CHAPTER XLIIA

CONCLUDING REMARKS

SYNOPSIS

Some of the Constitutional Amendments have been of minor significance.[1] Some of the amendments have been rather major and of an omnibus character, as one amending Act may make a number of changes in a large number of constitutional provisions. As for example, the 7th Amendment, the 42nd Amendment and the 44th Amendment affected several provisions of the Constitution rather drastically.

The cumulative general effect of the various amendments of the Constitution has mainly been:

(1) to restrict the scope and ambit of some of the Fundamental Rights, particularly, the right to property;[2]

(2) to give greater safeguards to the Minorities and Scheduled Castes and Scheduled Tribes;[3]

(3) to create new States and to admit certain foreign possessions into the Indian Union;[4]

(4) In the area of Federalism, the amendments have achieved the following results—

(i) to give greater powers to the Centre *vis-à-vis* the States;

(ii) to remove distinctions among the States and place them all on the same footing;

(iii) to reorganise the States on linguistic basis;

(iv) to strengthen safeguards in emergency provisions.[5]

So many amendments made to the Constitution in a short span of 59 years cannot be regarded as a happy situation. While some of the amendments can be regarded as inevitable, *e.g.*, amendments changing some details which needed to

1. For example, II, V, XI, XIII Amendments.
2. For example I, IV, XVII, XI, XLII and XLIV.
3. I, VII, VIII, XXI, XXII, XXIII, XXVII, XXXII, LIII, LVII, LXXXII.
4. X, XII, XIV, LV, LVI.
5. Amendment XXXXIV.

be changed with the lapse of time, some were not necessary at all as they were an attempt to change the balances originally incorporated into the Constitution by its framers.

It needs to be emphasized that the Constitution should be treated with great respect and not made into a play thing by political parties. A stable constitution gives stability to the country's constitutional process. For example, in the U.S.A., during nearly over 200 years, only 30 amendments have been made and the U.S.A. has progressed tremendously under an old Constitution.

The purpose of the constitution is to regulate administrative and political processes in the country and it is not proper to change the constitution to suit transient political expediency. Majority in Parliament in a democracy is only transient; it is not permanent, but constitution is more permanent in nature. Parliament under a written constitution ought not to regard itself as omnipotent and seek to mutilate the Constitution in any way it likes. If one party in majority changes the Constitution today, another party in majority will change it tomorrow and the Constitution will then cease to claim respect of the people on which it depends for its efficacy and survival.

The procedure to amend the Constitution as laid down in Art. 368, though different from the ordinary legislative process (where the rule of only simple majority operates), has, in practice, been found to be not so rigid as in America or Australia. This is evident from the fact that since its inception in 1950, the Constitution has been amended so many times.

A major factor contributing to the facile way in which the Constitution could be amended so far has been that the Congress Party has enjoyed an overwhelming majority in both the chambers of Parliament at the Centre as well as in the State Legislatures. Therefore, when once the Central leadership of the Party has made up its mind to effect an amendment, it has not found it difficult to muster the requisite majority in the two Houses of Parliament as well as in the State Legislatures whenever their ratification was required.

But the political life in India has now become fragmented; political parties have proliferated and the Congress Party has lost its predominant position. No single political party now enjoys 2/3rd majority in the two Houses of Parliament. Therefore, it may no longer be possible to predicate with any certainty whether a particular proposal to amend the Constitution would get the necessary votes in both Houses of Parliament as well as in the States to become effective. For example, in 1970, the bill to abolish privy purses of the erstwhile rulers failed to get the requisite votes in the Rajya Sabha in spite of the fact that it had got the requisite majority in the Lok Sabha and received a wide measure of support from several sections of Parliament as well as the government. This is one example of the failure of a constitutional amendment initiated by the government.[6] Another

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6. *Supra*, Ch. XXXVII, Sec. E.

The Bill received 339 out of 493 votes in Lok Sabha. In Rajya Sabha, it received 149 out of 224 votes which was less than 2/3rd votes by a fraction. A joint session of the two Houses of Parliament is not envisaged to break an inter-House deadlock in case of a Constitution Amendment Bill. Under Art. 368, such a Bill has to be passed by a special majority in each House. The use of the phrase 'each House' rules out the technique of a joint session when such a Bill has been passed by one House by the requisite majority but not by the other, as the rule of special majority in 'each House' cannot possibly be fulfilled at a joint session.

[Footnote 6 Contd.]

example is that certain provisions of the Forty- fifth Constitution Amendment Bill though passed by Lok Sabha were not passed by Rajya Sabha.[7]

Quite a few Amendments, such as VII, VIII, X, XII, XIV, XXI, XXII, XXIII, *etc*. had a wide measure of consensus behind them. Quite a number of other Amendments, such as, those admitting foreign possessions to the Union, or ceding Berubari to Pakistan (Amendment IX) were rather inevitable. Some of the amendments, such as, II, a part of XIV, *etc*., had to be undertaken because the Constitution contains too many details which need to be modified from time to time to meet the changing situation. Some amendments, such as, II, V, XI, XII, are of minor significance.

Most of the Amendments did not raise any sharp reaction but Amendments I, IV, XVII, XXIV, XXV and XLII raised quite a good deal of controversy in the country. These Amendments were criticised not only on the ground that they adversely affected the Fundamental Rights, but also that they constituted ostensible attempts to negative some of the tenets of the judicial pronouncements on the Constitution which the ruling political party regarded as coming in the way of enacting its projected socio-economic legislation or which gave a wide ambit to a Fundamental Right.

Nevertheless, there is no denying the fact that the Amendments regarding property rights can be justified, to some extent, except Schedule IX,[8] on the ground that the views of the judiciary regarding payment of compensation for agricultural property acquired could not just be fully implemented in the Indian context.[9] But the addition of Schedule IX immunizing as many as 284 State Acts from judicial scrutiny does not seem to be warranted. To begin with, it was envisaged that Schedule IX would be used to give immunity only to land laws, but, in course of time, all kinds of State Laws have been added to the Schedule and granted immunity from judicial review. A significant question to be considered in this regard is : How far the concept of IX Schedule is compatible with the thesis that Judicial review is an essential feature of the Constitution? *Prima facie*, there

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[Footnote 6 Contd.]

The idea to have a joint session in such a situation may find support from some observations made by the majority of the Judges of the Supreme Court in *Golak Nath* refusing to distinguish between the legislative process and the constituent process. But these observations were made with reference to Art. 13 only and cannot be taken to obliterate entirely, for all purposes, the difference between the two processes. An ordinary Bill is passed by a simple majority in a House where the quorum is very small.

Thus, an ordinary Bill can be passed in a House by merely a few members present at a sitting. That cannot be done with respect to a Constitution Amendment Bill which must have at least 272 votes in its favour in the Lok Sabha, as the strength of the House is 542. In addition, 2/3 of the members present and voting should also support such a Bill. There is thus an essential difference between legislative and constituent processes. Since *Kesavananda*, such a difference has been judicially recognised. Also the XXIV Amendment amended Art. 368 in such a manner as to underline the distinction between legislative and constituent processes.

7. *Supra*, Ch. XLI, Sec. E(f).

8. *Supra*, Ch. XXXII, Sec. C.

9. Blackshield in his article, Fundamental Rights and the Economic Viability of the Indian Nation, 10., *JILI.*, 183 (1968), makes the point that these amendments were not really necessary and the purpose in view could have been achieved by proper legislative drafting. Also see, *Ramaswami,* the Indian Constitutional Amendments, (1963) *Indian Yr. Book of Int. Affairs*, 161.

is no compatibility between the two as Schedule IX has been conceived primarily to keep Judicial review of the protected laws at bay.

The most controversial Amendments in the whole constitutional history of India have been the 39th and the 42nd Amendments because of their content as well as the manner and the circumstances in which these Amendments were carried out. These Amendments very much alienated public opinion which resulted in a change of government after the election. The 39th Amendment was declared to be invalid by the Supreme Court.

The 42nd Amendment had a number of the obnoxious features and sought to make the Central Executive very potent and the courts comparatively weaker. It was an attempt to drastically re-write the Constitution and denude it of its many liberal and democratic features. In fact, critics have asserted that this Amendment sought to institutionalise the emergency for good in India. It proved to be the most ill-advised and controversial constitutional Amendment ever undertaken in the country. It was inevitable that with the change in government, CA 42 should undergo a drastic change sooner than later and the *status quo ante* restored to a large extent. Accordingly, most of the controversial provisions of the 42nd Amendment were neutralised by the 43rd and the 44th Amendments.[10]

Because of the fact that inconvenient judicial pronouncements touching upon the Fundamental Rights could be nullified rather easily through the process of constitutional amendment, the institution of judicial review has not been able to play that pervasively creative role in shaping and moulding the Indian Constitution as it has been able to play in the U.S.A. But, if formal amendments of the Constitution become difficult to accomplish under Art. 368, in course of time, the judiciary may be able to make its impact felt more and more on the development of the Constitution to meet the contemporary socio-economic exigencies. Such a development has already taken place, to some extent, from 1978 onwards when the Judiciary has been able to play a very creative role in shaping and moulding constitutional process in the country. The most outstanding examples of judicial creativity have been the expansion of the scope and range of Art. 21,[11] and the enunciation of the doctrine of non-amendability of the basic structures and fundamental features of the Constitution.[12]

Lastly, it needs to be said that the facile way in which it has been possible to amend the Constitution so far has not promoted in the minds and hearts of the people a deep emotional respect for the Constitution as a symbol having sanctity and permanence. Such a sentiment can take root only when the Constitution is not tampered with whenever the government encounters the least difficulty in putting through its programme. It is extremely important for the endurance of the Constitution and promotion of constitutionalism in the country that people respect it and have confidence in it. Such a sentiment can be promoted only when the Constitution is regarded as something sacrosanct and not to be tinkered or trifled with lightly but only as a last resort when there is no other viable alternative available to meet a national situation.

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10. *Supra*, 2404, 2405-2413.
11. *Supra*, Ch. XXVI, Sec. J.
Also see, *supra*, Ch. XLI, Sec. C.
12. *Supra*, Ch. XLI, Sec. D(e).

To achieve this laudable objective, it seems absolutely necessary that the constitutional amending process be rigidified and made more difficult so that an Amendment can be made to the Constitution only when there is broad national consensus favouring the same. The truth remains that 2/3 of Lok Sabha hardly represents a broad national consensus as it is common knowledge that not more than 45% of the eligible voters cast their votes at the general election for the House. Rajya Sabha has no popular mandate whatsoever. It also needs to be realised that the basic purpose of the constitution is to control power—legislative as well as executive. This is the idea inherent in the term "constitutionalism".[13] Therefore, the government cannot rush to amend the constitution the moment it feels any constitutional difficulty in executing its policies. If that is done too often, then, all constitutional restraints on the government will come to an end and we shall be left with an uncontrolled, arbitrary, government.

The Janata Government through CB 45 had proposed to lay down the process of referendum to amend certain specified features of the Constitution.[14] This was a very wholesome proposal and although approved by Lok Sabha, unfortunately, it could not get the requisite votes in Rajya Sabha because of the intransigence of certain political groups, especially, the Congress Party.

If referendum appears to be too complicated a procedure in a country like India, another alternative to consider may be to require ratification of all constitutional amendments by 2/3 of all the State legislative assemblies, each assembly passing the requisite resolution by the same voting rule as prevails in Parliament for a constitutional Amendment. After all, it is illogical that while many constitutional provisions need State ratification to amend, Fundamental Rights which affect the individual so vitally can be amended by Parliament alone. The proposed procedure will ensure a broad public participation on national level in the constitutional amending process.

13. See, *supra*, Ch. I, Sec. B.
14. *Supra*, Ch. XLI, Sec. E(f).