PETITIONER:
IN RE: THE BERUBARI UNION ANDEXCHANGE OF ENCLAVES

Vs.

RESPONDENT:
REFERENCE UNDER ARTICLE 143(1) OFTHE CONSTITUTION OF INDIA

DATE OF JUDGMENT:
01/04/1959

BENCH:

ACT:
President's Refeyence-Indo-Pakistan Agreement, 1958-Division of Berubari Union and exchange of Cooch-Behar Enclaves-If involve cession of territory-Implementation-Amendment of Constitution-Constitution of India, Arts. 1, 3, 368.

HEADNOTE:
As a result of the Radcliffe Award dated August 12, 1947, Berubari Union No. 12 fell within West Bengal and was treated as such by the Constitution which came into force on January 26, 195o, and has since been governed on that basis. Certain disputes arose between India and Pakistan subsequent to the Radcliffe Award but Berubari was not in issue before the Badge Commission set up by agreement between the parties to decide those disputes. That commission made its award on January 26, 195o. Pakistan raised the question of Berubari for the first time in 1952 alleging that under the Radcliffe Award it should form part of East Bengal and was wrongly included in West Bengal. On August 28, 1949, the Ruler of the State of Cooch-Behar
251
entered into an agreement of merger with the Government of India and that Government took over the administration of Cooch-Behar which was ultimately merged with West Bengal on January 1, 1950, so as to form a part of it. It was found that certain areas which belonged to the State of Cooch-Behar became enclaves in Pakistan after the partition, and similarly certain Pakistan enclaves fell in India.
In order to remove the tension and conflict caused thereby the Prime Ministers of India and Pakistan entered into an agreement, called the Indo-Pakistan Agreement on September 10, 1958, and items 3 and 10 of that agreement provided for a division of Berubari Union half and half between India and Pakistan and for an exchange of Cooch-Behar Enclaves in Pakistan and Pakistan Enclaves in India.
Doubts having subsequently arisen regarding the implementation of the said items, the President of India referred the matter to the Supreme Court under Art. 143(1) of the Constitution:
Held, that item NO. 3 of the Agreement leaves no manner of doubt that the parties to it were thereby seeking to settle the dispute apart from the Award, amicably, and on ad hoc basis by dividing the territory half and half. There is absolutely no indication in it that they were seeking to interpret the Award and determine the boundary on that basis. The question relating to Berubari must, therefore, be considered on the basis that it involves cession of ;1 part of India's territory to Pakistan and this applies with greater force to the agreement relating to the exchange of

the enclaves.
There can be no doubt that the implementation of the Agreement would alter the boundary of West Bengal and affect Entry 13 in the First Schedule to the Constitution, since as a matter of fact Berubari was treated as a part of West Bengal and governed as such from the date of the Award and was thus comprised therein before the commencement of the Constitution. Any argument to the 'contrary cannot be accepted.
The State of Australia v. The State of Victoria, (1911) 12 C.L.R. 667 and the State of South Australia- v. State of Victoria, [1914] A.C. 283, distinguished and held inapplicable.
Although it may be correct to describe the preamble as a key to the mind of the Constitution-makers, it forms no part of the Constitution and cannot be regarded as the source of any substantive power which the body of the Constitution alone can confer on the Government, expressly or by implication. This is equally true of prohibitions and limitations. It was not, therefore, correct to say that the preamble could in any way limit the power of Parliament to cede parts of the national territory. Nor was it correct to say that Art. 1(3)(c) did so.
Article 1(3)(c) correctly construed, confers no power to acquire foreign territories but merely recognises automatic absorption of such territories as may be acquired by India in its sovereign right and, consequently, does not exclude by implication, the power to cede national territory. Moreover, the power to amend
252
the Constitution under Art. 368 gives the Parliament the power to amend Art. 1(3)(c) so as to include the power to cede national territory as well. It was, therefore, incorrect to suggest that the sovereign State of India lacked the two essential attributes of sovereignty, namely, the power to acquire foreign territory and the power to cede national territory, and that no process of legislation could validate the Agreement in question.
Although such cession of territory, which amounts in law to a transfer of sovereignty must cause great hardship from the human point of view, the right of a sovereign State to do so in the exercise of its treaty-making power and subject to such limitations as the Constitution may, expressly or by necessary implication, impose, can never be in doubt and the question as to whether the treaty can be implemented by ordinary legislation or by constitutional amendment must depend on the provisions of the Constitution itself.
It may be assumed in construing Art. 3 that the Constitution contemplated changes of the territorial limits of the constituent States and there was no guarantee of their territorial integrity. Broadly speaking, that Article deals with the territorial adjustment inter se of the Constituent States of India, and not merely their reorganisation on linguistic or other basis. Article 3(c) deals with the diminution of the area of a State and it is unreasonable to suggest that it is wide enough to cover cession of national territory. The true position is that the Constitution does not expressly provide either for acquisition of foreign territory or forcession of national territory; powers are inherent in that behalf in every sovereign State.
Consequently, the Agreement cannot be implemented by a law relatable to Art. 3 and legislation relatable to Art. 368 would be inevitable.
It follows, therefore, that the Parliament acting under Art. 368 can make a law to give effect and implement the

Agreement in question covering both Berubari and the Enclaves or pass a law amending Art. 3 so as to cover cases of cession of the territory of India and thereafter make a law under the amended Art. 3 to implement the Agreement.

JUDGMENT:

ADVISORY JURISDICTION : Special Reference No. 1 of 1959.

Reference by the President of India under Article 143(1) of the Constitution of India on the implementation of the Indo-Pakistan Agreement relating to Berubari Union and Exchange of Enclaves.

The circumstances which led to this Reference by the President and the questions referred appear from the full text of the Reference dated April 1, 1959, which is reproduced below:-

WHEREAS the Boundary Commission appointed under the Chairmanship of Sir Cyril Radcliffe in

253

accordance with sub-section (3) of section 3 of the Indian Independence Act, 1947, made an Award, hereinafter referred to as "the Radcliffe Award", a copy whereof is annexed hereto as Annexure 1, determining the boundaries of the Province of East Bengal and the Province of West Bengal constituted by clause (b) of sub-section (1) of section 3 of the said Act;

AND WHEREAS certain boundary disputes having arisen out of the interpretation of the Radcliffe Award, the Dominion of India and the Dominion of Pakistan set up, by agreement, a Tribunal under the Chairmanship of the Hon'ble Lord Justice Algot Bagge for the adjudication and final settlement of the said boundary disputes and for demarcating the boundary accordingly:

AND WHEREAS the said Tribunal gave decisions on the said boundary disputes, such decisions being hereinafter referred to as "the Bagge Awards", a copy whereof is annexed hereto as Annexure 11;

AND WHEREAS, with respect to the District of Jalpaiguri, the demarcation of the boundary line between the Province of West Bengal and the Province of East Bengal is described in paragraph 1 of the Schedule forming Annexure A to the Radcliffe Award as follows :-

"A line shall be drawn along the boundary between the Thana of Phansidew a in the District of Darjeeling and the Thana Tetulia in the District of Jalpaiguri from the point where that boundary meets the Province of Bihar and then along the boundary between the Thanas of Tetulia and Rajganj; the Thanas of Pachagar and Rajganj, and the Thanas of Pachagar and Jalpaiguri, and shall then continue along the northern corner of the Thana Debiganj to the boundary of the State of Cooch Behar. The District of Darjeeling and so much of the District of Jalpaiguri as lies north of this line shall belong to West Bengal, but the Thana of Patgram and any other portion of Jalpaiguri District which lies to the east or south shall belong to East Bengal";

254

AND WHEREAS a further dispute arose between the Government of India and the Government of Pakistan whether, having regard to the above description of the boundary line with respect to the District of Jalpaiguri, the Radcliffe Award assigned the territory in the said District known as Beruibari Union No. 12 (being the territory covered by blue parallel lines in the sector map, a copy whereof is annexed hereto as Annexure III) to the Province of West Bengal, as

contended by the Government of India or it assigned a major portion of the said territory to the Province of East Bengal, as contended by the Government of Pakistan ;

AND WHEREAS certain other disputes also arose between the Government of India and the Government of Pakistan regarding the interpretation and implementation of certain other parts of the Radcliffe Award and of some parts of the Bagge Awards;

AND WHEREAS the problem arising from the existence of enclaves in Pakistan of certain territories of India which formed part of the territories of the former Indian State of Cooch-Behar (shown in red in the sector map, a copy whereof is annexed hereto as Annexure IV) and of enclaves in India of certain territories of Pakistan (shown in blue in the said sector map) was, along with other border problems, engaging the attention of the Government of India and the Government of Pakistan;

AND WHEREAS, with a view to removing causes of tension and resolving border disputes and problems relating to Indo-Pakistan border areas and establishing peaceful conditions along those areas, the Prime Minister of India, for and on behalf of the Government of India, and the Prime Minister of Pakistan, for and on behalf of the Government of Pakistan, entered into an agreement settling some of the said disputes and problems in the manner set out in the note jointly recorded by the Common wealth Secretary, Ministry of External Affairs, Government of India, and the Foreign Secretary, Ministry. of Foreign Affairs and Commonwealth Relations, Government of Pakistan' a copy whereof is annexed hereto as Annexure V, the agreement as embodied in the said
255
note being hereinafter referred to as "the Indo-Pakistan Agreement";

AND WHEREAS the Indo-Pakistan Agreement settles the aforesaid dispute relating to the territory known as Berubari Union No. 12 in the manner specified in item (3) in paragraph 2 thereof, the agreement relating to such settlement being hereinafter referred to as "the Agreement relating to Berubari Union" ;

AND WHEREAS the lndo-Pakistan Agreement settles the aforesaid problem arising from the existence of Indian enclaves in Pakistan and Pakistan enclaves in India by exchange of enclaves in the manner set out in Item (10) read with Item (3) in paragraph 2 thereof, the agreement relating to such exchange of enclaves being hereinafter referred to as "the Agreement relating to Exchange of Enclaves";

AND WHEREAS a doubt has arisen whether the implementation of the Agreement relating to Berubari Union requires any legislative action either by way of a suitable law of Parliament relatable to article 3 of the Constitution or by way of a suitable amendment of the Constitution in accordance with the provisions of article 368 of the Constitution or both;

AND WHEREAS a doubt has arisen whether a suitable law of Parliament relatable to article 3 of the Constitution is sufficient to implement the Agreement relating to Exchange of Enclaves or whether, in addition or in the alternative, a suitable amendment of the Constitution in accordance with the provisions of article 368 of the Constitution is necessary for the purpose;

AND WHEREAS there is likelihood of the Constitutional validity of any action taken for the implementation of the Agreement relating to Berubari Union and the Agreement relating to Exchange of Enclaves being questioned in courts of law, involving avoidable, and protracted litigation;

AND WHEREAS, in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out have arisen and are of such nature and of such importance that it is expedient that the opinion of the Supreme Court of India should be obtained thereon;

256

Now, THEREFORE, in exercise of the powers conferred upon me by clause (1) of article 143 of the Constitution, 1, Rajendra Prasad, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report thereon, namely:-

"(1)Is any legislative action- necessary for the, implementation of the Agreement relating to Berubari Union ?

(2) If so, is a law of Parliament relatable to article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with article 368 of the Constitution necessary, in addition or in the alternative ?

(3) Is a law of Parliament relatable to article 3 of the Constitution sufficient for implementation of the Agreement relating to Exchange of Enclaves or is an amendment of the Constitution in accordance with article 368 of the Constitution necessary for the purpose, in addition or in the alternative ?"

[Annexures omitted]

1959. December 8, 9, 10 and II. M. C. Setalvad, Attorney-General of India, C. K. Daphtary, Solicitor General of India, H. N. Sanyal, Additional Solicitor General of India, G. N. Joshi, R. H. Dhebar and T.. M. Sen, for the Union of India. It is important to note that the integrity of the territory of the States is not guaranteed by the Constitution of India and Parliament is made Supreme even with respect to the questions relating to the territory. Part 1 of the Constitution is a self-contained code with respect to the territory of the Union. The residuary powers are vested in Parliament. The provisions in the Constitution of the United States, Australia and Canada are entirely different'

The Prime Ministers' agreement with regard to Berubari Union No. 12 does not involve any cession of territory, but it merely ascertains the boundary between East Bengal and West Bengal, which had been left vague by the Radcliffe Award. As such, this part of the agreement can be implemented by executive

257

action. Where there is merely settlement of boundaries, it is not a case of alienation of cession of land. The State of South Australia v. State of Victoria, 12 C.L.R. 667; Penn v. Baltimore, 1 Ves. Sen. 444; Gran-dall on Treaties, 1 Edn., pp. 115 and 161 ; The Lessee of Lattimer et al v. Poteet, 10 L. Ed. 328. The territories of Berubari Union No. 12 were being governed by West Bengal unconstitutionally and did not fall within. item 3 of the First Schedule to the Constitution.' Berubari Union was administered by West Bengal as its own territory, though legally it was not part of its territory and it was not administered " as if it formed part of West Bengal " within the meaning of item 3 of Sch. 1. The giving of a part of the Berubari Union to East Bengal under the Prime Ministers' agreement did not involve any amendment to the First Schedule to the Constitution. A.I.R. 1959 Cal. 506 at 517 and 518.

The executive power of the Union is co-extensive with the powers of Parliament with this limitation that the executive cannot act against the provisions of the Constitution or of any law made by Parliament. [1955] 2 S.C.R. 225 at 234-237.

The power of making treaties is within the sovereign power and resides both in the executive and in Parliament. What the executive can do in respect of treaties and agreements is part of the Governmental function. The executive can by entering into a treaty or agreement settle a boundary dispute which does not involve acquisition or cession of territory.

If the agreement relating to Berubari does not amount to a mere settlement or delineation of boundary, then legislation by Parliament relatable to Art. 3 of the Constitution would be sufficient but, legislation under Art. 368 would be incompetent. Part 1 of the Constitution is a self-contained code dealing with the territories of the Union. Article 1 defines the territory of India as the territory of the States; the description of the territories of the States describes the territory of India. Article 2 contemplates addition to the territories of the Union by the admission of new States or new areas. Article 3(a) contemplates in its last part uniting any territory to

158

a part of any State and any territory includes foreign territory that may be acquired. Article 3(b) contemplates increase in the area of any State which may be by acquiring foreign territory and adding it to that of the State. Article 3(c) contemplates the diminishing of the area of any State which may be by cession to a foreign power. There is no restriction or limitation placed on the words " increase " or " decrease in clause (b) and(c) of Art. 3 and they are comprehensive enough to include increase or decrease by acquisition of foreign territory or cession of a State territory. See Babulal Parate's case, [1960] 1 S.C.R. 605. No doctrinaire approach or preconceived notions should be imported in the interpretation of Arts. 2 and 3 of an organic instrument like the Constitution. Legislation under Art. 368 of the Constitution is neither necessary nor proper. Legislation under Art. 368 would put the States to a disadvantage as under that Article it would not be necessary, as it would be under Art. 3, to refer the bill to that State for expressing its views thereon.

The exchange of the Cooch-Behar enclaves does not involve cession of territory and executive action alone is sufficient to implement the agreement. An exchange of territory for administrative considerations as a part of a larger settlement does not amount to cession. Oppenhiem, 8th Edn., p. 451, Art. 169, p. 548, Art. 216, p. 547; Halsbury, Vol. 7, Art. 604. Even if the transaction involves cession of territory, legislation under Art. 3 of the Constitution will be sufficient to implement the agreement.

The Union has the right to cede territory if and when the occasion arises. Such a right vests in every Sovereign State and can be implied even when not specifically conferred by its Constitution. Willoughby, Vol. 1, p. 572.

S. M. Bose, Advocate-General, West Bengal, B. Sen, K. C. Mukherjee and P. K. Bose, for the State of West Bengal.

Under the Indian Independence Act the whole of the district of Jalpaiguri was provisionally given to West Bengal. If the Radcliffe Award fixed the boundary line, then there can be no dispute and no necessity for the agreement. But, if the Award

259

did dot fix the line and left it undetermined, then under the Indian Independence Act, the whole of Berubari went to West Bengal. The Act contemplate settlement of the boundary by an Award and not by agreement of the Prime Ministers. If

the Award did not settle the boundary, then the whole of Jalpaiguri belonged to India. The Prime Ministers' agreement in fact divides Berubari half and half without making any attempt to clarify the Award. It was wrong to say that the agreement amounts merely to delineation of the boundary. It involves cession of Indian territory to Pakistan. The Constitution gives power only to acquire foreign territory and not to cede Indian territory to foreign powers. First, it would be necessary to take action under Art. 368 empowering Parliament to make law for cession of territory and then legislation under Art. 3 can be resorted to. In Art. 3(a) the words " any territory " are not wide enough to include foreign territory; they apply what has already been acquired and has become part of the Union under Art. 1. Parliament has power only to pass law in respect of territory over which it has jurisdiction. Article 3 merely deals with the internal arrangement of the territories of the States and does not deal with acquisition of foreign territory or cession of the Indian territory to foreign powers.

N.C. Chatterjee with Janardan Sharma for Krishna Kumar Chatterjee and Ramaprasanna Roy and with U. M. Trivedi, D. R. Prem, Veda Vyasa, R. Thiagarajan and Ganapat Rai, for (1) the President, Bharatiya Jana Sangh, Kerala, (2) Secretary, Jana Sangh, Mandi, (3) Shri Tata Srirama Murthy, Akhila Bharatiya Jan. sangh, Visakhapatam, (4) Chairman, Bharatiya Jansangh, Mangalore, (5) Secretary, Bharatiya Jansangh, Sitapur, (6) Shri N. Thamban Nambiar, Bharatiya Jansangh, Thaliparambu and (7) President, Bharatiya Jansangh, Pattambi (Cochin). The Prime Ministers' agreement cannot be implemented at all. Indian territory cannot be ceded at all. Berubari is an integral part of the Union of India and it was and has all along been under the possession of West Bengal since the partition of the country in 1947. The true nature of the Prime Ministers' agreement is that it is not the

260

ascertainment of a boundary in accordance with the Radcliffe Award, but it is a pure case of cession of territory to Pakistan. The case reported in The State of South Australia v. State of Victoria, 12 C.L.R. 667, has no bearing, as in that case there was no question of giving of any territory to a foreign power. Similarly, Penn v. Baltimore, Ves. Sen. 444, was not concerned with the cession of any territory. There are certain implied prohibitions in our Constitution and it is not a completely amendable Constitution. The preamble to the Constitution does not permit the dismemberment of India and preserves the integrity of the territory of India. Article 4, s. 3, para. 2, of the United States Constitution gives a specific power to cede territory. It does not flow necessarily from the concept of sovereignty that the Government must have power to cede its territory. 33 L. Ed. 642; 1933 U. S. 258. The express mention of the power of acquisition in Arts. 1 and 2 excludes the power to cede. The maxim " expression unius exclusio alterius " is applicable to statutes also. Brooms Legal Maxims, 10th Edn., p. 452; Craies, 5th Edn., p. 240; 1951 U. S. 914; Willoughby, Vol. 1, p. 518. The Indian Parliament is not sovereign and it is prohibited from changing or dismembering or whittling down the territory of India. [1951] S.C.R. 744, 968. The preamble is the key to open the minds of the makers. 8 E.R. 1034; A.I.R. 1956 S.C. 246; [1950] S.C.R. 1098. In the transfer of the areas of Berubari to Pakistan, the fundamental rights of thousands of persons are involved. The rights of franchise and

citizenship cannot be taken away by executive action.
C.B. Agarwala and A. G. Ratnaparkhi, for the Secretary, Jalpaiguri Revolutionary Socialist Party, the Secretary, All India Forward Bloc, Calcutta and Shri Nirmal Bose of Jalpaiguri. The agreement cannot be implemented by executive action. The Government is not dealing with its own property but with the property of the States. Even legislation under Art. 3 would not be sufficient. The right of citizenship cannot be taken away except by legislation under Art. 1 1. In the implementation of the agreement the fundamental rights guaranteed by Part III of the
261
Constitution are involved and the citizens of that part of Berubari which has to be given to Pakistan will be deprived of all such rights. Citizens of India cannot be deprived of their fundamental rights by legislation under Art. 3. The agreement cannot be implemented even by legislation under Art. 368 as there are limitations on the power to amend imposed by the preamble. Such an agreement can only be implemented with the consent of the people by referendum.
D.R. Prem (with the permission of the court). Article 3 deals with the formation of new States and alterations of areas, boundaries or names of existing States as indicated in the marginal note. Article 3 makes the same provisions in the present Constitution as s. 290 did in the Government of India Act, 1935. Both deal with internal arrangement and not with foreign territory.
M.C. Setalvad, in reply. The description of the boundary line in the Radcliffe Award is not clear and the provision in the agreement that the division would be horizontal only means that the division is to be by means of a line running east to west dividing the territory half and half. The preamble cannot control the unambiguous language of the Articles of the Constitution. Willoughby, Vol. 1, p. 62. Constitution of the United States of America, 1952 Edn, p. 59. The preamble is not a part of the Constitution. The language of Art. 368 is perfectly clear and no limitations can be placed upon it on account of the preamble. The rights of citizenship and the fundamental rights do not affect the power under Art. 368. It is only by legislation under Arts. 2 or 3(a) that foreign territory can be acquired and can become part of India. There is no reason or warrant to restrict the language or the scope of Art. 3. Clause (a) of Art. 3 clearly deals with foreign territory and there is no warrant for considering clauses (b) and (c) in any other way as not relating to foreign territory. Every other provision in Part 1 of the Constitution envisages two kinds of territory-Indian and foreign-and there is no reason to envisage only one kind of territory in cls. (b), (c), (d) and (e) of Art. 3. The Court should not construe the
34
262
provisions in such a manner as would make adjustments of boundary difficult. It is of the essence of sovereignty to cede and to acquire territory. Willoughby,. Vol. 1, pp. 575 and 576, Willis, pp. 254 to 255. There is no specific provision regarding cession of territory in any Constitution. The power to cede territory in the United States is included in its treaty making power and is not conferred by Article 4, section 3, part 2 of the United States Constitution as stated by Shri N. C. Chatterji. Willoughby, Vol. I, p. 90. Parliament has been empowered under Art. 1 1 to take away the rights of citizenship. A law under Arts. 3 and 4 will deal with " supplemental and incidental " provisions and may contain provisions under

Art. 11 for taking away the rights of citizenship also. Cession of territory necessarily affects the nationality and rights of the inhabitants of the ceded territory. Anson's Law and Custom of the Constitution, 4th Edn. Vol. 2, Part 11, p. 141. Fundamental rights cannot exist when there is transfer of allegiance consequent upon cession of territory.

cur. adv. vult.

1960. March 14. The Opinion of the Court was pronounced by GAJENDRAGADKAR, J.-In accordance with the directives issued by the Prime Ministers of India and Pakistan, on September 10, 1958, the Commonwealth Secretary, Ministry of External Affairs, Government of India and the Foreign Secretary, Ministry of Foreign Affairs and Commonwealth, Government of Pakistan, discussed 10 items of dispute between the two countries and signed a joint note recording their agreement in respect of the said disputes and submitted it to their respective Prime Ministers; and with a view to removing causes of tension and resolving border disputes and problems relating to Indo-Pakistan Border Areas and establishing peaceful conditions along those areas, the Prime Ministers, acting on behalf of their respective Governments, entered into an agreement settling some of the said disputes and problems in the manner set out in the said joint note. This agreement has been called the Indo-Pakistan

263

Agreement and will be referred to hereafter as the Agreement.

In the present Reference we are concerned with two items of the Agreement; item 3 in paragraph 2 of the Agreement reads as follows:-

(3) Berubari Union No. 12.

This will be so divided as to give half the area to(Pakistan, the other half adjacent to India being retained by India. The Division of Berubari Union No. 12 will be horizontal, starting from the northeast corner of Debiganj Thana. The division should be made in such a manner that the Cooch-Behar Enclaves between Pachagar Thana of East Pakistan and Berubari Union No. 12 of Jalpaiguri Thana of West Bengal will remain connected as at present with Indian territory and will remain with India. The Cooch-Behar Enclaves lower down between Boda Thana of East Pakistan and Berubari Union No. 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan."

Similarly item 10 of the Agreement is as follows:" (10) Exchange of Old Cooch-Behar Enclaves in Pakistan and Pakistan Enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to."

It appears that subsequently a doubt has arisen whether the implementation of the Agreement relating to Berubari Union requires any legislative action either by way of a suitable law of Parliament relatable to Art. 3 of the Constitution or by way of a suitable amendment of the Constitution in accordance with the provisions of Art. 368 of the Constitution or both; and that a similar doubt has arisen about the implementation of the Agreement relating to the exchange of Enclaves; and it further appears that there is a likelihood of the constitutional validity of any action taken for the implementation of the Agreement relating to Berubari Union as well as the Agreement relating to the exchange of Enclaves being questioned in courts of law involving avoidable and protracted litigation; that is why the President thought that questions of law which have arisen are of such nature and of such importance that it is expedient that the

264

opinion of the Supreme Court of India should be obtained thereon; and so, in exercise of the powers conferred upon him by cl. (1) of Art. 143 of the Constitution, he has referred the following three questions to this Court for consideration and report thereon:-

(1)Is any legislative action necessary for the implementation of the Agreement relating to Berubari Union?

(2)If so, is a law of Parliament relatable to article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with article 368 of the Constitution necessary, in addition or in the alternative ?

(3)Is a law of Parliament relatable to article 3 of the Constitution sufficient for implementation of the agreement relating to Exchange of Enclaves or is an amendment of the Constitution in accordance with article 368 of the Constitution necessary for the purpose, in addition or in the alternative ?

Before dealing with the questions thus referred to this Court it is necessary to set out briefly the historical, political and constitutional background of the Agreement. On February 20, 1947, the British Government announced its intention to transfer power in British India to Indian hands by June 1948 On June 3, 1947, the said Government issued a statement as to the method by which the transfer of power would be effected. On July 18,1947, the British Parliament passed the Indian Independence Act, 1947. This Act was to come into force from August 15, 1947, which was the appointed day. As from the appointed day two independent Dominions, it was declared, would be set up in India to be known respectively as India and Pakistan. Section 2 of the Act provided that subject to the provisions of sub-ss. (3) and (4) of s. 2 the territories of India shall be the territories under the sovereignty of His Majesty which immediately before the appointed day were included in British India except the territories which under sub-s. (2) of s. 2 were to be the territories of Pakistan. Section 3, sub-s. (1), provided, inter alia, that as from the appointed day the Province of Bengal as constituted under the Government of India Act, 1935, shall cease to exist

265

and there shall be constituted in lieu thereof two new Provinces to be known respectively as East Bengal and West Bengal. Sub-section (3) of s. 3 provided, inter alia, that the boundaries of the new Provinces aforesaid shall be such as may be determined whether before or after the appointed day by the award of a boundary commission appointed or to be appointed by the Governor-General in that behalf, but until boundaries are so determined, (a) the Bengal District specified in the First Schedule of this Act..... shall be treated as the territories which are to be comprised as the new Province of East Bengal; (b) the remainder of the territories comprised at the date of the passing of this Act in the Province of Bengal shall 'be treated as the territories which are to be comprised in the new Province of West Bengal. Section 3, sub-s. (4), provided that the expression "award" means, in relation to a boundary commission, the decision of the Chairman of the commission contained in his report to the Governor-General at the conclusion of the commission's proceedings. The Province of West Bengal is now known as the State of West Bengal and is a part of India, whereas the Province of East Bengal has become a part of Pakistan and is now known as East Pakistan.

Berubari Union No. 12, with which we are concerned, has an

area of 8.75 sq. miles and a population of ten to twelve thousand residents. It is situated in the police station Jalpaiguri in the District of Jalpaiguri, which was at the relevant time a part of Rajashahi Division. It has, however, not been specified in the First Schedule of the Independence Act, and if the matter had to be considered in the light of the said Schedule, it would be a part of West Bengal. But, as we shall presently point out, the First Schedule to the Independence Act did not really come into operation at all.

On June 30, 1947, the Governor-General made an announcement that it had been decided that the Province of Bengal and Punjab shall be partitioned. Accordingly, a boundary commission was appointed, inter alia, for Bengal consisting of four judges of High Courts and a Chairman to be appointed later.

266

Sir Cyril Radcliffe was subsequently appointed as Chairman. So far as Bengal was concerned the material terms of reference provided that the boundary commission should demarcate the boundaries of the two parts of Bengal on the basis of ascertaining the contiguous areas of muslims and non-muslims; in doing so it had also to take into account other factors. The commission then held its enquiry and made an award on August 12, 1947, which is known as the Radcliffe Award (hereinafter called the award). It would be noticed that this award was made three days before the appointed day under the Independence Act. The report shows that the Chairman framed seven basic questions on the decision of which the demarcation of a boundary line between East-West Bengal depended. Question No. 6 is relevant for our purpose; it was framed in this way:

" C. 6. Which State's claim ought to prevail in respect of the districts of Darjeeling and Jalpaiguri in which the muslim population amounted to 2.42 of the whole in the case of Darjeeling and 23.08 of the whole in the case of Jalpaiguri but which constituted an area not in any natural sense contiguous to another non-muslim area of Bengal?" It appears that the members of the commission were unable to arrive at an agreed view on any of the major issues, and so the Chairman had no alternative but to proceed to give his own' decision. Accordingly the Chairman gave his decision on the relevant issues in these words:-

" The demarcation of the boundary line is described in detail in the schedule which forms annexure A to the award and in the map attached thereto, annexure B. The map is annexed for the purposes of illustration, and if there should be any divergence between the boundary as described in annexure A and as delineated on the map in annexure B the description in annexure A is to prevail."

Paragraph 1 in annexure A is material. It provided that " a line shall be drawn along the boundary between the Than&' of Phansidewa in the District of Darjeeling and the Thana Tetulia in the District of

267

Jalpaiguri from the point where that boundary meets the Province of Bihar and then along the boundary between the Thanas of Tetulia and Rajganj, the Thanas of Pachagar and Rajganj and the Thanas of Pachagar and Jalpaiguri, and shall then continue along with northern corner of Thana of Debiganj to the boundary of the State of Cooch-Behar the district of Darjeeling and so much of the district of Jalpaiguri as lies north of this line shall belong to West Bengal, but the Thana of Patgram and any other portion of Jalpaiguri District which lies to the east or south shall

belong to East Bengal." Since the award came into operation three days before the day appointed under the Independence Act the territorial extent of the Province of West Bengal never came to be determined under Schedule 1 to the said Independence Act but was determined by the award. There is no dispute that since the date of the award Berubari Union No. 12 has in fact formed part of the State of West Bengal and has been governed as such.

Meanwhile the Constituent Assembly which began its deliberations on December 9, 1946, reassembled as the Sovereign Constituent Assembly for India after midnight of August 14, 1947, and it began its historic task of drafting the Constitution for India. A drafting committee was appointed by the Constituent Assembly and the draft prepared by it was presented to the Assembly on November 4, 1948. After due deliberations the draft passed through three readings and as finalised it was signed by the President of the Assembly and declared as passed on November 26, 1949. On that date it became the Constitution of India; but, as provided by Art. 394, only specified articles came into force as from than date and the remaining provisions as from January 26,1950, which day is referred to in the Constitution as the commencement of the Constitution. Article 1 of the Constitution provides, inter alia, that India, that is Bharat, shall be a Union of States and that the States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule. West Bengal was shown as one of the States in Part A ; and it was provided that the

268

the territory which immediately before the commencement of the Constitution was comprised in the Province of West Bengal. In the light of the award Berubari Union No. 12 was treated as a part of the Province of West Bengal and as such has been treated and governed on that basis.

Subsequently, certain boundary disputes arose between India and Pakistan and it was agreed between them at the Inter-Dominion Conference held in New Delhi on December 14, 1948, that a tribunal should beset up without delay and in any case not later than January 31, 1949, for the adjudication and final decision of the said disputes. This tribunal is known as Indo-Pakistan Boundaries Disputes Tribunal, and it was presided over by the Hon'ble Lord Justice Allot Badge. This tribunal had to consider two categories of disputes in regard to East-West Bengal but on this occasion no issue was raised about the Berubari Union. In fact no reference was made to the District of Jalpaiguri at all in the proceedings before the tribunal. The Bagge Award was made on January 26, 1950.

It was two years later that the question of Berubari Union was raised by the Government of Pakistan for the first time in 1952. During the whole of this period the Berubari Union continued to be in the possession of the Indian Union and was governed as a part of West Bengal. In 1952 Pakistan alleged that under the award Berubari Union should really have formed part of East Bengal and it had been wrongly treated as a part of West Bengal. Apparently correspondence took place between the Prime Ministers of India and Pakistan on this subject from time to time and the dispute remained alive until 1958. It was under these circumstances that the present Agreement was reached between the two Prime Ministers on September 10, 1958. That is the background of the present dispute in regard to Berubari Union No. 12.

At this stage we may also refer briefly to the background of events which ultimately led to the proposed exchange of

Cooch-Behar Enclaves between India and Pakistan. Section 290 of the Government of India
260
Act, 1935, had provided that His Majesty may by Order-in-Council increase or diminish the area of any Province or alter the boundary of any Province provided the procedure prescribed was observed. It is common ground that the Government of India was authorised by the Extra-Provincial Jurisdiction Act of 1947 to exercise necessary powers in that behalf. Subsequently on January 12, 1949, the Government of India Act, 1935, was amended and s. 290A and s. 290B were added to it. Section 290-A reads thus :-
" 290-A. Administration of certain Acceding States as a Chief Commissioner's Province or as part of a Governor's or Chief Commissioner's Province:-
(1)Where full and exclusive authority, jurisdiction and powers for and in relation to governance of any Indian State or any group of such States are for the time being exercisable by the Dominion Government, the Governor-General may by order direct-
(a)that the State or the group of States shall be administered in all respects as if the State or the group of States were a Chief Commissioner's Province ; or
(b)that the State or the group of States shall be administered in all respects as if the State or the group of States formed part of a Governor's or a Chief Commissioner's Province specified in the Order;".
Section 290-B(1) provides that the Governor-General. may by order direct for the administration of areas included within the Governor's Province or a Chief Commissioner's Province by an Acceding State, and it prescribes that the acceding area shall be administered in all respects by a neighboring Acceding State as if such area formed part of such State, and thereupon the provisions of the Government of, India Act shall apply accordingly.
After these two sections were thus added several steps were taken by the Government of India for the merger of Indian States with the Union of India.
35
270
With that object the States Merger (Governors' Provinces) Order, 1949, was passed on July 27, 1949. The effect of this order was that the States which had merged with the Provinces were to be administered in all respects as if they formed part of the absorbing Provinces. This order was amended from time to time. On August 28, 1949, an agreement of merger was entered into between the Government of India and the Ruler of the State of Cooch-Behar and in pursuance of this agreement the Government of India took over the administration of Cooch-Behar on September 12, 1949 ; Cooch-Behar thus became apart of the territory of India and was accordingly included in the list of Part C States as Serial No. 4 in the First Schedule to the Constitution. Thereafter, on December 31, 1949, the States Merger (West Bengal) Order, 1949, was passed. It provided that whereas full and exclusive authority, jurisdiction and power for and in relation to the governance of the Indian State of Cooch-Behar were exercisable by the Dominion Government, it was expedient to provide by the order made under s. 290A for the administration of the said State in all respects as if it formed part of the Province of West Bengal. In consequence, on January 1, 1950, the erstwhile State of Cooch-Behar was merged with West Bengal and began to be governed as if it was part of West Bengal. As a result of this merger Cooch-Behar was taken out of the list of Part C States in the

First Schedule to the Constitution and added to West Bengal in the same Schedule, and the territorial description of West Bengal as prescribed in the First Schedule was amended by the addition of the clause which referred to the territories which were being administered as if they formed part of that Province. In other words, after the merger of Cooch-Behar the Territories of West Bengal included those which immediately before the commencement of the Constitution were comprised in the Province of West Bengal as well as those which were being administered as if they formed part of that Province. Subsequently a further addition has been made to the territories of West Bengal by the inclusion of Chandernagore but it is not necessary to refer to the said addition at this stage,

271

It appears that certain areas which formed part of the territories of the former Indian State of Cooch-Behar and which had subsequently become a part of the territories of India and then of West Bengal became after the partition enclaves in Pakistan. Similarly certain Pakistan enclaves were found in India. The problem arising from the existence of these enclaves in Pakistan and in India along with other border problems was being considered by the Governments of India and of Pakistan for a long time. The existence of these enclaves of India in Pakistan and of Pakistan in India worked as a constant source of tension and conflict between the two countries. With a view to removing these causes of tension and conflict the two Prime Ministers decided to solve the problem of the said enclaves and establish peaceful conditions along the said areas. It is with this object that the exchange of enclaves was agreed upon by them and the said adjustment is described in item 10 of paragraph 3 of the Agreement. That in brief is the historical and constitutional background of the exchange of enclaves.

On behalf of the Union of India the learned Attorney-General has contended that no legislative action is necessary for the implementation of the Agreement relating to Berubari Union as well as the exchange of enclaves. In regard to the Berubari Union he argues that what the Agreement has purported to do is to ascertain or to delineate the exact boundary about which a dispute existed between the two countries by reason of different interpretations put by them on the relevant description contained in the award; the said Agreement is merely the recognition or ascertainment of the boundary which had already been fixed and in no sense is it a substitution of a new boundary or the alteration of the boundary implying any alteration of the territorial limits of India. He emphasises that the ascertainment or the settlement of the boundary in the light of the award by which both Governments were bound, is not an alienation or cession of the territory of India, and according to him, if, as a result of the ascertainment of the true boundary in the light of the award, possession of some land has had to be

272

yielded to Pakistan it does not amount to cession of territory; it is merely a mode of settling the boundary. The award had already settled the boundary but since a dispute arose between the two Governments in respect of the location of the said boundary the dispute was resolved in the light of the directions given by the award and in the light of the maps attached to it. Where a dispute about a boundary thus arises between two States and it is resolved in the light of an award binding on them the agreement which embodies the settlement of such a dispute must be treated as no more than the ascertainment of the real boundary between

them and it cannot be treated as cession or alienation of territory by one in favour of the other. According to this argument there was neither real alteration of the boundary nor real diminution of territory, and there would be no occasion to make any alteration or change in the description of the territories of West Bengal in the First Schedule to the Constitution.

It is also faintly suggested by the learned Attorney-General that the exchange of Cooch-Behar Enclaves is a part of the general and broader agreement about the Berubari Union and in fact it is incidental to it. Therefore, viewed in the said context, even this exchange cannot be said to involve cession of any territory.

On this assumption the learned Attorney-General has further contended that the settlement and recognition of the true boundary can be effected by executive action alone, and so the Agreement which has been reached between the two Prime Ministers can be implemented without any legislative action. In support of this argument the learned Attorney-General has relied upon certain provisions of the Constitution and we may at this stage briefly refer to them.

Entry 14 in List 1 of the Seventh Schedule reads thus : " Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries ". Article 253 occurs in Part XI which deals with relations between the Union and the, States,. It provides

273

that " notwithstanding anything in the foregoing provisions of the said Chapter Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body ". This power is conferred on Parliament by reference to Entry 14. Besides there are three other articles in the same part which are relevant. Article 245(1) empowers Parliament to make laws for the whole or any part of the territory of India;. Article 245(2) provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation; Article 246 prescribes the subject-matter of laws which Parliament can make; and Art. 248 provides for the residuary powers of legislation in Parliament. Article 248 lays down that Parliament has power to make any law with respect to any matter not enumerated in the Concurrent List or State List. There is thus no doubt about the legislative competence of Parliament to legislate about any treaty, agreement or convention with any other country and to give effect to such agreement or convention.

It is, however, urged that in regard to the making of treaties and implementing them the executive powers of the Central Government are co-extensive and co-incidental with the powers of Parliament itself. This argument is sought to be based on the provisions of certain Articles to which reference may be made. Article 53(1) provides that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 73 on which strong reliance is placed prescribes the extent of the executive power of the Union. Article 73(1) says " that subject to the provisions of this Constitution the executive power of the Union shall extend (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights,

authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement provided that
274
the executive power referred to in sub-cl. (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also the power to make laws "; and Article 74 provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions; and Article 74(2) lays down that the question whether any, and if so what, advice was tendered by the Ministers to the President shall not be inquired into in any court. According to the learned Attorney-General the powers conferred on the Union executive under Art. 73(1)(a) have reference to the powers exercisable by reference to Entry 14, List 1, in the Seventh Schedule, whereas the powers conferred by Art. 73(1)(b) are analogous to the powers conferred on the Parliament by Art. 253 of the Constitution. Indeed the learned Attorney-General contended that this position is concluded by a decision of this Courtin Rai Sahib Ram Jawaya Kapur & Ors. v. The State of Punjab (1). Dealing with the question about the limits within which the executive Government can function under the Indian Constitution Chief Justice Mukherjea, who delivered the unanimous decision of the Court, has observed that " the said limits can be ascertained without much difficulty by reference to the form of executive which our Constitution has set up ", and has added, " that the executive function comprised both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State ". It is on this observation that the learned Attorney-General has founded his argument.
Let us then first consider what the Agreement in fact has done.' Has it really purported to determine the boundaries in the light of the award, or has it sought to settle the dispute amicably on an ad hoe basis by dividing the disputed territory half and half ? Reading the relevant portion of the Agreement it is
(1) [1955) 2 S.C.R. 225.
275
difficult to escape the conclusion that the parties to it came to the conclusion that the most expedient and reasonable way to resolve the dispute would be to divide the area in question half and half. There is no trace in the Agreement of any attempt to interpret the award or to determine what the award really meant. The Agreement begins with the statement of the decision that the area in dispute will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. In other words, the Agreement says that, though the whole of the area of Berubari Union No. 12 was within India, India was prepared to give half of it to Pakistan in a spirit of give and take in order to ensure friendly relations between the parties and remove causes of tension between them. Having come to this decision the Agreement describes how the decision has to be carried out. It provides that the division of the area will be horizontal starting from the northeast corner of Debiganj Thana. It also provides that the division should' be made in such manner that the Cooch-

Behar Enclaves between Pachagar Thana of East Pakistan and Berubari Union No. 12 of Jalpaiguri Thana of West Bengal will remain with India. This again is a provision for carrying out the decision of dividing the area half and half. Yet, another provision is made as to the division of Cooch-Behar Enclaves lower down between Boda Thana of East Pakistan and Berubari Union No. 12 and it is provided that they shall be exchanged along with the general exchange of enclaves and will go to Pakistan. In our opinion, every one of the clauses in this Agreement clearly and unambiguously shows that, apart from, and independently of, the award, it was agreed to divide the area half and half and the method of effecting this division was specifically indicated by making four material provisions in that behalf. If that be so, it is difficult to accept the argument that this part of the Agreement amounts to no more than ascertainment and delineation of the boundaries in the light of the award.

It is no doubt suggested by the learned Attorney-General that an examination of the description in

276

annexure A in the Schedule to the award in relation to police station boundaries revealed a lacuna in it, inasmuch as there was DO mention in it of the boundary between police station Boda and police station Jalpaiguri; and the argument is that the result of this description was that the two points were specified, one on the western boundary of the Berubari Union (the extremity of the boundary between the Thanas of Pachagar and Jalpaiguri) and the other on its-eastern boundary (the northern corner, of the Thana of Debi. ganj where it meets Cooch-Behar State) without giving an indication as to how these boundaries were to be connected. It is also pointed out that the line as drawn in the map, annexure B , in the Schedule to the award would, if followed independently of the description given in Schedule A in the annexure to the said award, mean that almost the whole of the Berubari Union would have fallen in the territory of East Bengal and that was the claim made by the Government of 'Pakistan, and it is that claim which was settled in the light of the award.

In this connection it is relevant to remember the direction specifically given by the Chairman in his award that the map is annexed for the purpose of illustration and that in case of any divergence between the map, annexure B, and the boundary as described in annexure A, the description in annexure A has to prevail, and so no claim could reasonably or validly be made for the inclusion of almost the whole of Berubari Union in East Bengal on the strength of the line drawn in the map. Besides, the lacuna to which the learned Attorney-General refers could have been cured by taking into account the general method adopted by the award in fixing the boundaries. Para. graph 3 in annexure A shows that the line which was fixd by the award generally proceeded along the boundaries between the Thanas, and this general outline of the award would have assisted the decision of the dispute if it was intended to resolve the dispute in the light of the award. The line which was directed to be drawn in paragraph 1 of annexure A has " to continue" along the northern corner of Thana Debi ganj to the boundary of the State of Cooch-Behar, and

277

this in the context may suggest that it had to continue by reference to the boundaries of the respective Thanas. It is principally because of these considerations that the territory in question was in the possession of India for some years after the date of the award and no dispute was

raised until 1952.

We have referred to these facts in order to emphasize that the agreement does not appear to have been reached after taking into account these facts and is not based on any conclusions based on the interpretation of the award and its effect. In fact the second clause of the Agreement which directs that the division of Berubari Union No. 12 will be horizontal starting from the north-east corner of Debiganj Thana is not very happily worded. The use of the word " horizontal " appears to be slightly inappropriate; but, apart from it, the direction as to this horizontal method of division as well as the other directions contained in the Agreement flow from the conclusion with which the Agreement begins that it had been decided that India should give half the area to Pakistan. We have carefully considered all the clauses in the Agreement and we are satisfied that it does not purport to be, and has not been, reached as a result of any interpretation of the award and its terms; it has been reached independently of the award and for reasons and considerations which appeared to the parties to be wise and expedient. Therefore, we cannot accede to the argument urged by the learned Attorney-General that it does no more than ascertain and determine the boundaries in the light of the award. It is an Agreement by which a part of the territory of India has been coded to Pakistan and the question referred to us in respect of this Agreement must, therefore, be considered on the basis that it involves cession or alienation of a part of India’s territory.

What is true about the Agreement in respect of Berubari Union No. 12 is still more emphatically true about the exchange of Cooch-Behar Enclaves. Indeed the learned Attorney-General’s argument that no legislation is necessary to give effect to the Agreement in respect of this exchange was based on the assump

36

278

tion that this exchange is a part of a larger and broader settlement and so it partakes of its character. Since we have held that the Agreement in respect of Berubari Union No. 12 itself involves the cession of the territory of India a fortiori the Agreement in respect of exchange of Cooch-Behar Enclaves does involve the cession of Indian territory. That is why the question about this exchange must also be considered on the footing that a part of the territory of India has been ceded to Pakistan; besides it is clear that unlike questions 1 and 2 the third question which has reference to this exchange postulates the necessity of legislation.

In this connection we may also deal with another argument urged by the learned Attorney-General. He contended that the implementation of the Agreement in respect of Berubari Union would not necessitate any change in the First Schedule to the Constitution because, according to him, Berubari Union was never legal1y included in the territorial description of West Bengal contained in the said Schedule. We are not impressed by this argument either. As we have already indicated, since the award was announced Berubari Union has remained in possession of India and has been always treated as a part of West Bengal and governed as such. In view of this factual position there should be no difficulty in holding that it falls within the territories which immediately before the commencement of the Constitution were comprised in the Province ’of West Bengal. Therefore, as a result of the implementation of this Agreement the boundaries of West Bengal would be altered and

the content of Entry 13 in the First Schedule to the Constitution would be affected.
Before we part with this topic we ought to refer to the decision of the Australian High Court in The State of South Australia v. The State of Victoria (1) on which reliance has been placed by the learned Attorney-General. In that-case the boundary between the State of South Australia and the State of New South Wales was by Act 4 & 5 Will. IV, c. 95 and the Letters Patent issued under that Act defined to be the 141st meridian
(1) (1911) 12 C.L.R. 667.
279
of East Longitude. In 1847, by the authority of the Governors of New South Wales and South Australia and with the knowledge and approval of the Secretary of State a line was located and marked on the ground as being the 141st meridian, but it was discovered in 1869 that the said line was in fact about two miles to the westward of that meridian. The line marked in 1847 had, however, been proclaimed by the respective Governors as the boundary and was the de facto boundary thenceforward. In dealing with the dispute which bad arisen in respect of the true boundary between the two States Griffith, C.J., referred to the fixation of the boundary in 1847 and observed that "the real transaction is the ascertainment of a fact by persons competent to ascertain it, and a finding of fact so made, and accepted by both, is in the nature of an award or judgment in rem binding upon them and all persons claiming under them" (p. 701). The said dispute was subsequently taken to the Privy Council and it was held by the Privy Council that "on the true construction of the Letters Patent it was contemplated that the boundary line of the 141st meridian of East Longitude should be ascertained and represented on the surface of the earth so as to form a boundary line dividing the two colonies, and that it therefore implicitly gave to the executive of the two colonies power to do such acts as were necessary for permanently fixing such boundaries " (1). The Privy Council also observed that " the material facts showed that the two Governments made with all care a sincere effort to represent as closely as was possible the theoretical boundary assigned by the Letters Patent by a practical line of demarcation on the earth's surface. There is no trace of any intention to depart from the boundary assigned, but only to reproduce it, and as in its nature it was to have the solemn status of a boundary of jurisdiction their Lordships have no doubt that it was intended by the two executives to be fixed finally as the statutable boundary and that in point of law it was so fixed ". It would thus be clear that the settlement of the boundaries which was held not to amount to an alienation in that case had been
(1)[1914] A.C. 283. 309.
280
made wholly by reference to, and in the light of, the provision of the parliamentary statute to which reference has already been made. What was done in 1847 by the parties who had authority to deal with the matter was to locate 'and mark a line on the ground which was held to be the 141st meridian though it is true that in 1869 it was discovered that the line so fixed was about two miles to the westward of the meridian. This was not a case where contracting parties independently determined the line with a view to settle the dispute between the two respective States. What they purported to do was to determine the line in accordance with the provisions of the parliamentary statute. In the

present case, as we have already pointed out, the position of the Agreement is essentially different; it does not purport to be based on the award and has been reached apart from, and independently of, it. Therefore, we do not think that the learned Attorney-General can derive any assistance from the decision in the case of The State of South Australia v. The State of Victoria (1) in support of his construction of the Agreement.

In view of our conclusion that the agreement amounts to cession or alienation of a part of Indian territory and is not a mere ascertainment or determination of the boundary in the light of, and by reference to, the award, it is not necessary to consider the other contention raised by the learned Attorney-General that it was within the competence of the Union executive to enter into such an Agreement, and that the Agreement can be implemented without any legislation. It has been fairly conceded by him that this argument proceeds on the assumption that the Agreement is in substance and fact no more than the ascertainment or the determination of the disputed boundary already fixed by the award. We need not, therefore, consider the merits of the argument about the character and extent of the executive functions and powers nor need we examine the, question whether the observations made by Mukherjea, C.J. in the case of Rai Sahib Ram Jawaya Kapur (2) in fact lend support to the said argument, and if they do, whether the question should not be reconsidered.

(1) [1911] 12 C.L.R. 667.

(2) [1955] 2 S.C.R. 225.

281

At this stage it is necessary to consider the merits of the rival contention raised by Mr. Chatterjee before us. He urges that even Parliament has no power to cede any part of the territory of India in favour of a foreign State either by ordinary legislation or even by the amendment of the Constitution; and so, according to him, the only opinion we can give on the Reference is that the Agreement is void and cannot be made effective even by any legislative process. This extreme contention is based on two grounds. It is suggested that the preamble to the Constitution clearly postulates that like the democratic republican form of government the entire territory of India is beyond the reach of Parliament and cannot be affected either by ordinary legislation or even by constitutional amendment. The makers of the Constitution were painfully conscious of the tragic partition of the country into two parts, and so when they framed the Constitution they were determined to keep the entire territory of India as inviolable and sacred. The very first sentence in the preamble which declares that " We, the people of India, having solemnly resolved to constitute India into a sovereign democratic Republic ", says Mr. Chatterjee, irrevocably postulates that India geographically and territorially must always continue to be democratic and republican. The other ground on which this contention is raised is founded on Art. 1(3)(c) of the Constitution which contemplates that " the territory of India shall comprise such other territories as may be acquired ", and it is argued that whereas the Constitution has expressly given to the country the power to acquire otter territories it has made no provision for ceding any part of its territory; and in such a case the rule of construction, viz., expressio unius est exclusio alterius must apply. In our opinion, there is no substance in these contentions.

There is no doubt that the declaration made by the people of

India in exercise of their sovereign will in the preamble to the Constitution is, in the words of Story, "a key to open the mind of the makers" which may show the general purposes for which they made the several provisions in the Constitution; but
282
nevertheless the preamble is not a part of the Constitution, and, as Willoughby has observed about the preamble to the American Constitution, " it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted ".
What is true about the powers is equally true about the prohibitions and limitations. Besides, it is not easy to accept the assumption that the first part of the preamble postulates a very serious limitation on one of the very important attributes of sovereignty itself. As we will point out later, it is universally recognised that one of the attributes of sovereignty is the power to cede parts of national territory if necessary. At the highest it may perhaps be arguable that if the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the preamble. Therefore, Mr. Chatterjee is not right in contending that the preamble imports any limitation on the exercise of what is generally regarded as a necessary and essential attribute of sovereignty.
Then, as regards the argument that the inclusion of the power to acquire must necessarily exclude the power to cede or alienate, there are two obvious answers. Article 1(3)(c) does not confer power or authority on India to acquire territories as Mr. Chatterjee assumes. There can be no doubt that under international law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as the power to cede national territory in favour of a foreign State. What Art. 1(3)(c) purports to do is to make a formal provision for absorption and integration of any foreign territories which may be acquired by India by virtue of its inherent right to do so. It maybe that this provision has found a place in the Constitution not in pursuance of any expansionist political philosophy but mainly for providing for the integration and absorption of
283
Indian territories which, at the date of the Constitution, continued to be under the dominion of foreign States; but that is not the whole scope of Art. 1(3)(c). It refers broadly to all foreign territories which may be acquired by India and provides that as soon as they are acquired they would form part of the territory of India. Thus, on a true construction of Art. 1(3)(c) it is erroneous to assume that it confers specific powers to acquire foreign territories.
The other answer to the contention is provided by Art. 368 of the Constitution. That article provides for the procedure for the amendment of the Constitution and expressly confers power on Parliament in that behalf The power to amend Constitution must inevitably include the power to amend Art. 1, and that logically would include the power to cede national territory in favour of a foreign State; and if that is so, it would be unreasonable to contend that there is no power in the sovereign State of India to cede its territory and that the power to cede national territory which is an essential attribute of

sovereignty is lacking in the case of India. We must, therefore, reject Mr. Chatterjee's contention that no legislative process can validate the Agreement in question.

What then is the nature of the treaty-making power of a sovereign State ? That is the next problem which we must consider before addressing ourselves to the questions referred to us for our opinion. As we have already pointed out it is an essential attribute of sovereignty that a sovereign state can acquire foreign territory and can, in case of necessity, cede a part of its territory in favour of a foreign State, and this can be done in exercise of its treaty-making power. Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner-State in favour of another State. There can be no doubt that such cession is possible and indeed history presents several examples of such transfer of sovereignty. It is true as Oppenheimer has observed that " hardship is involved in the fact that in all cases of cession the inhabitants of the territory who remain lose their old citizenship and are handed over to so new sovereign whether they like it or

284

not" (1); and he has pointed out that "it may be possible to mitigate this hardship by stipulating an option to emigrate within a certain period in favour of the inhabitants of ceded territory as means of averting the charge that the inhabitants are handed over to a new sovereign against their will " (p. 553). But though from the human point of view great hardship is inevitably involved in cession of territory by one country to the other there can be no doubt that a sovereign state can exercise its right to cede a part of its territory to a foreign state. This power, it may be added, is of course subject to the limitations which the Constitution of the state may either expressly or by necessary implication impose in that behalf; in other words, the question as to how treaties can be made by a sovereign State in regard to a cession of national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the country. Stated broadly the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by constitutional amendment will naturally depend on the provisions of the Constitution itself We must, therefore, now turn to that aspect of the problem and consider the position under our Constitution.

In dealing with this aspect we are proceeding on the assumption that some legislation is necessary to implement the Agreement in question. It is urged on behalf of the Union of India that if any legislative action is held to be necessary for the implementation of the Agreement a law of Parliament relatable to Art. 3 of the Constitution would be sufficient for the purpose; and if that be so, there would be no occasion to take any action under Art. 368 of the Constitution. The decision of this question will inevitably depend upon the construction of Art. 3 itself The learned Attorney-General has asked us to bear in mind the special features of the basic structure of the Consti-

(1) Oppenheim's ,International Law by Lauterpacht, Vol. 1,P. 551. (8th Ed.)

285

tution in construing the relevant provisions of Art. 3. He contends that the basic structure of the Constitution is the same as that of the Government of India Act, 1935, which had

for the first time introduced a federal polity in India. Unlike other federations, the Federation embodied in the said Act was Dot the result of a pact or union between separate and independent communities of States who came together for certain common purposes and surrendered a part of their sovereignty. The constituent units of the federation were deliberately created and it is significant that they, unlike the units 'of other federations, had no organic roots in the past. Hence, in the Indian Constitution, by contrast with other Federal Constitutions, the emphasis on the preservation of the territorial integrity of the constituent States is absent. The makers of the Constitution were aware of the peculiar conditions under which, and the reasons for which, the States (originally Provinces) were formed and their boundaries were defined, and so they deliberately adopted the provisions in Art. 3 with a view to meet the possibility of the redistribution of the said territories after the integration of the Indian States. In fact it is well-known that as a result of the States Reorganization Act, 1956 (Act XXXVII of 1956), in the place of the original 27 States and one Area which were mentioned in Part D in the First Schedule to the Constitution, there are DOW only 14 States and 6 other Areas which constitute the Union territory mentioned in the First Schedule. The changes thus made clearly illustrate the working of the peculiar and striking feature of the Indian Constitution. There may be some force in this contention. It may, therefore, be assumed that in construing Art. 3 we should take into account the fact that the Constitution contemplated changes of the territorial limits of the constituent States and there was no guarantee about their territorial integrity.

Part 1 of the Constitution deals with the Union and its territories, and in a sense its provisions set out a self-contained code in respect of the said topic. Just as Part 11 deals with the topic of citizenship, Part 1 deals

37

286

with the territory of India. Art. 1 deals with the name and territory Of India. It reads thus :-

1.(1) India, that is Bharat, shall be a Union of States.

(2)The States and the territories thereof shall be as specified in the First Schedule.

(3) The territory of India shall comprise-

(a) the territories of the States;

(b) the Union territories specified in the First Schedule; and

(c) such other territories as may be acquired.

Art. 1 as it now stands is the result of amendments made by the Constitution (Seventh Amendment) Act, 1956. Before its amendment, Art. 1 referred to the territory of India a,; comprising the territories of the States specified in Parts A, B and C as well as the territories specified in Part D of the Schedule and such of the territories as might be acquired. Then a separate provision had been made by Art. 243 in Part IX for the administration of the territories specified in Part D and other territories such as newly acquired territories which were not comprised in the First Schedule. The Constitution Amendments of 1956 made some important changes in Art. 1. The distinction between Parts A, B and C and territories specified in Part D was abolished and in its place came the distinction between the territories of States and the Union territories specified in the First Schedule. In consequence Art. 243 in Part IX was deleted. That is how under the present Article the

territory of India consists of the territories of the States, the Union territories and such other territories as may be acquired. We have already referred to Art. 1(3)(c) and we have observed that it does not purport to confer power on India to acquire territories; it merely provides for and recognises automatic absorption or assimilation into the territory of India of territories which may be acquired by India by virtue of its inherent right as a sovereign State to acquire foreign territory. Thus Art. describes India as a Union of States and specifies its territories.
Article 2 provides that Parliament may by law admit into the Union or establish, new States on such
287
terms and conditions as it thinks fit. This Article shows that foreign territories which after acquisition would become a part of the territory of India under Art. 1(3)(c) can by law be admitted into the Union under Art. 2. Such territories may be admitted into the Union or may be constituted into new States on such terms and conditions as Parliament may think(fit; and as we shall presently point out such territories can also be dealt with by law under Art. 3(a) or (b). The expression " by law " used in Arts. 2 and 3 in this connection is significant. The acquisition of foreign territory by India in exercise of its inherent right as a sovereign State automatically makes the said territory a part of the territory of India. After such territory is thus acquired and factually made a part of the territory of India the process of law may assimilate it either under Art. 2 or under Art. 3 (a) or (b).
As an illustration of the procedure which can be adopted by Parliament in making a law for absorbing newly acquired territory we may refer to the Chandernagore Merger Act, 1954 (Act XXXVI of 1954), which was passed on September 29, 1954, and came into force as from October 2,1954. Chandernagore, which was a French possession, was declared a free city, and in June 1946 the French Government, in agreement with the Government of India, stated that it intended to leave the people of the French establishments in India a right to pronounce on their future fate and future status. In pursuance of this declaration a referendum was held in Chandernagore in 1949, and in this referendum the citizens of Chandernagore voted in favour of the merger of the territory with India. Consequently, on May 2, 1950, the President of the French Republic effected a de facto transfer of the administration of Chandernagore to India, and as from that date the Government of India assumed control and jurisdiction over Chandernagore under s. 4 of the Foreign Jurisdiction Act, 1947 (Act 47 of 1947). Relevant notification was issued by the Government of India under the said section as a result of which certain Indian laws were made applicable to it. The said notification also provided that the corresponding
288
French laws would cease to apply with effect from May 2, 1950. This was followed by the treaty of cession which was signed at Paris and in due course on June 9, 1952, Chandernagore was transferred de to the Government of India on the ratification of the said treaty. The result was Chandernagore ceased to be a French territory and became a part of the territory of India; and the Foreign Jurisdiction Act was no longer applicable to it. Article 243(1) which was then in operation applied to Chandernagore as from June 9, 1952, and in exercise of the powers conferred under Art. 243(2) the President promulgated a regulation for the ad ministration of Chandernagore which came into force from

June 30, 1952. The Government of India then ascertained the wishes of the citizens of Chandernagore by appointing a commission of enquiry, and on receiving the commission's report that the people of Chandernagore were almost unanimously in favour of merging with West Bengal, the Government introduced in Parliament the Chandernagore Merger Act in question. After this Act was passed Chandernagore merged with the State of West Bengal as from October 2,1954. This Act was passed by Parliament under Art. 3 of the Constitution. As a result of this Act the boundaries of West Bengal were altered under Art. 3(d) and by s. 4 the First Schedule to the Constitution was modified. We have their briefly referred to the history of the acquisition and absorption of Chandernagore and its merger with West Bengal because it significantly illustrates the operation of Art. 1(3)(c) as well as Art. 3(b) and (d) of the Constitution.

That take-, us to Art. 3 which deals with the topic of formation of new States and alteration of areas, boundaries or names of existing States; but before we construe Art,. 3 it would be convenient to refer to Art. 4. Article 4 reads thus

4.(1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and 289

in the Legislature or Legislatures of the State of States affected by such law) as Parliament may deem necessary.

(2)No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

The effect of Art. 4 is that the laws relatable to Art. 2 or Art. 3 are not to be treated as constitutional amendments for the purpose of Art. 368, which means that if legislation is competent under Art. 3 in respect of the Agreement, it would be unnecessary to invoke Art. 368. On the other hand, it is equally clear that if legislation in respect of the relevant topic is Dot competent under Art. 3, Art. 368 would inevitably apply. The crux of the problem, therefore, is: Can Parliament legislate in regard to the Agreement under Art. 3 ?

Let us now read Art. 3. It reads as follows:"

Art. 3. Parliament may by law-

(a)form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory. to a part of any State;

(b) increase the area of any State;

(e) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State;

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired."

Prima facie Art. 3 may appear to deal with the problems which would arise on the reorganisation of the constituent States of India on linguistic or any other basis; but that is not the entire scope of Art. 3. Broadly stated it deals

with the internal adjustment inter so of the territories of the constituent States of
290
India. Article 3(a) enables Parliament to form a new State and this can be done either by the separation ,if the territory from any State, or by uniting two or more States or parts of States, or by uniting any territory to a part of any State. There can be no doubt that foreign territory which after acquisition becomes a part of the territory of India under Art.. 1(3)(c) is included in the last clause of Art. 3(a) and that such territory may' after its acquisition, be absorbed in the new State which may be formed under Art. 3(a). Thus Art. 3(a) deals with the problem of the formation of a new State and indicates the modes by which a new State can be formed.-
Article 3(b) provides that a law may be passed to increase the area of any State. This increase may be incidental to the reorganisation of States in which case what is added to one State under Art. 3(b) may have been taken out from the are& of another State. The increase in the area of any State contemplated by Art.-3(b) may also be the result of adding to any State any part' if the territory specified in Art. 1(3)(c). Article 3(d) refers to the alteration of the boundaries of any State and such alteration would. be the consequence of any of the adjustments specified in Art. 3(a), (b) or (c). Article 3(e) which refers to the alteration of the name of any State presents no difficulty, and in fact has no material bearing on the questions with which we are concerned. We have yet to consider Art. 3(c) the construction of which will provide he answers to the questions under reference; but before we interpret Art. 3(c) we would like to refer to one aspect relating to the said Article considered as a whole.
It is significant that Art. 3 in terms does not refer to the Union territories and so, whether or not they are included in the last clause of Art. 3(a) there is no doubt that they are outside the purview of Art. 3(b), (c), (d) and (e). In other words, if an increase or diminution in the areas of the Union territories is contemplated or the alteration of their boundaries or names is Proposed, it cannot be effected by law relatable to Art. 3. This position would be of considerable assistance in interpreting Art. 3(c).
291
Article 3(c) deals with the problem of the diminution of the area of any State. Such diminution may occur where the part of the area of a State is taken out and added to another State, and in that sense Arts. 3(b) and 3(c) may in some cases be said to be co-related but does Art. 3(c) refer to a case where a part of the area of a State is taken out of that State and is not added to any other State but is banded over to a foreign State The learned Attorney-General contends that the words used in Art. 3(c) are wide enough to include the case of the cession of national territory in favour of a foreign country which causes the diminution of the area of the State in question. We are not impressed by this argument. Prima facie it appears unreasonable to suggest that the' makers of the Constitution wanted to provide for the cession of national territory under Art. 3(c). If the power to acquire foreign territory which is an essential attribute of sovereignty is not expressly conferred by the Constitution there is no reason why the power to cede a part of the national territory which is also an essential attribute of sovereignty should have been 'provided for by the Constitution. Both of these essential attributes of sovereignty are outside the Constitution and

can be exercised by India as a sovereign State. Therefore, even if Art. 3(c) receives the widest interpretation it would be difficult to accept the argument that it covers a case of cession of a part of national territory in favour of a foreign State. The diminution of the area of any State to which it refers postulates that the area diminished from the State in question should and must continue to be a part of the territory of India; it may increase the area of any other State or may be dealt with in any other manner authorised either by Art. 3 or other relevant provisions of the Constitution, but it would not cease to be a part of the territory of India It would be unduly straining the language of Art. 3(c) to hold that by implication it provides for cases of cession of a part of national territory. Therefore, we feel no hesitation in holding that the power to cede national territory cannot be read in Art. 3(c) by implication.

292

There is another consideration which is of considerable importance in construing Art. 3(c). As we have already indicated Art. 3 does not in terms refer to the Union territories, and there can be no doubt that Art. 3(c) does not cover them; and so, if a part of the Union territories has to be ceded to a foreign State no law relatable to Art. 3 would be competent in respect of such cession If that be the true position cession of a part of the Union territories would inevitably have to be implemented by legislation relatable to Art 368 ; and that, in our opinion, strongly supports the construction which we are inclined to place on Art. 3(c) even in respect of cession of the area of any State in favour of a foreign State., It would be unreasonable, illogical and anomalous to suggest that, whereas the cession of a part of the Union territories has to be implemented by legislation relatable to Art. 368, cession of a part of the State territories can be implemented by legislation under Art. 3. We cannot, therefore, accept the argument of the learned Attorney-General that an agreement which involves a cession of a part of the territory of India in favour of a foreign State can be implemented by Parliament by passing a law under Art 3 of the Constitution. We think that this conclusion follows on a fair and reasonable construction of Art. 3 and its validity cannot be impaired by what the learned Attorney-General has described as the special features of the federal Constitution of India.

In this connection the learned Attorney -General has drawn our attention to the provisions of Act XLVII of 1951 by which the boundaries of the State of Assam were altered consequent on the cession of a strip of territory comprised in that State to the Government of Bhutan. Section 2 of this Act provides that on and from the commencement of the Act the territories of the State of Assam shall cease to comprise the strip of territory specified in the Schedule which shall be ceded to the Government of Bhutan, and the boundaries of the State of Assam shall be deemed to have been altered accordingly. Section 3 provides for the consequential amendment of the first paragraph in Part A of the First Schedule to the Constitution relating to the territory of Assam. The argument is

293

that when Parliament was dealing with the cession of a strip of territory which was a part of the State of Assam in favour of the Government of Bhutan it has purported to pass this Act under Art. 3 of the Constitution. It Appears that the strip of territory which was thus ceded consisted of

about, 32 sq. miles of the territory in the Dewangiri Hill Block being a part of Dewangiri on the extreme northern boundary of Kamrup District. This strip of territory was largely covered by forests and only sparsely inhabited by Bhotias. The learned Attorney-General has not relied on this single statute as showing legislative practice. He has only cited this as an instance where the Parliament has given effect to the cession of a part of the territory of Assam in favour of the Government of Bhutan by enacting a law relating to Art. 3 of the Constitution. We do not think that this instance can be of any assistance in construing the scope and effect of the provisions of Art. 3.

Therefore our conclusion is that it would not be competent to Parliament to make a law relatable to Art. 3 of the Constitution for the purpose of implementing the Agreement. It is conceded by the learned Attorney-General that this conclusion must inevitably mean that the law necessary to implement the, Agreement has to be passed under Art. 368.

Art. 368 reads thus:-

" Art. 368. 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 the total membership of that House and 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 that if such amendment seeks to make any change in-

(a)article 54, article 55, article 73, article 162 or article 241, or

38

294

(b)Chapter IV of Part V, Chapter V of Part VI, or Chapter 1 of Part XI, or

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

(d) the representation of States in Parliament, or

(e) the provisions of this article,

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

We have already held that the Agreement amounts to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the alteration of the content of and the consequent amendment of Art. 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made under Art. 368. This position is not in dispute and has not been challenged before us; so it follows that acting under Art. 368 Parliament may make a law to give effect to, and implement, the Agreement in question covering the cession of a part of Berubari Union No. 12 as well as some of the Cooch-Behar Enclaves which by exchange are given to Pakistan. Parliament may however, if it so chooses, pass a law amending Art. 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed then Parliament may be competent to make a law under the amended Art. 3 to implement the Agreement in question. On the other hand, if the necessary law is passed under Art. 368 itself that alone would be sufficient to implement the Agreement.

It would not be out of place to mention one more point before we formulate our opinion on the questions referred to us. We have already noticed that under the proviso to Art. 3 of the Constitution it is prescribed that where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has to be referred by the President to
295
the Legislature of that State for its views thereon within such period as is therein prescribed. It has been urged before us by the learned Attorney General that if it is held that Parliament must act under Art. 368 and not under Art. 3 to implement the Agreement, it would in effect deprive the Legislature of West Bengal of an opportunity to express its views on the cession of the territory in question. That no doubt is true; but, if on its fair and reasonable construction Art. 3 is inapplicable this incidental consequence cannot be avoided. On the other hand, it is clear that if the law in regard to the implementation of the Agreement is to be passed under Art. 368 it has to satisfy the requirements prescribed by the said Article; the Bill has to be 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 the House present and voting; that is to say, it should obtain the concurrence of a substantial section of the House which may normally mean the consent of the major parties of the House, and that is a safeguard provided by the Article in matters of this kind.

In this connection it may incidentally be pointed out that the amendment of Art. 1 of the Constitution consequent upon the cession of any part of the territory of India in favour of a foreign State does not attract the safeguard prescribed by the proviso to Art. 368 because neither Art. 1 nor Art. 3 is included in the list of entrenched provisions of the Constitution enumerated in the proviso. It is not for us to enquire or consider whether it would not be appropriate to include the said two Articles under the proviso. That is a matter for the Parliament to consider and decide.

We would accordingly answer the three questions referred to us as follows:-

Q. 1. Yes.

Q.2. (a) A law of Parliament relatable to Art. 3 of the Constitution would be incompetent;

(b)A law of Parliament relatable to Art. 368 of the Constitution is competent and necessary;

(c)A law of Parliament relatable to both Art. 368 and Art. 3 would be necessary only if Parliament chooses first to pass a law amending Art. 3
296
as indicated above; in that case Parliament may have to pass a law on those lines under Art. 368 and then follow it up with a law relatable to the amended Art. 3 to implement the agreement.

Q. 3. Same as answers (a), (b) and (c) to Question 2.

Reference answered accordingly.