CHAPTER - VIII

Constitution (Forty-Second Amendment) Act, 1976 -- An assessment.

I. General observations regarding the 42nd Amendment Act -- 42nd Amendment Act being "a mixed bag" seeks to place community interest over individual right.

The Constitution (Forty Second Amendment) Act which was drafted mainly on the basis of the recommendations of the Swaran Singh Committee, generated a mixed feeling in the country. It was declared categorically that "the democratic institutions" although basically sound, "have been subjected to considerable stresses and strains and that vested interests have been trying to promote their selfish ends to the great detriment of public good."(1)

mixed feelings in the country

The Act, therefore, proposed to amend the Constitution "to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the Directive Principles more comprehensive and give them precedence over those Fundamental Rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the Directive Principles. It is also proposed to specify the Fundamental Duties of the Citizens and make special provisions for dealing with anti-national activities, whether by individuals or associations."(2)

With a view to placing the legislature above the judiciary because of the former's role as vehicle of popular will, and to making the amending power under Art. 368 all inclusive, it was proposed "to strengthen the presumption in favour of the constitutionality of legislation enacted by Parliament and State Legislatures."(3) Again, it was also proposed "to take away the

jurisdiction of High Court with regard to determination of Constitutional validity of Central laws and confer exclusive jurisdiction in this behalf on the Supreme Court so as to avoid multiplicity of proceedings with regard to validity of the some Central law in different High Courts and the consequent possibility of the Central law being valid in one State and invalid in another State."(4)

In order to reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development and progress, it was considered expendient "to provide for administration and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under Art. 136 of the Constitution."(5) It was also found necessary "to make certain modifications in the writ jurisdiction of the High Court under Art. 226."(6)

In support of the proposed amendments, Mr. Swaran Singh, Chairman of the Constitution Amendment Committee of The All India Congress expressed his opinion that "the people are the masters of the country's constitution and they alone enjoy their right to amend it."(7) Addressing a meeting of Congress workers at Lucknow,

Government standpoint explained by Swaran Singh

Mr. Swaran Singh said that the election manifesto of the Congress had clearly stated about certain changes in the Constitution so as to remove obstructions that hampered socio-economic progress of the country.(8) On the question of the supremacy of Parliament, he observed. "The Supremacy of Parliament is the supremacy of the people and the changes sought to be made by the representatives of the people should be final."(9) While refuting the

allegation of the opponents that proposed amendments would certail the powers of the Judiciary, Mr. Swaran Singh declared that the proposed amendments simply attempted to delineate the powers of the judiciary and rectify some drawbacks in the functioning of the Constitution.(10) On the question of attaching too much importance to the Preamble and the Directive Principles, he said, "to build a strong India all legislations would have to be guided by the directive principles enunciated in the Preamble of the Constitution."(11)

As regard the argument that a Parliament whose term had been extended could not amend the Constitution, Mr. Swaran Sigh said that it had been provided in the Constitution that in the case of Emergency, Parliament could extend its term and no power could prevent it from enacting any Bill.(12)

II

Opposition views Analysed:

These official standpoints in favour of constitutional amendments failed to satisfy the opposition parties. In a number of occasions, the opposition parties have vehemently opposed the proposed changes from many corners. It has been contended by N.A. Palkhivala, one of the eminent constitutional experts in India that the proposal to change the Preamble "is singularly ill-conceived."(13) Explaining his standpoint, he said: "First, what follows, or is annexed to, the Preamble, is the Constitution. The Preamble is a part of the Constitution Statute, but it is not a part of the Constitution. Art. 368 deals only with an amendment of 'this Constitution' but not of the Constitution Statute. Therefore, Preamble cannot be amended under Art. 368. Moreover, the Preamble, from its

Palkhivala's criticism

very nature and content, is incapable of being amended. It refers to the most momentous event in India's history and sets out, as a matter of historical fact, what the people of India resolves in 1949 to do for their unfolding future. No parliament can amend or alter the historical past.

Secondly, the insertion of the word "Socialist" would, instead of clarifying the basic structure of the Constitution, merely make it dangerously ambiguous. A coin, which has passed through millions of hands, almost loses its identity and the impress on it can hardly be deciphered, and the same happens to the words of political jargon which are mouthed by millions. 'Socialism' means different, and even contradictory, things to different people. There is the true socialism which has uplifted nations, multiplied national wealth and ensured the welfare of the masses; and there is the other type of socialism which has destroyed basic human freedoms while perpetuating poverty."(14)

With regard to the inclusion of words like 'secular' and 'integrity' in the Preamble, he observed that their inclusion "can add nothing to the content of the Preamble. Anyone who has a sense of rhythm and style would know the beauty of the Preamble which is distinguished by economy of words, would be marred by the insertion of the three words all of which are unnecessary and one of which is misleading equivocal."(15)

He is of the view that at least in three respects, the recommendations of the Swaran Singh Committee aim at altering or destroying the basic structure of the Constitution. "First,

they propose to overthrow the supremacy of the Constitution and install Parliament as the supreme authority to which the Constitution will be subservient. The instrument will become the master and the master, the instrument. Secondly, the proposals seek to enact that the eternal values enshrined as Fundamental Rights in the Constitution will no longer be justiciable or operate as breaks on legislative or executive action in most fields. Thirdly, they will result in the enforcement of laws which are held unconstitutional by a majority of the Supreme Court or the High Court." (16)

Altering or destroying the basic structure of the Constitution.

Regarding the restrictions imposed on the powers of the High Courts in relation to the question of judging the validity of Central law, he considers this to be "a massive devaluation of the highest court in the State. Further, having to go to the Supreme Court would involve pointless trouble and waste of time for citizens and prohibitive costs for the poor." (17)

Like Mr. Palkhivala, many eminent personalities also took part in the 'national debate' on this issue and expressed many conflicting opinions. Each of them tried to explain the proposed amendments to the Constitution from his own points of view and consequently, no two view points expressed similar opinions.

Dr. P. B. Mukharjea, a former Chief Justice of Calcutta High Court is reported to have commented: "The nation is brought to the brink of a confrontation between Parliament, the Executive and Judiciary by the present controversy. (He was referring to the proposals for amending the provisions for judicial review). This is a needless, frustrating and self-defeating controversy. The High

Courts and the Supreme Court may have given wrong decisions on many vital points of the Constitution but the Government and the Parliament were equally wrong in taking measures that they did and allowing such open confrontation between the Government and the Parliament on the one hand and the Judiciary on the other. It was unseemly and detrimental to the public interest. It did lasting damage to Parliament and the Judiciary in shaking public credit and confidence in the two great institutions under the Constitution."(18)

Justice P.B.Mukharjea's views

Shri Binayak N. Banerjee, a former Judge of the Calcutta High Court held almost a similar opinion.(19) He noted that "the present hullabaloo for far-reaching constitutional reforms comes from above. That causes nervous anticipations. In democratic countries such calls come from below. Pandit Jawaharlal Nehru truly said that the making and changing of Constitution 'cannot be done by the wisest lawyers sitting together in conclaves, it cannot be done by small committees trying to balance interests and calling that Constitution-making; it can never be done when the political and psychological conditions are present and the sanctions come from the masses."(20)

Speakers at the seminar expressed their near-unanimous opinion that the advancement had been prevented not because of the inherent drawbacks of the Constitution, but because of the hesitation or refusal to interfere with those classes who are responsible for the social, educational, cultural and above all economic backwardness of the common man, namely, the monopoly capitalists and the big landlords. This hesitation is understandable. In any society, dominated by them, these classes are bound to have a thousand links with the administration. If the social structure is not changed and these classes are not totally deprived of their

Other views

economic power and are suppressed redistributing the resources concentrated in their hands, they will always enjoy sufficient power and influence to defeat and throw in disarray every legislation or administrative instruction aimed at improving the lot of the common people.

In another Seminar,(22) speakers from different walks of life vehemently opposed the proposals for amending the Consitution.

Draconian legislation

The former Attorney General, Mr. C.K.Daphtary questioned the need for amendment. He suspected that the executive was thinking of having recourse to 'draconian legislation' whose fore-runner was the Maintenance of Internal Security Act.(23)

Mr. Asoke Mehta said that the Bill constituted "gross interference in the lives of the people." The frontiers of people's freedom were sought to be circumscribed and the battle would soon have to be joined in the courts of law. He thought that once the amendments took effect "the Constitution would become unrecognizable."(24)

The observations made by Mr. Soli Sarbajee,(25) a lawyer, are interesting. He raised the basic question: "why the amendment?" He said that he had waited endlessly for an answer to this question when the Constitution might have come in the way of socio-economic measures. He had yet to be told when the courts or the Supreme Court had struck down a law that had a bearing on the socio-economic well-being of the people. Ironically, he added, while all the fundamental rights of the people had been subjected to serious curbs the right to property remained untouched. He held the view that the Ninth Schedule could well have been used to protect socio-economic

Need for amendment questioned

legislation.

Shri H. V. Kamath, a member of the Constituent Assembly, recalled that as a member of the Constituent Assembly, he warned in August, 1949 that the emergency powers could "sound the death-knell of the republic."(26) He declared that the proposed Bill was "neither amending nor mending but simply ending the Constitution."(27)

The resolution adopted at the Seminar,(28) after making a survey of the socio-political situation of the country, observed that "the present Constitution places no impediment on genuine socio-economic reform and the Government has failed to point out a single measure that it had brought forward during the past five years or would like to introduce in the future which could not or cannot be enacted and implemented given the political will. Nor it is true to say that the doctrine of the sanctity of the 'basic structure' of the Constitution pronounced by the Supreme Court in the Keshavanenda Bharati judgment has obstructed social and economic change."(29)

Seminar resolution criticising the 42nd Amendment Bill

Commenting upon the wide scope of the Constitution (44th, renumbered 42nd Amendment) Bill, it was stated in the resolution that the 44th amendment would practically abrogate the citizens' fundamental rights altogether by expanding the scope of Art. 31C to place any legislation purporting to further any of the Directive Principles beyond judicial challenge on the ground of violating the right to equality and the other fundamental freedoms. The scope of the Directive Principles was all inclusive, ranging from the welfare of the citizens to internatinal peace.

With regard to the inclusion of a new Art. 31D relating to anti-national activities, the resolution stated that it would pave the way "for virtually one-party rule, any anti-governmental activity being treated as anti-national."(31) Again, "the liberties of the citizen are sought to be further curtailed by prescribing a set of so-called fundamental duties."(32)

"The effect of the 44th amendment", the resolution stated categorically, "will be to eliminate the whole system of checks and balances provided in the Constitution and leave the way clear for arbitrary exercise of executive authority to the detriment of the citizen."(33)

The 44th (renumbered 42nd) Amendment to the Constitution would, it was apprehended in the resolution, weaken the federal structure envisaged by the Indian Constitution, "by enhancing the powers of the Centre at the expense of the States and more particularly by enabling the Government of India to deploy the armed forces of the Union and the States without the consent of the State Governments for dealing with any grave situation of law and order in any State."(34)

Net effect analysed

"The net effect of the 44th Amendment is to take away the rights and powers of the President, the legislatures, the judiciary, the States, the UPSC, the Election Commission and the Comptroller and Auditor General. In each case, power is transferred not just to the Central executive but to the Chief executive, namely, the Prime Minister who emerges all-powerful and above the law. Such an enormous accretion of power in the hands of a single person is dangerious and liable to misuse.

However, in view of the recent experience of the arbitrary exercise of authority, such a total concentration of power cannot be regarded innocent or accidental and would spell the end of individual liberty and democratic institutions which millions of Indians have unitedly struggled to win and uphold."(35)

A similar sentiment was expressed by the Committee long before the 44th (renumbered 42nd) Amendment Bill was introduced in the Parliament. In its press release of August 1, 1976, the Committee, after analysing the various recommendations of the Swaran Singh Committee, observed:(36) "The Constitutional changes proposed by the Swaran Singh Committee are calculated to emasculate the concept of checks and balances in respect of the exercise of executive authority by seriously diminishing the scope of judicial review. It is not difficult to envisage that once the powers of independent courts are eliminated from such a vital field of elections, the very concept of free and fair elections would disappear and people's right to govern themselves would be seriously compromised."(37)

The same press-release ended with a note of caution to the people when it declared: "The Committee would like to sound a note of warning to the people and to caution them against the imminent threat to their sovereignty. It is incumbent on every citizen not only to take note of the basic changes which are being proposed in the Constitution but also to appreciate their full implication and the grave danger which they pose to India's democracy and sovereignty of the people. People should come forward to express their views on these matters fearlessly. Let not the coming generation say that we were not vigilent when we were bring systematically deprived of our

Imminent threat to Indian democracy

freedom and democracy."(38)

Mixed reactions were expressed by eminent lawyers of the country about the 44th Constitution Amendment Bill. Only exceptions were Mr. M. C. Bhandare and Mr. D. P. Singh who did not see anything harmful" in the Bill.(40) Indeed, Mr. Singh visualised what some of his opponents had called "dilution of the judiciary's powers" as merely a "readjustment" of the functioning of this vital forum.(41) In a similar tone, Mr. Bhandare contended that the amendments were only trying to preserve "what was there in the original Constitution."(42)

Mixed reactions among lawyers

On the contrary, Mr. F. S. Nariman, former Additional Solicitor General of India, referred to the 59 clauses of the amending bill but chose to lay stress on the "disquieting" fact that attempts were being made to denigrate the judiciary.(43) Moreover, he was not in favour of enunciation of citizens' duties.(44)

The former Justice, Mr. Sarjoo Prasad, in common with Mr. Somnath Chatterjee and Mr. Govind Mukhoty did not quite understand the reasons advanced for the proposed changes.(45) But there were some like Mr. R. K. Garg and Mr. K. M. Ramamurthy who saw little that was objectionable in those parts of the Bill which aimed at securing social justice.(46) Mr. Garg declared in the course of deliberations that he would be sorry if the Bill was withdrawn for he was convinced that on it would be built "the socialist edifice of India."(47) But he was opposed to the provision relating to the despatch of the Central forces to a State with the consent of the Chief Minister of the State concerned. He was equally opposed to the Article that would make it possible to declare an association or individual anti-national.

The observations of Mr. Daniel Latifi were interesting.[49] Striking a personal note, Mr. Latifi said that he used to accuse Nehru of being inclined towards Western liberalism, but with the passage of time, he had come to appreciate Nehru better, a man who had profound appreciation of the forces moving men and nature. That was why the Constitution, as framed by the Founding Fathers, had rejected Stalinism. Mr. Latifi did not believe in the argument that strengthening the executive "would yield results". He expressed grave apprehension about the limits sought to be placed on the powers of the President. It was a clear possibility, he said, that a Council of Ministers having lost the confidence of Parliament, might insist on staying in power and the President, under the new dispensation, would be absolutely helpless.[50]

Among others, Mr. Ram Panjawani, a firm supporter of the Bill, felt that the curbs on the President's powers were by no means extra-ordinary. It was only right that the President be told that, in a Cabinet form of government, he would be bound by the advice of the Council of Ministers.[51] Mr. Ramamurthy was quite impressed by the provision for specialised administrative tribunals.[52] The tribunals, he hoped, would help the emergence of well-informed, specialised jurisprudence. Judges were not necessarily the best equipped to adjudicate in the matters of a specialised nature like industrial disputes or service matters, he added.[53]

III

The Opposition Proposals:

Most of the opposition parties have criticised the recommendations of the Swaran Singh Committee from various standpoints. It is worthwhile to mention here the statement issued by the left parties of West Bengal on Constitution amendment.(54) It was said in the statement that, "the ruling Congress party is making brisk preparations for substantially amending the Constitution through the present Parliament.

Serious apprehensions expressed by the Opposition parties

The Prime Minister and other leaders of the Congress have talked about the necessity of a national debate on constitutional changes. But the opposition parties so far have not been provided the opportunity of free and open discussion and in fact, there is only a monologue."(55) The leaders emphasised in their statement that the people should be associated with these amendments. The statement declared:

"It is urgently necessary for the people to be informed of all points of view and specific proposals in order to have meaningful discussions. We are also of the view that it is not morally justified to entrust the present Parliament which has lost its mandate to effect substantial changes."(56)

CPI (M) proposals -- a detailed study

Considering all aspects of the proposals for amending the Constitution, the Communist Party of India (Marxist), hereinafter referred to as CPI (M), proposed the following main amendments, "which are not exclusive, but only indicate the direction."(57)

"1. In order to make the election free and fair, constitutional provision must be made to check the power of money and official

pressure. Provision should be made for conducting the elections under the supervision of all party committees.

2. Proportional representation and the right to vote to all those above the age of 18 should be ensured in the elections to Parliament and Assemblies.

3. Provision must be made for the right to recall of elected representatives.

4. The right to acquire, hold and dispose of property under Art. 19(f) should be reformulated to ensure that the right of small property holders, and earners of income alone is protected while the property of big landlords and big capitalists will not be protected as a fundamental right. Also a provision must be made that such property can be acquired without compensation.

5. The Supreme Court judgement in the Keshavananda Bharati case that any amendment which changes the basic features of the Constitution is invalid is too vague and the judgement always faces the risk of being reversed.

It is, therefore, necessary that the amendments made in 1971 viz., Art. 368(1) seeking to give absolute power to Parliament to amend by way of addition, variation or repeal any provision of the Constitution and 368 (c) which states that nothing in Art. 13(relating to fundamental rights) should apply to any amendment made under this Article, should be repealed.

6. The Constitution should specifically provide that no amendment changing basic features of the Constitution, which includes, inter alia, Parliamentary Republic, Federal structure, adult franchise, accountability of the Executive to the Legislature, responsibility of the Cabinet to Legislature, and restriction, abridgment or abrogation

of fundamental rights of the people, can be made by Parliament.

7. It must further be provided that in case of conflict between the Parliament and the Judiciary regarding the constitutional validity of any measure, the Judiciary's verdict will prevail until the conflict is resolved by a referendum to the people.

It should also be provided that if 20 per cent of the members of either House or Legislatures of three States demand a referendum on any proposed measure, including amendment to the Constitution, the issue must be referred to the people for a referendum.

8. The power of making laws providing for preventive detention without trial must be removed and Art. 22 authorising the making of such laws should be repealed.

9. It must be specifically provided that Acts like MISA which restrict, abridge or abrogate any fundamental right or the Election Law Amendment Act which has nothing to do away with any socio-economic Reforms cannot be placed in the IX Schedule. Only Acts which restrict, abridge, or abrogate the property right of big property holders and landlords can be placed in the IX Schedule.

10. Art. 31(c) should be deleted as under it all fundamental rights can be over-ridden. In fact, there is no need for this Article once the Right to property is taken away in manner suggested above.

11. The following should be added to the list of Fundamental Rights in Chapter III:

a) All citizens shall have the Right to work and a living wage after attainting the age of 16 years;

b) to have free education upto Secondary Standard;

c) to have State assistance in case of un-employment, old age, sickness and disablement;

d) to free medical treatment;

e) to have equal pay for equal work for men and women;

f) to bear small arms.

12. The arbitrary powers given to the President on the Emergency provisions provided in Arts. 352 to 360 have been the major cause of mischief and exploited by an unscrupulous executive for attacking the democratic rights and subverting elected Governments in States. These provisions must be drastically amended.

A declaration of emergency can only be made if the country is involved in a war or is directly threatened by external aggression. The proclamation must authentically cease to operate on the cessation of armed hostilities or if no war takes place within a month of such proclamation.

The provision for automatic suspension of fundamental rights under Art. 19, and to suspend the Right to approach the Court for enforcement of any of the fundamental Rights must be scrapped.

Arts. 356 and 357 which enable the President to dissolve a State Government or its Assembly or both should be deleted. In case of breakdown in a state, provision must be made for the democratic step of holding election and installing a new Government as in the case of the centre. Similarly Art. 360, which empowers the President to interfere in a state administration on the ground of a threat to financial instability or to the Government of India should be deleted.

13. The ordinance-making powers of the President and the Governor must be drastically curtailed.

14. Arts. 200, 201 which empower the Governor to reserve Bills passed by the Assembly for President's assent should be done away with. The State Legislatures must be made supreme in the State sphere and no interference by the centre in this should be allowed on any ground.

15. The President's power to nominate Governors, under Art. 155 should be done away with.

Instead, provision must be made that the Governors shall be elected by the State Legislature.

16. Art. 249, giving power to Parliament to legislate on a subject in the State List under the plea of national interest should be deleted.

17. There should be a drastic revision of the state, Central and concurrent lists so as to provide for more powers and finance to the States in order to ensure real autonomy to the States.

18. Article regarding financial commission and distribution of revenues should be amended to provide for 75 per cent of the total taxes collected by the Centre going to the States for allocation to different states by the financial commission.

19. In order to enforce the principle of equality of the federating units, and to protect erosion of State autonomy, it is suggested that election to the Rajya Sabha also should be directly by the people and all States must have equal representation in the Rajya Sabha except those with a population of less than three million. Both Houses must have equal powers.

20. Equality of all the National Languages must be specifically recognised in the Constitution.

21. The provision (b) and (c) to Art. 311 (2) which provide

that an officer for the President or Governor can decide that an enquiry is not necessary and take disciplinary action against a Government employee nullifies the protection under Art. 311(2).

22. The amendments giving special status to the Prime Minister, President, Vice-President and Speaker, and the Press (Objectionable Matter) Act prohibiting legitimate criticism of these dignitaries must be repealed.

23. The privilege that existed for publication of parlia-mentary speeches must be restored.

24. Immunity from arrests of members of Parliament and legislatures must be provided for in the Constitution.

25. All India Services like the IAS, IPS, etc., whose officers are posted to the States, but remain under the supervision and disciplinary control of the Central Government, must be abolished. There should be only Union Services and State Services and recruitment to them should be made respectively by the Union Government and State Government concerned. Personnel of the Union Services should be under the disciplinary control of the Union Government and that of the State Services should be under the disciplinary control of the State Government concerned. The Central Government should have no jurisdiction over the personnel of the state services.

26. There should be no provision for a Labour Appellate Tribunal."(58)

Having made these recommendations, the Party has expressed the opinion that these amendments can not bring about desired socio-economic changes without united popular effort. In the opinion of the Party:-

"It must be emphasized that the adoption of these amendments alone cannot ensure the ending of exploitation and oppression of the masses, and bring about the socio-economic transformations needed for it. This can be brought about only where the people of India unite together and struggle for their social and economic emancipation. But such constitutional rights will be an advance for the people and facilitate their struggle for social progress."(59)

Among other opposition parties, the Communist Party of India (hereinafter referred to as CPI) has almost supported all the recommendations of the Swaran Singh Committee which were subsequently included (with some alterations) in the Constitution (42nd Amendment) Act. The CPI National Council's proposals relating to the observation that the Parliament has no power to alter the basic structure of the Constitution by amendment are worth mentioning. It has been observed that "there remains the danger of any radical amendment for facilitating social and economic advance being struck down by the Supreme Court as being contrary to the 'basic structure' if that theory is not given up by the Supreme Court."(60) So according them, "... some radical constitutional amendments in the present circumstances will always be open to challenge ..."(61) They think that "the uncertainty must not be allowed to stand in the way of going ahead with the urgently needed amendments to the Constitution."(62)

CPI support to the Forty-Second Amendment

"The urgency", according to them, "has been particularly under-scored by the recent developments and the great popular urge for radical social and economic changes which are essential among other things, to destroy the base of right-reaction and fascism. These

amendments must necessarily be aimed at removing all constitutional and legal obstacles to the enactment of progressive measures and their implementation."(63)

They further feel that the power of judicial review "has been exercised in favour of the vested interests to obstruct and negate progressive legislations and administrative measures."(64) So they think that "some changes in the Constitution are immediately necessary to put such reforms and related measures outside the reach of the judiciary by making them non-justiciable."(65)

With regard to the issue of keeping the legislation enacted to implement the Directive Principles of the State Policy outside the jurisdiction of the Judiciary, i.e., in regard to the question of extending the sphere of the present Art. 310, reference has been made to the suggestion once made by B.N. Rao that "in event of conflict arising between the directive principles and the fundamental rights, the directive principles which concern with the community as a whole should prevail over the rights of the individual."(66)

The existing power of the High Courts to issue writs for the purposes other than enforcing the fundamental rights has also been criticised in strong terms. They have observed that "this has resulted in thousands 'Stay Orders' and other forms of judicial intervention to hold back and even bar implementation of economic and other measures including administrative actions. The land reforms have been the worst casualty of Art. 226."(67)

The stand taken by the CPI can be summed up in this manner: In their opinion, as is revealed in the resolution of the National Council, the judiciary serving the interests of the

"vested interest" with the aid of its power of judicial review is frustrating any attempt for amendment or any enactment or any 'progressive measure' designed to be implemented to bring about "radical transformation" of the socio-economic condition of the people. It is for this very conservative attitude of the judiciary, they apprehend, that neither "progressive" land reform measures can be implemented nor suitable acts can be framed to implement the directive principles of State Policy in practice. Such a situation, they are of the opinion, can be basically changed and the path to "radical transformation" can be opened through suitable enactments and amendment of the constitution provided the judiciary is deprived of its power to review or scrutiny any amendment of the Constitution or the Parliament is made the depository of unquestioned power.

Summary of CPI views

But the stand taken by another opposition party, based on Marxist doctrine, the Socialist Unity Centre of India (hereinafter referred to as SUC), is quite opposite. After making a detailed survey of the recommendations of the Swaran Singh Committee, the Party has declared:

"So, whatever attempts may however be there to bring about constitutional changes, any right thinking man will feel the necessity of preservation and widening of democracy, democratic rights, political liberty and freedom, fundamental rights with the guarantee of its enforcement and rule of law against arbitrary absolute power. Again in a parliamentary democracy, under no pretext and under no circumstances the relative independence of judiciary, its traditional status and power should be curtailed and the pattern of relative

S. U. C. views

separation of power between the different organs with suitable arrangement of check and balance of power should be eliminated. Because any curtailment of the status and power of the Judiciary, coupled with any move to vest unchallengeable supreme and absolute power in any particular organ will sound death-knell of whatever little democratic rights and political liberty of the people now exist in a set up where there is capitalism and thereby only help accentuate the rise of fascism."(68)

On the question of altering the Constitution, the Congress (O) President, Mr. Asoke Mehta has declared that "the ruling party would be wise to wait for the results of fresh elections before altering the Constitution."(69)

Commenting on the demand for convening a Constituent Assembly to reframe the Constitution made by the Congress legislative parties in some states, Mr. Asoke Mehta has further observed: "The proposal is being mooted perhaps because the Government fears a challenge in the court of the validity of the 44th amendment or because it wants even more sweeping changes."(70)

In a statement, he declared: "The constituent powers riside only with the people. They alone can decide whether a new Constitution is needed and if so, its basic character and they alone can endow such a body with the requisite authority. Nobody else, neither Parliament and much less the Government can arrogate that authority to itself."(71)

On the other hand, the leaders of the Indian Union Muslim League in a meeting in New Delhi on Octo. 23, 1976, welcomed the proposal to amend the Preamble to declare the State not only to be sovereign and democratic but also socialist and secular.(72)

They described as welcome features the proposals for inclusion of fundamental duties, Constitution of administrative tribunals, provision for free legal aid and participation of workers in the management of industries.(73)

They felt that while the need for a fresh look at the Constitution was "imminent", a State of Emergency with the suspension of various civil liberties was both inconsistent and inopportune for a discussion and adoption of drastic amendments. "Such an attempt not only fails to have the advantage of fruitful, free and frank discussion but may also fail to inspire national and international respect for the Constitution that proclaims the State to be sovereign, democratic, socialist and secular. This meeting, therefore, is of the opinion that a democratic atmosphere free from any lurking fear and apprehensions should first be restored before the proposed amendments are considered."(74)

Indian Union Muslim League reaction

The meeting said that the proposed amendment of Art.31C was a "serious inroad into the democratic and secular nature of the Indian republic and destructive of fundamental rights."(75) The meeting considered the precedence sought to be given to Directive Principles over fundamental rights as "retrograde." It regretted that the guarantee contained in the Swaran Singh Committee's proposals to the effect "that any law purporting to be for the implementation of any directive principles would not affect the special safeguards or fundamental rights conferred on minorities, Scheduled Castes or Tribes on other backward classes was conspicuous by its absence."(76)

IV.

Concluding observations regarding the Constitution (42nd Amendment) Act: A critique.

The foregoing discussion conclusively proves that the Constitution (42nd Amendment) Act, stirred a controversy unprecedented in the annals of Indian history as they sought to bring about drastic changes in the Constitution which virtually amount to writing a fresh Constitution of the country. Serious doubts were expressed by the public, press and by eminent authorities on Constitutional law of different political shades in the country as to the precise implications of these amendments for the political system of India. Since detailed discussion of all the 59 clauses of the Act has already been made, the present section seeks to explore the overall impact of the Bill on the Indian political process. For the sake convenience, the present discussion may be broken up into the following sub-divisions:

(a) The Constitution (42nd Amendment) Act and the operation of the theory of checks and balances between the three organs of the Government, viz. the Executive, the Legislative and the Judiciary.

(b) Changing pattern of federalism in the light of the amendment Act; and

(c) the amendment Act as an weapon of social revolution in the country.

Coming to the first sub-division, it can be safely stated the 42nd Amendment Act was the culmination of the march towards the establishment of parliamentary supremacy which had started with the passing of 24th Amendment Act. So in that sense,

the Act may be taken to be a logical extension of the 24th Amendment Act. It was observed in an edictorial comment: "what will the 42nd Amendment achieve? It will, first, emphasize the supremacy of Parliament over the Judiciary and the people, of the Cabinet over Parliament and of the office of Prime Minister over everybody else. In short, this will bring about an 'elective dictatorship' of the kind Lord Hailsham recently spoke about. The new Constitution does not guarantee that even the Prime Minister's will would not be enforced in the larger interests of the country. Thus the concentration of power can be dangerious, should persons who pay only lip service to the Constitution succeed in manipulating things in their favour ..... The only good principle it lays down is that even if it forms part of the Constitution, it can be amended with case by the same and subsequent Parliament. But surely prevention is better than cure."(77)

Impact on checks and balances among the governmental organs

That the avowed objective of the Act was to strengthen the Parliament could be obtained from the statement of the then Prime Minister Smt. Gandhi who was reported to have said: "Our intention in bringing some amendments to the Constitution is only to strengthen the sovereignty of Parliament and to see that the Constitution is interpreted correctly and in the spirit intended by its makers and to meet the changing needs of the people."(78)

Again she observed: "In our tradition, each has been able to retain its distinctive personality and make a contribution to the national life. Our aim is to build an India in which the old handicaps, prejudices and superstitions do not operate, where there

is absolute equality for all based on the unshakable foundation of tolerance but respect for one another."(79)

The Government's stand point with regard to the supremacy of Parliament was supported by the observation of Mr. A.R. Antulay that the Supreme Court's decision on the Keshavananda Bharati case in 1973 that Parliament was not competent to change either "the fundamental features or the "basic structure" of the Constitution "lacks constitutional jurisdiction."(80) After examining the constitutional position in regard to the powers of Parliament in the context of the Supreme Court's judgment since 1951, he asked the question: "Under which articles of the Constitution did the Supreme Court assume the jurisdiction to decide on the ambit and scope of Art. 368?"(81)

He further observed: "Indeed unless it is independentl shown as to which article places the limit on the authority of Art. 368, the question of examining the scope of Art. 368, perse, does not arise. In other words, unless a touchstone is found in the Constitution itself, how can you test Art. 368? I am certain that none can reasonably argue that the touchstone to test Art. 368 is Art. 368 itself. You donot measure by that very thing. But in the Keshavananda Bharati case, this is precisely what is unfortunately done."(82)

He added that Art. 32, which provides for distribution of the Supreme Court's powers among other courts, cannot be said to vest in the Supreme Court the power to pronounce on the ambit of Art. 368. He said: "Indeed, Art. 32(3) empowers Parliament to dilute the Supreme Court's power. How can the same article authorise the Suprem Court in the same breath to diminish the Constituent Authority of the Parliament?(83)

His observations regarding the nature and scope of Art. 32 vis-a-vis Art. 368 are worth-mentioning. He held: "In my view, Art. 32 does not contain a plain warning to the Supreme Court but only other subordinate Court too can simultaneously exercise all its powers. It is beyond comprehension that Parliament empower Lower Courts to exercise the Supreme Court's power but itself cannot amend such articles as are considered unalterable by that very court. If, indeed there was one 'fundamental feature' of the Constitution, it would have been Art. 32, which grants power to enforce Fundamental Rights. Yet, this very article authorises the entrusting of all these powers to numerous subordinate courts within their jurisdiction, placing thus all Lower Courts, in that respect, on a par with highest court".(84)

He added: "If moon cannot be imagined to control the functioning of the sun, surely then Art. 32 cannot be said to control the functioning of Art. 368. And yet, if Art. 368 has to subserve Art. 32, then as soon as Parliament exercises its authority and confers jurisdiction on hundreds of High Courts and district courts all over the country to exercise power under Art. 32(3), then there is nothing to prevent them on the Supreme Court's analogy from deciding on the ambit or amending articles' authority."(85)

The supremacy of Parliament found vocal support from Mr. P.B.Gajendragadkar, former Chief Justice of India, when he observed that the only limitations on the exercise of the amending power were the constitutions laid down by Art. 368 and no other.(86)

In his opinion, in interpreting Art. 368, no extrinsic considerations, based on imaginary hypotheses, should be treated as legitimate and courts must attempt to ascertain the true scope and

and effect of Art. 368 dispassionately.(87)

Mr. Gajendragadkar said that it was an elementary principle of jurisprudence that Legislative power was a 'generic term'; it consists of normal law-making power derived from the Constitution of the country and constituent power which enables the Constituent Assembly to frame a Constitution for the country. The Indian Constituent Assembly framed our Constitution and it provided for the amendment of its provisions by Art. 368. It would, thus, be clear that, when Parliament acts under Art. 368, it is a Constituent Assembly, except that it can exercise its powers subject to the limitations imposed by Art. 368.(88)

He pointed out that in construing Art. 368, it must be borne in mind that the heading of Part XX is 'amendment of the Constitution'. The debates in the Constituent Assembly clearly showed that two competing views were expressed about the constituent power to be conferred on Parliament: one was that the power should be more liberal, and the other was that it should be more restricted. Ultimately, a compromise was reached and the Article, as it finally emerged from the debates was based on the more liberal views.(89)

In his own words: "It was necessary to point out with some emphasis that the framers of the Constitution anticipated that the Constitution was not a static document and that, when Indian democracy embarks upon its mission of satisfying the legitimate but expanding hopes and aspirations of the citizens based on social equality and economic justice, it may have to make suitable laws from time to time to achieve that purpose and if it was found that these laws could not be passed because of any provisions of the Constitution, the Constitution will certainly need to be amended.

That is why they included Part XX in the Constitution which contains only Art. 368."(90) He said that in conferring on Parliament plenary constituent powers, the Constitution-makers did not appear to have thought of any alternative procedure for amending the provisions of the Constitution such as referendum or a new Constituent Assembly.

Emasculation of the Presidency or a mere re-statement of President's position?

The position and authority of the President underwent serious changes as a result of the 24th Amendment wherein it was declared that the President will have to assent to an amendment Bill whenever duly passed by the Parliament and presented to him. The present amendment seeks to restate the position of the Indian President by removing the ambiguity in the original Art. 74 of the Constitution. The said Article, in its present amended form, states that "the President shall in the exercise of his functions, act in accordance with such advice, "i.e., the advice tendered by the Council of Ministers through the Prime Minister.

This amendment is welcome in so far as it is concerned with the task of removing ambiguity in the Constitution. But there are some fields in which the President is expected to play an independent role. One of these fields is covered by the appointive power of the President. The President has been empowered to appoint the State Governors, the Comptroller and Auditor General of India, the Election Commissioner, the members of the Finance Commission, Planning Commission, the Judges of the Supreme Court etc. These appointments are important in so far as the federal structure of the country in concerned.

The second important field where the President should be given independent power covers the area where he can seek the advice of the Supreme Court under Art. 143 (1) on a question of law or fact. Actually, the Constitution wants "the President to play an independent role, since his power to consult the Supreme Court on matters concerning the States, falls within the ambit of his authority as the focus of Indian federation."(91)

Another aspect of the Indian political process which demands that the President should act independently is the power of the President to declare a state of emergency in a State under Art. 356 of the Constitution. "If the President exercises emergency powers at the behest of the party government at the Centre, an improper discriminate use in the present heterogenous political party system cannot altogether be ruled out."(92)

These are some of the areas in which the President is expected to play the role of an impartial umpire because of the presence of a number of political parties who should be given adequate opportunities to play effective roles with a view to making the Indian democracy strong. In the period between 1967 and 1971, India experienced a tendency towards an incoherent unstable inter-party coalition. No political commentator can, with any degree of certainty, predict the future political landscape of the country. At this point, it is necessary to refer to Art. 74(2) which provides that the question whether any, and if so what, advice was tendered by ministers to the President shall not be inquired into any court. Hence so far as the legal sanction is concerned, nothing can be done

in case of Presidential disobedience of the ministerial advice. That the Makers of the Constitution were well aware of the possibility can be seen in the following exchange that took place between the President of the Constituent Assembly and the Chairman of the Drafting Committee:

"Mr. President: where is the provision in the Draft Constitution which binds the President to act in accordance with the advice of the Ministers?

Dr. Ambedkar: I am sure that there is a provision and the provision is that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions.

Mr. President: Since we are having this written Constitution, we must have that clearly put somewhere.

Dr. Ambedkar: Though I cannot point it out just now, I am sure there is a provision, I think there is a provision that the President will be bound to accept the advice of the Ministers. In fact, he cannot act without the advice of his Ministers.

Some Honourable Members: Art. 61 (1).

Mr. President: It only lays down the duty of the Ministers, but it does not lay down the duty of the President to act in accordance with the advice given by the Ministers. It does not lay down that the President is bound to accept the advice. Is there any provision in the Constitution? We will not be able even to impeach him, because he will not be acting in violation of the Constitution, if there is no provision.

Dr. Ambedkar: May I draw your attention to Art.61, which deals with the exercise of the President's functions. He

cannot exercise any of his functions unless he has got the advice 'in the exercise of his functions.'....

Mr. President: I have my doubts if this word could bind the President. It only lays down that there shall be a Council of Ministers with the Prime Minister at the Head to aid and advise the President in the exercise of his functions. It does not say that the President will be bound to accept that advice.

Dr. Ambedkar: If he does not accept the advice of the existing Ministry, he shall have to find some other body of Ministers to advise him. He will never be able to act independently of the Ministers.

Mr. President: Is there any real difficulty in providing somewhere that the President will be bound by the advice of the Ministers?

Dr. Ambedkar: we are doing that. If I may say so, there is a provision in the Instrument of Instructions.

Mr. President: I have considered that also.

Dr. Ambedkar: Paragraph 3 reads: In all matters within the scope of the executive power of the Union, the President shall, in the exercise of the powers conferred upon him, be guided by the advice of his Ministers. We propose to make some amendment to that: (93)

It was expected that suitable conventions would grow to fill the gap and in actual practice, the history of last two decades shows that the successive Presidents of the Union did never try to disobey any advice tendered by the Council of Minister in the discharge of his duties. But as we have already noticed that serious doubts were raised as to the real nature of the Indian Presidency

because of the absence of any specific provision for the guidance of the relationship between the President and the Council of Ministers. The present amendment would surely remove all sources of doubts in this sphere. But our contention is that to make this change more comprehensive the above gaps should be bridged out since these may cause further sources of constitutional doubts among the commentators of the Constitution. At this point, it is necessary to mention Art. 78 of the Constitution which enjoins on the Prime Minister the duty -- (a) to communicate to the President all decisions of the Council of Ministers: (b) to furnish such information relating to the administration and proposals for legislation as the President calls for; and (c) to submit for the consideration of the Council of Ministers, if the President so requires, any matter on which a decision has been taken by a minister but which had not been considered by the Council. This provision is indicative of the impartial role that the President is expected to play in the political process of the country. But it is difficult to fit in Art. 78 (c) in this scheme which provides that "the President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business." Since the Prime Minister as the Head of the Cabinet fixes the agenda of the meeting, this provision under Art. 78(c) seems to be redundant and opens the way for a conflict between the President and the Prime Minister.

The framers of the present amendment Act could do well, had they been able to plague these loopholes before making an amendment in Art. 74, making it obligatory on the President to act in accordance with the advice of the Council of Ministers. But it should

be noted that this change in Art. 74 is of tremendous significance from at least two points of view, namely, to preserve and strengthen Parliamentary system of government with the President as a nominal Head of the State and to place the Presidential office above all sorts of controversy and political manipulation of different parties with opposing political ideals.

Impact on Centre-State relations

The other changes of the amendment Act which call for a closer analysis may be found in the provision which authorises the centre to send any armed forces or other forces under its authority to deal with the law and order situation in any State. Such forces shall act under the direction of the Central Government and shall not be controlled by the State Government. Provision has been made to empower Parliament to define the powers, functions and liabilities of the members of such force.(94) This new provision will exert tremendous influence on the nature of federalism. Since 'law and order' falls within the exclusive jurisdiction of the States, this new provision may threaten the smooth operation the existing principle of federation. It will not be out of place here to refer to at least two instances when the deployment of the Central Reserve Police (hereinafter referred to as CRP) gave rise to a bitter controversy between the Centre and the States concerned. One such incident took place in 1968 in Kerala. In September of that year, Central Government employees called for a strike and the Centre despatched several CRP units with view to safeguarding Central properties - in spite of the assurance given by the State Government that the strike would not pose any law and order problem. Since the Centre did not seek for the

State's consent, Mr. E.M.S. Namboodripad, the then Chief Minister, considered the Centre's action as an encroachment upon the State jurisdiction.

In a recent Article (95) Mr. Namboodripad has recalled the situation in this way:

"A dispute arose in 1968 between the then Government of Kerala and the Centre on the question of dealing with the Central Government employees' strike. The Central Government decided to take particular forms of action (including preventive detention) against the strikers and asked the State Governments to fall in line. The Government of Kerala declined to do this and asserted its right to deal with the public order arising out of the strike as it thinks fit. It was legally within its right to do so, while politically it thought that the manner in which the Centre proposed to deal with the strike would do more harm than good.

The Centre, at this stage, issued a threat that if the State Government did not fall in line, appropriate action would have to be taken against it. It also sent the Central Reserve Police for the use in dealing with the strike situation even though the State Government had not asked for it, on knowing that this had been done, the State Government not only protested against it but declined to use the CRP.

The Centre-State dispute that arose over this question did not burst out into a confrontation but blew over. Almost alone amongst the State Government, the Kerala Government did not have any striker arrested or otherwise proceeded against. The CRP which reached the State was confined to the barracks, and not allowed to move out."

Almost a similar situation arose during second United Front Ministry in West Bengal when on March, 24, 1369 the CRP opened fire on a mob in the Administrative Building of the Durgapur Steel Plant. It resulted in the injury of about sixty people which angered the then State Deputy Chief Minister Mr. Jyoti Basu who wanted the immediate withdrawal of the CRP from the State. According to his contention, the maintenance of law and order, including the protection of all kinds of property was the concern of the State. The Central Government however, justified their stand by stating that the help of the state police was inadequate. The then Union Minister of State for Home, Mr. Shukla was reported to have said that although normally the protection of Central property came within the constitutional jurisdiction of the State Government, when it was not available, it was the duty of the Centre to make alternative arrangements for protection.(96) On the same day, Mr. Y.V.Chavan, the then Union Home Minister, declared in the House of the People (Lok Sabha) that the Centre had authority to deploy the CRP Force in all parts of India with a view to safeguarding Central property and the State Governments were not competent to demand their withdrawal from the States concerned.(97)

Another firing incident in April, 1969 at Cossipore further worsened the relationship between the Central and the Government of West Bengal. As a protest against, the United Front in West Bengal organised a State-wide "Bandh" and the State Government lent support to it. The Centre could not in any way support the action taken by the State Government on the day of "Bandh" to prevent interferences in the Central agencies. Mr. Chavan, in a statement made in the Lok Sabha said that the State Government did not take effective measures in spite of the fact that all the State Governments in 1967 had been

reminded of their obligations under Arts. 256 and 257 of the Constitution.(98) When the differences between the Centre and the State reached its zenith, the Central Government set up a Commission of Enquiry for this purpose. Mr. Jyoti Basu, the then State Home Minister, questioned the legality of its appointment since no prior consultation in this regard was held with the State Government. However, the matter could not proceed too far and a deadlock prevails over the issue of investigation since then.

This has given rise to a number of questions which are of tremendous importance in so far as Indian federalism in concerned. These questions are:

"(a) Can there be two parallel agencies for the protection of law, order and property within the legal and constitutional framework? If so, what are their specific fields of operation?

(b) Again, if the Central Police has an independent role, how is it possible to reconcile it with the constitutional delineation of the Central and State spheres as is found in the Seventh Scheduled?

(c) What are the precise implications of the vast directive power of the centre under Arts. 256 and 257? If the Centre has a separate administrative machinery for safeguarding its establishments, is it not then true to say that much of the Centre's directive power become superfluous?"(99)

These are very pertinent questions in a country with a multiparty system. It was only in 1967 when the country witnessed a situation when some of the opposition parties had been able to come to power in some of the States. Although, at present there is sign of single party dominance in the country, but can it be easy to forsee

the future political outcome when a few opposition parties might be able to capture power, thereby ushering in a new political landscape? Although it is true that the present amendment in this regard would certainly remove any scope of doubt about Centre's power of deploying police force in a State, but still the question remains: is it compatible with the basic scheme of India's federal constitution?

That the Makers of the Constitution did not want to empower the Centre to deal with the issue of 'public order' falling within the sphere of a State can be easily seen from the course deliberations in the Constituent Assembly. It may not be out of place here to mention an unsuccessful attempt that was made by Shri Brajeshwar Prasad who wanted to transfer the item of "public order" from the State list to the Central list. Supporting the move, he argued: "there are dangers within and without, and we cannot depend upon the loyalty of the provincial administration in times of crisis. Centrifugal forces have been the base of our political life since the dawn of history. I, therefore, urge the public order should become Central subject." (100) But other members including Dr. Ambedkar did not support this stand and the proposal was lost.

On the question of arming the Centre with the power of giving direction to the State Governments with regard to the protection of Central property, Dr. Ambedkar was of the opinion that the protection of property was simply a police function. With regard to the scope of Art. 257 (3), his observation in this connection is worth-mentioning. He said: "All police, first of all, are in the List II (State List). Consequently, the protection of railway property also lies within the field of State Governments. It was felt that in particular cases, the Centre might desire that the property of the

Railway should be protected by taking special measures by the State and for that purpose the Centre now seeks to be endowed with power to give directions in that behalf."(101)

The foregoing discussion conclusively proves that it had never been the idea of the Constitution-Makers to empower the Central Government to deploy any Central force for the maintenance of law and order which are essentially the subjects of the State List. Naturally, the question arises: what prompted the Centre to take such a drastic change, contrary to the wishes of the framers of the Constitution? The answer lies not in the interpretation of the constitutional provisions, but in the changed political landscape of the country that prevailed in the period between 1967 to 1971. With the rise of non-Congress parties to power, it became almost difficult on the part of the Central Government to compel a recalcitrant State Government to toe line. The result was that many State Governments had to be governed under "President's rule", since the Constitution specifically provides that non-compliance of Central directive under Art. 365 would invite President's rule under Art. 356. It appears that the amendment sought to remove any future scope of debate over the issue of deploying Central force in a State. It also empowered the Parliament to define the powers, functions and liabilities of the members of such force. Although it may be justified in so far as the move to strengthen the Parliament is concerned, but it can not be supported in so far as party position is concerned since it will make the party in power to manipulate the in its favour. It may so happen in future that a political party with different ideology at the State level administration will not be able to perform its duties in a manner that helps it to further the political programme and pledges to the voter as it occurred in the

cases of States of Kerala and West Bengal.

But whatever might be the argument against the changes, it can be emphatically said that the underlying philosophy of the Act was to implement the socialist programme for bringing to the people "justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and fraternity assuring the dignity of the individual and the unity of the nation." This is what the people have promised themselves in the Preamble to the Constitution. But from the foregoing discussion it has been clearly revealed that both the Congress and the Opposition were debating the respective merits and demerits of these constitutional changes. The opposition parties were clamouring for a referendum as they felt that the then ruling party wanted to have a built-in system of "controlled democracy". The Congress, on the other-hand, contended that it would fulfil its pledges to the people by giving supremacy to the directive principles in the Constitution touching the social and economic lives of the people.

Both sides, however, regard the issue extremely vital affecting the lives of the people as well as the future of the country. The main argument of the then ruling party was that those changes were a must to "give fuller expression to the democratic and egalitarian aspirations of the people." The opposition, however felt that they would be able to cash in on what they believed to be "popular shock at abridgment of civil liberties." But whatever might be the arguments and counter arguments advanced for and against the 42nd Amendment Act, few would disagree with Mrs. Gandhi in her assertion that "there is something bigger test than judicial scrutiny and that is the scrutiny of history and its capacity to meet the

challenge of historical forces."(102) It can not be denied that as a result of these changes a new pattern of institutional arrangements emerged at the governmental level; it is equally true that the balance of power had been tilted in favour of the Executive-Legislature. It can be said easily and emphatically that had the Judiciary not faltered in its interpretation of the amending powers of Parliament saying one thing in one case and just the opposite in another, the need for the 42nd Amendment would not have been felt. Similarly, had the Judiciary from the beginning tried a synthesis between the justiciable Fundamental Rights and the non-justiciable Directive Principles, there would have been no attempt to tilt the balance against Fundamental Rights. The touchstone of the 42nd Amendment should not be the,"basic structure" theory being right or wrong, but whether it indeed impedes socio-economic legislation and where the balance of convenience, keeping the larger interests of the nation in mind, lies.

R E F E R E N C E S.

1. Statement of Objects and Reasons, appended to the Constitution (42nd Amendment) Act, 1976.
2. Ibid.
3. Ibid.
4. Ibid.
5. Ibid.
6. Ibid.
7. Lecture delivered on "Amendment of the Constitution" organised by the Lucknow Constitution Club. (Amritabazar Patrika, Octo. 12,1976).
8. Ibid.
9. Ibid.

10. Ibid.

11. Ibid.

12. The Statesman, Octo, 21, 1976.

13. Palkhivala - Reshaping the Constitution - Implications of the Swaran Singh Committee's Recommendations (Published by the Forum of Free Enterprise, 29th July, 1976) p. 2.

14. Ibid., pp. 2-3.

15. Ibid., p. 3.

16. Ibid., pp. 8-9.

17. Ibid., pp. 10-11.

18. The Speech delivered at the Seminar on Amendments organised of the Association of Democratic Lawyers, West Bengal, held in April,25, 1976 in Calcutta.

19. Ibid.

20. Ibid.

21. Ibid. Notable among the Speakers apart from those two mentioned, were Shri Somnath Chatterjee, M.P., Shri Banamali Das, Shri Sadhan Gupta, Shri B. Pande. Dr. Buddhadev Bhattacharyya, Reader, Calcutta University, sent paper to the Seminar.

22. A Seminar Sponsored by the National Committee for Revier of the Constitution, held in New Delhi on 16th and 17th October, 1976.

23. Ibid.

24. Ibid.

25. Ibid.

26. Ibid.

27. Ibid. The Seminar was attended among others by Mr. Asoke Mehta, Mr. E.M.S. Namboodripad, Mr. A. K. Gopalan, Mr. P. Ramamurthy, Mr. Tridib Sezhiyan, Mr. S.M.Joshi, Mr. O.P.Tyagi, Mr. Shibenlal Saksena, Mr. H.M.Patel and Mr. Krishan Kant.

28. Ibid.

29. Ibid.

30. Ibid.

31. Ibid.

32. Ibid.

33. Ibid.

34. Ibid.

35. Ibid.

36. The National Committee for Review of the Constitution was set up at the instance of J. P. Narayan in March, 1976. The present "press-release" was published in the 'People' of 9th August, 1976, pp. 20-23.

37. Ibid., p. 22.

38. Ibid., p. 23.

39. A seminar organised by the Bar Association of India in New Delhi, held on 19th & 20th Octo. 1976. (Statesman, Octo. 21 & 22, 1976).

40. Ibid.

41. Ibid.

42. Ibid.

43. Ibid.

44. Ibid.

45. Ibid.

46. Ibid. These speakers participated in the discussion of 21st Octo. 1976.

47. Ibid.

48. Ibid.

49. Ibid.

50. Ibid.

51. Ibid.

52. Ibid.

53. Ibid.

54. The Statement was issued jointly by Shri Jyoti Basu (CPI-M), Shri Makhan Pal (R.S.P.), Shri Asok Ghosh (F.B.), Shri Sukumar Ghosh (S.P.), Shri Subrid Mallik Choudhuri (M.F.B.), Shri Bimalananda Mukherjee (R.C.P.I.) and Shri Asish Bhattacharyya (Biplabi Bangla Congress) on May, 6, 1976 (Published in People's Democracy, Organ of the C.P.I.(M)- Vol. 12; No. 20, May 16, 1976.

56. Ibid.

57. C.P.I. (M) Stand on Constitutional amendments (published in People's Democracy, Vol. 12, No. 24, June 13, 1976).

58. Ibid.

59. Ibid.

60. ~~Peoples~~ Resolution adopted by the National Council of the C.P.I., held at Trivandum (Feb. 7-11, 1976).

61. Ibid.

62. Ibid.

63. Ibid.

64. Ibid.

65. Ibid.

66. Ibid.

67. Ibid.

68. Proletarian Era, Vol. 9, No. 20., dated 15th June, 1976.

69. The Statesman, October 24, 1976.

70. Ibid.

71. Ibid.

72. Ibid.

73. Ibid.

74. Ibid.

75. Ibid.

76. Ibid.

77. The Statesman, Nov. 5, 1976.

78. Ibid. It may be referred here that this observation of Mrs.Gandhi came as a sharp reaction to the resolutions, proposing the ~~co-ve-~~ convening of a Constituent Assembly were adopted in three States, namely, U.P., Punjab and Hariyana. (Statesman Octo, 24, 1976).

79. Ibid.

80. This was the observation made by Mr. A.K.Antony M.P. and General Secretary of the Congress in the Spotlight Programme of All India Radio on Octo 28, 1976.

81. Ibid.

82. Ibid.

83. Ibid.

84. Ibid.

85. Ibid.

86. He made this observation in a talk on the National Programme of All India Radio on Octo. 26, 1976.

87. Ibid.

88. Ibid.

89. Ibid.

90. Ibid.

91. Amal Ray - Tension Areas in India's federal System World Press, Calcutta, 1970, pp. 67-68.

92. Ibid., p. 68.

93. C.A.D. Vol. VIII, pp. 215-216.

94. Clause 43 which provides for the inclusion of a new Art. 257A.

95. Namboodripad - "The Constitution (44th Amendment) Bill", published in the People's Democracy, Vol. 12: No. 40, dated, Octo. 3, 1976.

96. The Statesman, April, 12, 1969.

97. Ibid.

98. The Statesman, April 12, 1969.

99. Amal Ray - Tension Areas in India's Federal System. Op.cit. pp. 52-53.

100. C.A.D. Vol. IX pp. 864-865.

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102. Lok Sabha Debates, 28th Octo. 1976 (The Statesman, Octo., 29, 1976).