FUNDAMENTAL RIGHTS AND AMENDMENT OF THE INDIAN CONSTITUTION. By S. P. Sathe, University of Bombay, Bombay University of Bombay. 1968. Pp. 68. Rs. 4·00.

IN THIS SMALL BROCHURE the author has endeavoured to give an analytical survey of the Golak Nath case[1] which caused a great thrill in the country. The book contains six chapters. In these chapters, Mr. Sathe has systematically arranged and examined the main lines of reasoning adopted both by the majority as well as the minority Judges in the case. In his opening chapter, the author has introduced the nature of the fundamental rights in the Indian Constitution and the various amendments made therein alongwith the three judgments of the Supreme Court on the topic.[2] The second chapter examines the scope and extent of parliamentary power to amend the Constitution and of the constitutional interpretation. In this Chapter the author focuses the conclusion drawn by the majority judges. He criticizes the majority view that article 368 of the Constitution contains only the procedure for amending the Constitution. The majority drew support for this view from the marginal note to the article, which reads "Procedure for Amendment of the Constitution."[3] Mr. Sathe quotes Maxwell[4] to assert that "according to well established rules of statutory interpretation the marginal notes are not ordinarily taken into consideration for construing a statute. They can be looked at to trace inclination of the provision in case of doubt (only)"[5]. He further refers to the practice prevalent in other countries where similar constitutional provisions exist. For example, in the United States of America only the question of non-compliance with the prescribed procedure is raised and not the substantive competence of the Congress[6]. Similar is the position in the Australian Constitution.[7]

The author also disagrees with the majority view that power to amend has been expressly mentioned in some other articles and thus it could not have been contemplated under article 368.[8] He agrees with the minority that there are certain constitutional provisions of transitory nature and it could be visualized that they would have to be amended in the near future, *e.g.*, reorganization of the territories

1. *Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1643.
2. *Shankari Prasad* v. *Union of India*, A.I.R., 1951 S.C. 458; *Sajjan Singh* v. *State of Rajasthan*, A.I.R. 1965 S. C. 845; *Golak Nath*, v. *State of Punjab*, A. I. R. 1967 S. C. 1643.
3. Sathe, *Fundamental Rights and Amendments of the Indian Constitution* 14 (1968). Hereinafter cited as *Sathe* only.
4. *Maxwell on Interpretation of Statutes* 41, 42 (11th ed. 1962).
5. *Sathe* at 15.
6. *Id.* at 16.
7. *Ibid.*
8. *Id.* at 17.

of the states. These provisions according to him, are merely exceptions to article 368 which contains the general provisions enabling Parliament to amend the Constitution.[9] He disagrees with the majority view that the power to amend the Constitution is found in the residuary legislative power of Parliament, and observes that "the location of the residury power in a federal constitution is a matter of convenience and is guided by historical considerations."[10] He supports his contention by referring to the Constitution of the United States, Australia and Canada where such is not the case. Further, he says that if there was any intention of the makers of the Constitution to exclude the fundamental rights from the purview of article 368, it could have been indicated expressly therein[11] as has been provided in article V of the Constitution of the United States wherein certain provisions of the Constitution have been made immune from amendment. However, the reviewer, feels unable to agree with this line of argument that if a particular provision is not in the Constitution of the United States, Australia or Canada, it should also be presumed accordingly in the Indian constitution. Perhaps, the author is unmindful of the fact that the Constitution of India has been written in details as compared with other Constitutions where the provisions have been provided in general terms. In this connection article 13 (2) is express in its terminology and lays down constitutional inhibition in amending fundamental rights.

The author does not agree with the majority opinion that the constitutional amendment is a "law" for the purpose of article 13(2).[12] But he has given no reasons why the word "law" should not include constitutional amendment. The reviewer thinks that constitutional law is itself a "law" irrespective of the fact that it may not be an ordinary law. It fulfils the basic definition of "law" as given by Salmond as "rules recognized and applied by the courts in the administration of justice." Moreover, article 13 itself has not laid down that it would not cover constitutional law. Similarly, it is not easy to agree with the view, as author has suggested without reasons, that if the word "law" in article 13(2) excludes constitutional law there would be no conflict between article 368 and article 13(2).

Regarding premissible limits which can be imposed on the powers of Parliament to amend the constitution, the author submits :

> that as the power of constitutional amendment is derived from the Constitution itself, it should not be excercised so as to completely rob the constitution of its spirit and purpose...to change a democracy into a totalitarian government....

9. *Ibid.*
10. *Id.* at 19.
11. *Id.* at 22.
12. *Id.* at 28.

> So long as a constitutional amendment does not tend to undermie the enduring values enshrined in the Constitution, it is within the scope of the power of constitutional amendment given by article 368. It is submitted that although Parliament can amend the Constitution, so as to take away or abridge the fundamental rights, such amendment must be consonant with the enduring values such as liberty, equality and justice, which the Indian Constitution proudly enshrines.[13]

But this is all utopian. He fails to point out what should be the positive checks if Parliament completely changes the Constitution even its enduring values such as, liberty, equality and justice. Author has failed to appreciate the circumstances under which rights were adopted in the various amendments of the Constitution of the United States and rendered those rights inalienable and the framers of the Indian Constitution declared some of the rights as fundamental and put them in a special part of the Constitution. If Parliament is permitted to abridge these rights, then there would be no safeguard. It would be a mockery of the guarantee provided in part III of the Constitution. Thus, it can be reasonably assumed that these rights have been provided in a special part so as to safeguard them against the arbitrariness of the majority i.e. putting them beyond the reach of Parliament.

The author has rejected the proposal of one of the Judges to convene a Constituent Assembly to amend the Constitution. He says that a fresh Constituent Assembly may be convened only to draft an entirely new Constitution after abrogating the present one. Moreover, this has not been provided in the Constitution.[14] Here the author has become unmindful of the large residuary powers of the Parliament in entry 97, list I of schedule under which a Constituent Assembly can be legally convened. The author has failed to point out an important objection to this proposal. In Parliament for amendment of the Constitution a special majority would be needed but a bare majority would be sufficient in the Constituent Assembly to amend the fundamental rights. This could have been a stronger ground against convening the Constituent Assembly.

In chapter three, the author has criticized invocation of the doctrine of "prospective overruling". According to him this doctrine can be invoked only to the extent of saving past executive acts in pursuance of these amendments. By invoking this doctrine, he thinks that the Supreme Court has exceeded its limits of judicial law making[15]. But in rejecting this important doctrine the author forgot to point out that when all the amendments of the Constitution concerning fundamental rights were declared void, how it is possible to

13. *Id.* at 30.
14. *Id.* at 33.
15. *Id.* at 41.

declare continuance of a void law. A void law means void for all times to come.

Chapter four relates the philosophy of fundamental rights. The author has appreciably analysed the shifting trend of the Supreme Court. He syas that the Supreme Court which had once shown its reluctance to read the natural law concept into the Constitution[16] departed from this attitude in the *Golak Nath* case on the basic premise that fundamental rights are transcendental.[17] This approach, Mr. Sathe says, lost its "philosophical flavour" "under the jargon of verbal interpretation." This was due to the Court's reliance mainly on article 13 (2).[18] He observes that there are rights not included in part III but "no less fundamental to the democratic process." These are, for example, right to vote[19] or right to inter-state trade and commerce.[20] Further, "in a changing society, the order of precedence of rights is bound to change."[21] The author has posed a problem that "In view of the rigid and static meaning given to the word 'fundamental' by the Court, it is difficult to imagine how the court will be able to keep the concept of 'fundamental' dynamic ?"[22] It may be added here that the author has under-estimated the creative role of the judiciary through interpretational process. By interpreting the various provisions of part III, any matter can be brought within the ambit of "fundamental." The author has failed to take notice of minority opinion of Mr. Justice Madholkar on this aspect in the *Sajjan Singh* case[23] wherein this point was stressed. Surprisingly this point is missing in the majority judgement of *Golak Nath* case.

The author may have raised many more fine points in criticizing the majority judgement given in the *Golak Nath* case, but he appears to have been engrossed upon the points raised by the minority Judges against the majority judgment. The author did not take into consideration the basic approach of the majority Judges in the *Golak Nath* case. As a matter of fact Parliament by introducing forty-four Acts passed by various states in schedule IX created "legislative escapism,"[24] *i.e.*, the Acts were made completely out of the purview of the judiciary. Thus, Parliament unduely tried to snatch

16. *Gopalan* v. *State of Madras*, A.I.R. 1950 S.C. 27.
17. A.I.R. 1967 S.C. 1643 at 1656.
18. *Sathe* at 52.
19. *Ind. Const.* art. 326.
20. *Ind. Const.* art. 301.
21. *Sathe* at 52.
22. *Id.* at 53.
23. A.I.R. 1965 S.C. 845.
24. The term was pointed out by Dr. G. S. Sharma in a symposium held in the University Law School, Jaipur on 10 Jan., 1969.

away the power of judiciary which was enshrined by the makers of the Indian Constitution to safeguard the basic rights of the people.

The book, however, provides a new trend in the field of criticism of legal judgments. I hope it will prove a great asset in the legal field.

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