THE DICEYAN PERSPECTIVE OF SUPREMACY AND THE CONSTITUTION OF SINGAPORE

The quintessence of the supremacy of the constitution according to Dicey lies in the constitution (1) being written, (2) being rigid, and (3) providing for judicial review. This article examines the existence of these criteria in the constitution of Singapore. As relevant local case law is very limited, an effort is made to interpret the provisions of the constitution, mostly in the context of the experience in the working of the pertinent provisions of the constitution of India and Malaysia, which are germane to the constitution of Singapore.

ARTICLE 4 of the Constitution of the Republic of Singapore describes itself as the "supreme law of the land" and provides that any post-constitutional[1] legislation inconsistent with the constitution, shall "to the extent of inconsistency be void."

The "supremacy clause" is the keystone of a federal polity without which the federal structure may collapse. Art. VI of the American Constitution[2] incorporating the supremacy clause has been instrumental in establishing the hegemony of the national government *vis-a-vis* the State governments. The Federal Constitution, the laws enacted by Congress, and Federal treaties, as such prevail over conflicting State Constitutions and laws.[3]

However, in a written unitary constitution like Singapore's its description of itself as the "supreme law of the land" is without any legal significance. Paramountcy of the constitution over ordinary legislation is an attribute of every written constitution. As John Marshall C.J. expounded in *Marbury* v. *Madison*:[4]

> "Certainly those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation,

[1] Reprint No. 1 of 1980 (1985 Rev. Ed.). Art. 156: "Subject to the provisions of Part XIV, this Constitution shall come into operation immediately before 16th September 1963."
[2] Excerpt of Art. VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."
[3] See B. Schwartz, *A Commentary on the Constitution of the United States: Part I – The Powers of the Government* (1977), Vol. 1, pp. 37-74.
[4] 1 Cranch 137 (1803).

and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution is void."[5]

I. Legal Criteria for Supremacy of Constitution

Albert Venn Dicey in his monumental work, *Introduction to the Study of the Law of the Constitution*,[6] proposed three juridical tests for the supremacy of the constitution. For him in the supremacy of the constitution are involved three consequences:

1. The constitution must almost necessarily be "written".

2. The constitution must be "rigid" or "inexpansive".[7]

3. Authority may be given, preferably to courts, to adjudicate upon the constitutionality of legislative acts, and treat them as void if they are inconsistent with the letter or spirit of the constitution.[8]

Plenum dominium over the territory is an essential attribute of supremacy of the constitution. If the territory of a State can be ceded by ordinary legislative process, or treaty, or executive agreements, a piquant situation may arise where there may be a constitution but no territory. Generally, territorial sovereignty is required for nationhood without which the constitution remains in a legal limbo. Territorial integrity is as such a necessary corollary of supremacy of the constitution.

II. Written Constitution

The Constitution of Singapore is written. Art. 1 provides that "[*t*]*his* Constitution may be cited as the Constitution of the Republic of Singapore."[9] In *Heng Kai Kok* v. *Attorney-General, Singapore*,[10] the High Court held that "[b]y virtue of Art. 155 ... the (1980) Reprint shall be deemed to be and shall be, without any question whatsoever, the authentic text of the Constitution of the Republic of Singapore in force as from March 31, 1980 until superseded by the next or subsequent reprint...."[11] Such an observation and the emphasis "to *this* Constitution" in Arts. 2, 4, 5, 150(5) (a) and (b), and 156 rule out the possibility of considering any other legal instrument as the constitution of Singapore.

5 *Ibid*., at p. 177.
6 10th ed., 1985 [1982 reprint].
7 *Ibid*., at p. 146. The criteria are culled from his entire discussion at pp. 126 to 180.
8 *Ibid*., at pp.131 and 157 ff.
9 Emphasis added.
10 [1987] 1 M.L.J. 98.
11 *Ibid*., at p. 103. For a comment on the 1980 reprint see A. J. Harding, *"The 1980 Reprint of the Constitution of the Republic of Singapore: Old Wine in New Bottle"* (1983) 25 M.L.R. 134.

III. RIGIDITY

The constitution is not sacrosanct in the sense of a holy scripture which should be blindly worshipped. It is a prismatic legal code, adopted by the people of a nation, prescribing the principles by which they wish to be governed, and formulating the organs and instrumentalities of the government, and their rules of operation. The constitution is not merely the organic law of a country, it also enunciates the national philosophy, aims, and objective for attaining not only political stability but also economic prosperity for the people. If the constitution is not serving the principles and purposes envisaged therein, and if it is made permanent and static, it retards the growth of the nation. It is imperative that the constitution should adapt to changing conditions. If the people consider that the constitution is not achieving the ideals and aims they had envisioned, they have a right to amend and adjust it for the realization of their cherished aspirations. A free and democratic people can have no taboo against amending the constitution.

Dicey makes a distinction between a "flexible" and "rigid constitution". He points out that "a 'flexible' constitution is one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body", and cites as an example the English constitution:[12] and "a 'rigid' constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws."[13]

Rigidity of a unitary constitution does not import that it is legally immutable. All it envisages is that the amendment process should be different for the constitution and ordinary laws. Many modern constitutions have such distinct procedures.[14]

A. *Power to Amend Constitution*

Art. 5[15] envisages a process for amending the constitution that is different from the legislative process. It requires that a bill for amendment be supported by not less than two-thirds of the total membership of the Parliament at the second and third readings, whereas for passing an ordinary

[12] Introduction, *supra,* note 6, at p. 127. The supreme legislative authority of the English Parliament is expressed by De Lolme which has become almost proverbial: "It is fundamental principle with the English lawyers that Parliament can do every thing but make a woman a man, and a man a woman." *Ibid*., at p. 43.

[13] *Ibid*., at p. 127.

[14] For the provisions relating to amendments in different constitutions, see D. D. Basu, *Commentary on the Constitution of India* (5th ed., 1970), Vol. 5; pp. 484-492.

[15] Art. 5. – "Amendment of Constitution –

(1) Subject to this Article and Art. 8, the provisions of this Constitution may be amended by a law enacted by the Legislature.

(2) A bill seeking to amend any provision of the constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the Members thereof.

(3) In this Article, 'amendment' includes addition and repeal."

bill all that is required is a "majority of the votes of the members present and voting."[16]

An inconsistent post-constitutional law is void under Art. 4. "Law" as defined in Art. 2 includes "written law" which is defined to include the "Constitution". An amendment becomes necessary only when some contemplated measures are obviously incompatible with the existing constitution. An important question that arises is whether the constitution can be amended at all because an amendment pursuant to Art. 5 is *ipso jure* inconsistent with the Constitution and as such void under Art. 4.

In America, as there is no provision similar to Art. 4 the question of constitutionality of constitutional amendments was easily settled by the Supreme Court in *Coleman* v. *Miller*.[17] Black J. held that Art. V "grants power over the amending of the Constitution to Congress alone" and as such the amending process "is 'political' in its entirety, from submission until an amendment becomes a part of the Constitution, and is not subject to judicial guidance, control or interference at any point."[18]

The Constitutions of India and Malaysia, however, have provisions, which are *in part materia* with Art. 4. Important constitutional issues have arisen both in India and Malaysia, time and again, on the validity of constitutional amendments, which have been resolved by distinguishing between the "constituent" and "legislative" powers of Parliament. Parliament of Singapore has multiple roles. It is the forum for electing the President[19] and Vice-President,[20] it oversees the performance of the Cabinet,[21] controls the purse of the nation,[22] enacts laws[23] and amends the Constitution[24]. Among the multitudinous roles, the "legislative" and "constituent" are very significant in resolving the issue of the *vires* of a constitutional amendment and thereby ensuring the supremacy of the Constitution.

B. *Constituent Power and Legislative Power*

1. *Genesis of distinction*

The nature of the "constituent" and "legislative" powers was explicated by the Supreme Court of India in *Shankari Prasad Singh Deo* v. *Union of India*.[25] In order to overcome the difficulties in the working of the Constitution particularly from the inclusion of the fundamental right to property,[26] and to promote agrarian reforms by abolishing feudal estates

16 Art. 57(1).
17 307 US 433 (1939).
18 *Ibid*., at p. 459.
19 Art. 17.
20 Art. 22.
21 Art. 24(2).
22 Art. 145.
23 Art. 58.
24 Art. 5.
25 AIR [1951] SC 458.
26 Arts. 19(1) (f) and 31 prior to the 42nd Amendment 1976.

known as *Zamindari* [27] tenures, the provisional Parliament had pursuant to Art. 368[28] enacted retroactively the Constitution (First) Amendment Act 1951 which, *inter alia,* introduced Arts. 31A, 31B and the Ninth Schedule. According to Art. 31A a law providing for the acquisition by the State of any "estate", [therein defined] shall not be deemed to be void on the ground that it infringes Arts. 14 [equality before law and equal protection of laws], 19 [consisting of the right to property], and 31 [providing that private property cannot be acquired save by authority of law enacted for a public purpose that provides for compensation]. In the Ninth Schedule various *Zamindari* abolition acts were enumerated and in Art. 31B it was provided that none of those Acts could be challenged as violating the fundamental rights. The constitutionality of the First Amendment itself was impugned on the ground that it was contrary to Art. 13(2) which provided that "the State shall not make any law which takes away or abridges the funda-mental rights ... and any law made in contravention ... shall, to the extent of such contravention be void."

A unanimous bench of five judges pointed out that the terms of Art. 368 were perfectly general and conferred on the Parliament the power to amend the Constitution without any exception whatsoever. The terms of Art. 13(2) were also general. Consequently by the "Rule of Harmonious Construction" it should be read as excluding a constitutional amendment. If it was intended to exclude fundamental rights from the power of amendment it would have been easy to add a proviso to that effect. There is a well recognized distinction between constitutional law and ordinary law, the court reasoned, the former being made in exercise of "constituent power" and the latter pursuant to "legislative power". "Law" in Art. 13(2) would only include a law made in exercise of "legislative power",[29] and not a law made in exercise of the "constituent power". The court explained:

> "Although 'Law' must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in the exercise of legislative power, and constitutional law, which is made

[27] *Zamindar* in Hindi and Urdu means a landlord. The word is derived from *Zamin* earth or land and *dar* holder or possessor.

[28] Art. 368 prior to the 24th Amendment 1971:

"Procedure for Amendment of the Constitution. –

(1) An Amendment to this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of the Parliament, and when the Bill is passed in each House by a majority of the total membership of the House and by a majority of not less than two-thirds 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 that if such amendment seeks to make any change in –

(a) Art. 54, Art. 55, Art. 73, Art. 162 or Art. 241, or

(b) Chapter IV of Part V, Chapter V of Part VI or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in the Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by Legislatures of not less than one-half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

[29] The allocation of Legislative power in the Indian Constitution is provided in Arts. 245, 246, and 248 and the Seventh Schedule.

> in the exercise of constituent power.... [I]n the context of Art. 13, 'Law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that Art. 13(2) does not affect amendments made under Art. 368."[30]

In *Sajjan Singh* v. *State of Rajasthan*[31] where the constitutionality of the 17th Amendment was assailed, all five judges concurred in dismissing the petitions on the lines of *Shankari Prasad.* Two of them, however, flatly denied the soundness of its *ratio decidendi* and reserved their opinion until that question was squarely posed.[32]

That opportunity arose in *I.C. Golaknath* v. *The State of Punjab*.[33] By a majority of six to five the Supreme Court held that *Shankari Prasad* was not correctly decided. Subba Rao C.J. reasoned that Art. 368 provided only for the "procedure" and not the "power" to amend the Constitution, but postulated the existence of the power of amendment elsewhere in the Constitution. As there was no specific provision in the Constitution conferring that power, it could be traced only to the "residuary power" of the Parliament under Art. 248 and Entry 97 of List I in the Seventh Schedule. The residuary power being itself ordinary legislative power, a constitutional amendment, enacted in exercise of that power, could not but be law within the meaning of Art. 13(2). The majority overruled *Shankari Prasad* "prospectively" and held that there was no distinction between "constituent" and "legislative" power. In the result the 17th Amendment was held to be within the inhibition of Art. 13(2) and, as such void.

To circumvent *Golaknath* the Constitution 24th Amendment 1971 was enacted. In the amended Art. 368, the marginal heading was changed to "Power of Parliament to amend the Constitution and the procedure therefor." A new clause (1) provided that "Parliament may in exercise of its constituent power amend by way of addition to, variation, or repeal of any provision of this Constitution in accordance with the procedure laid down in this article." The original clause (1) was renumbered as clause (2) and Presidential assent for an amendment was made obligatory. By a new clause (3) constitutional amendments were saved from the operation of Art. 13, which was also amended to exclude its operation to amendments under Art. 368.

Subsequently the Constitution 25th Amendment 1972 was enacted which completely recast the fundamental right to property. The newly introduced Art. 31C provided that any law enacted for securing the principles specified in clauses (b) and (c) of Art. 39 be deemed to be void on the ground of inconsistency with Arts. 14, 19, and 31. A declaration

30 *Supra,* note 25, at p. 463.
31 AIR [1965] SC 845.
32 Hidayatullah and Mudholkar JJ..
33 AIR [1967] SC 1643.

in a law that it was for giving effect to such policy could not be called in question in any court on the ground that it did not give effect to such policy.[34]

The Constitution 29th Amendment 1972 added the Kerala Land Reforms (Amendment) Act 1971 to the Ninth Schedule.

These amendments would, however, be impeachable so long as *Golaknath* remained good law, on the same ground that Parliament has no power to amend the Constitution affecting the fundamental rights. These amendments were challenged in *His Holiness Swai Kesavananda Bharati* v. *The State of Kerala*[35] popularly referred to in India as the "Fundamental Rights Case". A bench of 13 judges overruled *Golaknath* and upheld the 24th Amendment. Ten judges held that Art. 368 contained in its original form the power of amendment and that "law" in Art. 13(2) did not include a constitutional amendment. One judge explained that "law making power" is the genus of which "legislative" and "constituent" powers are the species. The difference is found in the distinct procedure prescribed for their exercise and is vital in a "rigid controlled Constitution" in examining whether a "law was ultra vires the Constitution."[36]

2. *Malaysian experience*

According to Art. 4(1), the Constitution is the "supreme law of the Federation" and any conflicting post-Merdeka law shall, to the extent of inconsistency, be void.[37] Under Art. 159(1) the Constitution may be amended by federal law, subject to certain limitations which are not relevant for

34 Relevant excerpt of Art. 31C as introduced by the 25th Amendment. —
Saving of laws giving effect to certain directive principles.
"Notwithstanding anything contained in Art. 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Art. 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14, Art. 19, or Art. 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy .... "
Excerpts of Art. 39 in Part IV entitled "Directive Principles of State Policy".
"Certain principles of policy to be followed by the State. –
The State shall, in particular, direct its policy towards securing –
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; ... "

35 AIR [19731 SC 1461.

36 *Per* Ray *i.* at 1657. Three judges Sikri C.J. and Shelat J., who were parties to the majority judgment in *Golaknath,* and Grover J. did not consider it necessary to express themselves on that question.

37 Art. 4. – "Supreme Law of the Federation
(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of inconsistency, be void."

the present purposes.[38] The correlation between these two articles was examined by the Federal Court in *Loh Kooi Choon* v. *Government of Malaysia*.[39]

Art. 5(1) provides that "no person shall be deprived of his life or personal liberty save in accordance with law." Freedoms of movement and residence are ensured in Art. 9(2), subject, *inter alia,* "to any law relating to the public security, order, health, or the punishment of offenders."

Under s. 2 of the Restricted Residence Enactment 1933,[40] "the Resident" could require a person to remain in a particular district, or *mukim,* or not to enter any particular place.[41] The order should be communicated to the person. Contravention of the order is an offence entailing arrest and detention. The Enactment does not provide for communication of grounds of arrest, production before a magistrate within 24 hours of arrest, and affording of opportunity of making representations, as required by Art. 5.

In *Assa Singh* v. *Mentri Besar, Johore*,[42] the Federal Court held that as the Enactment relates to security it is saved under Art. 9(2). Lack of requirements in the Enactment similar to those in Art. 5(3) and (4) does not render it void in spite of inconsistency. The provisions of Art. 5 should be considered to be a part of the Enactment and as such an order of arrest and detention could be effected only in accordance with Art. 5.

In *Loh Kooi Choon,* the appellant, Loh Kooi Choon was arrested under the Enactment and detained at the Alor Star prison. While his appeal against dismissal of a claim for damages for wrongful confinement was pending before the Federal Court, clause (4) of Art. 5 was amended to exclude its application in regard to any arrest or detention under any pre-constitutional law relating to restricted residence. The amendment was made retroactive from Merdeka Day, *i.e.,* 31 August 1957.[43] The effect of the amendment was to overrule *Assa Singh* retrospectively.

It was contended that an amendment to the Constitution under Art. 159 was "law" and as such within the line of fire of Art. 4(1), and since the amendment was contrary to clause (1) of Art. 5 as it originally stood, it was, consequently, void.

38 Excerpts of Art. 159 relevant for present purposes:
"Amendment of the Constitution. —
(1) Subject to the following provisions of this Article ... the provisions of this Constitution may be amended by federal law.

(3) A Bill for making any amendment to the Constitution ... shall not be passed in either House of the Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.

(6) In this Article "amendment" includes addition and repeal...."

39 [1977] 2 M.L.J. 187.

40 Federated Malay States (FMS) Cap. 39.

41 The text of the section may be found in *Assa Singh, infra,* note 42, at pp. 31-32.

42 [1969] 2 M.L.J. 30.

43 Act 354/76.

Rejecting the argument Raja Azlan Shah J. observed that "the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law."[44] Referring to the definition of "law" in Art. 160(1) as including "written law" which on its part is defined as including the "Constitution", he continued:

> "In the context of clause (1) of Art. 160, 'law' must be taken to mean law made in exercise of ordinary legislative power and not made in exercise of the power of constitutional amendment under clause (3) of Art. 159, with the result that clause (1) of Art. 4 does not affect amendments made under clause (3) of Art. 159."[45]

Wan Suleiman J., however did not "note any ambiguity when Arts. 4 and 159 are read together," because "like any other bill, a Constitution amending bill would become law [under Art. 66(5)] on being assented to by the Yang di-Pertuan Agong, ... thenceforth becomes part of the Constitution, becomes integrated therein."[46]

The decision of the Federal Court in *Phang Chin Hock* v. *Public Prosecutor*[47] is more emphatic on the distinction between the "constituent" and "legislative" power.

Art. 149 empowers the Parliament to make laws against subversion and Art. 150 provides for the proclamation of an emergency. In their original form a law enacted pursuant to Art. 149 *ipso facto* expired after one year from the date of operation, and a proclamation under Art. 150 expired two months after the date of issue. Arts. 149 and 150 were amended, thereafter, a law under Art. 149 and a proclamation under Art. 150 operate, *sine die,* unless revoked.

In *Phang Chin Hock,* the appellant was convicted in accordance with the Essential (Security Cases) Regulations 1975[48] for unlawful possession of six rounds of ammunition, an offence under section 57(1)(b) of the Internal Security Act 1960, enacted pursuant to Art. 149, and sentenced to death. The conviction was challenged on the ground that an amendment under Art. 159 was valid only if it was consistent with the Constitution. Since the amendments were inconsistent with the Constitution, they were accordingly void.

Speaking for a unanimous court including Wan Suleiman and Syed Othman JJ., Suffian L.P. observed that if such an argument was correct, no change could be made in the Constitution and "Art. 5 is superfluous". That was not the intention of the makers of the Constitution.[49]

Consequently, in a vein similar to the Indian Supreme Court's in *Shankari Prasad,* he held:

44 *Supra,* note 39, at p. 190.
45 *Ibid.*
46 *Ibid*., at p. 191.
47 [1980] 2 M.L.J. 70.
48 PU (A) 146.
49 *Supra,* note 47, at p. 72.

> "In construing Art. 4(1) and Art. 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in Art. 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in Art. 4(1); only such law must be consistent with the Constitution.
>
> In other words, in our judgment the position here is the same as that declared in India by the Supreme Court in 1951 in *Shankari Prasad Singh Deo & Or$.* v. *Union of India & Ors* and in 1965 in *Sajjan Singh* v. *State of Punjab"*.[50]

Such a lucid pronouncement on the distinction between constituent power and legislative power, however, may not appear to be very clear, as at a later stage he pointed out:

> "Indian Courts draw a distinction between the power of the Indian Parliament to amend the Constitution in its constituent capacity and to make ordinary Law in its ordinary legislative capacity.
>
> We do not think that we can draw such a distinction here as our Constitution was not drawn up by a constituent assembly and was not 'given by the people'."[51]

This observation was made in the context of the limitations on the power of the Parliament to amend the constitution. As it pertained to the source of the constitution, whether it emanated from a Constituent Assembly or was brought into existence by an arrangement with the former colonial empire, it seems that the expression "constituent power" was not used in the same sense in which it was used in the Indian constitutional context.

As Wan Suleiman J. had not given any separate judgment and had concurred with the judgment of the Lord President, he had apparently abandoned the *ratio decidendi* of his judgment in *Loh Kooi Choon.*

The distinction between the constituent power and legislative power as used in the Indian context appears to be undoubtedly accepted in the Malaysian Constitution for upholding the constitutionality of constitutional amendments.

3. *Position in Singapore*

The power to amend the constitution is vested in the "Legislature" under Art. 5(1). Art. 4 provides that a law enacted by the "Legislature" incon-

50 *Ibid.*
51 *Ibid.*, at p. 73.

sistent with the Constitution shall be void.[52] Whether a constitutional amendment falls within the inhibition of Art. 4 has not yet been the subject of judicial consideration. However, it may be argued on the analogy of identical provisions in the Malaysian Constitution that the effect in Singapore would be the same as in Malaysia. If the word "law" in Art. 4 is not restricted to an enactment pursuant to the legislative power under Art. 58(1), as was done in India and Malaysia, Art. 5 would become redundant as no amendment can be brought about because every amendment is bound to be in conflict with the Constitution. Unless the proposed amendment was inconsistent with the Constitution, the amendment would not have been necessary. The doctrine of harmonious construction would require the interpretation of Art. 5 as vesting "constituent power" in the Legislature to amend the Constitution, and "law" in Art. 4 as an enactment made pursuant to "legislative power". Any other interpretation would render either Art. 4 or 5 otiose.

C. *Procedure for Amendment*

The constitution being an organic law, the procedure for changing it should be distinct from the procedure for enacting legislation. In federal constitutions this procedure tends to be more rigid. A federation being a compact between the federal and provincial governments, amendments to the constitutions may generally require the latter's participation.

In the United States of America, a constitutional amendment may be proposed either by (i) a two-thirds vote of both the Houses of the Congress; or (ii) a convention called together on the application of the Legislatures of two-thirds of the States. An amendment so proposed has to be ratified by (a) the Legislatures of three-fourths of the States; or (ii) a convention in three-fourths of the States. The method of ratification is determined by Congress in each case. Following the ratification the amendment becomes a part of the Constitution. The only limitation on the power of amendment is that no State may be deprived of its "equal suffrage" in the Senate without its consent.[53] Presidential assent is not necessary for an amendment.[54]

The constitutions of Australia, Eire, France, Japan, and Switzerland require, *inter alia,* a referendum.

The Indian Constitution may be amended in three ways:

(1) Some provisions like those on admission of new States,[55] formulation of new States or drawing boundaries of States or changes in names of States,[56] or creation or abolition of upper houses in

52 According to Art. 38 "(t)he Legislature of Singapore shall consist of the President and Parliament."
53 Art. V.
54 See *Hollingswnrth* v. *Virginia* (1798) 3 Dallas 378.
55 Art. 2 read with Art. 4.
56 Art. 3 read with Art. 4.

State Legislatures,[57] or establishment of popular governments in certain union territories,[58] may be amended by a bare majority of members present and voting in each House of Parliament.

(2) Amendments other than the above require a majority of the total membership of each House as well as a majority of not less than two-thirds of members of that House present and voting.

(3) Provisions of the Constitution relating to distribution of powers between Union and States, representation of States in Parliament, powers of Supreme Court and High Courts, election of the President, procedure for amending the Constitution, known as entrenched provisions, require ratification by resolution of at least half of State Legislatures.

1. *Amendment procedure in Singapore*

Prior to independence when Singapore was a constituent unit in the Federation of Malaysia, according to Art. 90,[59] barring exceptional circumstances, a bill for amending the Constitution required the support of not less than two-thirds of the total number of the members in the Legislature at the second and third readings. Upon independence the 1965 Amendment provided for amendment of the Constitution "by a law enacted by the Legislature".[60] The Constitutional Commission appointed in 1966 to safeguard the position of the racial, religious, or linguistic groups, recommended that express provisions be made in the constitution to describe it as the "supreme law and that if any other law is inconsistent with it, that other law shall, to the extent of inconsistency, be void."[61] It also recommended that a bill for amendment be specifically identified or expressed as an amendment bill and require the support of not less than two-thirds of the elected Members of the Parliament at the final voting. The Commission also felt that there were certain fundamental provisions in the Constitution that required to be conserved for ensuring the harmony of a multi-racial, multi-cultural, and polyglot society, which should not be amended except by the approval of a substantial majority of the population.

The provisions were amended by the 1979 Amendment.[62] A further amendment was made in 1984.[63] At present the Constitution may be amended in two ways:

57 Art. 169.
58 Art. 239A.
59 The Sabah, Sarawak and Singapore (State Constitutions) Order-in-Council 1963 (29 August 1963). Constitution of the State of Singapore. State of Singapore Government Gazette, Subsidiary Legislation Supp., No. 1 of 1963 (Monday, 16 September 1963, Sp. No. 1).
60 For a discussion on Art. 90 as amended in 1965, see S. Jayakumar, *Constitutional Law (with Documentary Materials),* Singapore Law Series No. 1, 1976, p. 1 and pp. 50-53. At p. 1, Prof. Jayakumar observes that the concept of supremacy of constitution is embodied in the Constitution. For a contrary view see A. J. Harding, *"Parliament and the Grundnorm in Singapore"* (1983) 25 Mal.L.R. 351.
61 *Report of the Constitutional Commission 1966* at p. 23.
62 The Constitution (Amendment) Act 1979 (No. 10).
63 Constitution (Amendment) Act 1984 (No. 16).

(1) provisions that may be amended by a special majority devised in Art. 5(2); and

(2) provisions that may be amended only after approval has been obtained in a national referendum.

Special Majority: An amendment to any of the provisions of the Constitution requires a special majority. Art. 5(2) provides that a bill to amend the Constitution shall be supported on "Second and Third Readings" by votes of not less than two-thirds of the total number of members of the Parliament.

According to the Standing Orders (SO) of Parliament[64] a member who gave notice of motion to introduce or support a bill shall, in introducing the bill, read aloud the long title of the bill and present it to the Clerk at the Table. The Clerk thereupon reads the short title aloud. It is then deemed to have been read the first time, and is ordered to be read a second time at a scheduled time. The bill is then formulated and published in the Gazette at least seven days before the second reading. During the second reading a debate may arise on its general merits and principles. If the Parliament agrees to any substantial amendment to the motion "that the Bill be now read a second time" the bill is considered to have been "negatived". Otherwise it is obviously considered to have been read a second time. The bill is then "committed" to a Committee of the whole Parliament or a Select Committee. Following the consideration of the Committee and any recommittal that may occasion, the bill is read a third time, and in the same manner as at the second reading, is considered approved.

Thus, it can be seen, that the requirement of a two-thirds majority of the members is envisaged on two occasions in regard to the same bill.

The requirement of a two-thirds majority of the members works out in the following way.

According to Art. 56 of the Constitution and SO 6 the quorum in Parliament, though contingent upon an objection taken by a member as to the want of the quorum, is one-quarter of the total number of members. In a House of 82 members the quorum would be 21. Art. 57 envisages the procedure for voting in Parliament. Decisions are taken by a majority of members "present and voting". Thus if 21 members are present and 11 of them cast affirmative votes in favour of a motion, the motion is adopted. It is therefore possible, at least in theory, that legislation may be enacted in a Parliament consisting of 82 members by 11 members. But for effecting a constitutional amendment affirmative votes of at least 54 members are required.[65] The requirement of a special majority in any

64 *Standing Orders of the Parliament of Singapore 1960,* 1987, reprint as amended on 11 August 1988. See the provisions under "Procedure on Bills."

65 In computing the total number of the Members of Parliament for the purposes of a constitutional amendment, the non-constituency members are to be excluded, as according to Art. 39(2)(b) they shall not vote on a Bill for amending the Constitution.

constitutional system relates to the quorum and strength of the Houses of the Parliament in adopting the amendments to the Constitution.

Referendum: An amendment to Part HI of the Constitution may be effected only upon a referendum.[66] Part HI deals with protection of the sovereignty of the Republic. Art. 6 prohibits the surrender or transfer of the "sovereignty" and "relinquishment of control over" the armed and police forces, unless such surrender, transfer, or relinquishment is supported in a national referendum. Art. 8 envisages that a bill for amending Part HI "shall not be passed by Parliament unless it has been supported, at a national referendum, by not less than two-thirds of the total number of votes cast by the electors registered under the Parliamentary Elections Act."

The referendum provision is distinct from those in Australia, Eire, France, Japan, and Switzerland. There, a bill is first passed by the relevant legislature and then submitted for the approval of the people. Referendum follows the proposed amendment; whereas in Singapore, it is the other way. Referendum precedes the proposal to amend Part III. The words in Art. 8 "(a) Bill for making an amendment to this Part shall not be passed by Parliament unless ..." support the conclusion that Parliament is not even competent to pass the bill unless approved in a referendum. The result is that in the event of an amendment to Part III, it should be in the shape of a bill, and after the first and second readings should be approved in a referendum, and only then Parliament is competent to consider it for the third reading.

Simple Majority: Prior to the 1984 amendment, the Constitution could be amended in a third way, like any other ordinary legislation. Art. 39, as it originally stood in the 1980 reprint provided that Parliament shall consist of such members as the Legislature may by law provide, and the membership was fixed at sixty-nine. Clause (3) of Art. 5 in effect provided that "law" in Art. 39 shall not be considered as an amendment of the Constitution.[67] The 1984 amendment in restructuring the membership of the Parliament repealed Clause (3). As such, amendment by simple majority now remains only as a part of the constitutional history of Singapore.

66 The Constitution of the Republic of Singapore (Amendment No. 3) Bill 1990 [Bill No. 23/90] in s. 3 proposes the addition of clause 2A to Art. 5, which provides that unless "the President acting in his discretion, otherwise directs the Speaker in writing" an amendment to that proposed clause 2A, or any of the articles as amended by the proposed 1990 Amendment, namely, "Arts. 17 to 22, 22A to 22N, 35, 65, 69,70, 93A, 94, 95, 105, 107, 110A, 110B, 151, or any provision in Part XI shall not be passed by Parliament unless it has been supported at a national referendum by not less than two-thirds of the total number of votes cast by the electors registered under the Parliamentary Elections Act."

67 Art. 5(3) prior to the 1984 Amendment: "Any amendment consequential on such a law as is mentioned in clause (1) of Art. 39 shall be excepted from the provisions of clause (2)."

Amendments by Ordinary or Subsidiary Legislation during Emergency?: The decision of the Supreme Court of Malaysia in *Sim Kie Chon*[68] raises constitutional issues of far reaching consequences. At stake was the question whether during the proclamation of an emergency the constitution could be amended by ordinary legislation or subsidiary legislation. While the decision is persuasive in Singapore, it has great importance in countries whose constitutions pre-empt emergency provisions over constitutional cannons.

The facts in *Sim Kie Chon,* relevant for the present purposes, are that the respondent was tried and convicted for possession of a firearm and ammunition without lawful authority, under section 57(1) of the Internal Security Act 1960[69] and sentenced to death by the High Court at Kuala Lumpur. The Federal Court dismissed his appeal and confirmed the death sentence. The Pardons Board for Security Offences (Board) considered his case and advised implementation of the death sentence. The Yang di-Pertuan Agong (the Agong) held that in his judgment it was expedient to carry out the execution. The High Court at Kuala Lumpur consequently issued the warrant for execution.

The "decision" of the Board was impugned, *inter alia,* on the ground that Regulation 29 as amended by the Essential (Security Cases) (Amendment) Regulations 1981[70] providing for the composition and functions of the Board was unconstitutional.

Art. 42(1) of the Malaysian Constitution vests the pardoning power in the Agong in respect of all offences tried by courts-martial, all offences committed in the federal territories of Kuala Lumpur and Labuan, and over sentences imposed by Muslim courts in the federal territories and the States of Malacca, Penang, Sabah and Sarawak. According to Art. 42(4)(a) read in conjunction with clauses (1) and (3) of Art. 40, this power is exercised in accordance with the advice of the Cabinet, or a Minister acting under its authority, or in consultation with any person or body of persons as required in a federal law. A Pardons Board consisting of the Attorney-General of the Federation, the Minister responsible for the federal territories, and not more than three members appointed by the Agong, is envisaged in clause (11) of Art. 42 for the federal territories. The Federal Pardons Board meets in the presence of the Agong, who presides over it.

68 1. *Superintendent of Pudu Prison and Others,*
2. *Pardons Board for the Federal Territory of Kuala Lumpur and the Federal Territory of Labuan,*
3. *Government of Malaysia,*
4. *Pardons Board for Security Offences* v. *Sim Kie Chon* [1986] 1 M.L.J. 486.

M.L.J. citation of the case does not list the names and particulars of all the appellants/respondents. Their identification is important because the judgment in certain contexts refers to the number of the appellants/respondents. They are ascertained from a copy of the judgment. For a critical evaluation of the case see the author's *"Pardoning Power and the Saga of Sim Kie Chon"* (1987) 8 S.L.R.106.

69 Act 18 of 1960.

70 PU(A) 206.

Soon after the 1969 general elections when riots broke out in Kuala Lumpur, the Agong proclaimed a state of emergency under Art. 150. At the same time acting under clause (2) of that Article (as it was then) he promulgated the Emergency (Essential Powers) Ordinance 1969, Ordinance 1,[71] giving himself wide powers for securing public safety, defence, maintenance of public order and of supplies essential to the life of the community. Many ordinances were promulgated. When the security situation improved by the middle of 1970 the Parliament was reconvened on 20 February 1971. Thereafter, several ordinances were also promulgated. One of them was the Essential (Security Cases) Regulations 1975[72] providing for a special procedure for the trial of "security offences" (therein defined) some of which were punishable with death. It differed substantially from the procedure for the trial of capital offences under the Criminal Procedure Code. Reg. 32(1) extended the pardoning power of the Agong under Art. 42 to all "security cases" (therein defined) wherever committed. By clause (2) other relevant provisions of Art. 42 were made applicable *mutatis mutandis.* These regulations were replaced by the Essential Security Cases (Amendment) Regulations 1975.[73] Reg. 29 was substituted for Reg. 32 which incorporates virtually the same provision except that under the new regulation the power of pardon in relation to security offences is exercised only for so long as the regulations remain in force.

In *Teh Cheng Poh* v. *Public Prosecutor*[74] the Privy Council held the regulations to be *ultra vires* the Constitution, because the Ordinance Power "lapses as soon as Parliament sits," and thereafter, the power to issue ordinances can only be delegated by the Parliament.[75]

The Parliament enacted the Emergency (Essential Powers) Act 1979 to operate retrospectively from 20 February 1971, the day the Parliament was reconvened, giving the Agong the necessary powers, and also validating the regulations as well as all the trials held in accordance with them. The Essential (Security Cases) (Amendment) Regulations 1981, promulgated under section 2 of the Emergency (Essential Powers) Act 1979 replaced clause (2) of Regulation 29 of the Essential (Security Cases) Regulations with the following:

> "(2) The power conferred upon the Yang di-Pertuan Agong by virtue of paragraph (1) shall be exercised on the advice of a Pardons Board constituted for security offences wherever committed or tried, and the provisions of Clauses (5), (6), (7), (8) and (9) of Art. 42 of the Constitution shall apply *mutatis mutandis* to the Pardons Board, except that reference to 'Ruler or Yang di-Pertua Negeri' shall be construed as reference to Yang di-Pertuan Agong and reference to 'Chief Minister of the State' shall be construed as reference to the Prime Minister."

71 PU(A) 146.
72 PU(A) 320.
73 PU(A) 362.
74 [1979] 1 M.L.J. 50.
75 *Ibid*., at p. 53.

In assailing the validity of the composition of the Board the respondent impugned the 1981 amendment to Reg. 29 contending that it could not be lawfully promulgated under the Emergency (Essential Powers) Act 1979. Rejecting the argument as "wholly bereft of any substance or merit whatsoever" Abdoolcader J. held, *inter alia,* that as Art. 150(6) validates any inconsistent law during an emergency, "the purport and effect" of Reg. 29 is to "modify the provisions of clause (1) of article 42 of the Constitution in relation to security cases within the connotation thereof in the Regulations."[76]

The question is whether Reg. 29 constitutes an amendment to Art. 42(11). If the answer, as held by Abdoolcader J., is in the affirmative, it means that during an emergency the Constitution may be amended by ordinary, or even by subsidiary legislation.

Art. 42(11) provides the procedure for exercising pardoning power under clause (1) over offences committed in the Federal territories of Kuala Lumpur and Labuan. In the exercise of that power the Agong is to act on the advice of a Pardons Board constituted under clause (11). According to Art. 40(3) a federal law may make provisions requiring the Agong to act in consultation with or on the recommendation of any person or body of persons other than the cabinet in the exercise of any non-discretionary functions. Pardoning power is not a discretionary power as envisaged in Art. 40(2). Federal law may provide for the exercise of the pardoning power in consultation with or on the recommendation of any person or body of persons. "Federal law" under Art. 160(2) means any existing law relating to a matter with respect to which Parliament has power to make laws.

According to Art. 150(2B), during an emergency, if both Houses of Parliament are not in session, the Agong, may promulgate such "ordinances" as are expedient. While an emergency is in force, Parliament may, under clause (5) "notwithstanding any thing in this Constitution, make *laws* with respect to any matter" as are required by reason of emergency. [Emphasis added.] Under clause (6) such an ordinance or law shall not be "invalid on the grounds of inconsistency with any provisions of this Constitution." Restrictions on this power are envisaged in clause (6A) providing that clause (5) "shall not extend the powers of Parliament" over any matter relating to Islamic law, custom of the Malays, or native law or custom in Sabah and Sarawak. This clause also declares that clause (6) shall not validate any provision inconsistent with the constitutional provisions relating to "religion, citizenship, or language."

Thus, it can be seen that the power of Parliament under Art. 150 to enact laws that are inconsistent with the Constitution is an exercise of "legislative power" and not a "constituent power" to amend the Constitution. Art. 159 is a complete code for amending the Constitution. Clause (4) provides for the circumstances where an amendment is excepted from the special procedure for amendment. If the intention of the architects

76 *Ibid*., at pp. 497-498.

of the Constitution was to except laws or subsidiary legislation promulgated during an emergency, such an exception could have been expressly provided as a sub-clause in clause (4). Clauses (2B) and (5) of Art. 150, therefore, are not a source of "constituent power" to amend the constitution, but only "legislative power" to enact laws.

Further Reg. 29(2) had not affected the composition of the Pardons Board for federal territories. It remains the same. Only in regard to security offences if the power of pardon is to be exercised it is to be on the advice of the Pardons Board for Security Offences. Since it is promulgated in exercise of the power under Art. 40(3), the question of its incompatibility with the Constitution does not arise.

Indeed clause (1) of Reg. 29 in enhancing the pardoning power of the Agong in relation to all the security offences wherever committed affects Art. 42(1). But that was not in issue in the case. Even if it amplifies the pardoning power of the Agong it is saved under clause (6) of Art. 150, whose effect is to eclipse the Constitution during an emergency. If laws like Reg. 29 were to be amendments they would continue even after the emergency is withdrawn. But under clause (7) of Art. 150, the inconsistent ordinances or laws are not perennial but only ephemeral as they cease to be operative automatically, six months after the revocation of the emergency. No doubt the Constitution may be amended during an emergency. If such an amendment is intended to last beyond the emergency it should be made under Art. 159 and not under Art. 150.

It may also be noted that the effect of Art. 150(6) is to remove laws made during an emergency from the inhibition of Art. 4(1). It was held in *Phang Chin Hock*[77] that "law" in Art. 4(1) means ordinary laws enacted in the ordinary way and not constitutional amendments. The same conclusion would also be apt for defining "law" in clauses (5) and (6) of Art. 150.

In *Osman & Anor* v. *Public Prosecutor*,[78] the appellants who were Indonesian saboteurs were convicted under the Penal Code for the murder of three civilians by planting explosives in MacDonald House on Orchard Road during "Confrontation," and sentenced to death. They were tried in accordance with the Emergency (Criminal Trials) Regulations 1964. The Regulations dispensed with the requirement of preliminary inquiry before trial, restricted bail, and provided for trial before a single judge of the High Court. It was contended before the Privy Council that the Regulations violated the "equality clause" of the Constitution.[79]

The Regulations were made under the Emergency (Essential Powers) Act 1964. This Act was made pursuant to Art. 150(5), and consequently, it was held that the validity of the Regulations could not be impeached. It may be noted that the Regulations had not amended the "equality clause" but because of clause (6) they prevailed over the Constitution, even though inconsistent with it.

77 *Supra,* note 47.
78 [1968] 2 M.L.J. 172.
79 Art. 5 (presently Art. 12).

It is therefore submitted that there is no special procedure for amending the Constitution during emergencies. It is the effect of the emergency that saves them from constitutional mortality, but that does not mean that there exists a power to amend the constitution by ordinary legislation or subsidiary legislation during the proclamation of an emergency.

2. *Compliance with procedure*

The effect of the requirement of a particular procedure for amending the constitution was examined by the Privy Council in *The Bribery Commissioner* v. *Pedrick Ranasinghe*.[80] The Parliament of Ceylon could amend or repeal the constitution under s. 29 of the Ceylon (Constitution) Order-in-Council 1946, provided that no bill for amendment could be presented for Royal assent unless the Speaker of the House of Representatives had endorsed that the bill was passed by a majority of not less than two-thirds of the members thereof. Endorsement of the Speaker was a procedural requirement. The appellant was convicted for a bribery offence by a Tribunal set up under the Bribery Amendment Act 1958.

The Act was not passed by a two-thirds majority and did not have the Speaker's certificate. The method of appointing members to the Tribunal, under the Act was inconsistent with the provisions of the Constitutional Order relating to the appointment of judicial officers. It was argued for the Bribery Commissioner that, if such an inconsistency existed, the Act should be considered as an amendment of the Constitution.

This contention was rejected both by the Supreme Court of Ceylon and the Privy Council. Lord Pearce held that a legislature cannot "ignore the conditions of law-making imposed by the constitution."[81] In the absence of the constitutionally required two-thirds majority and the Speaker's certification, the Act was not an amendment of the Constitution.

Ranasinghe was distinguished from the earlier case of *McCawley* v. *The King,*[82] where a law enacted by the legislature of Queensland in Australia which was inconsistent with the Constitution Act was held to be *pro tanto* an amendment to the Constitution, because the Constitution of Queensland was "neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process ..."[83] for effecting an amendment, whereas amendment to the Constitution of Ceylon can "only be made by laws which comply with the special procedure laid down...."[84]

80 [1965] A.C. 172.
81 *Ibid*., at pp. 197-198.
82 [1920] A.C. 691.
83 Quoted in *Ranasinghe, supra,* note 80, at p. 198.
84 *Ibid.*

D. *Implied Amendments*

In *Mohamed Samsuddin Kariapper* v. *S.S. Wijesinha*[85] the Privy Council considered whether the Imposition of Civic Disabilities (Special Provisions) Act 1965, enacted by the Parliament of Ceylon, was an amendment of the Constitution, under s. 29(4) of the Ceylon (Constitution) Order-in-Council 1946. The bill was not expressly stated to be an amendment to the Constitution.

When it was presented for Royal assent it had an endorsement of certification by the Speaker as required in s. 29(4). The appellant who, along with others, was unseated as a member of Parliament by the Act contended that it was inconsistent with s. 24 of the Constitution, [providing for the vacating of seats by members of the Parliament] and even though it purported to be an amendment, it was not an amendment, because the words in the proviso to s. 24(4) "a bill for amendment or repeal" referred to only a bill that provided expressly for the amendment or repeal of some provisions of the Constitutional Order. Advising the dismissal of the appeal the Privy Council stated:

> "A bill which, if it becomes an Act, does amend or repeal some provision of the order is a bill 'for amendment or repeal of the provisions of the order'.... A bill described as one for amendment of the Constitution which contained no operative provision to amend the Constitution would not require the prescribed formalities to become a valid law whereas a bill which upon its passing into law would, if valid, alter the Constitution would not be valid without compliance with those formalities."[86]

Even though the impugned law, in "form", was not expressed to be an amendment it was in "effect" an amendment because "[t]he effect of the repealing Act must ... depend on what it *does,* and not on the label it affixes to itself."[87]

1. *Scope for implied amendments in Singapore*

Apparently anticipating such difficulties in Singapore the Constitutional Commission, *inter alia,* recommended that "a Bill for an Act of Parliament altering the Constitution shall not be passed by the Parliament unless it is expressed to be one for amendment of the constitution and contains no other provision."[88]

Commenting upon the 1979 Amendment to the Constitution, Professor S. Jayakumar observed:

85 [1968] A.C. 717.
86 *Ibid*., at p. 743.
87 *Ibid*., at p. 744.
88 See *supra,* note 61.

> "The problem of implied amendments can still arise.... This is especially so in the present situation where all the Members of Parliament are from the party in power. Most legislation will be carried by votes exceeding the two-thirds majority. If a particular legislation (which was not expressly stated to be a constitutional amendment) received more than two-thirds vote but was in conflict with a provision of the Constitution then would such a law (a) be void because of the inconsistency, pursuant to the supremacy clause to Art. 52 [as it then was, now Art. 4], or (b) be considered to be an implied amendment of the Constitution? This dilemma can be avoided if the Constitutional Commission's recommendation had been implemented. That this is not an academic problem is clearly demonstrated by the Privy Council decision in *Kariapper* v. *Wijesinha.*"[89]

With utmost regard to the erudition of a renowned scholar of constitutional law, it is respectfully submitted that the situation in Singapore may be distinguished from that of Ceylon as it stood at the time of *Kariapper,* because Art. 5 of the Constitution of Singapore is different from s. 29 of the then Constitutional Order of Ceylon. The proviso to s. 29(4) starts with the words "no bill for amendment" whereas the relevant words used in Art. 5 are "A bill *seeking* to amend"[90] : the former relates to the "effect" of the bill, whereas the word "seeking" in the latter in etymologically connoting the obtaining of desired results refers to the aims, purposes and intentions of the bill. The real purpose of the bill, or its "pith and substance" becomes very important. Is it an amendment to the constitution? If so, the intention should be categorically spelt out, otherwise the bill will not "seek" to amend the constitution.

In *Kariapper* the Speaker had endorsed the bill that it was passed by the required two-thirds majority, because the relevant section in the Constitution Order so required for an amendment. And it was because of this endorsement in the bill that the intention of Parliament that it was for amendment was ascertained. In Art. 5 there is no requirement for any endorsement by the Speaker. Even the Standing Orders of the Parliament of Singapore do not require any endorsement by the Speaker on any bill. The only certification that is required of the Speaker in SO 78(3) is that the printed copy submitted by the Clerk for the Presidential assent should be attested as the true copy of the bill. In *Kariapper* the decision was based upon the constitutionally required endorsement of the Speaker.

Further SO 64(2) provides that at the first reading the "long title" [or in other words the Preamble] should be read aloud by the mover of a bill and the short title be read aloud by the Clerk of the Parliament. The Clerk is also required in SO 66(3)(a) to "ascertain and advise the Speaker as to whether ... the Bill contains anything foreign to what the title of the Bill imports." SO 69(2) and 71(15) relate to amendment to the title of the bills. SO 78(3) provides that "subject to the provision

89 Legislation Comment – *"The Constitution (Amendment) Act, 1979 (No. 10)",* (1979) 21 Mal.L.R. 111.
90 Emphasis added.

of the law being first complied with," a bill after being read a third time, a printed copy thereof, certified by the Speaker to be a true copy, be presented by the Clerk for Presidential assent. The description of a bill as a "bill for amendment", as argued above, is a procedural requirement, and until it is complied with, the bill is not ripe for presentation for Presidential assent.

Because of the distinction between "constituent" and "legislative" powers,[91] unless an amendment Bill is specifically described as an amendment Bill the resulting enactment will be an ordinary law thereby falling within the inhibition of Art. 4. The only way to make the bill impervious to Art. 4 is to designate it as one for amendment.

E. *Implied Limitations on Power of Amendment: Basic Features Theory*

In the course of arguments in *Golaknath*[92] the advocate for the petitioners, Mr. Mani, advanced an argument that in the exercise of the power of amendment Parliament could only modify the provisions of the constitution within the original framework for its better effectuation, but could not destroy its structure. The Chief Justice declined to express an opinion because the question could arise only if Parliament sought to destroy provisions other than the fundamental rights. However, one judge rejected the argument on the ground that by an amendment new matter might be added and an old matter removed or altered.

The Basic Features Theory, however, was propounded in *Kesavananda*[93] in considering the validity of Art. 31C introduced by the 25th Amendment. It may be recapitulated for the purposes of ready reckoning that Art. 31C provides that a law giving effect to the Directive Principles of State Policy enunciated in Art. 39(b) and (c) cannot be questioned on the ground of infraction of Arts. 14, 19, and 31, and that a declaration in such law that its purpose is to effectuate those Directive Principles cannot be impugned on the ground that it does not give effect to such purpose.[94]

The entire bench of 13 judges considered the case. Six judges[95] held that the entire Art. 31C was void. One judge considered only the last clause of Art. 31C to be void.[96] The other six judges were of the view that the whole of Art. 31C was not void.[97] For the former seven judges Art. 31C was wholly or partially void because it had excluded judicial review.

91 See *supra,* at pp. 216 to 217.
92 See *supra,* note 33.
93 *Supra,* note 35.
94 For the text of Art. 31C see, *supra,* note 34.
95 Sikri C.J., and Shelat, Grover, Hegde, Mukherjea, and Khanna JJ..
96 Jaganmohan Reddy J..
97 Ray, Palekar, Mathew, Beg, Dwivedi, and Chandrachud JJ..

Sikri C.J. reasoned that as the expression "amendment of the Constitution" was not "defined or expanded in any manner,"[98] in construing its meaning "the whole structure of the Constitution has to be looked into."[99] He accordingly concluded that in the context of the importance given to the economic, social and political justice in the Preamble, the freedom of the individual, the Directive Principles of State Policy, and the non-inclusion of provisions relating to the President and the executive power in Art. 368, the word "amendment" was not intended to be used in the "widest sense" and should be given a "limited meaning". Consequently "a necessary implication arises that there are implied limitations on the power of the Parliament."[100]

On the limitations implied on the power to amend the constitution, he explained:

> "... every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remain the same. The basic structure may be said to consist of the following features:
>
> (1) Supremacy of the Constitution;
>
> (2) Republican and Democratic forms of Government;
>
> (3) Secular character of the Constitution;
>
> (4) Separation of powers between the legislature, executive and the judiciary;
>
> (5) Federal character of the Constitution.
>
> The above structure is built on the basic foundation, *i.e.,* the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed."[101]

Other judges who referred to the basic structure as a limitation of amending power wrote in a similar vein. Among the judges who considered that the basic features cannot be abrogated there is no unanimity as to what are the basic features. According to them the question has to be resolved according to the facts of each case.[102]

In *P. Sambamurthy and Others* v. *State of Andhra Pradesh and another*[103] a proviso in Art. 371D(5) conferring power on the State government to modify or annul a final order of the Andhra Pradesh Administrative Tribunal

98 *Ibid.,* at p. 1496.
99 *Ibid*., at p. 1497.
100 *Ibid*., at p. 1534.
101 *Ibid*., at pp. 1535-1536.
102 For the author's criticism of the *raison d'etre* of Sikri C.J. in enunciating the basic features doctrine, see *infra,* p. 232.
103 AIR [1987] SC 663.

created thereby, for adjudicating service disputes in lieu of the ordinary courts, was held to be void because it was contrary to the rule of law, which was a basic feature of the Constitution.

1. *Basic features theory in Malaysia*

The Federal Court of Malaysia had not accepted the doctrine of implied limitations in *Loh Kooi Choon*[104] because, according to Raja Azlan Shah F.J.:

> "... the fallacy of this (implied limitations) doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power."[105]

The Federal Court once again deliberated the relevance of the basic features doctrine in *Phang Chin Hock*.[106] On the analogy of the Indian decisions relating to basic features an argument was advanced by the Counsel for the petitioners that there were certain "implied limitations" on the Parliament to amend the Constitution, namely the "basic structure", which was immutable. These basic features, it was contended, were: (a) supremacy of the Constitution, (b) constitutional monarchy, (c) theocracy with freedom of religion to others, (d) separation of powers, and (e) the federal structure. Consequently, even if the Emergency (Essential Powers) Act 1979 was valid, s. 2(4) [prevalence of essential regulation even though inconsistent with the Constitution], s. 9(3) [lawfulness of the trials and convictions], and s. 12 [ouster of jurisdiction of courts] were void, as they destroyed the basic structure of the Constitution.

Suffian L. P. pointed out that the power of the Parliament of Malaysia was not limited in the same way as the power of the Parliament of India and that there were differences in the Indian and Malaysian Constitutions: their sources were different, the former was adopted by a Constituent Assembly, whereas the latter was the outcome of "Anglo-Malayan" negotiation; the former had a preamble and Directive Principles of State Policy not found in the latter. In the result "Parliament (in Malaysia) may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself."[107] As the impugned legislation had not destroyed any basic features, he pointed out that there was no need to express an opinion on whether Parliament may so amend the Constitution in such a way as to destroy the basic structure.[108]

104 *Supra,* note 39.
105 *Ibid*., at p. 190.
106 *Supra,* note 47.
107 *Ibid*., at p. 74.
108 *Ibid*., at p. 75. For a critique of the case see Notes of Cases – "The Death of a Doctrine – *Phang Chin Hock* v. *Public Prosecutor"* (1979) 21 Mal. L.R. 365.

It may be noted that in *Kesavananda* the basic features doctrine was held to be a limitation on the power of amending the constitution, whereas in *Phang Chin Hock* the *vires* of a legislation was challenged on the basis of the basic features limitation. As such the decision of the Indian Supreme Court in *Indira Nehru Gandhi* v. *Raj Narain*[109] where it was held that the theory of basic features is inapplicable to ordinary legislation, would have been more relevant.

2. *Basic features theory in Singapore*

The basic features doctrine was canvassed as a limitation on the power of constitutional amendment in assailing the constitutionality of the 1989 Amendment to Art. 149[110] in *Teo Soh Lung* v. *The Minister for Home Affairs*.[111] It was argued that the power of the Parliament to amend the Constitution was not only limited by the express provisions of Art. 5 but also by the implied limitations upon the amending power which were derived from the basic structure of the Constitution itself. Rejecting these arguments Chua J. held:

> "If the framers of the Singapore Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations. But Art. 5 of the Constitution does not put any limitation on the amending power.... If the courts have the power to impose limitations on the legislature's power of constitutional amendments, they would be usurping Parliament's legislative function contrary to Art. 58 of the Constitution ... the *Kesavananda* doctrine is not applicable to our Constitution. Considering the differences in the making of the Indian and our Constitution, it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution. In any case ... none of the amendments complained of destroyed the basic features of the Constitution."[112]

3. *Relevance of basic features theory in Malaysia and Singapore*

The basis features doctrine appears to be irrelevant in Malaysia and Singapore because in addition to the differences between the Constitutions of India on one hand and Malaysia and Singapore on the other, as enunciated by Suffian L. P. as well as Chua J., in the relevant Arts. 159 and 5, there are clauses (6) and (3) respectively, defining "amendment" as including "addition and repeal."

"Repeal" is the abrogation or annulling of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated. This is referred to as "express" repeal. On the other hand where a new law contains provisions so contrary or

109 AIR [1975] SC 1590.
110 For the text of Art. 149 as amended in 1989, see *Tea Soh Lun,* note 111, at p. 451.
111 [1989J2M.L.J.449.
112 *Ibid*., at pp. 456-457.

irreconciliable with those of an earlier law to such an extent that only one of the two statutes can remain in force, the law is considered to be repealed. This is referred to as "implied repeal".

The distinction between an amendment and a repeal is that an amendment is an alteration in the law already existing, leaving some part of the original still standing, whereas a repeal is a complete abrogation of an existing law by a subsequent statute.

Since the Malaysian and Singapore Constitutions define "amendment" to include "repeal" there cannot be any constitutional inhibition in substituting for the existing Constitutions an entirely new one. Consequently there appears to be no room for the doctrine of basic features as an implied limitation on the authority of the Malaysian and Singapore Parliaments to amend the Constitution.

In the Indian Constitution the expression "amendment" was for the first time defined as "addition, variation, and repeal" in clause (1) of Art. 368 introduced by the 24th amendment."[113] In *Kesavananda* there was no doubt about the constitutionality of this clause. Indeed Sikri C.J. himself conceded that the 24th Amendment was valid.[114] Yet Sikri C.J. formulated the basic features doctrine because in the absence of a definition of "amendment of the Constitution", that expression meant "any addition or change" in the Constitution within the "objectives of the Preamble and the Directive Principles."[115] In the part of his judgment dealing with the validity of the 24th Amendment even though he had adverted to the definition of "amendment" introduced by that amendment, he did not examine the effect of "repeal", but merely in the context of proviso (e) to Art. 368, cursorily pointed out that "[t]he meaning of 'Amendment of the Constitution' does not change when one reads the proviso."[116] He did not give any reasons.

The fallacy in the reasoning of Sikri C.J. is that he had built up the entire theory of basic features on the assumption that the expression "amendment of the Constitution" was not defined in the Constitution as it originally stood, and hence had not examined the definition as succinctly given in the 24th Amendment.

The 42nd Amendment of 1976 sought, *inter alia,* to supersede *Kesavananda* by amending Art. 368. It provided in clause (4) that no amendment "shall be called in question in any court on any ground" and it clarified in clause (5) that "there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation, or repeal the provisions of the Constitution." In *Minerva Mills* v. *Union of India*[117] these clauses were held to be invalid on the ground that in removing all limitations upon power of the Parliament to amend the Constitution and precluding

113 For the text of Art. 368(1) see *supra,* at pp. 215-216, *supra,* note 34.
114 *Supra,* note 35, at p. 1552.
115 *Ibid*., at p. 1535.
116 *Ibid*., at p. 1552.
117 AIR [1980] SC 1789.

judicial review of an amendment on *any* ground sought to destroy an "essential feature" or "basic structure" of the Constitution.[118] The anomaly is that while clause 5 is held invalid, identical provisions in clause (1) remain untouched.

F. *Extent of Unconstitutionality*

When legislation is rendered void because of Art. 4 it becomes *void ab initio.* Generally it becomes unconstitutional retrospectively from the date of enactment unless the doctrine of prospective overruling is applied and the decision is made to operate prospectively.[119] However, such legislation will be unconstitutional only to the "extent" of inconsistency. Art. 4 incorporates the "doctrine of severability", according to which when certain of the provisions of a legislation are found to be unconstitutional, although others are *intra vires* the legislature, only the former provisions will be invalidated.[120]

The prohibition of Art. 4 is applicable only in regard to post-constitutional legislation. What happens to a pre-constitutional law whose provisions are inconsistent with the Constitution? Do they continue to be in force irrespective of inconsistency? Can the Constitution be considered to be supreme if that is the situation? Or do the pre-constitutional provisions continue to be in operation until the advent of the Constitution, and thereafter considered to be modified by the Constitution?

The Indian Constitution makes a specific provision rendering inconsistent pre-constitutional legislation also void. Because of such a provision issues had arisen whether legislation rendered void on the advent of the Constitution is *ipso facto* revived when the Constitution is amended subsequently. Invoking the "doctrine of eclipse" the Indian Supreme Court answered such interpolations in the affirmative.[121]

The validity of pre-constitutional legislation inconsistent with the Constitution was examined by the Privy Council in *B. Surinder Singh Kanda* v. *Government of the Federation of Malaya.*[122] Prior to the advent of the Constitution of the Federation of Malaya, the Commissioner of Police (COP), according to the Police Ordinance 1952, had the authority to dismiss an Inspector of Police. The Constitution of the Federation of Malaya came into force on 31 August 1957, Merdeka Day. Art. 140(1) provided for the establishment of a Police Service Commission (PSC) with a duty under Art. 144(1) to appoint and exercise disciplinary control over the members of the force. Art. 135(1) postulated that "no member of any service [that included the police service] shall be dismissed ... by an authority subordinate to that which, at the time of the dismissal ... has power to appoint a member of that service of equal rank."

118 *Ibid*., at paras. 21, 25, 28, and 93 to 94.
119 See *Public Prosecutor* v. *Dato' Yap Peng* [1987] 2 M.L.J. 311, and *Golaknath, supra,* note 33.
120 See, for example, *Moses Hinds* v. *The Queen* [1977] A.C. 195.
121 *Bhikaji Narain* v. *State of Madhya Pradesh* AIR [1955] SC 781.
122 [1962] A.C. 322.

The appellant, an inspector of police, was dismissed by COP after an inquiry. The dismissal was challenged on the ground that after the advent of the Constitution the PSC had the power and duty to appoint an officer of his rank, and COP being an authority subordinate to the PSC could not dismiss him. Allowing the appeal Lord Denning held:

> "In a conflict of this kind between the exiting law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it in accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service."[123]

Under Art. 135(1) as the PSC was the competent authority to appoint an officer of the rank of the appellant, it was also the authority to dismiss him. Consequently his dismissal by COP was held to be void.

In *Assa Singh*[124] the issue was whether Restricted Residence Enactment 1933 was void at the advent of the Constitution. It was held that the Act was not contrary to Art. 9 because of the saving provision in clause (2) of that Article, and that the absence of provisions like Art. 5(2) and (3) in the Act did not render it void. The Act, however, should be applied with such modifications as are necessary to bring it in accordance with clauses (2) and (3) in Art. 5.[125]

The Constitution of Singapore in this respect is closer to the Constitution of Malaysia. It, therefore, leaves scope for the conclusion that any law which was in force in Singapore at the advent of independence is not void even if it is inconsistent with the provisions of the Constitution, if saved by the provisions of the Constitution. Such a law should be modified in accordance with the provisions of the Constitution. Other inconsistent laws will be inoperative from the advent of the Constitution.

IV. JUDICIAL REVIEW

Marbury v. *Madison*[126] is axiomatic of two primary propositions of constitutional law:

(1) constitutions as fundamental law render inconsistent legislation null and void;[127] and

(2) courts are the arbiters of constitutionality of laws.[128] These formulations are the quintessence of judicial review.

123 *Ibid*., at p. 334.
124 See *supra,* note 42.
125 *Ibid*., at p. 41.
126 See, *supra,* note 4.
127 *Ibid.*
128 "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular case, must of necessity expound and interpret that rule." *per* Marshall C.J. *Ibid*., at p. 177.

The scope of judicial review of legislation in Singapore was elucidated by the Privy Council in *Ong Ah Chuan* v. *Public Prosecutor,*[129] where certain provisions of the Misuse of Drugs Act 1973 as amended in 1975 were impugned as being in violation of Arts. 9(1) and 12(1) relating to "personal liberty" and "equality" respectively. Art. 9(1) provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law." It was argued for the Public Prosecutor that as "written law" is defined in Art. 2(1) to mean "this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore" and "law" is defined as to include "written law", the requirements of the Constitution are satisfied if the deprivation of liberty was carried out in accordance with the provisions in any legislation enacted by the Parliament. Rejecting the contention the Privy Council held that as the definition of "written law" includes provisions of enactments only to the extent that they are "for the time being *in force* in Singapore", and Art. 4 renders a law inconsistent with the Constitution void, the use of the expression "law" in Arts. 9(1) and 12(1) "does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after September 16, 1963 (the date of merger with Malaysia), and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void."[130] The Board accordingly examined the provisions of the impugned Act and found them to be within the constitutional framework.

This decision of the Privy Council empirically demonstrates the existence of judicial review of legislation in Singapore.

V. TERRITORIAL INTEGRITY

A constitution is a bond of national unity. In *Texas* v. *White*[131] Chief Justice Chase pointed out that the real sense of the constitution may be derived by understanding the correct idea of a "State". A "State" often refers only to the "country or territorial region inhabited" by a people or community. It is a "political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution...."[132] In the American context the "Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[133] Territorial unity is, thus, at the core of a constitution.

The acquisition or cession of territory, however, is an attribute of the external sovereignty of every sovereign State. Issues have arisen in the United States and India whether the power to acquire and cede territory is outside the constitution as an attribute of the sovereignty or to be exercised in accordance with the constitution. In the United States it has

129 [1981] A.C. 648.
130 *Ibid.*, at p. 670.
131 7 Wallace 700 (1869).
132 *Ibid.*, at p. 721.
133 *Ibid.*, at p. 725.

been held to be necessarily involved in the "war" and "treaty" power, or in the power over foreign affairs.[134]

In India, the Supreme Court in *In re Berubari Union and Exchange of Enclaves*[135] gave an advisory opinion that the power to acquire and cede territory being sovereign power, existed outside the Constitution.

What then, is the method of giving effect to the acquisition or cession of territory? Would it require a constitutional amendment, or a legislative enactment, or could it be effected by an executive order? If the territory can easily be truncated a situation may be logically conceivable where there may be a constitution without any territory. Territorial integrity is, therefore, essential for the supremacy of the constitution and the procedure for cession, like the procedure for amendment, should not be flexible.

In *Berubari Union* the issue was whether Art. 3[136] empowers the Parliament by law to cede Indian territory because of an agreement with a foreign government or whether the cession requires an amendment to the Constitution under Art. 368. The Supreme Court rejected the argument that the territorial limits of the nation as fixed by the Constitution were unalterable and that Parliament had no power to cede any part of the territory either by ordinary legislation or by constitutional amendment. In regard to the procedure for ceding the territory the court was of the opinion that it could not be done by an agreement with a foreign government or by a legislation under Art. 3. It needs an amendment to the Constitution under Art. 368.

In *Maganbhai Patel*[137] it was held that a boundary dispute may be settled with neighbouring Pakistan involving transfer of territory, by an agreement between both the Governments, because such "has been the custom of Nations whose constitutions are not sufficiently elaborate on this subject."[138]

In India territory may be ceded to a foreign power either by constitutional amendment or by an agreement with a foreign power for settling an ostentatious "boundary" dispute.

Part III[139] of the Constitution of Singapore forbids the cession of any territory except on a referendum. Art. 6 prohibits any "surrender or transfer, either wholly or in part of the Sovereignty of Singapore as an independent nation, whether by way of merger or incorporation with any Federation, Confederation, country or territory or in any manner whatsoever," unless such "merger, transfer or relinquishment" is supported by not less than

134 See B. Schwartz, *supra,* note 3, Vol 2, at pp. 141-142.
135 AIR [1960] SC 845.
136 For the content of Art. 3, see *supra,* note 56.
137 *AIR* [1969] SC 783.
138 *Ibid*., at pp. 798-9.
139 For a comment on Part III see A. J. Harding, *"The Entrenchment of Sovereignty: An Analysis of Part III of the Singapore Constitution"* (1982-83) 2 Lawasia (N.S.) 261.

two-thirds of votes cast by the registered electors at a national referendum. Since the power to cede territory is an integral aspect of sovereignty, it is clear that Singapore territory cannot be ceded except upon a referendum. Territory of Singapore is delimited in the Interpretation Act[140] which in s. 2 provides that "Singapore means the Republic of Singapore and shall be deemed to include the Island of Singapore and all islands and places which on the 2nd day of June, 1959, were administered as part of Singapore and all territorial waters adjacent thereto." Even if a boundary adjustment involves the transfer of an area acknowledged as Singapore territory it would require a referendum. The prohibition against the surrender of sovereignty is further strengthened in Art. 8 providing that Part III cannot be amended except on a referendum.

The Constitution of Singapore, therefore, ensures territorial integrity, thereby safeguarding constitutional supremacy.

VI. CONCLUSIONS

Dicey perceived 'codification', rigidity and judicial review as the essential elements for the supremacy of the constitution. Rigidity does not mean unamendability. All that Dicey suggests is that the constituent and legislative process should be distinct. In Singapore the Constitution envisages different modes for enacting laws and for amending the Constitution. A special majority of the membership of the Parliament is required for amending the Constitution. In the context of surrender of national sovereignty and the amendment of certain articles under the 1990 amendment bill there is the requirement of referendum. These provisions are indeed more rigid. Referendum, an institution of direct democracy, is postulated in a more effective manner than in its traditional cradle, Switzerland. In Singapore it is a limitation on the authority of the Parliament. Even in regard to pre-constitutional laws that are inconsistent with the Constitution, the position is clear that they are to be administered in due subordination to the Constitution.

Territorial integrity is an essential ingredient of constitutional supremacy. While in the advanced constitutional systems of United States and India, national territory can be ceded by treaty, or executive agreements, the Constitution of Singapore has devised the unique instrument of referendum before national territory can be ceded to another country. Territorial integrity is safeguarded by the entrenched provisions of Art. 8.

Judicial review of legislation is also an essential characteristic of the Constitution. There is in existence a judicial infrastructure for rendering unconstitutional legislation inoperative.

[140] Cap. 1 (1985 Rev. Ed.).

It may, therefore, be vouchsafed that the Constitution of Singapore in addition to satisfying the Diceyan perspective fulfils other criteria of constitutional supremacy.

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