FUNDAMENTAL RIGHTS IN INDIA

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"People must come to accept private enterprise not as a necessary evil. but as an affirmative good."

—EUGENE BLACK

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I

A HISTORICAL BACKGROUND

By

B. SHIVA RAO*

Mr. Nath Pai's Bill for the restoration of what he has described as the supremacy of Parliament, after a majority judgement of the Supreme Court in a recent case, has given rise to a sharp controversy, both in Parliament and outside. In the first place, as a witness before the Joint Select Committee rightly pointed out, the Supreme Court's decision does not lay down that the Constitution cannot be amended, but that only one part of it, namely, the chapter on fundamental rights is beyond Parliament's authority to alter. Apart from the constitutional position, he also made the further point that "India, more than any other country, needs suitable fundamental rights in the widely diverse ideologies and doctrines which are being pursued in this country."

Historically, as early as 1895 a Swaraj Bill (inspired by Lokamanya Tilak) visualised a constitution guaranteeing to every citizen "freedom of expression, inviolability of one's house, right to property, equality before the law", etc. With the repressive policies of the Government reflected in deportations, internments and restrictive Press laws, in the next two decades, the need for fundamental right of citizenship became an article of faith with

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most political groups. Their inclusion in the Irish Free State constitution in 1921 had a definite impact on political, thinking in India.

Mrs. Besant's Commonwealth of Indian Bill enumerated fundamental rights almost identical in scope and nature with those in the Irish constitution. A resolution of the Congress in Madras in 1927 declared that "the basis of the future constitution of India must be a declaration of fundamental rights." The Nehru Committee in the following year observed that "the conditions obtaining in the Irish Free State approximated broadly to those prevailing in India; and the first concern of the people of Ireland, as of the people of India, is to secure fundamental rights hitherto denied to them." The committee added: "It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances."

The 1935 Constitution imposed on us by the British Government rejected a strong plea made in the Round Table Conferences in favour of fundamental rights. The Joint Parliamentary Committee, in arriving at such a conclusion argued: "Either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the courts as being inconsistent with one or other of the rights so declared."

Throughout that period (1895-1935) the demand for fundamental rights rested on the conviction that a citizen should have such guarantees of a kind (as the Nehru Committee observed) that they "will not permit their withdrawal under any circumstances." The fear of the executive making arbitrary inroads on individual liberties was visibly sharpened at every stage of the struggle for national freedom and particularly after Gandhiji's periodical resort to mass civil disobedience.

A Non-Party Committee of which Sir Tej Bahadur Sapru was the Chairman, reiterated this demand in 1944-45 on the ground that in the "peculiar circumstances of India fundamental rights are necessary, not only as assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, Governments and the courts."

For the first time, a body of eminent jurists which included Sir Tej Bahadur Sapru linked up the protection of minorities with the proposal for the inclusion of fundamental rights. This shift in approach — from the protection of individual rights to minority safeguards — though unnoticed at the time, was of considerable significance. The British Cabinet Mission in 1946, in rejecting the demand for the creation of Pakistan as unwise and impracticable, fell back on fundamental rights as ono of the expedients to be considered for creating a sense of security among India's minorities.

Indian leaders, with their political thinking long conditioned by the concept of fundamental rights in the constitution, had no difficulty in accepting the Cabinet Mission's proposal, though at an early stage of the deliberations of the Constituent Assembly (after February 1947) Pakistan's creation appeared to them to be the price for the country's freedom.

In any discussion of Mr. Nath Pai's Bill, one cannot overlook the important fact that the list of fundamental rights enumerated in the Constitution includes not only various individual freedoms (of expression, association, neligion, etc.) but also the right to property. All the subsequent discussions, whether in the Constituent Assembly or later, after the adoption of the Constitution, had their origin in the inclusion of the right to property among fundamental rights. As Mr. Frank Anthony reminded the Lok Sabha in the debate on Mr. Nath Pai's Bill, the minorities depend on fundamental rights for their security.

It was not an accident that the Sub-committee on Minorities created by the Constituent Assembly carefully scrutinised the report of the Fundamental Rights Sub-committee before expressing its final views in the Constituent Assembly. The Sub-Committee on Minorities would not have accepted joint electorate and the abandonment of the reservation of seats without being satisfied that the chapter on fundamental rights gave them adequate protection and safeguards.

The present controversy over Mr. Nath Pai's Bill was anticipated at the time the fundamental rights were being debated in the Constituent Assembly. Dr. Ambedkar placed the two divergent points of view and the defects inherent in each before the Assembly : one view was that the legislature could be trusted not to make any. law which would encroach on individual fundamental rights. According to the other view, it was not possible to trust the legislature since it might be led away by passion, party prejudice or other considerations. He added : "For myself, I cannot altogether omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court, examining laws made by the legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad."

The difficulty really arose over the issue of economic and social legislation. At one stage of the debate on fundamental rights, Pandit Govind Vallabh Pant confessed that he "could not visualise the future of the country being determined, not by the collective wisdom of the people's representatives but by the whims and vagaries of lawyers elevated to the judiciary." Legislatures in his view should retain "the power of passing tenancy laws and measures for the acquisition of private property for public purposes without being obliged to pay compensation at market rates."

At an early stage of the Constituent Assembly's deliberations, the constitutional adviser, Sir B. N. Rao, conveyed to the Drafting Committee after a discussion with Justice Frankfurter of the U.S. Supreme Court, that the power of review of legislation implied in the "due process of law" clause, which it was proposed should be borrowed from the American constitution, was in the latter's view not only undemocratic (because it gave a few judges the power of vetoing legislation enacted by the representatives of the nation) but also threw an unfair burden on the judiciary. The Drafting Committee decided in the light of this observation to replace the expression "due process of law" by the expression "except according to the procedure established by law." Muslim members of the Constituent Assembly reacted sharply to the proposed alteration : they expressed the fear that the phrase "procedune established by law" might strip the court of the power to go into the merits of a case, since its function would cease the moment it was satisfied that the procedure established by law had been complied with.

Consideration of the implications of Mr. Nath Pai's Bill cannot be isolated from the provision in the Constitution for its amendment. In the first draft a constitutional amendment could be passed only with a majority of not less than two-thirds of the total membership of each House and the subsequent ratification by the legislatures of not less than two-thirds of the units of the Union. A joint meeting of the Union Constitution Committee and the Union Powers Committee introduced an important change, namely, that for a constitutional amendment the majority should be two-thirds of the members present and voting, followed by ratification by not less than half of the constituent unit legislatures. Later still, the reference to the State Legislatures was omitted and replaced by the further condition of a majority of the total number of

members of each of the two Houses of the Federal Legislature.

Whatever might have been the justification for thus simplifying thb procedure for an amendment of the Constitution in the early years of its operation, the present moment seems inappropriate for a fresh look at the provision. Mr. Setalvad told the Joint Select Committee on Mr. Nath Pai's Bill that he favoured a three-fourths majority at both stages in each House at the Centre. A relevent question is whether the State Legislatures too should not be given a voice in such a vitally important matter as a change in the Constitution; also whether before a final decision is reached, a General Election should not be made an intermediate feature.

In any event, Mr. Nath Pai's Bill bristles with complications probably not foreseen by its author. A pledge to the minorities implicit in the fundamental right cannot be withdrawn in the name of the supremacy of Parliament. The Law Minister minimised the objections by describing it as only "an enabling measure." On the other hand was the weighty warning of an experienced advocate of the Supreme Court who visualised "the flood-gates of totalitarianism" opening with the passage of the measure. It is abundantly clear that the proposal to bring a revision of fundamental right within Parliament's purview must be handled with the greatest circumspection, without ignoring any of the likely consequences. *(Reproduced from "Times of India", dated December 17,* 1968, *with kind permission of the editor.)*

II

IT IS DANGEROUS TO TAMPER WITH FUNDAMENTAL RIGHTS

By
Dr. M. V. PYLEE*

In the United States of America often a legislative enactment is known by the name of its originator. For example, the Wagner Act, the McCurran Act, the Smith-Mundt Act and the Taft Hartley Act. In India it is known by a title which is derived from the subject that it deals with. However, in the case of private member's bills seeking important amendments to the Constitution, India seems to follow the American practice. For, today, the term 'Mr. Nath Pai's Bill' has become a well-known one in political and constitutional circles all over the country.

There have keen occasions in the past when Members of Parliament have moved Bills seeking amendments to the constitution. In 1961, for example, Mr. Bhupesh Gupta proposed two amendments to make ministerial advice binding on the President of India. But those Bills had not the distinction of being popularly known by the name of their originator. Mr. Nath Pai's Bill, in contrast, seems to have achieved this distinction on account of two reasons. First, it seeks to establish the supremacy of Parliament under the Constitution. Secondly, it aims at undoing the effect of the decision of the Supreme Court in the now-famous Golak Nath case in which a majority of the Supreme Court held that Parliament has no power to amend the Fundamental Rights embodied in Part III of the Constitution.

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The issues involved in the Golak Nath case, the implications of the majority decision of the Supreme Court and the objectives of Nath Pai's Bill are of great importance in the evolution of constitutional government in India which has a history of only a little over two decades. This article seeks to deal with them briefly.

The Golak Nath Case: During 1966 three writ petitions under Article 32 of the Constitution were filed before the Supreme Court challenging the validity of three constitutional amendments, the First Amendment Act, 1951, the Fourth Amendment Act, 1955 and the Seventeenth Amendment Act, 1964, all of which had substantially modified the Right to Property as embodied in Part III of the Constitution dealing with Fundamental Rights. One of the petitions was from the Punjab and the other two from Mysore. The former by the son, daughter and granddaughter of Henry Golak Nath who died in 1953 challenged the validity of the Punjab Security of Land Tenure Act of 1953. The latter sought to declare invalid the Mysore Land Reforms Act of 1962.

The States of Punjab and Mysore contended that the impugned Acts were saved from attack on the ground that they came under the protection afforded by the Seventeenth Amendment Act, 1964, of the Constitution, which by amending Article 31A (Right to Property) and including them in the schedule thereto, placed them beyond attack. In view of the great importance of the issues involved, the Supreme Court served notice on the Advocates-General of the various States as well as the Attorney-General of India. It is important to note that almost all of them appeared before the Court and expressed their respective viewpoints at some length. Hardly has there been another case, during the last two decades, which brought together so many legal luminaries of the country.

In view of the great importance of the case, all the eleven judges of the Supreme Court sat together as a

Constitution Bench of the Court to hear the case. Under the provisions of the Constitution, a minimum of five judges would be sufficient to constitute a constitution Bench for hearing cases involving the interpretation of the Constitution. Chief Justice Subba Rao, the Chief Justice, presided over the Bench. In making its decision the Court was divided, six against five, with the Chief Justice leading the majority. The effect of the decision on the Constitution is as follows:-

1. The Fundamental Rights are outside the amendatory process prescribed by the Constitution if the amendment seeks to abridge or take away any of the rights. Hence Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

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

3. Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III (Fundamental Rights), it is void.

4. The Constitution First Amendment Act, 1951, Fourth Amendment Act, 1955, and the Constitution Seventeenth Amendment Act, 1964, abridge the scope of Fundamental Rights. But, on the basis of earlier decisions of the Court, they were valid.

5. On the application of the doctrine of prospective over-ruling, the majority decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

6. For abridging or taking away Fundamental

Rights, a Constituent Body will have to be convoked and not the Parliament constituted as it is today, whatever may be the special majority that is prescribed.

7. The two impugned Acts—of Punjab and Mysore—are valid as they fall within the scope of the Seventeenth Amendment Act which is valid.

Objectives of Nath Pai's Bill: The Supreme Court announced its decision in the Golak Nath Case on February 27, 1967. As a result, Parliament has, from that day, lost the right that it had been exercising since 1950 to amend the Fundamental Rights embodied in the Constitution. Mr. Nath Pai's bill seeks to restore that right and re-establish the supremacy of Parliament. According to Mr. Pai, 'the supremacy of Parliament implies the right and authority of Parliament to amend even the Fundamental Rights that are at stake' he asserts, but the sovereignty is the people of India. The power to amend the constitution is an inalienable part of the sovereignty of the people. It is this sovereignty that is being challenged by the Supreme Court. My bill merely seeks to assert that the sovereignty of the people cannot be abridged by a group of judges. The Supreme Court should not sit as a Superlegislature.'

Mr. Pai says that it is evident from the judgements of the Golak Nath case and the Shankari Prasad Case that the Supreme Court itself held till February 27, 1967, that Parliament had the right to amend the Constitution. But after February 27 it ceased to have that power. It means that: there has been an amendment of the Constitution and that the rights of Parliament have been curtailed. 'By whom?' he asks. 'By six judges of the Supreme Court. Should judges assume such a naked power of amendment? Should the Constitution of India vary according to who is occupying the judge's seat in the Supreme Court?'

Mr. Nath Pai feels that the decision of the Supreme Court upsets the delicate balance which the Constitution has endeavoured to establish between the Judiciary, the Legislature and the Executive. His bill, he claims, will re-establish that balance; it is a golden mean between the denial of the power to Parliament to amend the Constitution and the possibility of a hasty amendment by Parliament. For, according to his bill, an amendment to be effective will have to be ratified by more than half the States.

Mr. Pai's Bill has the distinction of having been debated by both the Houses of Parliament for the longest time taken by a private member's bill. The Select Committee discussed it for eleven months before finalising its report and the report has been discussed at length. Yet Parliament has not reached a decisive stage in its deliberations. On the contrary, the support which the Bill received almost spontaneously in the beginning has been steadily going down during the past few months. Why should this happen? It calls for a comprehensive study of the whole problem.

Supremacy of Parliament? Often, members of our Parliament speak of a sovereign parliament or the supremacy of parliament. Mr. Pai's Bill is based on this assumption. But our Constitution does not recognise either the sovereignty of parliament or the concept of parliamentary supremacy. It is true that the sovereign power is vested in the people of India. Although Parliament is composed of members elected by the people of India, it is erroneous to think that the people of India have, at the same time, transferred to Parliament the sovereign power also. This is clear from the manner in which the different agencies of government, executive, legislature, judiciary etc. are created and the extent of the powers given to each of them.

It is important to remember in this connection that ours is a written constitution. And every written constitution prescribes the limits of power of every

agency created by it. If unlimited power is conferred upon any agency, what is the guarantee that that agency will dot encroach upon the powers conferred on others by the constitution?

Those who swear by parliamentary supremacy conveniently forget the fact that Parliament is only one of the agencies created by the Constitution for specific purposes. Its powers are defined. For example, the Parliament of India cannot pass laws on any and every subject. The division of legislative powers between the Union and the States clearly shows the limitations of Parliament in the law-making field.

If a parliamentary law encroaches upon the legislative field assigned to the States, the Supreme Court is given the power to resolve the conflict. In the process, the Court may declare the parliamentary law invalid. The moment the Court declares the law invalid, it loses all its authority and it has no binding force thereafter. Where is parliamentary supremacy under such circumstances? Under the type of federal system that is established by our constitution, Parliament can never be supreme.

The concept of a sovereign parliament or parliamentary supremacy is a British political idea. It has a history of its own. Britain has no written constitution. It has evolved itself over centuries and the rule of law was ingrained in the British people. But we should not forget the fact that in the process there were at least two revolutions, one 'bloody' and the other 'bloodless'. For establishing the liberties which the present generation of Englishmen enjoy, thousands of their ancestors paid a heavy price with their life, liberty and property. No doubt the British Parliament today has the theoretical power to pass any law. Yet it is unimaginable that it would take away the fundamental rights of the people. The British never accepted the idea that a legislature could also become a tyrannous body and that hence the individual liberties are to be safeguarded against legislative majorities too. The doctrine of parliamentary supremacy is the product of such an attitude.

Fundamental Rights are Guaranteed: The British had never believed in guaranteed fundamental rights. In contrast, the Americans although educated in the British tradition, did not accept the British position. They did not believe in the sovereignty of the legislature, however popular that body might be. This is why they have included the Bill of Rights as an integral part of their constitution and the task of protecting these rights was entrusted to an independent judiciary. To them, fundamental rights are not matters to be drawn into the vortex of political controversy or to be placed at the mercy of legislative majorities. They are to be definitely recognised in the Constitution and protected against any violation either by the executive or the legislature, through an independent and impartial judiciary. The idea is clear from what Jefferson, the author of the American Declaration of Independence, wrote in a letter to one of his friends in the early days of the American Republic.

'The executive in our government is not the sole, it is scarcely the principal, subject of my jealousy. The tyranny of the legislature is the most formidable dread at the present and will be for long years. That of the executive will come; but it will be at a remote period.'

Guaranteed fundamental rights have a definite purpose. And that is to withdraw certain subjects from the changing pattern of political controversy, to place them beyond the reach of a majority in legislatures and officials in the government, and to establish them as legal principles to be applied by courts. For, if the danger of personal rule by despotic rulers has more or less disappeared wherever representative institutions have been established, that from legislative interference has correspondingly increased because of the high-handed manner in which majorities might manage affairs in legislatures.

A dominant group of legislators may pass any discriminatory or unjust legislation and prejudice the interests of considerable sections of the people. This meant, in reality, the substitution of one kind of tyranny by another, the replacement of the personal rule of the monarch by the tyranny of a legislative majority. One's right to life and liberty, to free speech and expression, freedom of worship and assembly and other fundamental rights are not subjects to be submitted to vote. They should not depend on the outcome of elections.

When legislatures were prohibited from encroaching upon certain rights through constitutional safeguards, the protection of these rights was achieved against the arbitrary conduct of both the executive and the legislature. When an independent judiciary was made the guardian of these rights by the constitution itself, the process of protection of fundamental rights became complete and the enjoyment of these rights by all, irrespective of wealth or social status, race or religious belief, was fully ensured. Herein lies the importance of guaranteed fundamental rights.

Today the idea of a list of written rights as an integral part of a constitution is widely accepted. Even the British, who were once uncompromisingly opposed to such an idea, have come to accept its value particularly in multi-racial, multi-religious and multi-lingual countries.

The Indian Demand for Fundamental Rights: The demand for incorporating a list of fundamental rights in a new, constitution of India had excited the imagination of political thinkers and constitutionalists in India from the time the idea of the transfer of power from Britain to Indian hands had taken shape. The Indian National Congress, the Liberals, moderates of all shades and the religious minorities like the Muslims, Christians and Sikhs, all considered it not only desirable but essential, both for the protection of the rights of minorities and for infusing confidence in the majority community. The Motilal Nehru

Committee endorsed it. The Muslim League lent its full support to it. It was only the British Government which stood against it.

During the second Round Table Conference, however, Ramsay Macdonald, the then Labour Prime Minister, announced that he was in favour of incorporating a list of fundamental rights in the proposed federal constitution of India for safeguarding the interests of minorities. Yet, the Conservatives who came to power later and who were not in favour of incorporating a list of fundamental rights in the constitution, refused to honour Macdonald's pledge and hence the Constitution Act of 1935 was passed without any Fundamental Rights being incorporated in it.

The implications of the absence of fundamental rights became evident during the war years when civil liberties lost all their meaning in India and the courts including the Federal Court found it impossible to safeguard them. Hence the demand for the inclusion of fundamental rights in the constitution of India gathered momentum during the war years.

When the Constituent Assembly met for the first time in 1946, no member opposed the idea of a chapter on fundamental rights as an integral part of the Constitution of independent India. In fact, it was unreservedly supported by all sections of opinion in the Assembly. Over the special committee appointed for the purpose, Sardar Patel presided and it included prominent members of the various minority communities. The Committee made a detailed study of the whole problem and recommended a number of measures. On the basis of this report, the Drafting Committee of the Constituent Assembly prepared the provisions on Fundamental Rights as embodied in the Draft Constitution.

The provisions dealing with fundamental rights in the Draft Constitution underwent changes in respect of many details. Throughout the discussions in the Consti-

tuent Assembly, however, there was no change in the attitude of the framers regarding the essential character of these rights. They wanted not only a mere enumeration of these rights; they were bent upon safeguarding them in the best manner possible. This was made clear by Dr. Ambedkar, the Chairman of the Drafting Committee, in the following words:

'If there is no remedy, there is no right at all, and I am, therefore, not prepared to burden the constitution with a number of pious declarations which may sound as glittering generalities. It is much better to be limited in the scope of our rights and to make them real by enumerating remedies than to have a lot of pious wishes embodied in the Constitution'.

The remedies are provided under Article 32 of the Constitution, including the right of an aggrieved party to approach the Supreme Court directly if necessary. This was what happened in the Golak Nath case where the petitioners sought the Supreme Court's intervention by moving the Court directly. Speaking about the importance of Article 32, Dr. Ambedkar had said: 'If I was asked to name the particular article in this constitution as the most important without which this constitution would be a nullity, I could not refer to any other article except this one. It is the very heart of it; and I am glad that the House has realised its importance. Hereafter it is not possible for any legislature to take away the writs which are mentioned in this article'. The Supreme Court has thus become the protector and the guarantor of Fundamental Rights.

Anyone who is conversant with the political history of India will understand and appreciate the true significance of fundamental rights as an integral part of the Constitution, as a safeguard against encroachment by the legislature or the executive. As Granville Austin graphically put it, 'That a declaration of rights had assumed such importance was not surprising; India was a land of

communities, of minorities, racial, religious, linguistic, social and caste. For India to become a State, these minorities have to agree to be governed both at the Centre and in the Provinces by fellow Indian members, perhaps, of another minority and not by a mediatory third power, the British. On both psychological and political grounds, therefore, the demand for written rights, since rights would provide tangible safeguards against oppression, proved overwhelming.'

What Rights are guaranteed? Part III of the Constitution embodies seven different categories of fundamental Rights. Briefly, they are: (1) Right to Equality, (2)' Right to Freedom, (3) Right against Exploitation, (4) Right to Freedom of Religion, (5) Cultural and Educational Rights, (6) Right to Property and (7) Right to Constitutional Remedies. It is unnecessary to dwell at length on how important these rights are for the preservation and maintenance of a democracy, the protection of dignity and the development of human personality. These are the rights which enable a man to chalk out his own life in the manner he likes best. That is why they are called the 'primordial rights' by political thinkers. But these rights include not only the rights of the individual but also those of the minorities, the scheduled castes, the scheduled tribes and the backward classes as well.

Under Article 13 of the Constitution there are two important provisions relating to these Rights. On the one hand, it invalidates all laws which were in force at the commencement of the constitution in so far as they were inconsistent with the Fundamental Rights and to the extent of their inconsistency with those rights. On the other, it imposes a prohibition upon the state not to make any law which takes away or abridges the rights conferred by the chapter on Fundamental Rights.

On the strength of these provisions Chief Justice Subba Rao asserted that 'Fundamental Rights are given

a transcendental position under the Constitution and are kept beyond the reach of Parliament.'

Those who support Nath Pai's Bill often speak about the people's sovereignty, identifying it with the Parliament's 'sovereignty'. Because Parliament represents the people of the country, to argue that Parliament is as much sovereign as the people are, and has the competence to amend any part of the Constitution in whatever manner it likes, is a dangerous argument. For a constitution like ours is the product of mature consideration and a great deal of compromise. This is particularly true of the chapter on Fundamental Rights. Almost every Article embodied in that chapter was the result of long debate and detailed discussion among all the interested parties and groups over a considerable time. When viewed against a particular political ideology, some of the provisions may be found unsatisfactory. But that is the price of compromise ,and consensus among competing and even conflicting interests who were honestly seeking agreement. The Constituent Assembly was not interested in settling any of the basic issues that it confronted on party lines, as Parliament does almost invariably. This is the essential difference between the two in their respective approaches and this is perhaps the most distinguishing feature which has to be kept in mind. The working of modern parliaments under the party system and party politics, and the manner in which majorities are made and unmade through the whims and fancies of party bosses, should provide the necessary warning against the danger of equating Parliament's will with the people's will in all matters of fundamental importance, particularly in a country like India with its perplexing diversity.

What would be the fate of our Constitution and how much faith can we bestow on its lasting quality, if Parliament, one fine morning, decides on political considerations to amend Article 368 and enact that henceforward there would be no need for a two-thirds majority

but only a simple majority to amend the Constitution? Those who equate Parliament's will with the people's will may not find anything extraordinary in this, as, after all, according to them, Parliament should be the final arbiter. After having thus amended the 'amending provision', it would be easy for Parliament to get rid of any part of the Constitution which according to its prevailing mood is in accordance with the people's will. Viewed against the manner in which certain laws have been passed by our legislatures, such a contingency can never be ruled out.

The picture of our political life during the past few years has been a depressing one. In contrast to the stability and relative certainty of the first two decades after Independence, the situation that has emerged after the fourth General Election is one of uncertainty and utter confusion. True, the Congress Party under Nehru's unchallenged leadership functioned like a steamroller and on occasion it showed scant respect to the Constitution. That is why too many amendments were passed in too short a period although some of those amendments were quite unnecessary. Yet, the country generally had faith in Nehru's leadership, his essentially democratic approach to problems, his faith in secularism and peaceful and orderly change.

Today the Congress Party has no mind of its own and its leaders speak with divided voices. There is no abiding loyalty to the party among its members. Floor-crossing and defections have become a most passionate game for many of its members, who have lost the sense of discipline which had characterised the Party for many years. The position of other parties is even worse. The ranks of 'Aaya Rams' and 'Gaya Rams' are swelling, and indiscipline among politicians has become a contagion. Will not the judges be affected by such happenings in the legislatures? Will they continue to give the same respect which they used to give earlier to the doings of such legislatures?

The Supreme Court of India has a record of impartiality. It has also shown, in the past, its competence to analyse complex issues and arrive at viable solutions. The Government of India has sought its advice on a number of occasions on difficult problems, and every time the Court was able to give helpful advice. For example, the Court's advice in the Berubari Union Case. It arose out of the Indo-Pakistan agreement of 1958 under which the two countries agreed to exchange certain territories lying on the borders of West and East Bengal. At first, the Government was of the view that the agreement between the Prime Ministers of the two countries was enough to effect the exchange. Later on, it was decided that a parliamentary enactment under Article 3 was necessary. But when it was challenged, a reference was made to the Supreme Court and the Court held that Parliament was not competent to make such a law and transfer to another country a portion of the territory of India for the implementation of the agreement. The Court said that the implementation could be effected only by an amendment of the Constitution under Article 368. Subsequently the Constitution (Ninth Amendment) Act was passed to give effect to the agreement in accordance with the Court's advice.

Mr. Nath Pai's argument that the Supreme Court's decision in Golak Nath's case is a one man decision—six judges on one side against five on the other—is not an impressive one. Does it mean that Mr. Pai would have accepted the verdict of the court if it was a unanimous one? But the more important aspect of it is that the decision of each judge is supported by reasoning. If the majority has overruled the Court's earlier decisions, it only shows how eager the Court was to rectify itself when occasion demanded it. It does not show the weakness but the real strength of the Court, its sincerity and objectivity.

If Parliament persists in passing Mr. Pai's Bill, what will be its effect in the light of the Supreme Court's decision in Golak Nath's case? Since the amendment in effect gives power to Parliament to amend Fundamental Rights, if the Court adheres to its decision in Golak Nath's case, it will naturally declare the amendment itself invalid. This means that all the effort by Parliament in this connection will be wiped out at one stroke. And Parliament might look ridiculous to have attempted to bypass the Supreme Court.

After all, why should Parliament be so eager to take away the effect of the Court's decision in Golak Nath's case? The Court has not objected to Parliament's extending the scope of Fundamental Rights. It has only objected to the abrogation of the rights which the people have been enjoying so far and which the fathers of our Constitution thought were of a fundamental character.

It must also be remembered in this context that the Fundamental Rights as embodied in our Constitution are not absolute. Every right has its limitations. And unlike several other constitutions, our Constitution details the limitations of each right in the text itself and the State and its agencies are empowered to impose reasonable restrictions in the enjoyment of these rights in the interests of the community as a whole.

An erroneous impression somehow has been created by discussions on Mr. Pai's Bill that the Supreme Court, through its decision in Golak Nath's case, has prohibited any amendment to the Constitution in future. This is an unfortunate impression. The decision has done nothing of the sort. Its impact is only on Fundamental Rights, which can no longer be amended by Parliament as it used to do in the past. The rest of the Constitution can be amended in accordance with the provisions of Article 368.

Further, does the Court say through its decision in Golak Nath's case, that the Fundamental Rights cannot be amended at all? No, that is not the position of the Court. It says that the procedure prescribed under Ar-

ticle 368 cannot be employed for amending Fundamental Rights. But if the country as a whole feels that an amendment of Fundamental Rights is essential, the residuary power of Parliament may be relied upon to call for a Constituent Assembly for making the necessary changes. Chief Justice Subba Rao has cited an example of Parliament's making use of the residuary power in passing an Act providing for a referendum in Goa, Daman and Diu. Parliament is certainly entitled to act in a similar manner if occasion demands.

Some of our political parties and many of our legislators view our Constitution, as revealed through the discussions on Nath Pai's Bill, as a mere organisational document which establishes the structure and the mechanism of government. But the Constitution is intended to be much more. It aims at being a social document in which the relationship of society to the individual and of government to both and the rights of minorities and backward classes are clearly laid down. There are special provisions safeguarding the legitimate rights of minorities, linguistic, religious and cultural, socially and educationally backward classes of citizens, for ameliorating the condition of depressed classes, for removing class distinctions, etc. Such provisions were made so that, in the words of James Madison, 'men of factious tempers, of local prejudices or sinister designs may not by intrigue, by corruption or other means, first obtain the suffrages and then betray the interests of the people'.

An argument is often advanced that if Fundamental Rights cannot be amended, it would lead to violence and revolution. A proper understanding of Part III and Part IV of the Constitution as a whole will show the hollowness of this argument. For, Part III, Fundamental Rights and Part IV, Directive Principles of Stab Policy, form an integrated scheme and is elastic enough to respond to the changing needs of society in India. The verdict of Parliament on the scope of the law of social control of fundamental rights is not final, but justiciable. Therein

lies its strength and not its weakness. It is the duty of Parliament to enforce the Directive Principles; it is equally its duty to enforce them without infringing the fundamental rights. It is not an impossible task. The lathers of our Constitution thought that it was possible. The discussions in the Constituent Assembly clearly bring this out.

As Chief Justice Subba Rao pointed out: 'History shows that revolutions are brought about not by the majorities but by the minorities and sometimes by military coups. The existence of an all-comprehensive amending power cannot prevent revolutions, if there is chaos in the country brought about by misrule or abuse of power. On the other hand, such a restrictive power gives stability to the country and prevents it from passing under a totalitarian or dictatorial regime. We cannot obviously base our decision on such hypothetical or extraordinary situation which may be brought about with or without amendments. Indeed a Constitution is only permanent and not eternal. There is nothing to chose between destruction by amendment or by revolution, the former is brought about by totalitarian rule, which cannot brook constitutional checks and the other by the discontentment brought about by misrule. If either happens, the Constitution will be a scrap of paper'.

We should prevent such a development.

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—A. D. SHROFF
(1899-1965)
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