge not very long ago. He was saying that the attitude in our country is that the judges should be appointed solely on non-party lines. Very leading lawyer, if he is appointed as a Judge, it is a very dangerous attitude. I said why? He said in all these matters, we should take into consideration also the political outlook—not in terms of party adherence but in terms of the broad political outlook—of the judges who are to be appointed who should be competent lawyers so that they will have a progressive outlook. In fact, it is being done now in England under the Labour Government. This is what he claimed.

**Shri Jairamdas Daulatram:** He may be a Communist.

**Shri S. Mohan Kumaramangalam:** He is not a Communist. Communists do not come to our country.

**Shri Tenneti Viswanatham:** Without any offence to our Congress friends, I say that your rules are such that they stand in the way of every Congressman from becoming a judge. You said about taking matters of land acquisition out of Art. 226. Supposing we delete Art. 32 and Art. 226 altogether, does any harm happen to the Constitution?

**Shri S. Mohan Kumaramangalam:** I would be against that. Even when I referred to that example of taking matters of land out of 226, I wanted to work out—because it is an off hand suggestion—some method by which the State cannot use its powers under land acquisition to harm an individual, because that also can happen when it is not genuine. In our desire to protect matters like important projects, that should not take place. We should also not forget that we must be able to protect the individual. While taking it out of 226, some other method must be found. I don't want

to go into details, but I am not for blanket power to the State Government to do whatever they like. They are bound to misuse it.

**Shri Tenneti Viswanatham:** There was a suggestion made that the proviso under Art. 368 concerns mainly with matters relating to the States and hence the special safeguard and all that. May I draw your attention to Arts. 54 and 55 which relate to election of President, art. 73 which describes the extent of executive power of the Union, Chapter IV of Part V which deals with Union Judiciary. Therefore, no argument can be based on the fact that the proviso deals with matters that specially affect the States.

**Shri S. Mohan Kumaramangalam:** If the executive power of the State is extended, that means you must impinge on the executive power of the Union. If you extend it, it impinges on the executive power of the State. Because Art. 32 affects also the States, appeals from High Courts go to the Supreme Court.

**Shri Tenneti Viswanatham:** Every article, that way, affects every State, because the country lives in States. It does not live in the Secretariat.

One more question. So far as the judgment of the Supreme Court is concerned, it does nothing practical. Will you agree me if I say so? Because while summarising their judgment, they have drawn a number of conclusions where they say the 17th amendment continues to be valid, and then they add another clause saying any future constitutional amendment will be void. Will you agree with me that a court cannot pronounce upon a thing which does not come up before it for decision?

**Shri S. Mohan Kumaramangalam:** That is the doctrine of "prospective over-ruling".

**Shri Tenneti Viswanatham:** But actually there was no legislation before them on which they could say this is in conflict with the Constitution. They simply gave a general text-book document, saying that future amendment of the Constitution will be invalid. Unless we see the wording of the amendment, we cannot say whether it offends the Constitution or not. Therefore, they held that the 17th amendment continues to be in force, that all other actions taken prior to that continue to be in force and valid, but they declared invalid a certain thing which does not exist and which was not before them. Therefore, I say all these statements are merely *obiter dicta* and we need not be worried about them.

**Shri S. Mohan Kumaramangalam:** I am afraid I cannot agree with that. On the contrary, I think those statements do introduce a complication and the best way to remove the complication would be to adopt this amendment.

**Shri Tenneti Viswanatham:** Supposing I say that this is blanket power with no safeguards. It is not only property. A few friends are thinking of property alone. There are other minority rights, there is right to freedom, right of association.

**Shri S. Mohan Kumaramangalam:** Nobody proposes to touch them.

**Shri Tenneti Viswanatham:** Supposing you put me in power, I shall gag them.

**Shri S. Mohan Kumaramangalam:** I will deal with you then.

**Shri Tenneti Viswanatham:** You cannot argue with them.

**Shri S. Mohan Kumaramangalam:** People will deal with them.

**Shri Tenneti Viswanatham:** A fear was expressed in the previous sittings that minority rights might be trampled upon. It is not merely the question of property.

**Shri S. Mohan Kumaramangalam:** I think that is under-estimating the level of consciousness of our people.

**Shri Tenneti Visawanatham:** When I question about Parliament, we refer to the people. When I talk about people, we refer to Parliament.

**Shri S. Mohan Kumaramangalam:** I think, you cannot separate the two.

**Shri Tenneti Viswanatham:** Therefore, the argument advanced was the people while giving certain powers to Parliament, reserved for themselves certain rights which are not to be touched by the Parliament. That is what the witnesses who preceded you said. They gave Parliament certain powers; they gave Judiciary certain powers; they gave the executive certain powers. So far as they are concerned, they reserved certain rights for themselves. Of course they went to the logical extent like Shankaracharya and said even the people cannot touch them. As you said they cannot touch them under Art 368. They can touch them otherwise.

**Shri S. Mohan Kumaramangalam:** I don't think it is entirely wrong from the constitutional point of view. There is no constitution which has stood the test of time which is not amendable by the people.

**Shri Tenneti Viswanatham:** Supposing we say while amendability is understandable the amendability must have some safeguards, so that the rights of individual citizens are not trampled with easily. Just as you say amendment should not be easy, I also say rights of the citizens should not be trampled with easily. We should strike a balance.

**Shri S. Mohan Kumaramangalam:** That is why two-third majority i.e. more than half of the members present and voting. That is more than enough.

**Shri Tenneti Viswanatham:** From the point of view of those who want safeguards, two-third majority is not enough. From the point of view of those who want rapid social progress, our two-third majority is a block.

**Shri S. Mohan Kumaramangalam:** That shows how right I am. It balances between the two.

**Mr. Chairman:** On behalf of the Committee, I would like to express our grateful thanks to you for sparing some time for us. In fact we were for a long time after you.

**Shri S. Mohan Kumaramangalam:** I thank the Committee which has given me this oppotunity to express my views.

*(The witness then withdrew)*

*(The Committee then adjourned)*

MINUTES OF EVIDENCE BEFORE THE JOINT COMMITTEE ON THE CONSTITUTION (AMENDMENT) BILL, 1967 BY SHRI NATH PAI, M.P.

*Saturday, the 25th November, 1967 at 10.00 hours.*

PRESENT

Shri R. K. Khadilkar—*Chairman.*

MEMBERS

*Lok Sabha*

2. Shri K. Hanumanthaiya
3. Shri S. M. Joshi
4. Shri Kameshwar Singh
5. Shri D. K. Kunte
6. Shri J. Rameshwar Rao
7. Shri Mohammad Yusuf
8. Shri Nath Pai
9. Shri Deorao S. Patil
10. Shri K. Narayana Rao
11. Shri Mohammad Yunus Saleem
12. Shri Anand Narain Mulla
13. Shri Dwaipayan Sen
14. Shri Tenneti Viswanatham
15. Shri N. C. Chatterjee.

*Rajya Sabha*

16. Shri Chitta Basu
17. Shri M. P. Bhargava
18. Shri K. Chandrasekharan
19. Shri A. P. Chatterjee
20. Shri Jairamdas Daulatram
21. Shri J. Sivashanmugam Pillai
22. Shri Triloki Singh
23. Shri Rajendra Pratap Sinha.

REPRESENTATIVES OF THE MINISTRY OF LAW

1. Shri R. S. Gae, *Secretary, Department of Legal Affairs.*
2. Shri V. N. Bhatia, *Secretary, Legislative Department.*
3. Shri K. K. Sundaram, *Additional Legislative Counsel.*

SECRETARIAT

Shri M. C. Chawla—*Deputy Secretary.*

WITNESSES EXAMINED

I. Shri Purshottam Trikamdas, *Advocate, New Delhi.*

II. Shri G. S. Gupta, *Ex-Speaker, Madhya Pradesh and Berar Legislative Assembly and Member of Constituent Assembly.*

III. Shri M. C. Setalvad, *M.P. and former Attorney-General of India.*

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**Shri Purshottam Trikamdas, Advocate, New Delhi**

*(The witness was called in and he took his seat)*

**Mr. Chairman:** Many of us here are very well acquainted with Shri Trikamdas who is an eminent jurist and who has spared some time to appear before the committee to help us in the deliberations.

Mr. Trikamdas, your evidence shall be treated as public and is liable to be published unless you specifically desire that all or any part of it is to be treated as ev confidential. Even then, it is liable to be made available to Members of Parliament.

As you know, the majority judgment of the Supreme Court has raised a good deal of controversy. Shri Nath Pai had thought that certain powers which have been taken away from Parliament by the judgment which need to be restored back to this sovereign body. After a good deal of deliberation, the Constitution was given shape by the founding fathers. The question is whether the majority judgment is in keeping with it and whether it would be right to interpret the Constitution in the manner it has been interpreted.. Would it not be better to take cognizance of it and recognise that Parliament is supreme in its own sphere and it is not within the purview of the judiciary to lay down the law? They can interpret it and we submit to their interpretation. But when they exceed the sphere that has been carved out for their functioning within the framework of the Constitution, what is to be done? Since you are an eminent jurist not only in India but in the international sphere, we would like to know your views. We have gone through your memorandum. If you want to elucidate it, you may briefly do so.

**Shri Purshottam Trikamdas:** I would like to point out what Mr. Justice Hidayatulla has pointed out in his judgment—that is the only judgment which has taken note of it —that at the time when the Constitution, particularly the fundamental rights, were being drafted, the United Nations was also framing what is known as the Universal Declaration of Human Rights. I do not know if the draft fundamental rights were ready on the 10th December 1948 and whether the draft of Universal Declaration was available to the framers of the fundamental rights. But it is possible that the framers had that before them. The Universal Declaration of Human Rights contains three things—one is the inalienable right of the individual, the other is the political rights and the third are the social economic rights. The inalienable rights are provided in Part III of our Constitution. The social and economic rights are to be found in Part IV Directive Principles of State Policy, because they cannot be immediately implemented. The UN also has pointed out at that time that in order to make the fundamental rights effective, there must be an effective remedy in courts. That is in article 32. Only last year, in December 66, the UN have taken a further step in the two convenants which they have opened for signature now.

The two covenants between them covered the two aspects, namely, the individual and political rights and the social and economic rights. If you will look at my memorandum, paragraph (7) on page (2) you will find

what they have done. I have said there:

> "On December 16, 1966, the General Assembly of the United Nations adopted two Covenants, which have been opened for accession by various governments. These two Covenants are: Covenant on civil and political rights and a Covenant on social and cultural rights. The Covenant on civil and political rights contains the rights enumerated in Part III of the Constitution. This shows that the United Nations is of the view that the time has now come when states should provide the guarantees similar to those in Part III of the Constitution. Sub-Article 2 of Article 2 of that covenant wants states to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in that Convention. And Sub-Article 3 of Article 2 also requires that an effecitve remedy against any violation of the provisions of the Covenant should be provided. This is similar to Article 32 of our Constitution."

Therefore, my submission is that instead of looking at it from a purely technical point of view, we must consider that the Constitution is a fundamental document, an organic document so far as India is concerned. It is no use trying to be very technical or mechanical about it and saying, look at this article 368 on the one side and article 13(2) on the other. Let us reconcile it. I can reconcile it without any difficulty. Article 368 merely lays down the procedure for amendment of the Constitution. It is not unknown that although a Constitution can be amended the Constitution itself can provide that certain parts of the Constitution shall be sacrosanct. Take the Japanese Constitution. There are two articles in the Japanese Constitution. One is article 11 which says that fundamental rights are eternal and inviolable. Then comes article 96 which deals with amendments in very general terms and article 97 says that fundamental rights are to be held inviolable at all times. Therefore, the question is a fundamental question which Parliament has got to consider. Are we going to be a democratic State and, therefore, are we going to guarantee individual freedoms or do we want to open the floodgates to those who do not believe in individual freedoms so that they can abrogate fundamental rights and article 32 at one stroke of the pen by amending article 368—first part? That is the main question. I think that if we were going towards a totalitarian ideology then my hon. friend, Shri Nath Pai's amendment may serve the purpose but not as the Constitution or the spirit of the Constitution stands. These are the preliminary remarks that I would like to make.

**Mr. Chairman:** You mentioned the Japanese Constitution and said that they have made the fundamental rights almost a sort of permanent charter not to be tempered with or touched. But in our Constitution, as it has been interpreted by our jurists like the Advocate-General of Bombay and very recently by Mr. Austin Greenwood after a very thorough study, if I have understood him correctly, our Constitution-makers in order to stabilise democracy in this country have taken into consideration the social and economic conditions and made provisions to bring about a social change through the instrument of Parliament in such a manner that democracy would be stabilised. So what I feel is, your fears might be genuine, but to say or allege that the attempt to amend the Constitution in view of the recent judgment is a path to totalitarianism . . .

**Shri Purshattam Trikamdas:** I did not say 'path to totalitarianism'; I said that it will open the floodgates.

**Mr. Chairman:** That is interpretation of law in a vacuum. Recently I have come across a very good lecture

by Mr. Phillips Frankfurt. There he has stated that you cannot interpret law in a vacuum. Keeping that experienced jurist's view in mind I feel that we must consider the problem not with some sense of fear that this might lead to totalitarianism. Secondly, keeping in view the conflict that have arisen regarding fundamental rights, regarding property particularly landed property and compensation, and the tension that has been generated by our judiciary, perhaps unwittingly, between the sovereign body—we consider it sovereign—of Parliament and the judiciary, would it not be proper now to amend the Constitution in such a manner that article 368, where it has been inferred that it is only a procedural section and it does not confer any right, is made more effective. You have referred to the Human Rights Commission. It is a sort of a body which is trying to reach some sort of a consensus regarding human rights. It is a good effort. But there are sovereign bodies meeting together and they are looking at the problem that every member is a sovereign entity. Here within our sovereign sphere we consider this problem. That distinction must be borne in mind.

**Shri Purshottam Trikamdas:** You have raised very many questions and I will try to answer as much as I remember. You talked about sovereign body. Parliament is sovereign within its own sphere and no more. It is a creature of the Constitution but over and over again it has been said that Parliament is sovereign. At the time of question of privilege it was said so. But the right of individual is also sovereign in a sense and the Constitution itself provided that Parliament would be sovereign within certain limits. Therefore, there is no contradiction. In every federal constitution sovereignty is distributed between various bodies. Our Parliament is not sovereign and while we talk about sovereign within its own sphere—it is a legal phrase I am well aware—it does not mean it is a sovereign body as the British Parliament, for example. Take the American Constitution. The Central Government, the Senate and the Congress are not sovereign bodies. They have got certain limits imposed on them right from the beginning. That is my view—I do not say that it should be accepted by everybody.

So far as the United Nations is concerned, it has gone very much beyond by adopting unanimously these two covenants. They are open for signature. Therefore, whatever was being considered is now in a final shape. They want all members to adhere to it. Supposing India signs one of these covenants or both—we have nothing to fear in signing both—under the covenant we are bound to adopt a legislation to give effect to it and to give effect to it along with a provision like article 32 which we have in our Constitution. Otherwise it is meaningless.

**Shri Nath Pai:** I am a member of that Commission. There is no enforceability about those rights. Even Portugal can sign it. That analogy is very misleading. Our rights are enforceable by the Supreme Court.

**Shri Purshottam Trikamdas:** I am not referring to the general discussion going on in the United Nations. Here are these two Covenants adopted last year unanimously. Of course, there is no outside body to enforce them. The countries which sign them would be bound to have legislation in their own countries to give effect to the Government. When a country adheres to a Covenant which many other countries sign it has got to give effect to it in that country. It is not that the United Nations has provided the machinery. It has not yet provided the machinery of enforceablity. In this connection, I may point out the trend in the world. The Council of Europe has also, got a Convention of Human Rights. They have got a court of Human Rights. Those countries which signed the treaty of Rome in 1950 and which

adhere to the Covenent on Human Rights are bound to permit their own citizens, after they have exhausted remedies in their own courts, to go to the European commission of Human Rights. This is the trend also in South American and Central American countries. They are also framing this kind of Covenants on the model of the Council of Europe. We are now wanting to go back.

In this conection I may point out what are the human rights that are to be provided. Article 31 may be controversial, but we are not yet a country in which no private property of any kind or sort is to be permitted. Article 31 as amended stands even after the judgment. Article 31 (A) and 31(B) is there. All that has been included in the Ninth Schedule is already there. Therefore, there is no such impediment today regarding property rights. It can also be watered down, and even article 19 says that reasonable restrictions on these rights can be imposed. The Supreme Court has in the past upheld even under article 19 many of the restrictions imposed on property rights. To say that in socialist countries there are no property rights is not correct. If you look at the constitutions of socialist countries, equal to Communist countries, even there they can own their own property, own houses and various other amenities. Let us not be holier than thou. Let us take the fundamental rights as they are. Which fundamental right has been objectionable? If fundamental rights are general statements regarding protection of individual freedom and article 32 protects it, where is the need to say that the Supreme Court in interpreting the Constitution has done something which is violently opposed to the spirit of the Constitution?

**Shri Triloki Singh:** Article 368 lays down amendment of the Constitution. There it is said "amendment of this Constitution". Don't you think the word "this" is relevant when it applies to the entire Constitution or does it exclude Part III of the Constitution?

**Shri Purshottam Trikamdas:** If article 13(2) had not been there, which lays down the limitation on the right of amendment so far as Part III is concerned, then what you are saying would be correct. I pointed out the instance of the Japanese Constitution where also the right of amendment is very general at the same time they say that "this" will not be touched. If you look at the Japanese Constitution you will find that the fundamental rights which they are provided are much wider than our rights. They have many more rights than we have; in the Japanese Constitution they have many more rights. Yet they say that they shall not be touched. Therefore, you have got to consider as to what you are dealing with. We are dealing with the freedom of the individual. Of course if you do not believe in the freedom of the individual, if you believe that the individual it merely a cog in the wheel of the State, it is a different question. But, so far as India is concerned, I do not think it has committed itself to that kind of belief or ideology.

Let us look at the fundamental rights and find out what is it that we want to get rid of. You get rid of article 32 and the fundamental rights disappear. Now, how can a right to amend under article 368 get rid of article 32? If you get rid of article 32, what remains of the fundamental rights excepting empty promises as are to be found in many constitutions, beautiful fundamental rights, but when it comes to a violation of the fundamental rights, nobody can do a thing about it. Do we want a constitution of that nature.

**Shri Triloki Singh:** Certainly not.

**Shri Purshottam Trikamdas:** If you want such a constitution, then, by all means, amend it. Apart from that, I do not think the amendment which is

being suggested by my hon. friend, Shri Nath Pai is going to serve the purpose. Because, in my view, article 368 lays down the procedure. It is implicit that the procedure is intended to cover the power. Otherwise, there is no point in laying down the procedure, if there is no power. Similar provisions are to be found in many constitutions which lay down the procedure. The power is implicit.

Now, my hon. friend, Sari Nath Pai wants to include the two lines with the belief that it gives the power. Assuming it gives the power, article 13 (2) is still there. Unless you say that a constitutional amendment is not a law, which to my mind is untenable—although some of the learned judges of the Supreme Court seems to have held it, to my mind, it is untenable—and it is purely a mechanical reading of the Constitution, you cannot get over your difficulty. The Constitution, is an organic document, as pointed out by Mr. Justice Hidayatulla and the Chief Justice, and you cannot tinker with it in this manner, a little word here and a little word there and say "let us try to harmonise it; if we cannot harmonise, something which appears to be general should prevail"; in my submission, that is not the way in which the Constitution has got to be looked at. I hope I have answered your question.

**Shri Triloki Singh:** Since your argument is reinforced by the fact that article 13 (2) lays down that we cannot abridge or take away the fundamental rights, may I know whether we can add to them?

**Shri Purshottam Trikamdas:** I would not say that. Perhaps it could be said that we could add to them, but I would not say that because there is very little to be added to our fundamental rights, to what we have got in the Chapter now.

**Shri Nath Pai:** Can we not make it like the Japanese one, which you say is much more liberal?

**Shri Parshottam Trikamdas:** Then possibly you will have to adopt some other procedure. I am satisfied with the fundamental rights as they are.

**Shri Triloki Singh:** Can we not add to them?

**Shri Purshottam Trikamdas:** That is a possible interpretation, that you can add to them but you cannot take away from them.

**Shri Kunte:** I have only one question. You do not think that any time or any occasion will arise when there would be any need to amend any part of Part III of the Constitution.

**Shri Purshottam Trikamdas:** No, I do not think so.

**Shri S. M. Joshi:** You said that these are inalienable rights. True. Now, these inalienable rights can also be changed by those who have those rights. For instance, the sovereignty will be with the people. If the people tomorrow want to change them, as you have yourself stated just now, we will have to follow some other procedure. Now, assuming that we pass an amendment here in Parliament, according to the present restrictions and conditions, saying that whenever we make an amendment to Chapter III, after passing that amendment here it should be ratified through a system of referendum by the people in the country as a whole, will that do?

**Shri Purshottam Trikamdas:** That will not do, if you merely amend article 368, as it stands. For that some other procedure may have to be followed, as pointed out by the Supreme Court, although I do not agree with them that under entry 97 of the Union List you have got to pass a law or convene a Constituent Assembly. I do not agree with that procedure, because these rights are not to be tinkered with. If I may point out, the fundamental rights should not be left to the sweet will of the majority, as provided in the first part of article 368. It cannot possibly be left to them. I do not understand this heat

which is being engendered in this matter. So far as the fnndamental rights are concerned, what is it that you are objecting to in those fundamental rights, because no fundamental right is absolute and it cannot be. Therefore, article 19 has provided restrictions which can be imposed. But, ultima.ely, the judges must be the guardians of the Cons itution. In India the guardians of the Constitution are the courts. You get rid of the courts and you get rid of democracy at the same ime. Then the courts will become handmaiden of the State. I do not think or accept that the Constitu ion ever visualized that kind of a state in India.

Let us look at the fundamental rights. Article 14 says: no discrimination. Do you want to bring in discrimination. Articles 15, 16 and others refer to the rights of minorities and religious rights. Which is it that is found to be objectionable? Purely theoretically you may say: yes if we want to amend it, we must have the power. Well, the Constitution has not given that power to you; that is all I can say. And by this kind of amendment which my friend, Shri Nath Pai, has suggested, I doubt whether Parliament will get that power, so long as article 13(2) remains.

**Shri Rameshwar Rao:** I would like Shri Trikamdas to tell us whe her the whole concept of a written Constitution and all the provisions of the fundamental rights are not really an attempt to protect the minorities and no: necessarily to arm the majority to do what they like. Though the hormal process of constitutional amendment gives the power to the majority, the whole concept of the fundamental right is to protect the minori'y against the will of the majority.

**Shri Purshottom Trikamdas:** Even a minority of one will be protected under article 19 and article 14. If you get rid of article 14, we will have one procedure for trying Mr. X and another for trying Mr. Purshotham. That is possible. I do not like to visualise that such a possibility can exist in this country.

**Shri K. Chandrasekharan:** Do you make a distinction between a letgislative law and a constitutional law?

**Shri Purshottam Trikamdas:** I I make no distinction. You can call it a constitutional amendment. But it is still a law which Parliament has been given power under article 368 to pass. Therefore, I do not make that distinction which is sought to be made.

**Shri K. Chandrasekharan:** So according to you, after the Constitution, there is nobody in the country which can exercise unlimited sovereign powers.

**Shri Pursho tam Trikamdas:** That is so; that is obvious in a federal Constitution. I might draw your attention to this that if you get rid of protection of the fundamental rights under article 13(2), then if somebody who wants to take over the country by purely legal means, by majority, in Parliament, like Hitler, it will be very easy for him to say, "What does it matter? No fundamental rights. I will get rid of even the promise which is found to be there." If you interpret that article 368 gives power to get rid of fundamental rights, you will make it easy for a person like that to take over the power in this country.

**Shri K. Chandrasekharan:** You said that fundamental rights in Part III may be expanded or enlarged....

**Shri Pu shottam Trikamdas:** I did not say that. Somebody put it to me and I said it is possible; it could be interpreted like that.

**Shri K. Chandrasekha-an:** Can I take it that fundamental rights provisions in Part III of the Constitution cannot be expanded or enlarged?

**Shri Pu-shottam Trikamdas:** I did not say that either. You cannot take away any foundamental rights which are provided by Part III. That is all I said.

**Shri K. Chandrasekharan:** Is there any method by which fundamental

rights in Part III can be expanded or enlarged?

**Shri Purshottam Trikamdas:** It is possible to take article 13(2) to mean that you may enlarge them but not cut them down.

**Shri K. Chandrasekharan:** Can you suggest the machinery or the procedure or the method for the same, particularly, because you disagreed with the observations of the Supreme Court Judge in regard to the constitution of a Constituent Assembly?

**Shri Purshottam Trikamdas:** The Supreme Court has not definitely said. They have said that it is possible that you could do it in that way. I am not bound to agree with any observation which has been made by any Judge of the Supreme Court. It is my business to disagree with many of the judgements of the Supreme Court, by and large. I would say, certainly, Parliament should try and enlarge it. We all welcome it and we shall all go to the Supreme Court and argue that this is enlargement and, therefore, it should be permitted.

**Shri K. Chandrasekharan:** So, you think that this Parliament has got jurisdiction or competence to enlarge fundamental rights.

**Shri Purshottam Trikamadas:** I only said I would welcome if Parliament tried it and I would certainly stand up before the Supreme Court if somebody wants me to do so.

**Shri K. Chandrasekharan:** May I take it, apart from the forum of Parliament, you do not conceive of any other forum by which the fundamental rights in Part III of the Constitution can be got enlarged?

**Shri Purshottam Trikamdas:** The other forum wuld be a revolution by which Parliament is got rid of. That is the only forum.

**Shri K. Chandrasekharan:** As between the two, yu would certainly prefer Parliament.

**Shri Purshottam Trikamdas:** Parliament has got its rights. I repeat, I do not understand why anybody should want to get rid of fundamental rights or to amend them or to derogate from such fundamental rights as we have got. Today, all over the world, the trend is to give to to the people fundamental rights. The people in Central America and South America are dying to get these fundamental rights which we have got in the Constitution and article 13(2) and we are thinking of getting rid of it.

**Shri K. Chandrasekharan:** I hope you would agree that Parliament, as it is consti uted today, is more representative of the people and the country than the Constituent Assembly itself.

**Shri Purshottam Trikamdas:** I will not venture any opinion on that. In that case, you scrap the Constitution.

**Shri K. Chandrasekharan:** I am asking a question of fact. We all know how the Constituent Assembly was constituted and we all know how Parliament is constituted. In the way in which these two bodies are constituted, Parliament today, particularly with adult franchise, is certainly more representative of the people of this country. I should put it to you whether it is possible to have any other body as more representative of the people of this country than Parliament.

**Shri Purshottam Trikamdas:** If I may say so, with utmost respect, it was suggested by some political parties—I will mention one party which suggested it—that the Constitution as framed by the Constituent Assembly should be placed before Parliament which is elected on adult franchise for consideration and for ratification or amendment which the First Parliament or the Government did not choose to do and nobody raised the question at that time Today, whatever may have been the position 20 years ago, this Constitution has been accepted by Parliament for all these years and it is too late to ask a question as to who is more representative. Undoubtedly, Parliament which is elected by adult franchise would be more representative than the Constituent Assembly that we had.

**Shri K. Chandrasekharan:** So far as property rights are concerned, there are legislations by the States, amending legislations by the States, and these have all been included in the Ninth Schedule to the Constitution. Suppose a particular State wants to amend a particular Land Reforms Act and that amendment also is to be included in the Ninth Schedule. Now, that inclusion is possible only by way of a constitutional amendment. Will such a constitutional amendmeant for inclusion of a land reforms measure or an amending measure, taking it out of the purview of the courts, under article 13(2), be hit by the judgment in the Golak Nath case?

**Shri Purshottam Trikamdas:** Undoubtedly, it would. If you carry that argument a little further, you can put everything in the Ninth Schedule no law can be challenged. There is no difficulty about that if the power is there. If you look at article 31-A, as the definition of the 'state' is there, I do not think, as it stands, there any impediment in any legislature in passing a law dealing with land reforms. But to take 200 or 500 statutes and put them in the Ninth Schedule is, certainly, not becoming of a great legislative assembly. It is certainly trying to get round the Constitution.

**Shri K. Chandrasekharan:** Many legislations have already been included in the Ninth Schedule.

**Shri Purshottam Trikamdas:** Yes, because of the doctrine which, very rightly, was adopted by the majority in the Supreme Court that things have happened, titles have passed, and we did not want to upset that. But for the future, we declared, as the Supreme Court is entitled under article 141 to declare, that this cannot be done. Technically speaking, both Mr. Justice Subba Rao and Mr. Justice Hidayatulla have said that they would have struck down even the earlier amendments. But for practical reasons, they said that it would create a great deal of difficulty and perhaps chaos in titles and things which have been done 20 years ago and that it cannot be upset in this manner. That is the only reason why the doctrine of future applicability of the judgment, the prospective over-ruling, has been adopted.

**Shri K. Chandrasekharan:** No covenant of the United Nations is justiciable.

**Shri Purshottam Trikamdas:** I think you are mistaken. Once a country accepts that covenant with a term of that kind, you have got to have legislation in this country in conformity with that covenant. We have done it over and over again. Parliament has done it. I think there is an Article somewhere in the Constitution which says that we must give effect to treaties and international agreements and a covenant is nothing but an international agreement. As soon as you sign it, you must give effect to it.

**Shri K. Chandrasekharan:** Suppose a particular country does not implement one or some of the human rights contained in the United Nations covenant on human rights. What can the United Nations do?

**An hon'ble Member:** You can have reservations in the covenant itself.

**Shri Purshottam Trikamdas:** Yes, you can do it with certain reservations. I will answer your question. To-day as the United Nations stands, they can do nothing, but, in the near future, they may have a court of human rights. They may have—I do not know. For example, the Council of Europe was created by 17 countries. They have a covenant on human rights and a court of human rights. All over Europe it applies.

**Shri K. Narayana Rao:** The present Bill has been moved by Mr. Nath Pai on the basis of the judgment of the majority that Article 368 is procedural in character and the substan-

tive power is to be found in the residuary entry 97 of the Union List. I have the opportunity to go through the entire judgment and the various arguments both sides have tried to put forth. One side says that it is procedural while the other side says that it is substantive but I find it rather difficult. What material difference. Does it make if Article 368 have been construed one way or another so far as the conflict between 13(2) and 368 is concerned? In other words would the decision of the majority or the judgment of Mr. Subba Rao in any way be different if Article 368 had been held a substantive power rather than procedural?

**Shri Purshottam Trikamdas:** I entirely agree with you and I said that the substantive power of amendment has been implicit in Article 368 itself. Therefore, what Mr. Nath Pai is trying to do is to give the power of amendment and so far as 13(2) is concerned, it will have, in my view, no effect. The Supreme Court has tried to find the power under Art. 245 and not under entry 97.

**Shri K. Narayana Rao:** You are quite aware that when the framers of our Constitution have given us the fundamental rights, they have deviated from the American pattern in the sense that in America—you are quite aware of the fact—the rights have been enumerated in absolute terms, but the judiciary has been giving us certain restrictions from time to time consistent with the conditions and social changes in the given country, whereas, in our rights we have taken meticulous care not only in the enunciation of the right but in the regulation and restriction of the rights in different context also. So, would you, in the light of the flexible nature of these rights and also, the permissible possibility of the limitations of these rights, think that it may not be sufficient if we leave this matter of rights and restrictions to the judiciary to decide from time to time or do you agree that it is also necessary that Parliament should also go on from time to time prescribing these rights?

**Shri Purshottam Trikamdas:** The rights which are provided in Fundamental Rights are quite flexible. Look at Article 19. They are not absolute rights and Art. 31 will have to be read with 19 as has been read in the past. They are quite flexible. There is nothing rigid about it and from time to time, as the ideas change, what is a reasonable restriction and what is not, will also change so far as the courts are concerned. We do not have courts which stick to something which was decided 300 years ago. That theory has been given up even in a country like England where they used to stick to precedents. Only recently, the Lord Chancellor, Lord Gardner, said that taking a very rigid view of a decision which might have been rendered 150 years ago was not correct. Therefore, the rights are absolutely flexible, but let the rights remain and you can have the restrictions flexible.

I do not know much about the American Constitution. I have got some vague ideas and I do not like to venture an opinion on the American Constitution.

**Shri K. Narayana Rao:** Of course, when I say that, I have in mind the New Deal legislation of President Roosevelt. When he brought out the New Deal legislation, the Court at that time, conditioned as it was by the then thinking, was reluctant to go all the way to accede to—I would not say legislative encroachment—the legislative programme. Then he tried the package deal and tried to bring in as many Judges as possible, but he could not succeed.....

**Shri Purshottam Trikamdas:** .... which was not done in fact.

**Shri K. Narayana Rao:** He could not have done, but later on, that very Court, seeing the mood of the nation,

because, after all Judges, as you know, are also a part of the society and though they lag behind the time, they also reflect and adjust themselves with the current thinking of the society, accepted it and had given an interpretation which is in consonance with the society thinking. so, in the light of that experience, do you agree that if we leave this matter entirely to the judiciary, it can adjust itself with the socio-political developments that may take place in this country from time to time?

**Shri Purshottam Trikamdas:** I entirely agree, and, as a matter of fact, the Supreme Court and the other courts have been adjusting themselves to the changing circumstances in this country. They have got to. But Parliament has got to pass laws which are understandable. If they are not understandable, what can a Judge do except to interpret it according to his judgment of the intention of the legislators? With great respect to the legislatures of some States I found that it was impossible to understand what exactly the legislature had meant, but we try to give some meaning to it with due respect to the legislature.

**Mr. Chairman:** The Supreme Court of the United States initially adopted a very rigid attitude to the New Deal programme of President Roosevelt and you know Roosevelt had to give a very sharp warning against constituting itself as a Third Chamber and then they modified their stand. So Judges also sometimes need such warning.

**Shri Purshottam Trikamdas:** I do not think the Judges need a warning whatever might have been the position in the United States.

**Shri K. Narayana Rao:** Panditji also said the same thing in the Parliament.

**Shri Purshottam Trikamdas:** We have got a written Constitution and in interpreting a law, the Judges always adopted this thing that every law has got to be tested by three tests: (1) whether it is within the Constitution, (2) whether it is within the legislative competence of a particular legislature and (3) whether it conflicts with any of the fundamental rights and, therefore, Art. 13(2) will come in. These are the tests which the courts have applied and if the legislation is within the competence and not opposed to the fundamental rights and not opposed to the Constitution, the Judiciary has always upheld that law. In fact, the Judiciary goes out of its way to see whether they can uphold a law rather than strike it down. Over and over again the attitude of the Judiciary, at least in the Supreme Court, is that they try to uphold the law if possibly they can, and only if not, they strike it down. It is not that the judiciary is assuming to itself the powers of a third Chamber.

**Shri Kunta:** Do you agree that the courts can enter into the field of amending the law by constructive legislation as a result of their judgment?

**Shri Purshottam Trikamdas:** If you would kindly look at article 141, you will see that the effect of a judgment is that the law as interpreted by the Supreme Court is the law of the land so it is everywhere. Where the courts have been set up and there is a legislature, ultimately who is to decide what the legislature meant? Therefore, so long as the judgment stands, that is the law of the land.

**Shri Kunte:** I accept the position. My only question was this. Would it not lead to a constructive amendment because the judgments have taken a different view under the impact of the socio-economic conditions?

**Shri Purshottam Trikamdas:** You can call it anything. I am merely talking in legal terms. Also, talking as a constitutional lawyer, I would say that this power has got to be given to these judges. And if we have got

the power to amend, as can be done in many Constitutions, the court decides and the legislature amends. If you have got the power, by all means amend. I am not one of those who say that you should never amend the law because the courts have decided in a particular way. It has been done over and over again and nobody objects to that.

**Shri K. Chandrasekharan:** I think some distinction will have to be made between law which you referred to, the law binding on all courts and the law of the land as stated in article 141. Article 141 states that the law declared by the Supreme Court shall be binding on all courts in the country. I think distinction which is fine but appreciable has got to be made between that wording and law of the land which you have referred to.

**Shri Purshottam Trikamdas:** The law of the land would be made by the legislatures, and in a Constitution like ours, by the various State legislatures and not merely by the Central legislature. Supposing, however, that Parliament passes a law which is beyond its competence, then it is for the Supreme Court to say that that law is beyond its competence. Supposing in the Union List or the Concurrent List the power is not there but Parliament says that it is sovereign and it will pass that law, the Supreme Court and in fact any High Court can say that that is not the law at all and that was usurpation of powers which Parliament did not possess.

**Shri Nath Pai:** First of all, I should like to thank the distinguished witness of today, who in spite of his many preoccupations and indifferent health, has, because of his possionate convictions, volunteered to come and give us the benefit of his views. I have very carefully considered his memorandum, as I am sure the other Members have done. I had the further benefit of hearing Shri Purshottam at his residence telling me how deeply he disagreed. So, all the while, I was very eager to hear him testify before us. But may I submit to Shri Purushottam that whereas one can very much respect some of the apprehensions which he has expressed as being legitimate in a man who has been so deeply concerned with freedom in this country as elsewhere, I am afraid that some of the premises on which he proceeds are fallacious and, therefore, he reaches wrong and untenable conclusions? I would not be so presumptuous as to enter a caveat with him on the many subtle points of law, because I have all respect for his great legal acumen and scholarship.

But respecting his supremacy and sovereignty in the field in which he has specialised all his life, in the first place, may I tell him that it is a little difficult for me to appreciate some of the things which he has stated, though I am prepared to agree to share his anxiety that nothing should be done by us wittingly or unwittingly which may be a handle to those who do not share our faith in individual liberty? I am afraid I am not able to appreciate some of the phrases and sentences which he has used such as that we are trying to get rid of fundamental rights which the councils of Europe, Latin America, Western Europe etc. are trying to give to their people. I do not know how he has reached this conclusion that any such effort is afoot. But I leave it at that. This is perhaps expression of an anxiety by a person who is worried.

But I would like to ask him one thing. 19 judges of the Supreme Court have given their opinion on this vital issue. Of these, 12 have held that Parliament has competence to modify or amend Part III and the fundamental rights incorporated in that part. He has chosen all the while to say that if Parliament and the politicians are given this power, it will mean opening the flood-gates of a totalitarian regime in this country.....

**Shri Purshottam Trikamdas:** I did not use those phrases; I am sorry.

**Shri Nath Pai:** I have carefully noted his words. He has used the words 'flood-gates.'

**Shri Purshottam Trikamdas:** Yes, I had used those words afterwards.

**Shri Nath Pai:** He has stated that if Shri Nath Pai's amendment is carried out, we shall be opening the flood-gates of a totalitarian regime and so on. That was the time at which the chairman also had asked you a question. If he did not mean that really, I would not try to pin him down to that, because I have too great a regard for him. But is he suggesting that it is an irresponsible legislature or that Parliament consists of some new juvenile elements that are trying to do such a thing? We have men of the maturity of Justice Kania, Justice Gajendragadkar, Justice Bachawat etc. He has never quoted any of them. This matter was not agitated once but thrice; once there was a unanimous judgment, on the second occasion it was given by a preponderant majority, and on the third occasion, these judges were five against six. So, 12 judges as against seven have held this. Do these judges not feel concerned about the continuance of fundamental rights and the continuance of the independence of the judiciary and the right of the individual to appeal to them? When it is 12 against 7, is it something so simple as the witness is trying to make out that we have been impatient and all that?

**Shri Purshottam Trikamdas:** This happens over and over again in courts. I remember a decision in England against which I fought, and I wanted the decision of the one judge who agreed with the lower court. In all they were six. In the House of Lords, four judges held the other way, but that is the law. After all there is a way of looking at it. If I may point out, in the second judgment, a caveat was entered by Mr. Justice Mudholkar, Mr. Justice Hidayatullah. Therefore, it is not something new. Many of us were feeling it. But so far as the Supreme Court is concerned, we can only deal with the problem when it arises, whatever our private view may be. Therefore, taking numbers is of no use.

**Shri Nath Pai:** It is not, ordinary numbers, but if refers to judges of the Supreme Court.

**Shri Purshottam Trikamdas:** Even in regard to judges, taking numbers is of no use. In the House of Lords, in which there were five judges, one held one way and four held the other way. In the court of appeal, the number was 3 and originally 2 had held to the contrary. So, there were 6 against 4, and yet the decision of the House of Lords which I believe was right, though I argued against it, stood. Therefore, we must not be mechanical like a judge who said for instance that if two witnesses say a thing it must be believed and if three say it must be absolute gospel truth. There was a judge who used to deal with cases in that manner. So, we have got to look at things not in a purely mechanical way.

In the second case, if I may point out, some points were not argued, as has been pointed out by Mr. Justice Hidayatullah. The Supreme Court ordinarily does not deal with points which are not argued or in regard to which people say that they concede them, which may or may not be right. Personally, I think that the Supreme Court should not permit that kind of thing on questions relating to the Constitution. But that is how the decisions are rendered. This is the first time, if I may say so, when the question has been argued at great length by various lawers. The full court was sitting and there they had the benefit of those arguments. On that, the majority came to this conclusion with which I say I am in agreement. Therefore, the argument of numbers is no good.

**Shri Nath Pai:** Ultimately, you will realise that this is a question of preference. We have a variety of eminent jurists giving their opinion in one way, some other body giving its opinion in another way. So it is a question of one not being better than the other, but of preference.

**Shri Purshottam Trikamdas:** No.

**Shri Nath Pai:** How? You mentioned six against five.

**Shri Purshottam Trikamdas:** It has been my view long before this judgment. I am merely reiterating my view.

**Shri Nath Pai:** That is true. I have heard very many serious things. You must allow me to deal with the 'floodgates' and all that. It will be noticed that art. 368 does not mention fundamental rights. The Constitution which you, rightly I thnk, praised very highly has been very cautious, very prudent and full of foresight. If they wanted to exclude fundamental rights from the ambit of 368, would the constitution-makers, have failed to state it categorically?

**Shri Purshottam Trikamdas:** Because they are provided for in 13(2).

**Shri Nath Pai:** It will be noticed that art. 868 does not mention fundamental rights. The proviso to that article deals with matters pertaining to States and therefore require ratification by them. That is the only proviso. If the constitution-makers wanted to see that the articles in Part III are excluded from the scope of this, would they not have taken the ordinary precaution of adding a proviso to 368?

**Shri Purshottam Trikamdas:** So far as 368 is concerned, if you look at the proviso, it deals with various matters which are concerned with the States, the President's election and so on and so forth. It would have been the easiest thing for the constitution-makers to see that fundamental rights, notwithstanding anything, can be amended here. But apart from that, personally I think it would be very surprising, when you deal with comparatively small things where you say that where the States are concerned the procedure laid down in the proviso must be followed, to say that fundamental rights, which concern every individual in this country, can be amended at the sweet will of the majority in Parliament which, after all, is the central legislature. Here individuals are concerned and States are concerned and that is why if you look at it dispassionately, art. 13(2) is deliberately there saying, any law which is contrary to art. 13(2) is void; that is the only way in which you can safeguard fundamental rights—there is no other way.

**Shri Nath Pai:** Shri Triloki Singh has drawn your attention to the language of 368. The words are 'Any amendment of this Constitution..... which, I think, if languages has any meaning, means any part of this Constitution. I know you hold very strong views on the question, but I do submit to you that had they wanted that Part III should be excluded, they would have taken care to say so in 368. It is not a question of the legislature arrogating to itself the right to amend. But among jurists themselves there are two schools of thought about the meaning of constituent law and legislative law. This has been a division of opinion not introduced by the legislature but by the judges. This distinction between law and constituent law is not something which we are trying to draw, but this school of difference has been created by learned judges and jurists.

**Shri Purshottam Trikamdas:** I agree, so far as 'floodgates' is concerned. I would like you to consider this dispassionatey. By your amendment you claim to give powers which the Supreme Court has said is to be found somewhere else. They said this is only a procedure. Assuming you give the power....

**Shri Nath Pai:** You will give me the fundamental right of disagreeing with you, with anybody else or with the Supreme Court.

**Shri Purshottam Trikamdas:** As I was saying, by your amendment you are giving that power under that article to amend any provision of the Constitution. Taking that power, tomorrow a majority in Parliament under 368 says 'we will get rid of 32, 14, 19.' You are giving that power for a bare majority without consulting even the States, leave aside the people, leave aside referendum. You are giving that tremendous power and leaving it to the whim of the government for the time being to tinker with the rights which, as you yourself have said, the individual should have, the protection of certain rights. All that I am saying is that you are giving power and that is what I meant by 'floodgates', nothing more.

**Shri Nath Pai:** May I draw your attention to art. 124 which says that there shall be a Supreme Court of India? This is not in Part III. Don't you think the existence of an independent judiciary is a pivotal point in a democracy? Just because this article is not entrenched, is it any the less important than the articles in Part III, I mean the continuas the articles incorporated in Part III. I mean the continued existence of the Supreme Court of India. But it is not in Part III. Is this not a very vital thing, the pivotal pillar of or whole structure of democracy. Yet it is not in Part III.

**Shri Purshottam Trikamdas:** Look at 32.

**Shri Nath Pai:** If we abolish the Supreme Court, you can take recourse to it.

**Shri Purshottam Trikamdas:** So long as 32 is there you will not be able to abolish the Supreme Court.

**Shri Nath Pai:** I do not know about that.

**Shri Purshottam Trikamdas:** To abolish the Court and then to approach it will be a contradiction in terms.

**Shri Nath Pai:** My only point is that rights which are as vital as those in Part III are there in other parts of the Constitution and are not incorporated in Part III. They are not at the mercy of anybody.

**Shri Purshottam Trikamdas:** I am sorry you are misunderstanding it. Every part of the Constitution would be sacrosanct, and there are many important things in the Constitution. For example, Parliament. But the fundamental rights provided in the Constitution are the inalienable rights of the individual. They have been provided in Part III and no more. As regards the rest, I take it that no person in his senses will say 'we will abolish Parliament tomorrow because we have got the right to do so under 368.' No person would say 'we will abolish all the courts' excepting by revolution. Therefore, I am only protecting the rights of the individual which should be protected and which should be in great danger if you take away the protection afforded to the individual and the minorities as Raja Rameswar Rao has pointed out. You cannot so easily get rid of the Supreme Court and High Courts. There is some provision.

**Shri S. M. Joshi:** If Shri Nath Pai can abolish the Supreme Court under article 368, it means he has brought about a constitutional revolution!

**Shri Purshottam Trikamdas:** That is so. You will not be elected again to Parliament. No Parliament will be elected if they abolish the Supreme Court or try to abolish Parliament.

**Shri Nath Pai:** I am grateful to you for saying that because it brought me to the point which I have in mind that the ultimate sanction of the representatives of the people is not a body of learned Judges, but the consciousness of the people. Written Constitutions have never given freedom to

the people unless already those freedoms had become part and parcel of the life of the people. So, even where there is no Constitution giving freedom, people enjoy freedom, and even where there are written Constitutions, people not being mature enough do not enjoy them. Ultimately, the determining factor therefore is the consciousness of the people of India. This is what you said?

**Shri Purshottam Trikamdas:** I will add one word to that, that today so far our Constitution is concerned, it has guaranteed certain rights to the individual. Do you want them to be removed by an amendment of part (1) of article 368, because the States are concerned, every individual is concerned. I am not talking of this Parliament. I am not interested in this Parliament. I am looking to the future, 10, 15, 20 years ahead. Do you want in a paradise where there are no individual rights? You want to give power to Parliament, some Parliament, may not be this Parliament. I do not expect that this Parliament will tinker with it except in respect of property rights, although I think that under article 31A as it stands you can do anything so far as property rights are concerned.

**Shri Nath Pai:** I want Mr. Mulla's assistance on a point. Mr. Justice Wanchoo in a recent case, the details of which the Secretariat should have got for us by now, has indicated that there is fresh thinking on the part of the highest authority already on the points decided in Golaknath's case. Is that not so?

**Shri A. N. Mulla:** In a recent decision they have certainly made a point that "law" under article 13 (2) does not cover all laws, and that the laws made under the emergency by the President are not to be included in those laws which are to be covered by article 13 (2).

**Shri Purshottam Trikamdas:** That is because of articles 358 and 359, nothing else. Under article 19 freedom is suspended, it is because of that.

**Shri S. M. Joshi:** That means we are living in a paradise for the last five years without any fundamental rights.

**Shri Purshottam Trikamdas:** Only article 19 has been suspended, but article 14 remains.

**Shri S. M. Joshi:** But article 19 is the main thing.

**Shri Purshottam Trikamdas:** We are living unfortunately in that paradise, and many things have been done which should never have been done.

**Shri Nath Pai:** Should the Constitution of India therefore go on changing according to who at any time happens to be the Chief Justice and constitutes the majority in the Supreme Court?

**Shri Purshottam Trikamdas:** Should the Constitution of India keep on changing because the majority at the Centre keeps on changing? That is what you have got to consider. I beg of you to look at it from that point of view.

**Shri Nath Pai:** I very much respect the right of the Supreme Court, and I do hold that the Supreme Court, and supreme in the matter of interpretation, but the question Mr. Kunte asked and was reiterated by Mr. Chandrasekharan, is my final question to you. Whereas judicial interpretation sometimes may be coming to a point where it appears to be an amendment, should any court undertake the responsibility of legislation on itself?

**Shri Purshottam Trikamdas:** Let us not mix up amendments to the Constitution and amendments to the fundamental rights. You can amend any part of the Constitution under article 368 and the proviso if it is necessary, nobody is stopping you from that, but the Constitution itself lays down a ban on touching the rights which do not harm anybody.

**Shri Nath Pai:** There is a ban according to some Judges of India.

**Shri Purshottam Trikamdas:** Perfectly true. That is my view that there is a ban, and I think it is a good ban which the Constitution has imposed.

**Shri Nath Pai:** Do you agree that upto the 27th February, 1967 the Constitution of India as we understood it and as this understanding was confirmed by the Supreme Court was one thing, and the Constitution of India as from the 27th February, 1967, i.e. after the judgment in Golaknath's case is a different thing?

**Shri Purshottam Trikamdas:** Yes, it has been properly interpreted. It may take years for a proper interpretation.

**Shri Nath Pai:** That means the Constitution has been, by a process of judicial interpretation, changed. May I submit to you that I am trying to put back the Constitution as it was, I am not at all trying to amend it.

**Shri Purshottam Trikamdas:** That is your view. I do not agree. I am not quarrelling with your view.

**Shri Nath Pai:** There are very eminent jurists, it is not fair to mention their names, who agree that this is the position.

**Shri Purshottam Trikamdas:** You are taking a view which I may take if I was a technical lawyer, but I look at it from a much wider point of view. More than a lawyer, I have been a politician all my life believing in individual freedom. So, my view is not a purely technical one. It is possible to argue one way or the other, but my view is to look at it from not merely at mechanical point of view.

**Shri Jairamdas Daulatram:** I am not going into the legal or other aspects of this particular matter, but there was one question put by Mr. Chandrasekhar. I did not properly catch your reply to that. Because I hold very definite views on that particular matter, I want a clarification from you.

The question that has sometimes arisen in the course of the discussion is whether the Parliament is not more representative than the body of men who made and framed the Constitution. As I look at it, Parliament means the Parliament of the day, and the Parliament of the day passes certain legislation by a majority, that majority is more or less under the control of the party in power, which means the Government in power. So, the question is whether the Government of the day should have the right to make changes in the fundamental rights and take away or abridge some of them.

With regard to the comparative representative character of the two, the Parliament of the day is elected on certain issues and on the mind of its members the events of the day have their influence. With regard to the Constituent Assembly Members, they represented leadership at the national level, State level and district level and 30 years of struggle for freedom. Arising out of that, there came a body of men to make the Constitution in the best interests of the country, and then, with the experience we had under the British Parliament, they framed a Constitution; and when they framed a Constitution, they framed it in the context of the making up of the nation. The motive of that body of men was to lay down a Constitution for the future and the fundamental rights, with the backing of million of men at that time who, under the then leadership, had gone to the utmost limit of suffering. The question is whether that body of men at that time would not be considered to be more representative of the will of the people, especially when the decision was arrived at not only by a consensus but more or less by getting an agreement of all the elements in that body, than the will of the Parliament of the day.

**Shri Purshottam Trikamdas:** It depends on what you call 'representative'—whether it is representative in the sense that they get the votes at a certain election or otherwise.

**Shri Jairamdas Daulatram:** One is representative in the sense that they get the votes at a certain election; the other is representative of the mind of the nation, the make-up of the mind of the nation. One represents the will; the other represents the vote.

**Shri Purshottam Trikamdas:** If you count the heads, perhaps the Parliament as it exists is more representative. But, as you have pointed out, if you look at the aspirations of the country which were expressed by the cream of leadership not only of the Congress but of other parties, then, from that point of view, the Constituent Assembly was more representative. I should have pointed out earlier that Mr. Justice Hidayatullah, in his judgement had pointed out that right from the time of the Home Rule League, the Nehru constitution was framed because of our experience with the British, when we were asking for it, or, if I may say so, howling for it, for fundamental rights which can be enforced by the courts. And that is exactly a thing which was taking that background in view, when the British did tamper with our rights. The Constituent Assembly, in its wisdom, has made the fundamental rights inalienable and unamendable in terms of article 13(2). Therefore, you must look at the background of this country, what had happened before, and not merely say, "I have a right and I should have a right and I am sovereign". That does not seem good, and that is what is argued now over and over again with which I disagree, with the utmost respect.

**Shri Hanumanthaiya:** The rules of interpretation also contemplate ascertaining the intention of the legislature and the framers of the Constitution. I suppose that is right.

**Shri Purshottam Trikamdas:** I agree.

**Shri Hanumanthaiya:** Have you looked into the debates of the Constituent Assembly and could you find out any passage or anybody raising an objection that this particular portion, the article of the Constitution, should not be subject to amendment by subsequent parliaments?

**Shri Purshottam Trikamdas:** There are opinions which I have seen expressed in the debate, but they are opinions of two or three individuals however eminent they may be, and under the rules of interpretation, it has always been recognised that you have to look first to what has been expressed, whatever any individual might have contemplated or thought of. The consensus of the Constituent Assembly is here. I am not interested if Dr. Ambedkar or the then Prime Minister, Jawaharlal Nehru, held a particular view. I am just not interested in that. After all we are not ascertaining their views; we are not interpreting this great document from the opinions of two individuals.

**Shri Hanumanthaiya:** Nor do I hold that the opinion of one or two individuals is sacrosanct. The point is, you say that such an objection to subsequent amendments was raised. We are talking impersonally, and according to the Constitution. As you know, I am not one of those persons who are interested in merely mentioning one name or the other. I merely want to know whether such an objection was taken by anybody on the floor of the Constituent Assembly. Have you found any such objection?

**Shri Purshottam Trikamdas:** Objection to what? I have no followed.

**Shri Hanumanthaiya:** Here is a point of view—let me not say 'objection'—which said that Part III of the Constitution cannot be amended by

subsequent Parliaments so that there is a difference in the matter of amending the Constitution—certain parts might be amended and certain parts cannot be amended. Was any such opinion or point of view expressed on the floor of the Constituent Assembly?

**Shri Purshottam Trikamdas:** I am afraid I have not read all the debates of the Constituent Assembly. I have looked through here and there and I have not come across any such thing.

**Shri Hanumanthaiya:** I was a member of the Constituent Assembly. So far as my knowledge goes, nobody took that point of view. Even if it was taken, it is good that if it has been taken even by a minority and had been overruled by the majority. Don't you think that it was the intention of the Constituent Assembly, what is called the founding fathers of our nation, that no such distinction should be made?

**Shri Purshottam Trikamdas:** They should have expressed it in a different way. I take it that the ultimate consensus of the Constituent Assembly was expressed in article 13(2).

**Shri Hanumanthaiya:** Was it raised in the Constituent Assembly and even if it was raised don't you think the founding fathers had no such distinction to make as the one you are making?

**Shri Purshottam Trikamdas:** I do not think each individual expressed his opinion on this. Two or three individuals expressed their opinions and nothing was said. If from that you are taking that everybody agreed, I cannot quarrel with that. But the ultimate consensus of the Constituent Assembly was expressed in article 13 (2).

**Shri Hanumanthaiya:** There is what is called professional propensity. Parliament think that they are sovereign. Courts think that they are superior in wisdom and judgement and so on. Don't you think that many of these interpretations proceed out of this subjective feeling?

**Shri Purshottam Trikamdas:** If you had been in the Supreme Court as I had been for 12 years, you would not say what you are saying now. There is no propensity on the part of the judges or lawyers to say that Parliament is no good. All that we say is, Parliament has certain powers, but it is not completely sovereign. The rights of the individual as it arose in the privilege case have got to be conceded even by Parliament and ultimately when there is difference of opinion, it has got to be settled by somebody, which in every democratic constitution, is the court of law.

**Shri Hanumanthaiya:** Maybe if I were in the Supreme Court, I would have taken a particular view and being in Parliament, I take a particular view. But we have to take an impartial and objective view of things and not a subjective view. In private discussions and political discussions, I find certain classes of people having a subjective feeling all the time.

**Shri Purshottam Trikamdas:** I have nothing against the Parliament; I have got the g eatest respect for that body. But when that body tries to arrogate to itself powers which it has not got, I wil' get up and say, "You have not got that power."

**Shri Hanumanthaiya:** I hope you used the word "arrogate" in the legal sense?

**Shri Purshottam Trikamdas:** It is an ordinary dictionary word.

**Shri Hanumanthaiya:** If it is a dictionary word, why do you think that we are full of arrogance?

**Shri Tenneti Viswanatham:** There is no arrogance in arrogation.

**Shri Purshottam Trikamdas:** Arrogation is a purely dictionary term, which can be used anywhere in the sense of claiming without justification.

**Shri Purshot am Trikamdas:** in the legal profession take the extreme view that Parliament is not sovereign. Much of the criticism flows from that professional point of view.

**Shri Purshottam Trikamdas:** I am more of a politician though I am a lawyer. Therefore, I have got certain views of what an individual should have in this country, if we are to have a democracy. Therefore, there is no question of taking a subjective view or holding Parliament in disrespect. Far from it. Every democracy has got to accept the Parliament and various other legislative assemblies. Suppose parliament passes a law which deals with a state subject. You will be the first in Mysore to object to it, and say "Parliament has no power; what is the sovereignty of Parliament?" In a federal Constitution, nobody is sovereign; ultimately the people are sovereign.

**Shri Hanumanthaiya:** Is it your view that the fundamental rights part of the Constitution should never be subject to any sort of amendment either by way of expansion or contraction?

**Shri Purshot am Trikamdas:** I would answer it by saying, look at this part. Do you want to take away article 13 or 16 or 32? What is it that you want to take away except that article 31 is something which should not be there? To that, the answer is, already article 31A is there and the Supreme Court has said, it will remain. I ask those who say that this needs to be amended, what is it that requires amendment, because this is nothing but the bare minimum of invidual rights which are to be found wherever written constitutions are there; they are now trying to incorporate them and make them justiciable.

**Shri Hanumanthaiya:** I am not asking your opinion about the present rights. Is it your view that this chapter should never be amended?

**Shri Purshot am Trikamdas:** You can add to the rights under article 13(2). But I do not see any individual rights which need to be added.

**Shri R. P. Sinha:** You said in your opening remarks that if this amending Bill of Mr. Nath Pai is adopted by Parliament, we cannot be a signatory to the Human Rights Covenants which had been adopted by the General Assembly this year. I cannot understand how he makes this point. I would like him to clarify this point. As far as I remember the Human Rights Covenant is merely an expression of an ideology which every country should endeavour to adopt; there is no time limit fixed in the Covenant that as soon as you put your signature to the Convenant you must accept each and every article of the Covenant and put it in your Constitution or that you must grant each and every right mentioned in the Covenant to the citizens of the particular State. It merely says that that is an ideology which every country should endeavour to give to its citizens.

There is also a provision of the reporting system. The reporting system provides that the Commissioner of Human Rights will report to the General Assembly as to what was the state of human rights in every country which had signed the Covenant; nothing more than that. I was a member of the Human Rights Committee last year and they all said that what India has granted as human rights to its citizens is far more or goes far beyond the Covenant itself.

**Shri Purshottam Trikamdas:** I will not agree. Please read the Covenant.

**Shri R. P. Sinha:** I have read it. You may not agree with this. However, the point is: Even if we accept

the amendment of Shri Nath Pai, how will it prevent us from signing that Covenant? There are many countries, practically more than two dozen countries, who have not given as much rights to their citizens as we have given. They also can sign it and it is not compulsory on them to give those rights here and now.

**Shri Purshottam Trikamdas:** I may refer you to paragraph 7 of my memorandum. There is in that very Covenant sub-article (ii) of article 2 which wants the States to adopt such legislation or other measures as may be necessary which will give effect to the rights recognised by the Covenant. Once you sign a treaty, so far as British jurisprudence is concerned which we follow, the treaty by itself does not become the law of the land as in the United States but you have got to give effect to it by legislation which has been provided by the Constitution itself. Therefore once you sign a Covenant like that, it is expected that you will give effect to it by legislation.

**Shri R. P. Sinha:** I agree with you. You have stated that once we adopt this amendment, we will not be in a position to sign that Convenant.

**Shri Purshottam Trikamdas:** I am sorry, you have completely misunderstood me. I never said that.

**Shri R. P. Sinha:** I am sorry then.

**Shri Purshottam Trikamdas:** When the whole world today is wanting to adopt human rights—these are individual rights; these are not group rights or social and economic rights—when the whole world today is wanting that this should be done and minimum protection should be given, should we attempt to put power in the hands of the Central Legislature of India to abrogate them? That has been my argument.

**Shri R. P. Sinha:** That is another matter. What I say is that even if we pass this amendment, we will be perfectly justified and entitled to sign that Covenant.

**Shri Purshotam Trikamdas:** If you sign the Convenant, you will have to uphold all the fundamental rights plus article 32; you will have to do it. That is all I am saying.

**Shri Nath Pai:** The sanctity of those rights has nothing to do with our signing the Covenant.

**Shri R. P. Sinha:** I am not a constitutional lawyer nor am a jurist. As I said earlier, I have great respect for the learned witness. I have listened very carefully to what he has stated and have also read his memorandum. But as a student of socialogy I cannot imagine a state of affairs where we have to live in a static society. In my opinion the whole concept, even of fundamental rights, in a dynamic society keeps on changing and what is important is that the will of the people with regard to fundamental rights should be given expression to both in the Constitution and in the law of the land. If we are to accept what the learned witness has been saying, we will have to have a static concept even of fundamental rights. How are we going to get over that? The whole concept of fundamental rights may change in 10, 15 or 20 years and we must have some provision in our Constitution by which we could keep on changing that concept of the fundamental rights in our constitutional law. If he stops that from happening, I am afraid, I would not like to live in such a country or in such a society.

**Shri Purshottam Trikamdas:** You will succeed in doing exactly the opposite. If as a sociologist, you think that all citizens have freedom of speech and expression, would you like to take it away? As regards your point about the static concept, the subsequent part in article 19 itself makes it clear that reasonable restrictions can be imposed on these rights. Reasonable restrictions would depend from day to day, from age to age. If you accept a diffe-

rent ideology, these rights can be just scored out. That is all that I say. What is it in these rights which you do not want? If you want to expand them, by all means expand them and put them in the Chapter so that they cannot be touched; but, otherwise, you can give effect to many of the fundamental rights. The directive principles, for example, cannot be enforced in a single day. That is why the Constituent Assembly in its wisdom put it in a separate chapter. You can give effect to them by your laws. But in giving effect to those you cannot say that you are going to take away freedom of speech. That is exactly what the Supreme Court has said in many cases, namely, that the Directive Principles must not take away or abridge the basic fundamental rights. These are basic fundamental rights; there may be others, but so far as the two Covenants are concerned, which have been adopted by the United Nations, they cover the fundamental rights which are to be found in our Constitution as well as in the Directive Principles.

**Shri A. P. Chatterjee:** We have taken a lot of time already and I will not bother you with many questions. But I would ask you a few questions.

Would you or would you not agree that Hitlerism, to which you have referred in the course of your evidence, in other words, fascism, really begins when we try to deprive the elected assembly of powers and ultimately when we abolish it?

**Shri Purshottam Trikamdas:** I do not agree. Take the Communist Constitutions.

**Shri A. P. Chatterjee:** I am not asking you what is the Communist Constitution.

**Shri Purshottam Trikamdas:** I am answering your question.

**Shri A. P. Chatterjee:** My question is simply this: Would you or would you not agree that fascism or Hitlerism begins when we begin to take away the powers of the elected assemblies? If you do not agree, that is a different thing.

**Shri Purshottam Trikamdas:** No, on the contrary, if elected Assemblies had certain entrenched clauses which could be justiciable, Hitler would have found it difficult to say Parliament has given him those powers to abrogate the individual freedom of association, which he did. The first thing he did was to abolish trade unions. He could not have done it if such a clause, as is found in article 19, was there in the Weimer Constitution. Then, he could not have done it easily. Of course, if there is a revolution you can abrogate or tear up everything. Also, I want to point out that, so far as individual liberties are concerned, it is my view—that is why I mentioned the Communist Constitutions which I have studied—they have got all beautiful fundamental rights, but they are not enforceable. Therefore, our fundamental rights have been made justiciable under article 32 and 226 which is another wider article. That is why I said these are the basic individual rights which ought to exist in any democratic society.

**Shri A. P. Chatterjee:** I am not merely on that point of your ideas about Communist Constitutions. That is not the issue here. I am asking about our Constitution. I am not concerned with Hitler; I am concerned with Hitlerism. Do you or do you not agree that Hitlerism in Germany really started when the right of Reichstag was abolished and not when it was in session?

**Shri Purshottam Trikamdas:** Hitler, having got the power under the Weimer Constitution, afterwards brought out what he thought was a revolution, in derogation of the Constitution.

**Shri A. P. Chatterjee:** Do you or do you not agree that dictatorship really

is another form of giving the go-by to the wishes of the elected representatives of the people?

**Shri Purshottam Trikamdas:** I would not agree with it. Dictatorship does not recognise the rights of anybody at all, like Hitler, like Stalin who executed 11 million people. That is dictatorship. Nobody can question it. Even Mr. Khrushchev could not question it.

**Shri A. P. Chatterjee:** Is it, therefore, your thesis that dictatorship can develop even when there is an assembly, or elected representatives of the people?

**Shri Purshottam Trikamdas:** Of course, it can. What is the difficulty? Is there not an elected Assembly in every Communist country? Even during Stalin's regime, the terrible regime, there was an assembly. But he disregarded it.

**Shri A. P. Chatterjee:** The difficulty is that you are too much exercised by the bogey of Communism, which is not just there.

**Shri Purshottam Trikamdas:** I am not exercised by that bogey, though that bogey is there. I am not imagining it.

**Shri A. P. Chatterjee:** That is the whole trouble. You are exercised by that bogey.

**Shri Purshottam Trikamdas:** Even if you want to talk of Stalinist dictatorship, I do not want to. That is what I am saying.

**Shri A. P. Chatterjee:** With great respect to you, I am not really asking you a question about Communism. I was asking certain questions.

**Shri Purshottam Trikamdas:** I have answered those questions because I am a keen student of that unfortunate development.

**Shri A. P. Chatterjee:** I am not going to be drawn into a discussion on this.

**Shri Purshottam Trikamdas:** Since the question was asked, I answered it. Otherwise, I am not interested in going into it.

**Shri A. P. Chatterjee:** Of course, I hope you will not take it that I am in any way not respectful to your great legal acumen, constitutional ability and other qualities.

**Shri Purshottam Trikamdas:** You can cut "respect" out.

**Shri A. P. Chatterjee:** I will not, even if you ask me. I will continue to have respect for you.

**Mr. Chairman:** Because both of you are in the same profession.

**Shri A. P. Chatterjee:** A time may come when some of the provisions of the Constitution, including the provisions in Part III regarding the right to property, may act as a fetter upon the will of the people. If that time comes, then, would you say that the fetter can be broken only by a revolution and not by a constitutional amendment? Would you agree to that and welcome that?

**Shri Purshottam Trikamdas:** I say that the fundamental rights, as they stand, are no fetter to any legislation regarding property rights.

**Shri A. P. Chatterjee:** I will put it to you explicitly. Suppose the time comes when the people of India, well, get this opinion among themselves that there should be no private property among the people, as far as the ownership of the instruments of production is concerned, if that situation comes, and there is a question of amending article 19(1)(f) and article 31, then, either they can amend it or they cannot amend it. If they cannot amend it, there is only one way out: that is to say, to break the

fetter the people must go in for a revolution. Now, is it your opinion that to break the fetter they must go in for a revolution?

**Shri Purshottam Trikamdas:** I think it is necessary in a democracy to have these rights. If you do not want a democratic constitution, then it becomes a fetter. It may be that a different ideology will consider this a fetter. But I do not consider it a fetter. Even under different ideologies property rights have not been abolished. To say that everything should be nationalised is nothing but State capitalism, if I may say so with the utmost respect. So, if you want to create State capitalism, where everybody is the servant of the State, dependent on the State, then certainly it would be a fetter, I agree, but such a thing will happen only with a revolution; it will not happen so long as there is a democratic constitution. When people accept democracy, such a thing will not happen.

**Shri A. P. Chatterjee:** Would you not agree that democracy means, in a great measure, the will of the preponderant majority of the people?

**Shri Purshottam Trikamdas:** Democracy means something much more, not only this.

**Shri A. P. Chatterjee:** It means this also.

**Shri Purshottam Trikamdas:** It means a society in which every individual is respected and every individual's right is respected. Democracy does not mean that the majority can go as a steam-roller and say "we will not give any right to anybody".

**Shri A. P. Chatterjee:** Supposing...

**Shri Purshottam Trikamdas:** I am not supposing; I am talking facts. I have tried to understand democracy. My view of democracy is that, by and large, it is government by consent, where you have got to respect the minorities and their rights.

**Shri A. P. Chatterjee:** You will agree that we are wedded, as far as the Indian people are concerned, to a socialistic pattern of society.

**Shri Purshottam Trikamdas:** I want to add "democratic socialism".

**Shri A. P. Chatterjee:** Very well "democratic socialism". Supposing ten years hence, in order to give effect to this democratic socialism, the people of India, through their representatives in Parliament, want to take away the factories and workshops from their present owners so that the standard of living of the people may be raised, and in that way there is a necessity of amending articles 13 and 19 for taking away the rights, would you say that taking away of those rights would be undemocratic?

**Shri Purshottam Trikamdas:** Yes, I would say that. I would not like to live in a country which has State capitalism in which I am a slave of the State. If that comes about, then, of course you can tear up this Constitution. There is no difficulty about that.

**Shri Nath Pai:** It is all theoretical.

**Shri A. P. Chatterjee:** Of course, this is a little theoretical.

**Shri Nath Pai:** Shadow boxing about communism.

**Shri Purshottam Trikamdas:** When he is trying to tell me that Communism is the best ideology, I am too old to accept it.

**Shri A. P. Chatterjee:** You mentioned Communism thrice during your evidence even before I asked a question. So I wanted to disabuse your mind of the bogey of Communism. Now I am going to ask a very delicate question.

**Shri Purshottam Trikamdas:** You can ask any question.

**Shri A. P. Chatterjee:** Do you or do you not agree that, as far as recruitment to the judiciary is concerned, there should be or there should have been something in the Constitution by which people from all classes of society are recruited to the judiciary so that the Constitution may get a proper interpretations?

**Shri Purshottam Trikamdas:** If you want judges and lawyers, then you must have lawyers. Representation to different classes of society I do not understand. I know, it exists in countries which call themselves socialist countries—I will not use the other word. There are other modes of recruitment like election.

**Shri A. P. Chatterjee:** You told us in the course of your evidence that even in the socialist countries they respect private property in their Constitutions.

**Shri Purshottam Trikamdas:** In the Communist countries. If you do not mind, I might make a distinction between socialism and communism. Although socialist countries have adopted the word communism, communist countries have adopted the word socialism because it sounds nice; but I do make that distinction and must definitely make that distinction.

**Shri A. P. Chatterjee:** That is not my question. My question was whether I understood you aright when you said that even in Communist countries the Constitutions do protect the private right to property.

**Shri Purshottam Trikamdas:** Yes.

**Shri A. P. Chatterjee:** I have got with me the Constitution of the USSR and you can look at it.

**Shri Purshottam Trikamdas:** I do not want to look at it.

**Shri A. P. Chatterjee:** Well, you may not want to look at it, but there is no provision in it protecting private right to property.

**Shri Purshottam Trikamdas:** There is private property in every Communist country.

**Shri A. P. Chatterjee:** That is not my point. My point is that in the Constitution of the USSR private right to property is not protected.

**Shri Purshottam Trikamdas:** I have not carefully studied the USSR Constitution.

**Shri Tenneti Viswanatham:** Summarising all that has gone so far now, your view is that the Constitution is always opposed to a certain concept of society, that our Constitution embodies certain concepts which the Constitution-makers, who were the freedom fighters, according to Shri Jairamdas Daulatram.....

**Shri Purshottam Trikamdas:** Were you not one them?

**Shri Tenneti Viswanatham:** I was not there; I was only in the Assembly.

**Shri Purshottam Trikamdas:** Were you also not one of the freedom fighters?

**Shri Tenneti Viswanatham:** Of course, we were all freedom fighters.

Our Constitution embodies those concepts and against the background of our aspirations certain things were embodied in this Constitution. This Constitution does not concentrate the sovereignty in any particular organ or body but it protects individual liberties, it institutes the judiciary, it gives a legislature, it gives a Parliament and each in its own field is sovereign, all subject to the Constitution. That is your idea and, therefore, what are called the fundamental rights are not amenable to amendment under article 368 or any other article. Your view is that even if we take the power we ought not to venture to make an encroachment upon the very minimum which any individual should have. You also

think that the present provisions are adequate even if we want to change the society. Can we introduce Communism, for example?

**Shri Purshottam Trikamdas:** You can do it outside this Constitution.

**Shri Tenneti Viswanatham:** That is my complaint. Suppose, I want to be a Communist, I must be able to utilise this Constitution to introduce Communism.

**Shri Purshottam Trikamdas:** My view is that it is a foolish democracy which will permit itself to be destroyed. If you want to introduce Communism through this, this Constitution will not permit you, as it stands.

**Shri Tenneti Viswanatham:** Suppose, I want some power to change it.

**Shri Purshottam Trikamdas:** If you think so, you can have the power. Parliament may try. I am not saying that Parliament cannot try.

**Mr. Chairman:** Do you consider that the theory of Communism is so rigid? Somebody having that view may attempt it through democratic instruments. Is it not possible?

**Shri Purshottam Trikamdas:** And tear off those instruments at the end of it.

**Mr. Chairman:** Past analogy in history is not always a good guide. Whatever happened in the past somewhere is not a good guide. With the changed situation and the evolutionary process, as we see it, a liberalising process.....

**Shri Purshottam Trikamdas:** I do not see it.

**Mr. Chairman:** Is it not possible with that; is it absolutely so rigid?

**Shri Purshottam Trikamdas:** May be; we will not argue about it.

**Shri Tenneti Viswanatham:** You say that even if we want to legislate on all the subjects mentioned in Part IV of the Constitution, Part III will not come in the way.

**Shri Purshottam Trikamdas:** What the Supreme Court has said, and very rightly, is that while legislating under Part IV you are entitled to legislate—in fact, you are asked to legislate—but you cannot legislate and say that no individual will have freedom of speech.

**Shri Tenneti Viswanatham:** I agree.

**Shri Chitta Basu:** That will be a contradiction.

**Shri Purshottam Trikamdas:** No; there is no contradiction. One is fundamental, the other is directive.

**Shri Tenneti Viswanatham:** So, all the rights and aspirations mentioned in Part IV can be legislated upon without in any way conflicting with the provisions of Part III; therefore, we are quite safe and this amendment is not necessary. This is what you ...

**Shri Purshottam Trikamdas:** Yes. You can legislate about everything in the Directive Principles if you have got the money.

**Shri A. N. Mulla:** I am sorry, I was not present when you gave your evidence before this Committee, but I have gone through your memorandum and I have listened to the answers which you have given to the various questions which have been put to you. I have also heard you when you were saying that you were not only a constitutional lawyer appearing before us but were also a politician and that you also have human values in your mind. It is in this background that I want to put a question to you which is of the basic juristic rights of human beings.

The question that I put to you is: Do the people of a country have the right to tie down their coming generations to a particular stand and take away their rights by saying that

you wear certain things for all times as the Chinese shoe?

**Shri Purshottam Trikamdas:** I think, this is an argument which goes in a circle; that is why I have tried to emphasize what is the fundamental right. This is to be found in the universal declaration human rights. We have tried to give effect to it, only to the basic rights of the individual, which are to be found in Part III. If future generations say that there should be no freedom of speech, let them say it and we will think about it at that time; for the moment we want freedom of speech.

**Shri A. N. Mulla:** You have referred to the fundamental rights but I was only asking a basic question about the process of evolution and whether the people can at any stage take away the rights of generations which are to come or whether the generations to come have the same rights which the people who framed the Constitution had.

**Shri Purshottam Trikamdas:** They will not willingly take away the right of freedom of speech, let me tell you that.

**Shri A. N. Mulla:** That does not answer my question. My question is whether they can take away their rights.

**Shri Purshottam Trikamdas:** Anything can be done. Everything is possible. The question is what do we want to be possible. I am not going into the possibility. Even, as somebody said, it is possible that the pig can fly. But can he fly?

**Shri A. N. Mulla:** We are talking at cross-purposes. The question is, particularly, put about the rights of the people.

**Shri Purshottam Trikamdas:** I have answered that. If the people want that kind of a thing, they can, by all means, have it. They can live as slaves.

**Shri A. N. Mulla:** Therefore, the right of the people remains. Then, the only question which is to be considered is, how are the people to express themselves if they want a change in the existing conditions?

**Shri Purshottam Trikamdas:** If the people want a right to abrogate the fundamental right of individual freedom, I do not think, they will ever do it.

**Shri A. N. Mulla:** I am not referring to the freedom at all. I am talking of the basic principle, whether the people have a right to change or not.

**Shri Purshottam Trikamdas:** Theoretically speaking, anybody can have any right.

**Shri A. N. Mulla:** Theoretically, they can do so.

**Shri Purshottam Trikamdas:** At the same time, the mere doctrine is not enough. We are dealing with human beings; we are dealing with society. Therefore, theoretically, people might say, we want to become slaves. I do not think any people will ever willingly say that.

**Shri A. N. Mulla:** I am not going into that. I am going into the basic principles.

**Shri Purshottam Trikamdas:** I am also going into the very basic principles.

**Shri A. N. Mulla:** Is it a fact or not that we have developed a conception of the common wealth of humanity? If there is such a thing as the common wealth of humanity in the whole of the world, then our values might change and the integration of the individual with the society might also change.

**Shri Purshottam Trikamdas:** Anything is possible. I know what I want and I know what our people want. They do not want to live in paradise in which they have no rights. If somebody wants to do it, very well, let us hope, it does not happen and all the people do not go mad. That is all.

**Shri Chitta Basu:** So far as I could understand you, you said that we have incorporated certain inalienable fundamental rights in the Constitution. According to you, this is irreducible minimum. Do you visualise that the concept of fundamental rights may also undergo a change with the change of ideas or concepts of fundamental rights in course of time and, if so, how do you suggest that those fundamental rights, as per new ideas or concepts, can be incorporated in the Constitution?

**Shri Purshottam Trikamdas:** I will think about it when the time comes. For the time being, I am perfectly satisfied with the minimum rights we have. The whole world today wants these rights where the countries do not have them.

**Mr. Chairman:** That is all. Thank you.

**Shri Purshottam Trikamdas:** Thank you.

*(The witness then withdrew)*

**Shri G. S. Gupta, Ex-Speaker, Madhya Pradesh and Berar Legislative Assembly and Member of Constituent Assembly.**

*(The witness was called in and he took his seat)*

**Mr. Chairman:** We are really very happy to-day that one of the veterans and founding fathers, because he was a member of the Constituent Assembly, has come before us to help us in our deliberations. He has already submitted a note which clearly indicates that—as he knows how the Constitution was framed—that he is not so much against Shri Nath Pai's amendment but he would like that a little precaution should be taken and it should not be done in a hurry. That is the main purpose of his suggestion which is really worth consideration.

Before we begin—as a former Speaker of Madhya Pradesh and Berar for a long time he knows the procedure—I will have to read it as a matter of procedure. Our Direction says:

> "Where witnesses appear before a Committee to give evidence, the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and is liable to be published, unless they specifically desire that all or any part of the evidence given by them is to be treated as confidential. It shall, however, be explained to the witnesses that even though they might desire their evidence to be treated as confidential such evidence is liable to be made available to the members of Parliament."

This procedure, I am supposed to bring to your notice. Before we start, as I said in my preliminary remarks, I have gone through your short note regarding the procedure to be adopted while amending the Constitution. You would like that procedure slightly to be rigid so that we should not act in haste. That is the main idea in your note. That is what I felt. With your mature judgment certainly you also felt that more thought should be given whenever there is an occasion and circumstances also demand some alteration or amendment of the Constitution. It should be welcome. That is No. 1.

Then, secondly, all aspects should be properly considered and the procedure should be so devised that it would not make it very easy to push through any amendment. That is the main thing. I entirely share that view.

Now the Members would like to ask certain questions. When a member agrees with the basic thing, about the procedure there may be difference, naturally the Committee's task

is very easy. But when a witness is fundamentally opposed to the very concept, then it becomes very difficult and it takes long time. So I will request Justice Mulla to start with the questioning.

**Shri Nath Pai:** Sir, before we proceed to ask questions, the witness himself may like to say something.

**Mr. Chairman:** If you wish to say something in addition to the note you have given us, you are welcome.

**Shri G. S. Gupta:** I have nothing more to add to what I have already said in my note.

**Shri A. N. Mulla:** You agree that an amendment can be made, but, according to you, to safeguard against an amendment becoming hasty or ill-considered, you want that five-sixth of the legislators present should give their assent to it before it is declared passed. Is that your recommendation?

**Shri G. S. Gupta:** That is right.

**Shri A. N. Mulla:** Have you considered it or not that by making the percentage as high as five-sixth you have made it almost impossible for any amendment to be passed. I could have understood if you have made that percentage a little higher in order to make the opinion of the legislators to be a little more considered, but when you make it five-sixth, don't you think that you are almost making it impossible for any amendment to be passed?

**Shri G. S. Gupta:** I have made it so, so that no hasty judgment should be made and I still stick to it.

**Shri A. N. Mulla:** I put it to you whether you are not really making it impossible for a law to be amended.

**Shri G. S. Gupta:** I am making it only difficult and not impossible. It is only 82 per cent.

**Shri M. P. Bhargava:** You would like that when it is passed by the majority you envisage, even then the States also concur before it is made a law.

**Shri G. S. Gupta:** I would like it.

**Shri K. Chandrasekharan:** As a Member of the Constituent Assembly, may I put it to you with respect, that the Constituent Assembly never thought in terms of excluding any provision in the Constitution from out of the purview of the power of amendment being exercised by the Parliament subsequently.

**Shri G. S. Gupta:** So far as I remember, Sir, it was intended that it should not be easy to amend the fundamental rights. It should be really very difficult. Only in cases of very emergent circumstances or very great need amendment should be made to Fundamental Rights.

**Shri Nath Pai:** Our Constitution is a great heritage you have handed over to us. If you wanted any part to be put beyond the purview of amendment, certainly the founding fathers would have provided that. What did prevent them from making a provision to that effect—that the Fundamental Rights can be amended only subject to a very special procedure?

**Shri G. S. Gupta:** As I said, Sir, we all wanted and I suppose even Dr. Ambedkar who was then the main man wanted that amendment to Fundamental Rights should be so difficult that it should not ordinarily be made.

**Shri Nath Pai:** Where have you put this intention of yours in the Constitution?

**Shri G. S. Gupta:** I do not know. In Article 368, I suppose, it has been said. And the proceedings of the

Constituent Assembly is not before me here, but if you take the trouble of going through them, you will find it.

**Shri Nath Pai:** Thank you very much.

**Mr. Chairman:** I would like to ask you one question. The percentage that you have recommended for passing any amendment is so high. You were a member of the Constituent Assembly, and you know the normal attendance in the legislative bodies; further, you were the Speaker also, and a distinguished one too, of the Madhya Pradesh and Berar Assembly. Don't you think that if an emergency requires any change, this percentage should be lowered down to make it more practical?

**Shri G. S. Gupta:** Excuse my differing from you. I still hold that the percentage that I have said should be there.

**Mr. Chairman:** We are grateful to you for coming over here, and particularly for having basically accepted the principle of the amending Bill and for saying that the founding fathers of the Constitution visualised a time or circumstances when an amendment would have to be made and they had made a provision to ensure this much that that was not hastily done. You have sounded a note of caution in that regard now.

**Shri Jairamdas Daulatram:** I might say also one thing. I was also in the Constituent Assembly, and I may tell you that the view which he has expressed here is his own view namely, that we visualised a possibility of amending part III and had no intention to make it very rigid. I do not want to discuss it now across the table, but I just wanted to say this so as to make the position clear. The spirit behind the amendment that he has suggested is that he wants to make it very difficult to change. That it should not be changed was the spirit at that time, but I do not want to discuss this across the table now.

**Shri A. N. Mulla:** You have reiterated that in your considered opinion, a five-sixths majority is necessary to ensure that no hasty legislation is passed. I would like to know whether anywhere in the rest of the world, where written Constitutions exist or where amendments to the Constitution are passed, there is any such safeguard made in the laws of the country that unless there is such a majority, confidence cannot be created that the legislation is not hasty?

**Shri G. S. Gupta:** I am sorry: I am not an expert in foreign laws; but I believe that in England, where, of course, there is no written Constitution, such a thing as hastily changing the fundamental rights has been, I suppose so, I may be wrong, altogether discredited

**Shri A. N. Mulla:** I may place before you the law in England. In England, a bare majority is sufficient; in England there is no written Constitution; in England where the House of Lords stands in the way of a law which the House of Commons wants to be passed, they make a number of additional peers in order to get the majority to see that the law is passed. So, in England which is the first democracy, this is the way the laws are passed and amended.

**Shri G. S. Gupta:** But I would like to know whether they have often changed fundamental rights.

**Shri A. N. Mulla:** There are no fundamental rights in their Constitution as no Constitution exists, they are just customary law and there has just been an evolution of democracy in that country. That is what we want. We have a written Constitution. We thought that the provisions of article 368 had made a sufficient safeguard against hasty le-

gislation. Now, you wants us to accept the position that the safeguards mentioned in article 368 are not sufficient and they should be made more rigid. Originally, the framers of the Constitution were satisfied with a certain safeguard which they had put in, namely the two-thirds majority of those present and voting and also a bare majority of the total strength, and that under such conditions, a law that would be passed would not be a hasty one. Why is it that you have now come forward to say that the framers of the Constitution were too liberal and that further restrictions should be placed?

**Shri G. S. Gupta:** They were not too liberal. But now circumstances have changed from that time up to today, and, now, stricter conditions are necessary in my opinion; I may be wrong, but in my view, stricter conditions are necessary in the circumstances of today. Otherwise, there is likely to be a spate of fissiparous tendencies which were not envisaged in 1947. I was also a member of the Constituent Assembly at that time. So, I want to be excused for changing my opinion from that time up to this time.

**Mr. Chairman:** May I thank the venerable witness who has spared some time to come forward here all the way to help us?

**Shri G. S. Gupta:** I would request you to see that my memorandum* may be circulated among all the Members.

**Mr. Chairman:** In fact, it will be part of our evidence or record, and it will be there in the evidence that will be presented to Parliament and every Member will get it. It forms part of our record.

*(The witness then withdrew)*

*(The Committee then adjourned to meet again at 15.00 Hours.)*

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*(The Committee re-assembled at 15.00 Hours)*

**Shri M. C. Setalvad, M. P. and former Attorney General of India**

*(The witness was called in and he took his seat)*

**Mr. Chairman:** Today afternoon the Committee is fortunate in having an outstanding jurist of our country, not only an eminent lawyer of this country but of international fame, a man with the highest integrity in his profession. Therefore, I think we would very much benefit in our deliberations by his mature judgment on issues raised by the majority decision of the Supreme Court. Fortunately he has already given us a note which has been circulated. It indicates very clearly the constructive approach to the amendment proposed by our friend Shri Nath Pai. He has pointed certain precautions to be taken though he supports that the right taken away by the judgment needs to be restored; he feels that we must be circumspect in taking our decisions. I hope everybody has gone through his note.

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*Shri G. S. Gupta's suggestion con tained in his memorandum was as follows:—

I would suggest that to the amend ment proposed by Shri Nath Pai, M.P. the following proviso be added—

"Provided that if the amendment seeks to amend any of the provisions of Part III (Aemendment of the Constitution). of the Constitution it shall require two thirds majority of the total membership of that House and not less than five-sixth of the members of that House present and voting."

Before proceeding further, as a formality I must read out the procedural aspect of it. Where the witnesses appear before a Committee to give evidence the Chairman shall make it clear to the witnesses that their evidence shall be treated as public and liable to be published unless it is specifically desired that all or any part of the evidence given by them is to be treated as confidential. It shall, however, be explained to the witness that even after such a request such evidence is liable to be made available to the Members of Parliament.

The Committee had the advantage of listening to other members perhaps junior in your profession, lawyers, constitutionalists and others; various aspects were discussed thoroughly. As Mr. Nath Pai remarked—I had said it earlier—that this Committee is a miniature Constituent Assembly because the majority decision of the Supreme Court in the opinion of some of us at least is not quite sound; it has done damage to the structure of our Constitution as visualised by the founding fathers. You have made certain suggestions in order to avoid the proposed amendment being struck down again by the Supreme Court. The Members would like to discuss the various aspects of the judgment. Would you like to say something in the beginning?

**Shri M. C. Setalvad:** May I suggest one amendment to my note? On the last page, in pargraph 12, item (v) you will notice the following;

> "A further proviso shall be added to Article 368 enacting that an amendment taking away or abridging the fundamental rights contained in Part III of the Constitution shall be passed by each House of Parliament by a majority of three-fourths of the total membership of that House....

You will find that the last portion of the sentence is repeated.

> "....and by a majority of not less than three fourths of the members of that House present and voting."

So I suggest that this repetition may be omitted, as this seems to be unnecessary.

**Shri Tenneti Viswantham:** In your opinion it is safer to have three-forths rather than two-thirds. Why have you thought of making it a little more rigid?

**Sri M. C. Setalvad:** I have given the reasons for this. Though the majority decision does not say so, the amendments of the Constitution have been too frequent and if I may use the expression without any disrespect to Parliament too irresponsible. This has been illustrated in what I have quoted in two paragraphs..... expression of opinion of Justice Hidyatullah which in turn says that if this process of erosion of fundamental rights is allowed to go on, it would leave us without any fundamental rights at all. That is at the back of the minds of these Judges and even though, I am sure, some of them must have felt—I only guess it—that they were subjecting themselves to a somewhat strained reasoning, they have adopted this strained reasoning because of what had happened in the past. That is why I am recommending three fourth majority.

**Shri Tenneti Viswanatham:** There is a feeling that the country is making fast progress, making huge strides in social progress and any difficulty in amending the Constitution might come in the way of social progress. How far do you agree with this?

**Shri M. C. Setalvad:** Social progress need not involve the erosion of fundamental rights.

**Shri Tenneti Viswanatham:** You believe that the fundamental rights as embodied at present in Part III do not come in the way of any social progress.

**Shri M. C. Setalvad:** No. Experience has shown over the years that only rights to property stood in the way of some social progress. Those, I think, have already been sufficiently modified and I don't think anything now remains to be done. Other rights—the more important rights like personal freedom, right to speech and so on—do not need any further modification. Even those have been modified by amendment in the various clauses of Art. 19(2), 19(3) etc. which subject them to parliamentary legislation in respect of certain matters.

**Shri Tenneti Viswanatham:** Even with regard to property rights do you think that further modification will not be in the interest of society?

**Shri M. C. Setalvad:** Not, so far as I can see, in the interest of society; but if three-fourth of the legislators think that even further modification is in the interest of the society, or any other modification, room is left for that to be done by three fourth majority.

**Shri Tenneti Viswanatham:** I shall put it in another way. If the majority is so necessary for social progress, Members of Parliament being representative of those people, who feel the necessity, will certainly be able to attend and give the requisite majority to pass the measure. Your fear that members will not attend and therefore progress of legislation will be stopped, is not well founded. Do you agree with this?

**Shri M. C. Setalvad:** I put it this way. If social progress is so urgent, surely you i.e. three fourth of the legislature ought to be convinced that it is so necessary, and if three fourth are convinced, well then you have your way, you can abrogate any right you like.

**Shri A. P. Chatterjee:** You have stated at page 2 of your note (Para 8) that: "The majority of the court felt that the powers to amend under Art. 368 had clearly been abused. It was the apprehension of future action by Parliament of the same nature that drove the majority of the court to the conclusion they reached." I put this question to you: can the courts go into the question whether Parliament is abusing its powers or not? If the court goes into this question, can it not be said that the courts really are acting at present in India as a kind of super-legislature, as a moral mentor so to say to the legislatures? The function of the court is to interpret, not to give moral lectures. If that has been done, what do you say to that?

**Shri M. C. Setalvad:** I agree that it is not the function of the courts to judge Parliament or to give "moral lectures"—using your expression.—In fact the majority of five—I divide the majority into two (five and one) has not said anything about Parliament, has not even referred to past parliamentary action, but what I have put down there is my own feeling in the matter. I say the majority were moved to this decision and, according to me, resorted to strained legal reasoning to arrive at the conclusion they did. In my view they did that because at the back of their minds was the feeling which I have mentioned. You must not forget that Judges are after all human beings and they are affected as much by other things happening outside as an ordinary citizen, though to a lesser extent and they hold the balance and keep their minds more balanced, and even.

As to the sixth Judge, he has openly said so. I think I have quoted that in my note.

**Shri A. P. Chatterjee:** What does appear to us from the different judgments of the Supreme Court—may be I am wrong—is that the Supreme Court has been a little sensitive whenever there has been restriction on the property rights, but not so much sensitive when there has been a restriction on other rights given in Part III. I am asking this question because you have quoted the judgment of the 6th Judge in para 6 and it begins like this: "I am apprehensive that the erosion of the right to property

may be practised against other fundamental rights." Now is it really that apprehension which worked at the back of the minds of learned Judges, or the apprehension that further erosion of the right to property may be made and that is why the learned Judges were very strident in this judgment of Golak Nath.

**Shri M. C. Setalvad:** I think I would take the learned Judges statement as it is. He says—if I may paraphrase—in past property rights have been eroded and he is apprehensive that in future other fnudamental rights may as well be eroded. You must have noticed what he says in the later paragraph. He says, it is not an amendment at all, the putting in of 64 acts in Ninth Schedule and saying that the fundamental rights chapter will not apply to them. It is not really even an amendment; it is validating certain State legislations and not amending the Constiution.

**Shri A. P. Chatterjee:** Is it possible in this context to give the power of amendment to Parliament in such a fashion that further amendment of the other fundamental rights of speech person, liberty etc. may not be possible though the fundamental right to property may be restricted? First of all, may I ask you is it possible, and secondly even if it is possible, whether it is desirable?

**Shri M. C. Setalvad:** On the question whether it is possible, we come back again to the amending process. Supposing for a moment the article is amended as I have suggested, or some others have suggested and it is convassed before the Supreme Court and Supreme Court accepts it as proper constitutionally, acting under that amending power you can remove any rights you like by three-fourth majority. You can erode the property rights alone and keep the others. It is possible if this amendment or any other suitable amendment is arrived at to erode any right, as the Parliament has done in the past. It has affected property rights; it has not affected others mainly. As to the desirability, my own opinion is it is not desirable. However, others may disagree.

**Shri R. P. Sinha:** One thing is not clear to me. Is it possible to amend the rights of property, leaving aside the other rights?

**Shri M. C. Setalvad:** If your amending process is perfect, you can amend any right in any manner. Of course, you can make that amendment provided the amended article is accepted by Supreme Court and 3|4th majority is there. I do not see any reason why the amended article with these safeguards it should not succeed.

**Shri A. P. Chaterjee:** Then, Sir, I am giving expression, with great respect to judiciary, to a feeling which is wrongly or rightly felt by some people. I will like to ask your opinion on this. The feeling is this: the judciary in India is by and large conservative in its judgments. That feeling is there. To obviate that feeling, whether right or wrong, can some provision be made in the Constitution or otherwise that the judiciary should be crecruited with due weight to the different economic classes? Is it possible? And if it is possible, is it feasible?

**Shri R. P. Sinha:** It does not come within the ambit of this.

**Shri M. C. Setalvad:** If Chairman allows me. I will answer that question.

**Mr. Chairman:** That is true. At least some judges have no proper background. In the present context of the Constitution, their judgments are likely to be influenced by other factors. From that point of view, I will allow this question. But do not carry it too far.

**Shri M. C. Setalvad:** Am I to understand that what is put to me is that apart from the present apparatus for selecting members of the judiciary, you want to add a provision which would enable some authority to provide that the judiciary be drawn from all classes of opinion?

**Shri A. P. Chatterjee:** Economic classes, Those who represent the working classes—peasants, the owning class, and the class which is not owining.

**Shri M. C. Setalvad:** Without any judicial qualifications?

**Shri A. P. Chatterjee:** Of course, judicial qualifications would be there. Is it desirable?

**Shri M. C. Setalvad:** Do you mean the election of Judges as they have in Soviet Russia?

**Shri A. P. Chatterjee:** I just want to know your opinion on this.

**Shri M. C. Setalvad:** If this is the preposition, I am absolutely against it.

**Shri A. P. Chatterjee:** I do not mind. But if there is such a provision as this that the Supreme Court judges would be elected by the people, then what is your opinion? There are some countries where the Supreme Court judges are elected either directly or indirectly.

**Shri R. P. Sinha:** A very important issue has been raised by my friend.

**Shri Nath Pai:** These are delightly interesting questions, but not strictly relevant to the present issue.

**Mr. Chairman:** There is a protest; rightly so. You should not put these questions. We have been entrusted with the task of examining the Bill that has been brought before us.

**Shri Nath Pai:** Mr. Setalved has categorically stated that he is absolutely against this kind of thing.

**Shri A. P. Chatterjee:** As far as the judgment in Golakhnath's case is concerned, we find that the learned judges have imported a very novel doctrine: doctrine of prospective over-ruling. Now, as far as the Indian conditions—both political and constitional are concerned, would you, Sir, express your opinion on it, whether this is a sound doctrine to be imported into India?

**Shri M. C. Satalvad:** The case referred to in the judgment is an American case. I am afraid, I feel that it is not even a correct inference from the decision from which it has been taken; much less would it be applicable to conditions in India.

**Shri A. P. Chaterjee:** Thank you, Sir.

**Shri Chitta Basu:** Will you please clarify paragraph 1 of your note? Another point is whether you accept the supremacy of the Parliament.

**Shri M. C. Setalvad:** If you look at the judgment, it definitely decides that Parliament cannot act under Art. 368 to amend the Constitution in respect of abridging fundamental rights. There is no doubt about it. The judgment is clear.

**Shri Chitta Basu:** Do you yourself accept the supremacy of the Parliament?

**Shri M. C. Setalvad:** Yes; my view is that in all democratic countries, the last word must be left with the representatives of the people.

**Shri R. P. Sinha:** I would like to know from the learned witness this even if the amendment is made by Parliament, it can stand a judicial test or it cannot be challenged. Doubts have been expressed.

**Shri M. C. Setalvad:** I have expressed that view in the last paragraph of my note.

It may happen that Parliament's right to amend the Constitution may still be questioned. They may take the view that here is a Constitution given by the people and that Constitution cannot be amended except in matters of procedure and like matters. In the matters of abridging Fundamental Rights the Constitution cannot be amended by Parliament which itself is created by the Constitution. Therefore, in order to amend the Constitution in sovereign matters you will have to create another Body. People themselves may create another body which could amend the Constitution in respect of these sovereign matters.

**Shri R. P. Sinha:** I would like to have the views of the learned witness on this. It appears to me that the view that has been taken is that that the Parliament has no right to amend Constitution. How can we provide the safeguard that the judi-

ciary will not strike down the proposed constitutional amendment.

**Shri M. C. Setalvad:** The majority judgment has founded itself on various reasons. It has looked at the marginal note of Article 368, looked at the manner provided by it for amending the Constitution, looked at the President's assent provided by it and so on and so forth. Having pointed to all these points in the amending process laid down in Article 368, it has concluded that the word 'law' is not used, what Article 368, results in 'law'. Therefore, the amendment effected under Article 368 is affected by Article 13 (2) of the Constitution that article provides that a law taking away or abridging Fundamental Rights is void. If you remove all these grounds one by one—the marginal note and so on and so forth—then you make it difficult for the judges to resort to the same reasoning and reject Article 368 as a provision for amending the Fundamental Rights in the Constitution.

**Shri R. P. Sinha:** I would also like to know if we only provide that the amendments to the Constitution should be passed by three-fourth majority and do not provide for a similar majority in the State legislatures; what is the opinion of the learned witness? Will it stand the test of judiciary?

**Shri M. C. Setalvad:** Reasonable rigidity is necessary because the feeling not only of the Supreme Court but also of many citizens has been that Parliament has been too free with amending Fundamental Rights. Therefore, when you come to amending Part III there should be not only so far as court is concerned but also to the ordinary citizen an assurance that his precious rights in Part III will not to be taken away lightly. They will be taken away only if three-fourth of the representatives of the people desire that they need to be taken away.

**Shri R. P. Sinha:** If we provide for this it becomes very difficult for the Constitution amendment to take place; secondly, this in a manner affects the very sovereignity of the Parliament in making the laws. I understand in certain matters the State legislatures have to be consulted but in most of the matters the Parliament is supreme in even amending the Constitution. Now if we have such a provision to my mind it may become absolutely impossible to get the Fundamental Rights amended. So, I would suggest that if we stop at that—have a three-fourth majority—will that not work? What chance it has to stand a judiciary test?

**Shri M. C. Setalvad:** I would say it is very difficult to estimate the chances of success or failure of a possible amendment going before the Supreme Court on a future occasion. When you are amending such an important chapter of the Constitution—yours is a federal Constitution—you should certainly consult the representatives in the State Legislatures. The proviso provides that in respect of various matters which concern the States, the States should be consulted. Surely, Fundamental Rights are a very important matter and the States should be consulted in respect of any amendment of them. Indeed, even those judges in the earlier judgement who understood 368 as enabling Parliament to amend Fundamental Rights expressed surprise that the States were not to be consulted in the matter of amendment of Fundamental Rights.

**Shri R. P. Sinha:** Sir, I appreciate the reasoning advanced by the learned witness but let us consider from the practical point of view in the situation obtaining in the country today. I feel it will become absolutely impossible.

**Shri M. C. Setalvad:** Very soon a situation may arise when it may become difficult to get three-fourth majority even in Parliament. The difficulty which you are envisaging will not be confined only to the States.

**Shri R. P. Sinha:** From the practical point of view I thought it would

become impossible to get it done. It will become a dead letter if such a provision is made.

**Shri M. C. Setalvad:** The amendment of such a chapter as that dealing with fundamental rights should be made a very difficult thing which explains why three-fourths is provided. That would mean that a preponderant majority of the peoples' representatives want it.

**Shri R. P. Sinha:** As Mr. Chatterjee said will it be constitutionally possible to have an amendment where it only affects the property rights. For the rest of the other fundemental rights more stringent provisions could be made.

**Shri M. C. Setalvad:** By proper drafting it should be possible to confine these safeguards only to your amending power so far as fundamental rights are concerned but it would be very invidious and you may want to amend even other rights in conceivable circumstances; Why should the Parliament not have that power? It should have that power.

**Shri Jairamdas Daulatram:** I would like to have a view on the point--although it is not directly concerned—it was suggested by some witnesses that it may not be considered necessary to have any Bill of this type now. The Supreme Court by majority has passed a judgement. They have taken some steps to valididate it and unless an issue arises and faces this nation, need we raise this issue now and have this Bill because of all the circumstances in the country. Again there is a controversy regarding Supreme Court and Parliament. Parliament is already faced with so many tensions in the country. Whether it is wise—it is not a political point—as a leading citizen of the country I would like to know if you would advise Parliament to legislate and make this thing clear now or wait for a suitable opportunity.

**Shri M. C. Setalvad:** As I said it is not a legal or even semi-legal question. It seems to me a question of strategy so far as Supreme Court is concerned and of considering the general conditions in the country. I feel to let the things go on for some time and then try to restore the power to Parliament which it should have is difficult. One thing has to be remembered. Once these things remain in the Law Reports they become entrusted. It is very difficult to shake them after a certain period of time. That is my idea. This is in regard to the strategy part of it. I think it is more difficult to dislodge them at a later stage keeping in view the general conditions in the country. I do not think I am competent to speak of them. I know conditions are very difficult but as to whether Parliament should under these conditions act is a matter for Parliament.

**Shri Jairamdas Daulatram:** If there is a long interval between the passing of the judgment and the reaction of Parliament to meet the situation, then it becomes trusty right. If the interval is not long to balance things, it is for Parliament to feel what is necessary to do. They may do it after a year or so. We are balancing everything.

**Shri M. C. Setalvad:** It may be more expedient from the political point of view. I cannot say anything about that.

**Shri Nath Pai:** On the first paragraph attention of the Committee was drawn by Mr. Basu and the statement made by Mr. Setalvad I find fortified. I am really very happy that it is not spirit of deflance or contempt of court that I have moved.

I have one small query to make. It has been suggested to us that after it has been suitably amended by the Committee and before its enactment in the Parliament whether we may submit it to the Supreme Court for eliciting its opinion by persuading the President under Article 143. I would like to have your opinion about this procedure that after the Select Committee finishes its work and before we start enacting it in the two Houses of Parliament, the President

be persuaded to make a reference on our Bill so that the conflict is avoided and the due deference is shown to the Supreme Court. I would like to know the wisdom or desirability or otherwise of this suggestion. That is the only question I have.

**Shri M. C. Setalvad:** I do not think I approve of that idea. The opinion elicited under Article 143 is advisory so far as Supreme Court is concerned. Apart from that it has been held repeatedly that the Court is not bound to render the advice. On the whole I feel let Parliament decide whether it wants to take to itself the power with suitable amendment and if they feel they want to do, go ahead and let it be challenged in proper procedure.

**Shri Nath Pai:** I fully agree with both points that:

1. It is not bound, and

2. It is only advisory

Knowing the background of it, it is likely it gives an opinion and serious opinion. We show due deference and unwanted criticism is mitigated. We do not want artificial crisis. It weakens and mitigates the criticism.

**Shri M. C. Setalvad:** You are looking at it from the point of view of Parliament showing respect to the Supreme Court.

**Shri Nath Pai:** Moreover mitigating some genuine criticism that we are precipitating and weakening unwanted, uncalled for crisis and conflict between the Supreme Court and supreme legislature and judiciary.

**Shri M. C. Setalvad:** I would still prefer your going ahead.

**Shri Nath Pai:** Thank you.

**Shri Deoram S. Patil:** Mr. Setalvad, you have mentioned in your Memorandum in paragraph 12 the provision for presenting the Bill for President's assent may be omitted. May I know the reasons?

**Shri M. C. Setalvad:** It will show that the Parliament is exercising not its ordinary legislative power but constituent of sovereign power.

**Shri Deorao S. Patil:** Are you quite sure that the amendment of the Constitution under Article 368 will be deemed to be a law within the meaning of Article 13(2) of the Constitution?

**Shri M. C. Setalvad:** Under this amendment it should not be.

**Shri S. M. Joshi:** I quite appreciate that when the world is changing, the Constitution cannot be permanent. We will have to adjust the principles according to the changing situation. But at the same time we want to see to it that the sovereignity is not curtailed. Therefore, the majority judgment, it seems, wants to give the right to the people and not to the Parliament. Once I had asked one learned witness here whether it will not be useful, rather than making the Constitution rigid as you have suggested. Will it not be more beneficial if we pass an amendment here and send it for the ratification of the people? First we pass it and then we send it for ratification. I was then told that it will be costly.

**Shri M. C. Setalvad:** Under what procedure do you want to send it to the people?

**Shri S. M. Joshi:** Procedural amendment.

**Shri M. C. Setalvad:** If you will amend 368 by enacting a proviso, you can do that. You can well amend it in the manner I have suggested.

**Shri S. M. Joshi:** That I agree. As Mr. Sinha pointed out, if you make it too rigid, it is making it almost impossible. Therefore, make it possible and at the same time serve the popular sovereignty.

**Shri M. C. Setalvad:** The difficulty here is that the referendum would be too expensive. Besides, it will not be always a successful process as other countries like Switzerland, Australia and so forth have found.

**Shri S. M. Joshi:** The position is that we want to get something. If

we accept your amendment, it is impossible to amend the Constitution under the existing circumstances. Why can't we have the referendum process—democratic process — to change this? As far as cost is concerned, my proposition is very simple. If we are going to be democratic, just as we are going in for the General Elections every five years, we go and vote for Parliament as well as for the Assembly, why can't we have a third booth and say that 'here you have to vote as to whether you stand for a certain amendment or you do not want. You may say 'Yes' or 'no'. That is all. This will save the cost.

**Shri M. C. Setalvad:** You want to do it like that. How can a villager understand as to what the amendment is and how can he follow it?

**Shri S. M. Joshi:** We shall have to assume.

**Shri M. C. Setalvad:** You mean whether he will vote for a cow or a bullock!

**Shri S. M. Joshi:** For that, we can find out a way. You may keep green or red colour—green for passing while red for not passing. He can simply indicate whether he is confirming the amendment or not confirming the amendment in this way.

**Shri M. C. Setalvad:** If you are going to decide that you will refer it to the people, then you have to put this in the actual proposed amendment. Suppose, your amendment is for curtailing the rights of freedom of speech, then you have to say in what manner you want to curtail them. Otherwise, how is a villager to understand it?

**Shri S. M. Joshi:** If they can understand how the Congress is running the Government and how I want to run it, they can as well understand this also.

**Shri M. C. Setalvad:** I don't think they can understand how the Congress is ruling. They only know it by the name of a particular individual.

**Shri S. M. Joshi:** There are parties. People understand that. For example, you know in Maharashtra, when we said Samyukta Maharashtra, they understand it.

**Shri M. C. Setalvad:** I don't think, with all respect, I am going to be convinced about the feasibility for a referendum.

**Shri K. Chandrasekharan:** You said, Sir, that there have been too frequent and irresponsible amendments. So far as fundamental rights are concerned, there are First, Fourth and the Seventeenth Amendments. They amended the provisions relating to Art. 31—property rights. Would you agree therefore that the rest of the fundamental rights in Part III have not been touched by Parliament so far?

**Shri M. C. Setalvad:** With respect, you omitted the passage of the 17th Amendment Bill by Parliament. You know that by this Amendment Act, you have validated as many as 64 Acts of the State Legislatures irrespective of whether they relate to property rights or rights of any kind. You cannot question them at all. Has it any reference to fundamental rights? These amendments related not only to property rights. The Seventeenth Amendment Act has validated a number of State Acts. Nobody knows for what purpose or in what respect this has been done. It is not possible to find out the reasons for validating them.

**Shri K. Chandrasekharan:** Almost all the State Acts included in the old Schedule and as amended by Seventeenth Amendment Act related to property rights.

**Shri M. C. Setalvad:** They would also include many provisions which are capable of being challenged on grounds of breach of other fundamental rights. Take for example Art. 14 and so on and so forth. You

cannot really touch them at all. This amendment makes them impregnable against any attack on the ground of breach of fundamental rights.

**Shri K. Chandrasekharan:** Now, I am speaking generally. Would you agree that the Constitution should be flexible or rigid particularly from the point of view of the conditions in this country?

**Shri M. C. Setalvad:** I know the original idea of Sir B. N. Rau. The intention was that the whole Constitution should be capable of amendment at the end of five years. That was the idea of some of the promoters. Ultimately, that was given up.

The general opinion on the amending process under Art. 368 has so far been that this is a middling Constitution; not too rigid and not too flexible. But, recent events, particularly Parliamentary activities, have shown that it has not been successful in controlling Parliament in the matter of amendment of fundamental rights. Therefore, a more rigid procedure is needed.

**Shri K. Chandrasekharan:** As per the majority of the judgment of the Supreme Court, as it stands now, if this amendment, as incorporated in the present Bill, is passed into law, that would still be against the Supreme Court's judgment.

**Shri M. C. Setalvad:** My feeling is that this bill which is at present under consideration of this Committee requires to be fortified in various ways so that it may pass the challenge before the Supreme Court. It is bound to be challenged before the Supreme Court.

**Shri K. Chandrasekharan:** The only hope is that the Supreme Court should review its earlier decision and come to a different conclusion with regard to this amendment Act.

**Shri M. C. Setalvad:** Yes, they could be induced to do so by reason of this amendment as it emerges from Parliament which would be a different enactment altogether from the Article 368 which they had before them in the earlier case.

**Shri K. Chandrasekharan:** In paragraph 12(iii), you have suggested that there may be a non-substantive clause to the present Bill.

**Shri M. C. Setalvad:** It is not a non-obstante clause. The purpose of the clause (iii), if I may explain, is this. A strong reason on which the majority judgment relied in construing the power of amendment was this. Is what happens under Art. 368, the enactment of a law? Art. 13(2) prevents the enactment of any law which would take away or abridge the fundamental rights. Therefore, it is suggested in Clause (iii) that it should be made clear in the amended Art. 368 that what will emerge by the amendment process will not be a law.

**Shri K. Chandrasekharan:** That is probably because you think that the law under Art. 368 is a constituent law while the law under Art. 13(ii) is only a legislative law.

**Shri M. C. Setalvad:** That is so.

**Shri K. Chandrasekharan:** You have referred in paragraph 12(v) to circulation to the States.

**Shri M. C. Setalvad:** That is ratification by the States.

**Shri K. Chandrasekharan:** One is 3(iv) Article 368, as it was passed by the Constitutent Assembly, is regarding the circulation to the States and it contemplated only in respect of amendments covering Centre-State relations. Fundamental rights do not come under that category I believe.

**Shri M. C. Setalvad:** They do not. But, having regard to their importance to every citizen, it is necessary that even in respect of fundamental rights, the States should have a say and they should, by a three-

fourth majority, resolve in favour of the amendment.

**Shri K. Chandrasekharan:** If a Constituent Assembly were to be constituted at all should you think that Constituent Assembly should be constituted by Members of both Houses of Parliament?

**Shri M. C. Setalvad:** Parliament has to constitute it.

**Shri K. Chandrasekharan:** Has Parliament the power to constitute a Constituent Assembly?

**Shri M. C. Setalvad:** It is said that this can be done by making a provision in Article 368 itself. If you can amend Article 368 so as to bring into existence a Constituent Assembly, surely you can amend the Constitution itself under Article 368 without bringing into existence the Constituent Assembly which in its turn is to amend the Constitution.

**Shri K. Chandrasekharan:** Is it not referred to in the majority judgement?

**Shri M. C. Setalvad:** The judgment of the five learned Judges merely touched this point; they have expressed no opinion about it. But the sixth learned Judge has categorically stated that it could be done. It is difficult to understand the reasoning behind this suggestion.

**Shri N. C. Chatterjee:** Mr. Setalvad, if you kindly look at page 1669, paragraph 53—on the right hand column—in the All India Reporter, you will find a summary of the conclusions of the Judgment given by the Chief Justice. It states:

"The aforesaid discussion leads to the following results:

> The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof, which only deals with procedure. Amendment is an elaborate process. . ."

Article 368 deals also with the power to amend the Constitution.

**Shri M. C. Setalvad:** It does not with mere legislative power, but it deals with constituent power.

**Shri N. C. Chatterjee:** You remember Shankari Prasad's case. You were defending the Act. We argued that there cannot be any amendment to Fundamental Rights under Article 13(2). It was argued that Article 13(2) dealt with ordinary law and not with the constituent law. Your submission was that Article 368 dealt with the constituent law also. I hope you still hold that view.

**Shri M. C. Setalvad:** That is still my view. Personally speaking, I think the majority judgment is wrong.

**Shri N. C. Chatterjee:** Mr. Seervai the Advocate-General of Maharashtra, drew our attention to the last words of Article 368:

> ".... the Constitution shall stand amended in accordance with the terms of the Bill."

It clearly shows not merely procedure prescribed but also the amendment will be a substantive amendment after completing the prescribed procedure. He maintains that it refers to the amendment of the Constitution including Fundamental Rights.

**Shri M. C. Setalvad:** Please read Article 368: "An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose. . . . .the Constitution shall stand amended in accordance with the terms of the Bill."

The idea was to amend any part of the Constitution.

**Shri N. C. Chatterjee:** Chief Justice Subba Rao and other judges had referred to the marginal note to Article 368 which reads: Procedure for amendment of the Constitution and felt that this had done the mischief. You say that this marginal note should be amended. Should we drop the words "Procedure for"?

**Shri M. C. Setalvad:** Yes. It will be enough to drop those words which have been relied upon by the majority.

**Shri N. C. Chatterjee:** Should we put down something more in the body of the enactment itself?

**Shri M. C. Setalvad:** The omission of these words will be enough.

**Shri N. C. Chatterjee:** It has also been suggested that deletion of 13(2) will serve the purpose.

**Shri M. C. Setalvad:** That will really be a retrograde step.

**Shri N. C. Chatterjee:** The majority decision was influenced by Article 13(2).

**Shri M. C. Setalvad:** You can make the necessary provision in Article 368.

**Shri N. C. Chatterjee:** We may say: "Notwithstanding any provisions contained in Article 13 or 13(2), an Amendment of the Constitution...."

**Shri M. C. Setalvad:** That may be added. it will make it foolproof.

**Shri N. C. Chatterjee:** You remember that practically all the Judges, in the majority also, recognised the desirability of amendment from time to time to ensure social progress and change in socio-economic conditions of the country. Could it be justifiable to have a reference to the Supreme Court under Article 143 to find out what is their view?

**Shri M. C. Setalvad:** Even if you do that they would not suggest to you particular safeguards and particular phrases. They might say whether the proposed amendment constitutionally valid or not; they are not bound to make any suggestions.

**Shri N. C. Chatterjee:** Mr. Seervai suggested that this should be done in order to avoid any conflict between the legislature and the highest judiciary.

**Shri M. C. Setalvad:** I disagree with that suggestion.

**Shri A. N. Mulla:** Is it a fact or not that one of the things that prevailed upon the minds of the Judges who gave the majority judgment was a feeling of panic that the Parliament may not abuse the provisions of Article 368 and, therefore, it should be stopped from tinkering with the fundamental rights?

**Shri M. C. Setalvad:** One of the Judges says so. I have quoted that in my note.

**Shri A. N. Mulla:** Therefore, the considerations that prompted the majority judgment may have been legal reasons but there were certain other factors also playing upon the minds of the Judges which made them come to a particular opinion.

**Shri M. C. Setalvad:** That is what I have said also in my note.

**Shri A .N. Mulla:** You have made some suggestions as to how to word Article 368 and you have recommended that three-fourth of the Members of Parliament should support an amendment before it should be accepted as a valid law.

**Shri M. C. Setalvad:** That is only in regard to fundamental rights.

**Shri A. N. Mulla:** Now I would suggest that under the existing restrictions contained in Article 368, a two-third majority of the members present in the House and a majority of the entire legislature was suppos-

ed to be a sufficient safeguard to stop a hasty amendment. But you are of the opinion that in order to make it more difficult to pass any amendment of the Constitution, an added hurdle should be there.

**Shri M. C. Setalvad:** Yes; only in regard to amendment of Chapter on fundamental rights. I am suggesting an additional proviso which will relate only to such an amendment, not to amendments generally. The rest of it will remain as it is now—that is governed by a majority of two-thirds and.

**Shri A. N. Mulla:** On that I want to ask that if I make a suggestion that instead of three-fourth majority which you have suggested, supposing an amendment is made to the effect that unless two-third majority of the Members of Parliament support an amendment, it should not be valid. What I mean is not only two-third of the members present but two-third of the Members of Parliament also. Would that not be sufficient safeguard?

**Shri M. C. Setalvad:** You want to make it rigid in respect of other amendments also?

**Shri A. N. Mulla:** No, no, only in so far as fundamental rights are concerned.

**Shri M. C. Setalvad:** In respect of fundamental rights, you want to make it less rigid?

**Shri A. N. Mulla:** Less rigid than three-fourth but more rigid than the existing rigidity.

**Shri M. C. Setalvad:** A middle course.

**Shri A. N. Mulla:** Yes. After all this will become extremely difficult. That would satisfy, I believe, the reasonable caution that instead of two-third majority of the members present, there would be two-third majority of the members of the legislature.

**Shri M. C. Setalvad:** I would still think, having regard to the way in which the Seventeenth Amendment Act was passed that we should have, so far as fundamental rights are concerned, a three-fourth majority provision.

**Shri Nath Pai:** It is three-fourth of the total majority of the members. Actually, Mr. Mulla, yours is more rigid.

**Shri M. C. Setalvad:** What I am providing is three-fourth of the totality of the members of Parliament.

**Shri A. N. Mulla:** My idea was that if out of 520 legislators, about 350 want an amendment, that should satisfy the ends of caution and prudence and therefore, irrespective of whether it is three-fourth majority or not, an expression of need for an amendment by about 350 members should satisfy.

**Shri Jairamdas Daulatram:** That leaves a substantial minority.

**Shri M. C. Setalvad:** I would still keep three-fourth of the total number of members. That is my view.

**Shri A. N. Mulla:** You have also suggested that three-fourth of the States should also be asked to ratify the amendment. But is it not a fact that the laws which have been subjected to the proviso to Article 368 relate directly to States and that is why their concurrence was needed? The States may not be directly concerned with laws of the type of amendment of the Constitution.

**Shri M. C. Setalvad:** But surely in such a vital matter as fundamental rights, which everybody has agreed are most important and even sacrosanct, the representatives of the citizens of the States should certainly have a say and be preponderantly in favour of the amendment.

**Mr. Chairman:** As Mr. Sinha and Justice Mulla had some doubts I had

also some when I went through the the suggestions that you have made. Now you have made it clear that so far as those provisions that you are suggesting are concerned, they only apply to amendment of Part III of the Constitution.

**Shri M. C. Setalvad:** That is correct. I think I have said that. If you look at page 4, paragraph 12, sub-clause (v), what I have suggested is "A further proviso shall be added to Article 368 enacting that an amendment taking away or abridging fundamental rights contained in Part III of the Constitution shall be passed, etc....". This only relates to the amendment of Part III.

**Shri Jairamdas Daulatram:** Only amendments taking away or abridging fundamental rights are subject to this rigidity. Other amendments are not.

**Mr. Chairman:** My reaction is that you are rather laying a too rigid a condition. As things stand today, as you know, the complexion of Indian politics is changing fast. Even now, I am afraid, if we have to go to Parliament with the present amendment as it is with suitable modifications or even for ordinary purposes, it would be difficult to get a majority and two-third. Next year (1968) the complexion of your House will radically alter. The opposition will have almost equal numbers. In such a situation, even the present procedure to amend would be very difficult to get through. This is my personal opinion.

**Shri M. C. Setalvad:** The idea behind this rigidity is this. The amendment of the fundamental rights chapter must be or should be of such a nature that it would command not only the support of the ruling party but a good number of the opposition also.

That is, the total should be three-fourths. So far it has been the ruling party and nobody else. That has got to change. In the important matter of amendment of fundamental rights you have to carry with you not only the ruling party but a part of the Opposition also.

**Mr. Chairman:** That is the second hurdle, a very big hurdle.

**Shri Viswanatham:** Now, in this amendment which you have proposed Article 32 also is covered?

**Shri M. C. Setalvad:** Yes, it is covered?

**Mr. Chairman:** Well, I hope, no more questions now. On behalf of the committee, I want to extend our grateful thanks to you for giving us this help and making very useful and constructive suggestions, to see that the efforts made by our friend, Mr. Nath Pai, bear fruit.

**Shri Setalvad:** Thank you very much.

*(The witness then withdrew)*

*(The Committee then adjourned)*

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