

NOES

Ahirwar, Shri Nathu Ram	Jagjiwan Ram, Shri Kabandole, Shri Z. M.	Randhir Singh, Shri Rane, Shri
Azad, Shri Bhagwat Jha Babunath Singh, Shri Bajpai, Shri Vidya Dhar Barua, Shri Bedabrata Barua, Shri R.	Kamble, Shri Kamala Kumari, Kumari Kavade, Shri B. R. Kedaria, Shri C. M. Khadilkar, Shri Khan, Shri M. A. Kinder Lal, Shri Laskar, Shri N. R. Mahishi, Dr. Sarojini Malimariyappa, Shri Mane, Shri Shankarrao Masuriya Din, Shri Menon, Shri Govinda Mirza, Shri Bakar Ali Mishra, Shri Bibhuti Mishra, Shri G. S. Mrityunjay Prasad, Shri Nageshwar, Shri Pahadia, Shri Parmar, Shri Bhaljibhai Patil, Shri S. D. Prasad, Shri Y. A. Rajasekharan, Shri Ram, Shri T. Ram Kishan, Shri Ram Subhag Singh, Dr. L. M. Swarup, Shri	Rao, Shri K. Narayana Rao, Shri Muthyal Rao, Shri Rameshwar Rao, Shri Thirumala Roy, Shri Bishwanath Roy, Shrimati Uma Salve, Shri N. K. P. Sanghi, Shri N. K. Sankata Prasad, Dr. Sarma, Shri A. T. Sen, Shri Dwaipayan Sethuramae, Shri N. Shambhu Nath, Shri Sharma, Shri D. C. Shashi Ranjan, Shri Shastri, Shri B. N. Sheo Narain, Shri Shinkre, Shri Shukla, Shri S. N. Snatak, Shri Nar Deo Sotanki, Shri S. M. Sonar, Dr. A. G. Sunder Lal, Shri Tiwary, Shri D. N. Uikey, Shri M. G. Vikram Chand, Shri Virbhadra Singh, Shri

Shri Hardayal Devgun (East Delhi): This system should be corrected. It is most scandalous.

श्री मधु लिमये: इन नै उपा-यज्ञ काँ तो करीव करीव खत्म ह्रीं कर दिया था।

Mr. Speaker: It used to be very good last time.

Shri Hardayal Devgun: From this you can judge the state of affairs in the country.

Mr. Speaker: The result is the same. here may be ten more this side or that side. We will get it tested.

Shri Hardayal Devgun: This is how the Government is functioning in the country.

Mr. Speaker: The result of the division is:

Ayes* . . . 59
Noes . . . 85

The motion is lost.

The motion was negatived.

16.27 hrs.

CONSTITUTION (AMENDMENT)
BILL

(Amendment of Article 368)

by Shri Nath Pai.

Shri Nath Pai (Rajpur): **Mr. Speaker:** Sir, my Bill is for amending the Constitution.

Sir, for ready reference I should like to read here the statement of objects which I have appended to my Bill.

*Ayes: name of one Member could not be recorded.

it reads:

"Doubt and confusion have arisen as a result of the recent judgment of the Supreme Court in I.C. Golak Nath and others *versus* the State of Punjab etc., as regards the competence of Parliament to amend the articles incorporating Fundamental Rights. The issue raised is of cardinal importance to the supremacy of Parliament. This supremacy implies the right and authority of Parliament to amend even the Fundamental Rights. Just as Parliament can extend these rights it can in special circumstances also modify them. The Bill seeks to assert this and remove any doubt that might have arisen as a result of the said judgment."

I should like to read first the article in interpreting which the Supreme Court has given a new judgement. I should also like to remind the House that an argument will be trotted again and again by those who are interested in thwarting the passage of this amendment and, therefore, perhaps unwittingly be a party to thwarting the wishes of the people. These Members or this school of thinking will be citing that it is the Supreme Court who has given the judgement. I am one with those who will be waiting to uphold the authority, the prestige and the dignity of the Supreme Court. We shall be, I think, failing in our responsibility if we do not always exercise restraint in expressing ourselves wherever the Supreme Court is concerned. We shall have to so express ourselves that whatever our differences—and sometimes our differences with this highest forum of our judiciary will be very acute fundamentally and sometimes what we may say may be even critical—that when we appear to be critical it may need not necessarily appear to be disrespectful. It is in this spirit that I shall be offering my observations and points of disagreement with the judgement of the Supreme Court.

Sir, I regard the Supreme Court as a guardian and custodian of the rights of the citizen. Our Constitution clearly underlines the division of power between the executive, the legislative and the judicial branches of the State of India. I think, the principle of separation of powers has been clearly adumbrated, enunciated and elucidated in the provisions of our Constitution. I am also aware that the amendment I am trying to move is of far-reaching consequences and on a superficial reading it may appear to be one to defy the authority of the Supreme Court. At the very outset I should like to try to remove any such possible misunderstanding. What I am trying to do—and I hope to persuade the House—is to establish the supremacy of Parliament, not in the ordinary sense but in the deeper sense in which the founders of our Constitution, as I shall have occasion to refer to them, conceived it. If we allow, with all our regard to the Supreme Court, the judgement to remain, as it is, I think, slowly, the authority of Parliament will be clinched, gripped and curtailed and Parliament will not be able to function as the ultimate instrument of the will of our people. Parliamentary supremacy is meaningless, ceases to have any coherent meaning, if Parliament cannot amend the Constitution and the right to amend the Constitution must also embrace, must include, must imply, the right to amend every Section of the Constitution. The Supreme Court has now held to the contrary. My friends, here, are likely to cite the Supreme Court's authority in challenging my contention. For their benefit, I want to remind the House that there are two previous judgements of the same Supreme Court, the judgement in Shankari Prasad and later on confirmed by judgment in Sajjan Singh's case.

In these two judgements, the same Supreme Court upheld the authority, the competence, of Parliament to amend the Constitution, including Article 368 of the Constitution, making it very clear that Parliament

[Shri K. C. Pant]

has the full authority and the competence to amend even fundamental rights.

Now, I shall read first the constitutional provision relating to article 368 of the Constitution.

It says:

"An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided."

We are not immediately concerned here with the proviso.

I would point out here that the Supreme Court has referred immediately to Article 13 which, to a certain extent, is a prohibitory article, and interpreted the article in a new manner which is not in harmony, in keeping, with the previous interpretation by the same Supreme Court. I should, for ready reference, once again refer to Article 13 which lays down like this:

"13 (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

It would not have been the Constitution of free India if this provision was not incorporated by the founders of the Constitution. Any law imposed by an alien power, for the perpetuation of the rule of the alien power, which

was found to be not in harmony or in direct contradiction with the spirit of the Constitution had, therefore, to be declared null and void.

Then, comes Section (2) of that article which says:

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

Now, taking this section for interpretation, along with the power of Parliament in Article 368, the Supreme Court had held that Article 13 (2) forbids Parliament, bars Parliament, from passing any Act which may try to curtail the rights conferred on the citizen of India in section (3) of Article 368 of the Constitution.

I shall now read what exactly the Supreme Court has held. I shall not be fair to the Supreme Court or to this House if I did not give a summary, in a few words, of the judgement of the Supreme Court. The Chief Justice of India giving judgment for himself and four other judges of the Supreme Court dismissed on 27th February, 1967, the petitions by Golak Nath and others against the State of Punjab and summarised his main conclusions as follows:

"The power of Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368, which only deals with procedure. Amendment is a legislative process."

This is the fundamental difference the Supreme Court makes in its own earlier ruling on the same subject whereas the previous judgments held that the power under Article 368 meant not a procedural power but a

power of introducing substantive changes in the Constitution. In *Golak Nath's case*, the Supreme Court, by a new doctrine to which I shall be referring later, has introduced here this element. Then, it says:

"Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III governing fundamental rights, it is void."

Further, the Supreme Court states that the Constitution (First Amendment) Act 1951, the Amendment Act 1955, and the Constitution (Seventeenth Amendment) Act 1964 abridge the scope of the fundamental right, but on the basis of earlier decisions of this Court, they are valid. It is a very interesting anomaly in which we are landed. I will be taking two extraordinary anomalies in which their Lordships, the learned judges of the Supreme Court, have landed the whole judicial process and the legislative process in this country. They say that the judgment given by them is valid, but the prospective overruling, which is unknown to the Indian system of interpretation has been introduced. This is a system which is known to the United States' law, but it is a novel innovation so far as we are concerned. Though the theory of this prospective overruling is known to us, its application is a novel innovation in our judicial system or to our jurisprudence.

"On the application of the doctrine of prospective overruling, this decision will have a prospective operation only in future and therefore, the said amendments will continue as valid."

It is interesting here and I would like you to hear this again.

"On the application of the doctrine of prospective overruling, this decision will have a prospective operation only in future.."

not with regard to what we are doing today,

"...and, therefore, the said amendments will continue as valid."

"Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein."

"As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the Punjab Security of Land Tenures Act, 1953, and the Mysore Land Reforms Act, 1962, challenged in these proceedings cannot be questioned on the ground that they offend Articles 13, 14 or 31 of the Constitution."

The Supreme Court holds that these Acts cannot be challenged but in future when we go to them, they will challenge the validity of those Acts, and, therefore, the principle or doctrine of prospective overruling has been introduced

I should also like to give two or three or four sentences from the judgment of Mr. Justice Hidayatullah which cogently sums up the arguments for those who take this view that Parliament's competence to amend the Constitution does not extend to the amendment of the fundamental rights. Mr. Justice Hidayatullah, agreeing with the Chief Justice, stated his conclusions in a separate judgment as follows:—

"The Fundamental Rights are outside the amending process if the amendment seeks to abridge or take away any of the rights."

The point, therefore, is that the Supreme Court holds that Article 368 is not the relevant Article, but Article 19 is the relevant Article. Article 368 only lays down the procedure. Now

[Shri Nath Pai]

we have to address ourselves to these two questions: did the makers of the Constitution really feel so or think so? Was it their intention? Did the Supreme Court in its earlier judgments agree with this view? Mr. Justice Hidayatullah puts it like this:

"The Judgments of the Supreme Court in the cases of Shankari Prasad and Sajjan Singh conceding the power of amendment in relation to fundamental rights were based on an erroneous view."

Where shall we go? The Supreme Court has given this thing, namely, that the judgments of the earlier Court—the Supreme Court itself—were based on an erroneous view. I would not like to sit in judgment on this issue, but I would like to point out the anomaly in which we are landed. The Supreme Court tells us today that the previous judgments of the same Court were based on an erroneous view of the law. It is absolutely conceivable that when some of the judges who give the judgment today retire and a case comes for interpretation before another Bench, they will take another view and that is the doubt. This is a right, an inalienable right. That means that an independent judiciary, a supreme judiciary, a free judiciary—I would not call—has landed up into an anomaly so far as the fundamental rights are concerned. As somebody says it of the court of Enquiry, the Lord Chancellor's Court, that equity varies or changes according to the length of the shoe of the Lord Chancellor, so also the fundamental rights of the citizens of India shall not be guaranteed to them, shall not be there permanently for them to look to, follow and ask for their being protected but will be dependent upon

the composition of the Supreme Court at a given minute or a given point of reference in time. To a certain extent it is good, but to a very large extent it is pernicious and dangerous. Justice Hidayatullah further goes on to say:

"This Court having laid down that Fundamental Rights cannot be abridged or taken away by the amendatory process, any further inroads into those rights, as they exist today, will be illegal. For abridging or taking away Fundamental Rights, Constituent Assembly will have to be called."

Finally, he says:

"The First, Fourth and Seventeenth Amendments, being a part of the Constitution by acquiescence for a long time, cannot now be challenged, and the impugned Acts are, therefore, valid and the petitions must be dismissed."

This is a judgment which is to a certain extent academic immediately. But a citizen may go to the court and then the Supreme Court will follow the principles which are laid down in this judgment.

The three things to be borne in mind is this. According to the Supreme Court, article 368 is a procedural article; Parliament has no right to amend the Fundamental Rights; the previous judgment which had upheld Parliament's authority to amend was based on an erroneous view of the law. Thirdly, if you want to amend the Constitution, this Parliament is not the competent body, but a Constituent Assembly will have to be called.

I shall take up the third point first. Who is to call the Constituent Assembly? I want to submit to this House that Parliament as constituted today by freely held elections represents

the will of the people. Of course, there may be aberrations; I know that they did take place, but we are the first to condemn them. But we can take pride in the fact that from Tokyo to Accra, nearly three scores of countries became free simultaneously with or in the wake of the dawn of Indian Independence; one after the other these countries have gone under the jack-boot of one-party totalitarian dictatorship. India remains among the few nations, where the flag of democracy still flies high. It means that the ultimate instrument of that freedom, the symbol of that freedom the symbol and instrument of the will of our people, namely Parliament remains sovereign and supreme. But we are now told that a creature of Parliament can amend the Constitution, but the creator of that creature cannot amend the Constitution. A constituent assembly to be called by us can amend the Constitution, but we who will be creating the constituent assembly will not have the power to amend the Constitution.

I want to show another anomaly also in this. I want to submit that Parliament as constituted today is far more representative of the people of India than the Constituent Assembly; a large part of the members of the Constituent Assembly were nominated members. Therefore, the legislative power and the competence flowing from the will of the people freely expressed through elections is far greater.

Shri Manoharan (Madras North): The majorities are no more there.

Shri Nath Pai: That is another point. I have pointed out the three new points in the Supreme Court judgment and I shall point out what we are trying to do.

Mr. Speaker, I shall take some more time on this because this is not so simple as one might imagine. I want a thorough debate on this. I

understand that there will be opposition to this from my worthy colleagues on my right, who are sometimes vigorous and sometimes vehement, but on the whole, I hope I shall encounter a very intelligent opposition from my hon. friend Shri Piloo Mody; it may seem like a surprise to them when I use these adjectives, but that has been my experience; I hope that it will be the experience today, also to see their vigorous opposition, and on the whole, a consistently intelligent opposition. I understand that they want to oppose this Bill and they have asked for five hours' discussion on the ground that this is the most far-reaching amendment that they have ever seen here, and for my part, I have readily agreed to that. I do not want such an important Bill as this to be road-rolled and to be rushed through. I would like an adequate discussion to take place.

Later on, I am going to place before this House a motion that this may be referred to a Select Committee of the House so that we have the best evidence in the country and proper discussion could take place and then the House would get the fruits of the deliberations in the Select Committee after having heard the best judicial luminaries in the country. It is after that that we should take up this Bill in the House.

Shri Mathyal Rao (Nagarkurnool): Joint Select Committee.

Shri Sath Pai: My hon. friend may table an amendment to that effect. But my conception is that at this stage, a Select Committee of this House is sufficient. But my hon. friend is welcome to suggest a Joint Committee.

I would now in upholding my submission, try to quote what other authorities have to say, not what Nath Pai has to say. There are better authorities than Nath Pai. Let us see what

[Shri Nath Pai]

they have to say on this important issue. I have stopped quoting myself now. I will be quoting the authorities concerned.

This is the Supreme Court itself, in Shankari Prasad and Ors. petitioners vs. the Union of India and Ors. 1951, Supreme Court 458. I will read only the relevant part from the judgment of the Court. This I would like, particularly, not the supporters of my Bill—I think broadly an overwhelming majority will be agreeing with me—but those who are likely to disagree to hear. I hope after hearing me they will see that there is not much substance in their opposition; opposition based on fear is not a valid opposition; after I have met the grounds of their fear, I hope they including my hon. friend, will withdraw their opposition.

I shall now read Dicey's definition of constitutional law as including all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state. It is thus mainly concerned with the creation of all the three great organs of the state, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relations.

"No doubt, our constitution-makers, following the American model, have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the state".

I would like the House to follow very carefully the remainder part from this judgment.

"We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment."

A constitutional amendment is totally different from an ordinary enact-

ment of Parliament whereas an ordinary enactment which runs counter to the spirit of art. 13 of the Constitution may be null and void, ultra vires and therefore, unconstitutional. A constitutional amendment itself shall not be, because that makes a mockery of the supremacy of Parliament to amend the Constitution (Interruptions). Some people are allergic to Nath Pai; I do not know why. Let them bother to study a little more these things.

"We are inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of the rights of the subject by the legislative and executive organs of the state by means of laws and rules made in exercise of their legislative power and not the abridgement or nullification of such rights by alterations of the Constitution itself in exercise of the sovereign constituent power. That power, though it has been entrusted to Parliament, has been so hedged in with restrictions that its exercise must be difficult and rare. On the other hand, the terms of art. 368 are perfectly general."

I would read the last sentence again—

"On the other hand, the terms of art. 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. In short, we have here two articles, each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that the one should be read as controlled and qualified by the other."

"Having regard to the considerations adverted to above, we are

of the opinion that in the context of art. 13, law must be taken to mean the rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of the constituent power, with the result that art. 13(2) does not affect amendments made under art. 368”.

May I now read what Dr. Ambedkar, who is popularly called the architect of our Constitution, but who was—people disagree, I think it is for history to give its verdict—the principal architect of our Constitution has said? He has made it very clear when he was challenged on this issue. Dr. Ambedkar, speaking on November 4, 1948, said:

“The second means adopted to avoid rigidity and legalism is the provision of facility with which the Constitution should be amended. The provisions of the Constitution relating to the amendment of the Constitution divide the articles of the Constitution into two groups. In the one group are placed articles relating to the distribution of legislative powers between the Centre and the States; (b) the representation of the States in Parliament, and (c) the powers of courts. All other articles are placed in another group. Articles placed in the second group cover a very large part of the Constitution and can be amended by Parliament by a double majority, viz. a majority of not less than two-thirds of the members of each House present and voting and by a majority of the total members of each House. The amendment of these articles does not require ratification by the States.”

And then he has given what he had in mind. Here he adds:

“The draft Constitution has admitted the elaborate and difficult processes such as a decision by convention or a referendum. The

draft Constitution has the elaborate and difficult procedures such as a decision by convention or a referendum.”

The Supreme Court talks of a Constituent Assembly. Was that the intention of the makers of the Constitution? Here is Baba Saheb Ambedkar. I know under the canons of interpretations speeches made during the passage of an enactment or a Bill or an Act do not become aids necessarily for interpretation, but they can be taken into consideration, not necessarily as aids, but as useful guidelines.

“The powers of amendment are left with the legislatures, Central and provincial. It is only for amendment of specific matters, and they are only a few, that the ratification of the State legislature is required. All other articles of the Constitution . . . ”

— the important words are—

“All other articles of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of the members of each House present and voting and a majority of the total membership of each House.”

What Dr. Ambedkar is saying here is that article 368 is not just amendatory, is not just procedural, but it confers power to make substantial changes in any part of the Constitution.

“The Constitution has invested the Supreme Court with these rights, and these are restricted not to be taken away unless and until the Constitution is amended by means open to the legislature.”

With regard to the Supreme Court he says we can make an amendment.

[Shri Nath Pai]

Finally, I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which this country finds itself provided such a facile procedure the amendment of the Constitution. He agrees that there is a facile procedure laid down for amending the Constitution.

"If those who are dissatisfied with the Constitution have only to obtain a two-thirds majority, and if they cannot obtain even a two-third majority in a Parliament elected on adult franchise in their dissatisfaction with the Constitution cannot be deemed to be shared by the general public."

He is having in mind that in a changing society, in a dynamic society like ours which has to make good for the neglect of centuries under alien rule and neglect of two decades by the present rulers, Parliament will have to be the instrument of the will of the people. The new demands of the people will have to be given effect to by Parliament. Often some difficulty will arise, and who will solve the difficulty if not Parliament?

There are one or two sentences which I am tempted to quote, but I will leave them out because time is running out. I will conclude. I want to say only this thing.

"...that the views of Jefferson, echoed by Ambedkar and Nehru, were more powerfully expressed by Thomas Paine in 1790-91."

This is Justice Bachawat of the Supreme Court in the same judgment.—

"There never did, there never will, there never can exist a Parliament or any description of men or any generation of men in any country possessed of the right or the power of binding and controlling posterity to the end of time or of commanding for ever how the world shall be governed or who shall govern it, and therefore all such clauses, acts or declarations by which the makers of them

attempt to do what they have neither the right nor the power to do nor the power to execute, are in themselves null and void."

With regard to the supremacy of the Legislature, I want to conclude by saying what the Advocate-General of Maharashtra, Mr. Seervai has said. I was disappointed that this library did not have this book till the day before yesterday. I had been wanting this book for ready reference because this is perhaps among the major studies that have been made—Seervai's *Constitutional law of India*. It came in Bombay but I could not get it till the day before yesterday and therefore I am handicapped. In this lucid and learned commentary on constitutional law of India, Mr. Seervai says that the Supreme Court Judgment should be overruled at the first opportunity possible. He is one of the great students of constitutional law a sober man, and an objective scholar whose objectivity and loyalty to citizenship rights and to the Constitution have been unimpeachable. I want, therefore, all of them to bear in mind my basic submission. What is that submission? We shall not be trading off the toes of anybody else; we do not want artificial rivalry between the Supreme Court and the Parliament. They have their defined functions. But all these functions flow from one supreme source—the will of the people of India. The Constitution embodies that will and under that Constitution it is enjoined on Parliament to give from time to time as times change an embodiment a reflection to the will of our people, to the wishes of our people, to the needs of the people. This is the fundamental meaning of the supremacy of Parliament and nobody has the right to take away, snatch away or deprive Parliament of its inalienable right, the right to amend the Constitution of India. I submit therefore, in conclusion, that I have this motion to make before the House. I will have a

opportunity, I think, after a proper debate to reply to the points if any that are made by those who disagree.

Sir, with your permission I beg to move:

"That the Bill further to amend the Constitution of India be referred to a Select Committee consisting of fifteen Members namely, Shri R. K. Khadiolkar, Shri R. D. Bhandare, Shri N. C. Chatterjee, Shri Kanwar Lal Gupta, Shri S. M. Joshi, Shri Krishnan Manoharan, Dr. G. S. Melkote, Shri P. Govinda Menon, Shri Bakar Ali Mirza, Shri Pilo Mody, Shri H. N. Mukerjee, Shri Ram Kishan, Shri J. Rameshwar Rao, Shri R. Umamah and Shri Nath Pai,

with instructions to report by the first day of the next session."

I had the benefit of consulting some leaders of this House and so I move:

"That the Bill further to amend the Constitution of India be taken into consideration."

I thank you very much.

Mr. Speaker: The motion of Mr Nath Pai is before the House. The speaker's should be brief. Shri D. C. Sharma.

Shri D. C. Sharma (Gurdaspur): The hon. Member, Mr. Nath Pai . . .

Shri P. K. Deo (Kalahandi): My name is there.

Mr. Speaker: I will see....(Inter-
ruptions).

Shri D. C. Sharma:....has brought a wealth of learning and a wealth of eloquence to bear upon the elucidation of this Bill. After listening to him, I think nobody should have any doubt about the feasibility of this Bill and about the validity of this Bill. I think this is a very, very timely Bill and he has done a great service to this country and to this Parliament and to

the people of India by bringing forward this Bill.

17 hrs.

Now, Sir, I am not a person who used to practise in the high court of Bombay like Mr. Nath Pai before our External Affairs Minister when the latter was a judge there. The External Affairs Minister said that he found Mr. Nath Pai a very charming speaker. Of course, he has retained that quality still, but I do not have that legal wealth of knowledge which he has and I am glad that I have not practised before any court of law. I say this from one point of view. And it is this. When I go to the house of a lawyer, I find the office is stocked with almirahs and those almirahs I find are littered with books. I ask myself, what use do they make of these books. He says these books are very useful because you can find arguments in favour of anything or against anything. This case law which we have in this country in a very, very large degree, has been the hunting-ground of these lawyers, and there is no lawyer who will not find arguments for anything or against anything, who will not find a case law in his favour and a case law against him.

17.01 hrs.

[MR. DEPUTY-SPEAKER in the Chair]

I have great respect for the judges of the high courts. I have a great deal of regard for the judges of the Supreme Court, but I must submit very respectfully that the judges of the high courts and the judges of the Supreme Court are not such persons as can always take a neutral non-aligned view of things. We are all persons conditioned by things—

Shri Dattatraya Kunte (Kolaba): Sir, the hon. Member should not use such language with reference to the judges of the Supreme Court. (Inter-
ruption).

Shri D. C. Sharma: I was submitting very respectfully; my hon. friend who has objected just now has done so because that is his profession! He said that I had used certain words. Let hon. Members listen to me first. You know there is a science of psychology in this world, and there is the behaviour psychology in this world at present to be found. There is a word used in psychology, and that is "conditioned". Whether I am a judge or the Prime Minister of a country, whether I am a school teacher or a professor somewhere, whether I am a Member of Parliament or a member of a Panchayat Samiti, we are all conditioned human beings. And there is nothing that can take away from the conditioning of any human being. What is wrong in this? Our environment, our education, our social environment, the moral imperatives which govern the society, all these things condition us. Therefore, I said that the judges are most admirable persons in this world. I have great regard for them, but I must say they are also conditioned like other human beings and sometimes their conditioning gets the better of their, what you might call, the legal or judicial or constitutional qualities, whatever it is. My hon. friend, Shri Nath Pai, read three judgments. One judgment says this and two judgments say something else. I am a democrat and democracy is rule by majority. Now, two judgments are in favour of Shri Nath Pai and one judgment against him. Who knows how many judgments are yet to come and how many will be in favour of Shri Nath Pai and how many against him. Therefore, we have to take a balanced view of the judgments.

Then I come to the third point. I remember Dr. Katju saying on the floor of the House—I cannot produce that volume of the proceedings to quote from that—that sometimes it becomes very difficult to distinguish an *obiter dicta* in these judgments from

the legal opinions. Sometimes legal opinions become *obiter dicta* and sometimes *obiter dicta* become legal opinions. Therefore, when you look at a judgment from that point of view you find that this judgment was given only by a majority. Moreover, when I read the judgment, of course not as critically as Shri Nath Pai, I could not understand where legality ends and where *obiter dicta* begin. I could not understand it.

Here I want to say one thing. We function under a constitution and we have created our own autonomous bodies, sovereign bodies, and we swear by those sovereign bodies. There is the Supreme Court, the Election Commission and other bodies. Who created them? Have they fallen from heaven? Have they been bequeathed to us by some Gods or demi-gods? No. It is Parliament that has created those bodies. Now you must have heard of Frankenstein. He was the monster created by somebody. But that monster tried to eat up its creator. Now, I cannot understand how the bodies which we have created can claim superiority over us. Because, it is the Parliament that expresses the will, the sovereign will, the paramount will and the noble will of the people. Therefore, what the Parliament says, I think, should overrule what any Supreme Court or any other person says. After all, the Supreme Court judgments are not in all cases exact judgments. Therefore, the opinion of Parliament should prevail.

Then I come to my last point. When we come to fundamental rights, I think no country has been more generous in the grant of fundamental rights to its citizens than our country. If anybody thinks that these fundamental rights can be changed, curtailed or amended only after a Constituent Assembly is called, I think he is living in a world of imagination.

What is the Constituent Assembly? The Constituent Assembly was called

only to bring into being all this democratic apparatus that we have set up in order to preserve, conserve, strengthen, foster and advance democracy. That Constituent Assembly has done its duty. If anybody says that you should again call the Constituent Assembly if you want to amend the fundamental rights, I think he only wants to say that you cannot drink water from the Jumna at Delhi, that you cannot drink water from the river Jhelum at Jhelum and that to drink water from Jumna or Jhelum you should go to the source, you should go to Kashmir. If you say that to have a handful of water one has to go to the source of the river then one will die before one gets some water to drink. It is something my common-sense does not understand.

We have provided a great safeguard so that these things are not done in a perfunctory manner, these things are not done in a half-hearted way, in a way which will move the good odour from this. We have provided a two-third majority of the members present and a majority of the total membership. This is a great safeguard that we have adopted so that the fundamental rights are not trifled with. If anybody wants to trifle with my fundamental rights, be it the Prime Minister, be it a Minister, be it the leader of a party, be it a demagogue or anybody else, I would say to him that he cannot do so because the Constitution safeguards my fundamental rights. If you want me to go to some court of law or some other place in order to have my fundamental rights, If you want me to go to some court of law or some other place in order to have my fundamental rights, I would say no to him because the Constitution gives me enough protection. I do not want to go to any other place. The Constitution is my legal bible, the Constitution is my guarantee, the Constitution is my last court of appeal, the Constitution is my supreme arbitrator, the Constitution is my only hope, only guarantees and I do not want to go to any other place or person in order to have my fundamental rights asserted.

And, that Constitution gives powers to the Parliament which represent the will of the people. I am sure this Parliament will represent more and more the will of the people, more and more the basic agreement of Indians. I would not be a party to curtail the rights of Parliament in any way. After all the Parliament is supreme. As Shri Nath Pai said, a child cannot pull the beard of its father, a child cannot take away the turban of its father, a child cannot utter derogatory remarks against its father. After all, the Constitution is the real mother.

When I get into my stride, you start ringing the bell. But you are a good friend of mine.

Mr. Deputy-Speaker: Please conclude.

Shri D. C. Sharma: This Parliament is my mother. It is the mother of fifty crores of people and I think it is the guardian of our rights, civil liberties and everything. We are not going to subvert or curtail its power in any way.

With these words I support the Bill of Shri Nath Pai.

Mr. Deputy-Speaker: The Mover of the Bill has built up a very powerful case and the issue that he has posed in a proper perspective is whether the majority judgement has correctly interpreted the intention of our Constitution-makers. Perhaps some of us do not agree with the majority judgement but there should not be any attempt made to impute either political or ideological bias to the Judges of the Supreme Court because they are also creatures of our Constitution. We must remember that. The judiciary is one of the organs created by our Constitution. So, I would like to give a word of caution to speakers who will follow because unfortunately a certain derogatory phrase was used. I think, the speaker never intended it. Therefore no motive whatsoever even by suggestion should be imputed.

Shri F. K. Deo: Freedom of Parliament is licence, nothing else.

Mr. Deputy-Speaker: There was no intention. The speaker has assured me. The way the debate is conducted and the opening is made points to that. I think, that level should be kept. It is a fundamental question, the interpretation of the Constitution, that is before us. As we have our right to interpret the Constitution and ultimately come to a decision, the Mover never questioned the right of the Supreme Court also to interpret the Constitution. He has his view regarding the interpretation of the Constitution and we are free to have our view.

Shri D. C. Sharma: I never said anything derogatory to the Supreme Court. I respect them.

An hon. Member: That may be expunged.

Mr. Deputy-Speaker: He has clarified his position. Shri P. K. Deo.

Shri J. B. Kripalani (Guna) rose—

Mr. Deputy-Speaker: I will call you after Shri Deo because the Speaker has already named him.....

Shri P. K. Deo: The Speaker never named me. Naming a person is quite different.

Mr. Deputy-Speaker: I meant, named you as the next speaker.

Shri P. K. Deo: Please clarify that. I have never been named throughout my life.

Mr. Deputy-Speaker, Sir, since 1957 Shri Nath Pai and I have been in this House and I have all along admired his eloquence, but it is the compulsion of conscience and of duty that has forced me to cross swords with him on this academic plane because he wants to upset all the good that has been done by the historic judgement of the Supreme Court upholding the fundamental rights guaranteed under the Constitution as inviolable. The eloquence of Shri Nath Pai could be compared only with the eloquence of his and my distinguish-

ed colleague, Shri H. V. Kamath, who, when he took part in the discussion of the relevant provision of the draft amendment in the Constituent Assembly, spoke in equally vigorous words. This is what he spoke then:—

"they will at once realise the need for the flexibility of the Constitution. If we have made several alterations like this within less than a year how on earth do you propose or do you dare to bind or falter the future Parliament by making this more and more rigid than before."

After 13 years, Mr. H. V. Kamath became wiser and, in 1963, he tabled a Bill No. 14 of 1963, and in the debate on that Bill I had the privilege to participate and there he realised his previous mistake and said these words while suggesting that any amendment to the Constitution should be more rigid. He said:

"It is too late in the day to remind my colleagues that the Constitution is the basic law of the land, not that ordinary statutory law. Therefore, it is in the fitness of things and absolutely essential that it should not be tinkered with, tampered with or amended in the light-hearted manner to subserve party ends."

Shri R. Barua (Jorhat): Sir, the issue here is whether Parliament is competent to amend the Constitution or not and not whether we should amend it or not.

Shri P. K. Deo: He will get his chance to speak.

It was probably some compelling attachment to an unpractical and outmoded ideological dogma that had compelled him to speak those words then. But, after 13 years, he became wiser and these are the words that fell from his lips. I hope, with maturity, Mr. Nath Pai also will speak in similar terms.

Mr. Deputy-Speaker: I may point out that I was present when the debate took place here. He never questioned our right to amend the Constitution.... (Interruption).

Shri Pileo Mody (Godhra): Let him misconstrue the evidence; that does not matter.

Shri P. K. Deo: Even after his historic judgment on 27th February, 1957, not only Mr. Nath Pai himself but all the Opposition leaders, in great admiration, selected Shri K. Subba Rao, who presided over this Bench, for the office of the President of the Union of India. I say this with full authority because in the appeal that was circulated to us to support Shri K. Subba Rao, the signatories were, Shri M. R. Masani, Shri A. K. Gopalan, Shri H. N. Mukerjee, Shri S. N. Dwivedy, Shri Bhupesh Gupta, Shri Madhu Limaye.

Mr. Deputy-Speaker: The hon. Member will bear with me that the question here is totally different. He entered politics after resigning from his post of Chief Justiceship. They might have supported him as a candidate but that does not mean they supported his judgment.

Shri P. K. Deo: I would like to quote a few lines from that appeal which was circulated to us. I quote:

"The fact that he has been outstandingly a good judge shows that he does not lack the judicious temperament essential for the high office. His robust dedication that he has shown to fundamental freedom provides an assurance that he can be expected to remain a champion of people's rights...."

The leaders of the various Opposition Parties made an appeal that he was the person who could uphold the fundamental rights. And he has proved his genuineness in his judgment which he delivered the other day.

Shri E. Barua: On a point of order, Sir. Can he discuss the competence of the Supreme Court on the floor of the House.

Shri Nath Pai: We are discussing the competence of Parliament.

Shri Thirumala Rao (Kakinada): We are dealing with the judgment of the Supreme Court and not politics.

Mr. Deputy-Speaker: Not Mr. Subba Rao who later on became a candidate for the office of the President.

Shri P. K. Deo: I am not yielding. It might be due to either of the two considerations: either in the Praja Socialist Party they breathe hot and cold in the same breath, an inconsistency being their creed—I have nothing to say—or it may be that because those who are in the Treasury Benches felt shy to come forward with an official Bill and they have utilised Mr. Nath Pai as * *

Shri Nath Pai: These words must be expunged.

Mr. Deputy-Speaker: I have taken note of them.

Shri Nath Pai: This is the height of vulgarity.

Mr. Deputy-Speaker: It is highly undesirable to use such words.

Shri P. K. Deo: There is nothing wrong.

Mr. Deputy-Speaker: No, no. You were saying * *. These are undesirable words. You may withdraw those words.

Shri P. K. Deo: I am not going to withdraw it.

Shri Nath Pai: I request you to expunge these words. It is highly derogatory; it is *prima facie* a breach of privilege or contempt of the House. I am surprised that, having started by telling that he has worked with

[Shri Nath Pai]

me, he has the audacity to say, the vulgarity of insinuating, that I have been * * *. I am not used, Mr. Kala-handi to be anybody's **I strongly resent these remarks and I plead that these may be expunged. (*Interruptions*) I can see his difficulties. He has nothing to say on this. Perhaps he does not know what he is talking about. He has not grasped what he is talking about.

Mr. Deputy-Speaker: It will not go on record.

Shri Narendra Singh Mahida (Anand): On a point of order. We are discussing a decision of the Supreme Court and not the personalities concerned with the judgment. We have nothing against the Judge who has given this decision. We should not make a reference to personalities. We should merely discuss the decision of the Supreme Court.

Shri F. K. Deo: I am not prepared to listen to sermons from my hon. friend, a member of the House. He is not supposed to give a ruling on the subject.

Shri P. Viswambharan (Trivandrum): On a point of order. Is it in order that a Member can cast aspersions against another Member of the House?

Mr. Deputy-Speaker: I cautioned him immediately and requested him to withdraw it because this does not add to the dignity of the House nor to the level of the debate. Therefore, I have ordered that it will not form part of the proceedings.

Shri F. K. Deo: We should congratulate ourselves that we have got a Supreme Court, who are determined to protect and safeguard the various fundamental rights guaranteed under the Constitution. By this historic judgment, they have struck down the obnoxious Seventeenth Amendment of the Constitution and have rightly

chastised the arrogance of the political party which has, by using the majority in Parliament, maimed and mauled the Constitution 22 times in a period of 17 years. The Parliament has no right to take away or abridge any right by the process of Constitutional amendment. A Constitutional Amendment Act is a law. As a law, it is governed by Article 13 of the Constitution. Article 13(2) clearly says that any law which takes away or abridges the fundamental rights guaranteed in Part III would be void. So, under the pretext of amending the Constitution, if any law is enforced and it abridges or takes away any fundamental right, as the High Court judges or the Supreme Court judges have rightly observed, it should be void. They have rightly said so. Article 368 is only procedural. It only lays down the procedure as to how the Constitution is to be amended. We get the right to amend the Constitution from Article 245 or 246 or 248 of the Constitution which lays down our legislative power and we cannot go beyond that. All laws, including constitutional law, are governed by article 13(2). It prevents the basic fear of the ruling party in parliament riding rough-shod over the minority. The impatience and arrogance of Parliament . . .

Shri S. Kandappan (Mettur): It is a reflection on the House.

Mr. Deputy-Speaker: Would you attribute motives and say that Parliament was arrogant or impatient?

Shri F. K. Deo: I meant the executive. I am sorry; I meant the arrogance of the executive.

Shri J. B. Kripalani (Guna): I do not find anything wrong in it; nothing should be expunged from it.

Shri A. B. Vajpayee (Balrampur): Nothing wrong in saying that Parliament is impatient.

**Expunged as ordered by the Chair.

Mr. Deputy-Speaker: The framers of the Constitution had laid down these provisions. Even now the same party is in power. You can accuse the executive in their behaviour, but if you say that Parliament was impatient and arrogant, I think it is not fair.

Shri P. K. Deo: I have already corrected myself.

Shri J. B. Kripalani: There is nothing unparliamentary in that.

Mr. Deputy-Speaker: I have only cautioned him.

Shri P. K. Deo: Every time you have been pulling me up.

I would submit in this regard that Parliament is sovereign only within the four corners of the Constitution. The sovereignty lies in the people. The people of this country are sovereign. We know very well how the Members are elected to the Parliament. Have they got the mandate of the people to change the Constitution? Has it found a place in any of the manifestos of the party in power when they went to the polls? If they have got that courage, they should have got the mandate from the people to change the Constitution. When the 17th Amendment was discussed in the Third Lok Sabha, that was the pin point on which we argued, that the then Government never got the mandate of the people. If you consider the various amendments to the Constitution, you will see that only on two grounds the material amendments have taken place—either to circumvent some adverse decision of the highest judiciary or to give some practical shape to the whims, and fancies of the executive.

This fundamental right has undergone change thrice. The first change was within 15 months after the Constitution came into being, which affected articles 19 and 31. The fourth amendment further abridged the

scope of fundamental rights and opened the gate of socialist expropriation. The last blow was the 17th amendment which robs the freehold right of the peasant and makes him an intermediary to be liquidated at the sweet will of the executive. Sardar Patel, the Chairman of the Fundamental Rights Sub-committee in the Constituent Assembly said:

“The right of ownership of land is sacred to the peasant. Any interference with that right would be loot and robbery and will produce chaos and anarchy.”

This is how we tinkered with the fundamental rights. While speaking about the mandate, I would like to remind you that seeking a mandate from the people is nothing new to the House. Have we not enacted in this House the Goa, Daman and Diu Public Opinion Bill? Why feel shy to go to the people and take their verdict? In this regard, I would like to point out that only a freshly invoked Constituent Assembly can amend the Constitution.

Today, my hon. friend from the Andaman and Nicobar Islands, Shri K. R. Ganesh has introduced a non-official Bill where in he suggests that for the purpose of amendment of the Constitution, this House may be construed as a Constituent Assembly. We know very well how the elections take place and after people get elected how there has been a constant crossing of the floor. You know these things very well, and, therefore, I do not like to bring them to your notice.

Shri Shoo Narain (Basti): What is all this remark? It is highly objectionable to make such remarks about the elections.

Shri P. K. Deo: Suppose the party in power gets a dubious majority by such means and claims that it has got the power of the Constituent Assembly and it can amend the Constitution, are we going to support it?

Mr. Deputy-Speaker: The hon. Member should try to conclude his speech.

Shri P. K. Deo: You have taken away half of my time.

Take the other Constitutions. In Canada there is no provision for amendment of the Constitution. The Irish Constitution contemplates amendment of the Constitution but says that a simple majority in the House is not sufficient but it should be referred to the people by means of a referendum, and it can take the effect of law only after a majority is secured in the referendum. In Switzerland and Australia also, a simple majority of the representatives of the House is not sufficient, but there must be majority of the Cantons and majority of the States and then, there has to be a referendum by the people. In the USA since 1787, there have been only 22 amendments, but the Fundamental Rights chapters have not been tinkered with or touched.

To those who say that unless we march with time and we keep pace with time, there will be revolution and chaos, I would only point out what the Chief Justice of the Supreme Court has clearly stated, namely:

"If there was chaos brought about by misrule and abuse of power, the existence of an all-comprehensive amending power would not prevent revolution. Rather, such a restrictive power would give stability to the country and would prevent it from passing under a totalitarian and dictatorial regime."

He has added:

"This court cannot obviously base its decision on such hypothetical situation which might be brought about with or without amendments."

What are the Fundamental Rights? Part III of the Constitution gives a clear narration of the various 'Do's and Don'ts'. This part has been very cleverly drafted. So, it could march with time and keep pace with time in a transitional society such as ours. Various provisions have been embodied in the chapter on Fundamental Rights, but there are certain values, certain democratic values, and values of freedom which cannot be tinkered with or touched. These are: equality before law, no discrimination on grounds of religion, caste etc. equality in public employment, freedom of speech, freedom of association and movement and acquisition of property, freedom of profession, protection of life and personal property, freedom of religion and protection of minority interest. These are certain values which are sacrosanct.

Mr. Deputy-Speaker: The hon. Member should try to wind up his speech now.

Shri P. K. Deo: Not only you but other Members also have taken so much of my time.

श्री मधु सिन्घे (मुंबई): समय लगेगा ।
खुद हमारी प्रार्थना है हमको तीस मिनट काय
दीजिए ।

Shri Bedabrata Barua (Kaliabor): On a point of order. A private Member's Bill or resolution comes up here only once a week and that too, only for half the day. So, I would request that the time should be distributed to the Members in such a way that there could be a proper discussion.

Shri Randhir Singh (Rohtak): Kindly ration the time among the various Members who want to speak. We also want to urge certain very important points.

Mr. Deputy-Speaker: I have already requested him to conclude.

Shri P. K. Deo: Fundamental rights cannot dignified and democratic human behaviour, rights which are cherished

and valued by all free people. They are not pie-crusts to be broken at convenience. These are certain values. They are axiomatic truths for all time and sacrosanct so long as democratic society exists. If you want to tinker with the fundamental rights you are going to lay the foundation of a totalitarian society.

If you do not want freedom of speech, if you do not want freedom of association, if you want a one-party government, if you want that all property will vest in the state, if you want that there should be no collective bargaining or trade unionism of labour, then go ahead and do away with fundamental rights.

I would draw your attention to what happened in the USSR. On March 12, 1967, 145 million voters went to elect 884 candidates for their Supreme Soviet, all the candidates being nominees of the Communist Party. If you want to have a one party system with no Opposition, then go ahead.

I may say that even in the USSR there has been a rethinking on this subject. For better production, as an incentive to agriculture, a nucleus for the revival of the institution of private property is created.

I would conclude with a quotation of Dr. Ambedkar who rightly said during the debate on the fundamental rights provisions of the Constitution. He cautioned that:

"the Constitution is not merely to create the organs but to limit their authority, because if no limitation was imposed on the authority of the organs, there will be complete anarchy and complete oppression".

With these words, I oppose this sinister Bill brought in this House *ab initio*.

Shri J. B. Kripalani I am not a lawyer and I suppose, ordinarily, I

should have no right to argue with lawyers. However, I happened to be the Chairman of the Committee on Fundamental Rights and I was present throughout when our Constitution was made. This is the only right that I have to speak on this subject.

Shri Nath Pai is a barrister-at law. His education has been in England. His ideas of the Constitution are British. Britain has an unwritten constitution and there Parliament is supreme. It is said that the English Parliament can do everything except turn a man into a woman, or a woman into a man.

Dr. Karni Singh (Bikaner): Even that is being done now.

Shri J. B. Kripalani: Not by Parliament.

There is the difference between an unwritten and a written constitution as Shri Nath Pai will himself admit. In a written constitution there is a separation of powers. In England there is no separation of powers. And who is sovereign in a written constitution? Neither Parliament, nor the judiciary nor the executive. It is the constitution that is sovereign. We, therefore swear by the constitution and not the parliament.

In our constitution there is a division of powers, each wing of the Government within its own orbit is supreme. I submit that the judiciary is supreme within its own sphere. So also the Parliament is supreme. I submit the executive is also supreme when it is regulating by rules and by procedures the conduct of its servants and laying down procedures.

श्री जयु सिन्घे : प्राचार्य जी, वह ठीक नहीं है, कार्यकारिणी के बारे में आपने ठीक नहीं कहा है।

Shri J. B. Kripalani: You do not know how many laws the executive

[Shri J. B. Kripalani]

make, you have no idea of the laws that the executive make. They do not go under the name of law, but they are binding upon their servants, they are also binding upon the public.

So, there is a separation of powers, but each is supreme in its own sphere. The executive is supreme in its own sphere, and the judiciary is supreme in its own sphere, and Parliament is supreme in its own sphere.

Shri Sheo Narain: Parliament is supreme. (Interruptions).

Shri J. B. Kripalani: I really do not understand what is there to interrupt me in this. Is not the judiciary supreme in its own right so far as the interpretation of the constitution is concerned? Do you mean to say that the interpretation of the constitution is to be done by Parliament? Do you mean to say that executive orders that are as good as laws are to be passed by Parliament? Do you mean to say that the executive is going to regulate its departments by law passed in Parliament? Many times these rules and regulations abrogate our right.

So, I submit that all these three are sovereign in their own spheres, and legitimately they have been made sovereign, and they modify each other's authority, so that no authority is absolutely supreme as in an unwritten constitution in England.

You will see that in the United States the interpretation of the Constitution and the law is the right of the judiciary, and by that interpretation they make new laws. Am I correct or not? How can one object to these laws. You cannot break these laws? Those laws are as good as laws made in Parliament.

Shri Hanumanthaiya (Bangalore): I am also a lawyer. What the courts

make is case law, not law. Case law is different.

Shri J. B. Kripalani: Case law is also law. I do not understand this hairsplitting of the lawyers.

Shri Hanumanthaiya: Parliamentary laws are different from case laws.

Shri J. B. Kripalani: It may be case law, but it is law that you are bound to follow it is binding upon you I really do not know how a lawyer of your eminence should talk like this, difference between case law and parliamentary law.

The interpretation of the Constitution is the function of the judiciary. The executive also makes laws whatever you may call them and they are binding not only upon their own services but upon us also. All these departments make laws. I have absolutely no doubt about it. I can speak not in legal terms but in terms of the common man. To me the common-sense view is that these three branches of Government modify each other's authority though they are supreme in their own sphere. This is what is meant by a written constitution. In an unwritten constitution as in England, Parliament is sovereign. Here the Constitution is sovereign and it is good that this sovereign authority should be so divided because sovereignty implies absolute power. This absolute power must be modified. It must be modified in the case of the executive, in the case of judiciary and in the case of Parliament. I can tell you in recent times Parliaments have brought about totalitarian regimes. Hitler did it; Mussolini did it. Therefore, we do not want these fundamental rights to be at the mercy of the majorities and minorities. It is therefore that we call them fundamental rights. Can Parliament abrogate freedom of speech? Can it make India a theo-

cratic State where there will be no freedom of religion? I want you to be very careful when you tamper with this judgment of the Supreme Court. I think it is a very right and correct judgment and if we deviate from it, we are abrogating the benefits given by the constitution-makers. We made these provisions as fundamental, not to be interfered with, whether by the executive, judiciary or parliament. If you say that Parliament is supreme, I deny that proposition which means that the majority in Parliament is supreme. This makes nonsense of the public weal. You may have a majority of 51; and a minority of 49 does not count. (An Hon. Member: Two-thirds). Even two-thirds. How does it matter. There are limitations. I agree with the Supreme Court judgment that article 368 is procedural; it describes how the Constitution has to be changed if a change is necessary. I really cannot see now Mr. Nath Pai can have a quarrel with the Supreme Court; they are definitely procedural and they lay down the procedure by which ordinarily the Constitution has to be changed. This does not apply to article 13(2); it is very clear. I have not got the book and Mr. Nath Pai will read it for me.

Shri Nath Pai: This is a job I have often done for Dada and I will read it. Though he disagrees with me, my affection for him is not detracted. I have quoted two previous judgments of the Supreme Court. I shall now quote article 13(2).

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

Shri J. B. Kripalani: May I submit that an amendment is a law. Constitutional amendment is also law. You need not emphasise the word "law" and therefore take away its

comprehensive meaning. Constitutional amendment is a law. An amendment to the Constitution is a much greater law. Therefore, I submit it is a dangerous thing to tamper with the fundamental rights of the people. Those who made them fundamental had all these considerations in view and discussed all these matters and they put them separately under a separate category, that even a blind majority may not be able to touch them. To suppose that the majority is always right would make all great men to be fools. All great men had to walk alone; they were solitary. The Hindu community believed in untouchability and 90 per cent of them believed in but one man, Gandhiji, did not believe in it. Was he right or was he wrong? The majority is not always right and this elected majority cannot be always trusted. With the fundamental rights of the people, you cannot play havoc.

I ask Mr. Nath Pai, can the law that there is freedom of speech in this country be abrogated by a constitutional amendment? It would be a very dangerous thing if you say it can be.

Shri Bakar Ali Mirza (Secunderabad): The Constitution itself was given unto ourselves by a majority. It was passed by a majority. *(Interruption)*.

Shri J. B. Kripalani: The Constitution was adopted by a majority. You must remember that when a Constitution is made, a State is being created. The Constitution creates a State. At that time, there is no question of majority and minority. It is the creation of a State. When it has created a State, then it makes the Constitution. It is a new State that is being created. How is that new State to be created except through a Constituent Assembly or through conquest or through robbery or some other means. The most civilised method of creating a new State is by a Constituent Assembly. So, that does not matter.

[Shri J. B. Kripalani]

Anyway, my humble submission is that people should not be under the impression that our rights are being abrogated. It is not a question of our rights; we may be dead and gone, but the fundamental rights are based upon fundamental, moral principles. When you say fundamental rights, you are enunciating fundamental moral principles. Tomorrow a majority of Hindus might come in Parliament as they can come at any time, and as they are here today. The majority of us are Hindus. There is one Parsi, or there are two Parsis—I do not know.

Shri Pileo Mody: One present; one absent.

Shri J. B. Kripalani: There are a handful of Mussalmans. Can we say that this country shall be guided by the Hindu law? That would be absurd.

Shri Bakar Ali Mirza: How can that right be given? You are giving it to the Constituent Assembly, but not to Parliament.

Shri J. B. Kripalani: The Constituent Assembly creates a State. It has the right to do so. But I am asking you this definite question; Can the majority of Hindus say that this shall be a Hindu State?

An hon. Member: They can. (Interruption).

Shri Bakar Ali Mirza: Can the Constituent Assembly say that?

Mr. Deputy-Speaker: Order, order. Let him conclude. (Interruption).

18 hrs.

Shri J. B. Kripalani: I submit that the Constituent Assembly in Pakistan said that it shall be a theocratic State (Interruption). The Constituent As-

sembly in Pakistan said that it is going to be a theocratic State. Then the Constitution in Burma said that it shall be Buddhist State. The Constitution in Israel says, it shall be an Israeli State. That freedom is finished here. We have enunciated fundamental rights. At that time, it was open to the Constituent Assembly to say that this Indian State shall be a theocratic State. Then that would have been a fundamental law which could not be changed.

It is very dangerous for the Parliament to constitute itself so supreme as to change the fundamental rights of the people. These fundamental rights are not only legal rules, but moral rules. You are not going to break the moral rules.

An hon. Member: Moral rules also change.

Shri J. B. Kripalani: These are moral rules put in a legal language. There shall be freedom of conscience—this is a moral law. There shall be freedom of speech—this is a moral law. Everybody can follow his own religion—this is a moral law. These are eternal varieties. Fundamental rights are based upon fundamental moral principles and you have no right to tamper with them. We in our pride say that we are sovereign and we will tamper with them. We must not be so arrogant. Such arrogance amounts to stupidity. We must be careful. Arrogance can be stupidity and we in our pride must not think that we should be able to change by a majority of two-third the fundamental rights guaranteed under the Constitution. These are irrevocable, because they are made on fundamental moral principles. If you do not believe in fundamental moral principles, you can tamper with them.