RESHAPING THE CONSTITUTION

IMPLICATIONS OF THE SWARAN SINGH COMMITTEE'S RECOMMENDATIONS

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By

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Realizing that there is no exercise which can have such an immeasurable impact on the future of the entire nation as significant amendments to the Constitution, the Prime Minister has fairly stated that she desires to have a "free and open public debate" and a "study in depth" before any amendments are passed into law.

The Swaran Singh Committee's Report on "Constitutional Amendments" will in reality change the basic structure of our Constitution; and yet our monumental apathy and fatalism are such that the proposals are less discussed in public and private than the vagaries of the monsoon or the availability of onions.

Some of the proposals of the Swaran Singh Committee are laudable and deserve wide public support. For instance, the suggestion to put "agriculture" and "education" in the Concurrent List is commendable, since such an amendment alone can meet the need to evolve all-India policies in relation to these subjects of national importance.

The proposal to amend article 352 to make it explicit that the Proclamation of Emergency can be made, or the Emergency can be lifted, with reference to certain parts, and not the whole, of the territory of India, is also eminently in the public interest.

Equally unexceptionable is the proposal to have administrative Tribunals set up both at the State level and at the Centre to decide cases relating to service matters, and to have an all-India Labour Appellate Tribunal to decide appeals from Labour Courts and Industrial Courts.

But the landscape of human rights, bleak with recent amendments, will be dimmed to the point of invisibility by the other recommendations of the Swaran Singh Committee, and the public mind must take the trouble to grasp their legal and practical implications, and form and voice its opinion on the vital issues. If the proposals get transformed into law, public indifference must take its due share of the blame. In your sunset years your children will be asking you, "Where were you when the proposal to take away freedoms was put to public debate?"

Our Constitution has an extraordinarily forceful and meaningful Preamble which reflects the pledge contained in the Objectives Resolution of 1946 to guarantee basic human rights:

> *"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:*
>
> *JUSTICE, social, economic and political;*
>
> *LIBERTY of thought, expression, belief, faith and worship;*
>
> *EQUALITY of status and of opportunity;*
>
> *and to promote among them all*
>
> *FRATERNITY assuring the dignity of the individual and the unity of the Nation;*
>
> *IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."*

The Swaran Singh Committee suggests that in place of the expression "Sovereign Democratic Republic" we should substitute "Sovereign Democratic Secular Socialist Republic"; and that the words "and integrity" should be inserted after "unity". This proposal is singularly ill-conceived.

First, what follows, or is annexed to, the Preamble, is the Constitution. The Preamble is a part of the Constitution Statute, but it is not a part of the Constitution. Article 368 deals only with an amendment of "this Constitution" but not of the Constitution Statute. Therefore,

the Preamble cannot be amended under article 368. **Moreover, the Preamble, from its very nature and content, is incapable of being amended. It refers to the most momentous event in India's history and sets out, as a matter of historical fact, what the people of India resolved in 1949 to do for their unfolding future. No parliament can amend or alter the historical past.**

Secondly, the insertion of the word "Socialist" would, instead of clarifying the basic structure of the Constitution, merely make it dangerously ambiguous. A coin, which has passed through millions of hands, almost loses its identity and the impress on it can hardly be deciphered; and the same happens to words of political jargon which are mouthed by millions. "Socialism" means different, and even contradictory, things to different people. There is the true socialism which has uplifted nations, multiplied national wealth and ensured the welfare of the masses; and there is the other type of socialism which has destroyed basic human freedoms while perpetuating poverty.

Solzhenitsyn said in a recent broadcast, ". . . there is that attractive-sounding formula, 'socialist democracy', which is about as meaningful as talking about 'boiling ice'; for it is precisely democracy that the dragon of socialism is about to devour. And, as democracy grows weaker and weaker, loses more and more ground in the two continents it partially covers, so the force of tyranny spreads throughout the globe."

After the fullest consideration, the Constitutent Assembly had rejected the suggestion of some members to put the word "Socialist" in the Preamble.

Thirdly, the words "secular" and "integrity" can add nothing to the content of the Preamble. Anyone who has a sense of rhythm and style would know that the beauty of the Preamble which is distinguished by economy of words, would be marred by the insertion of the three words, all of which are unnecessary and one of which is misleadingly equivocal. You may as well try to improve upon Shakespeare by changing "The rest is silence" into "The rest is complete, weird and baffling silence".

The most astounding proposal of the Swaran Singh Committee is that article 368 should be amended to provide that "any amendment of the Constitution, passed in accordance with the requirements specified in that article, shall not be called in question in any Court". The Supreme Court held in *Kesavananda Bharati's* case that, while Parliament has the power to amend any part of the Constitution, the power cannot be so exercised as to alter or destroy the basic structure of the Constitution. This is the law of India today and it is binding on every authority throughout India.

How can Parliament, whose amending power is limited, rationally or validly enact that any transgression of the limits of its power shall not be called in question in any Court? How can the donee of a limited power enlarge its own power? If Parliament could validly enact such a law, it could enact with equal validity another constitutional amendment to the effect that, if it makes a law in respect of a subject which is exclusively reserved for the States, the validity of its law shall not be called in question in any Court.

The fundamental theme of the Swaran Singh Committee's recommendations is that Parliament is supreme and has unlimited power of amending the Constitution. This theme constitutes not only defiance of the law laid down by the Supreme Court but is insupportable on first principles. We may consider here some of the irrefragable reasons to justify the view that the word "amendment" in our Constitution has a restricted meaning and that in any event the amending power is subject to inherent and implied limitations which do not permit Parliament to alter or destroy the basic structure of the Constitution.

(1) The restriction on Parliament's amending power stems from three basic elements present or implicit in our Constitution which is a controlled Constitution:

(a) The Constitution has been given by the people unto themselves; and the ultimate legal sovereignty resides in the people.
(b) Parliament is only a creature of the Constitution.

Periodically, the Lok Sabha is dissolved and members of the Rajya Sabha retire, while the Constitution continues to reign supreme.

(c) The power to alter or destroy the basic features of the Constitution is an attribute of ultimate legal sovereignty.

If Parliament has the power to destroy the fundamental principles of our policy, it would cease to be a creature of the Constitution, the Constitution would cease to be controlled and Parliament would become supreme over the Constitution.

The point is that the people are not associated with the amending process at all. This factor is decisive in determining the ambit of the amending power. By contrast, in many countries no amendment of the constitution can take place without the consent of the people determined by a referendum or by the summoning of a Convention or otherwise.

As regards constitutional amendments, Parliament's will is certainly not the people's will. To equate Parliament with the people is to betray complete confusion of thought. In choosing their representatives the electorate take into account a number of factors which have nothing to do with constitutional amendments. This has been proved time and again in countries where the people's will is ascertained on a referendum held upon Parliament's proposal to alter the constitution.

The Australian electorate has approved only five out of thirty-two changes in the Constitution proposed by Parliament in the last seventy-five years. At the end of 1973 the Australian Parliament passed by an impressive majority two proposals for constitutional amendment, but both the proposals were rejected by equally impressive majorities by the people in every single State of Australia.

In countries where, upon the legislature proposing a constitutional amendment, the legislature is required to be dissolved and the representatives are compelled to seek re-election on the isolated issue of the amendment, it

has been found that the constitution is hardly amended half a dozen times in a hundred years.

(2) A power given by the Constitution cannot be construed as authorizing the destruction of other powers conferred by the same instrument. If there is no limit to the amending power, it can be used to destroy the judicial power, the executive power and even the ordinary legislative power of Parliament and the State legislatures. All the other institutions and organs of government would be entirely at the mercy of a single institution, viz., Parliament. Logically, Parliament could even abolish Parliament.

(3) A power given by the Constitution cannot be construed as authorizing the destruction of that very power. Article 368 confers the amending power. The provisions of article 368 itself can be amended under that very article. If the power of amendment is unlimited, Parliament can abolish the special procedure for constitutional amendment or render future amendments impossible.

If a party which believes in totalitarianism is in power, it may delete the entire chapter on Fundamental Rights, establish one-party rule, and after doing that pass an amendment:

(a) to repeal article 368 and expressly provide that the Constitution shall hereafter be unamendable; or
(b) to alter article 368 and provide for an impracticably large majority, say, 99 percent, for any future amendment of the Constitution including any amendment of article 368 itself.

This is the incontrovertible logical consequence of holding that the amending power is unlimited. The basic premises on which the claim for an unfettered amending power is founded are that —

(a) the amending power is so vital and essential for the survival of the Constitution that it must not be restricted in any manner; and

(b) it is the amending power which permits the democratic will of the people from time to time to be translated into constitutional changes.

But both these premises are negatived by the logical consequence of the argument, — which is that an unlimited amending power can be so exercised as to make all future amendments impossible. The whole argument must be rejected as unsound when its logical consequence is destructive of the basic premises on which the argument is founded.

If the amending power is vital and essential, surely it cannot be so limitless that it can be used to destroy itself. This necessarily involves the conclusion that there is an implied limitation on the amending power and that the power cannot extend to extinguishing itself. Now, the amending power has the same scope when it seeks to amend article 368 (the amending power) as it has in respect of all the other provisions of the Constitution.

Therefore, if the amending power cannot destroy itself since it is an essential element of the Constitution, it must follow that it cannot destroy the other essential powers and institutions. Thus from the implied limitation on the power to amend the amending power, the irresistible conclusion is reached that the same limitation must restrict the scope of the amending power in respect of all other essential features of the Constitution.

(4) The historical background is of immense significance in considering the ambit of the amending power. The fighters for national freedom as well as the architects of the Constitution envisaged a fundamental law which would provide inalienable human rights; the country became a free democracy and was welded into one state for the first time in history; the necessity arose of creating a sense of security and safety in the minds of numerous religious, linguistic and regional minorities; and the Fundamental Rights represented the solemn balance of rights, and the fundamental conditions on which all parts of India accepted the Constitution. It is inconceivable

that after having provided the most complete and comprehensive guarantees of the basic human freedoms known to any constitution of the world, the Constitution-makers still intended that any parliament could take away those Fundamental Rights.

(5) The Constitution represents charters of power given by the people to the executive, the legislature and the judiciary, while the people reserved certain fundamental freedoms for themselves. It would be a startling view that the rights retained by the people and made paramount to the delegated powers are yet liable to be taken away by the delegate.

(6) Under article 368, the President's assent is necessary before the Constitution can be amended. Under article 60, the President has to take an oath that he will "preserve, protect and defend the Constitution". Any proposed amendment which strikes at the core of the Constitution would require the President, if he is true to his oath, to refuse his assent. It is reasonable to assume that the Constitution did not intend to create a constitutional crisis by permitting Parliament to destroy the basic structure of the Constitution and by enjoining the President at the same time to be true to his oath and preserve, protect and defend the Constitution by refusing assent. On the other hand, if the amending power is limited, such glaring inconsistency between the President's oath and Parliament's power is avoided.

The Constitution is not a jellyfish; it is a highly evolved organism. It has an identity and integrity of its own, the evocative Preamble being its identity card. It cannot be made to lose its identity in the process of amendment.

In three respects at least, the Swaran Singh Committee's conclusions aim at altering or destroying the basic structure of the Constitution. First, they propose to overthrow the supremacy of the Constitution and install Parliament as the supreme authority to which the Constitution will be subservient. The instrument will become the master, and the master the instrument. Secondly, the proposals seek to enact that the eternal values enshrined as Fundamental

Rights in the Constitution will no longer be justiciable or operate as brakes on legislative and executive action in most fields. Thirdly, they will result in the enforcement of laws which are held unconstitutional by a majority of the Supreme Court or the High Court.

The proposal is that the present article 31C should be so amended that any legislation which is intended by the Government to be in pursuance of the directive principles of State policy should not be called in question on the ground that it violates any of the Fundamental Rights except the rights conferred upon minorities and backward classes. In this context, I do not have in mind the right to property — in fact, it may be better for the future of India if the remnant of the right to property is wholly removed from the chapter on Fundamental Rights so as to put an end to the perpetual and deliberate distortion of the issue of the basic human freedoms by snide references to the right to property. Since, presumably, the Government would be acting, or purporting to act, most of the time in pursuance of the directive principles of State policy, most of the laws, however arbitrary and authoritarian, would be said to be related to those principles.

The consequence under the Committee's proposal would be that the priceless human freedoms, including the rights to life and personal liberty, freedom of speech and expression, the freedom to form associations and assemble peacefully and to move freely throughout the territory of India, and the very foundation of republicanism, *viz.*, the right to equality before the law, would virtually stand abrogated. **At worst, only the corpse of the Fundamental Rights would remain embalmed in the Constitution; at best, they would remain in suspended animation most of the time.**

Our Constitution envisages a true and noble democracy and ordains that the objectives of social justice should be achieved without stifling freedom under the law and the dignity of the individual. Part III of the Constitution enumerates the Fundamental Rights and Part IV sets

out the directive principles of State policy. The directive principles are the *directory ends* of government, while the Fundamental Rights are the *permissible means* for achieving those ends. The permissible means are expressly set out, because men dazzled by the legitimacy of their ends seldom pause to consider the legitimacy of the means. The conviction underlying the Constitution is that an honest and competent government should be able to achieve the directory ends by the permissible means. The Swaran Singh Committee seeks to subvert this constitutional scheme by providing that the end justifies the means—any means.

Another part of the proposals relates to curtailment of the powers of the Supreme Court to enforce Fundamental Rights under article 32 and of the High Courts under article 226 to issue writs, directions and orders. It will result in rudely disturbing the balance between the executive, the legislature and the judiciary, and the judiciary will be relegated to the background.

The proposal to deprive the Supreme Court and High Courts of their writ jurisdiction under article 32 and article 226 in revenue and other matters can be justified only after Tribunals are first established of such calibre and integrity as to inspire public confidence. It would be a grave mistake to amend the Constitution first before such Special Tribunals start functioning and even before the laws are passed constituting such Tribunals.

The Swaran Singh Committee suggests that the constitutional validity of a Central Act or Central rules and regulations should be allowed to be challenged only in the Supreme Court and not in the appropriate High Court. Two-thirds of the laws in force in India today consist of rules, regulations and bye-laws made by the bureaucracy.

To say that the High Court should be disqualified to pronounce upon the validity of the Central Acts and rules which are in force in the State is to effect a massive devaluation of the highest Court in the State. Further, having

to go to the Supreme Court in every such case would involve pointless trouble and waste of time for citizens, and prohibitive costs for the poor.

The other proposal is that where there is an alternative remedy, no writ, direction or order shall be issued by the Court. The correct criterion should be alternative adequate remedy. For instance, there have been cases where even wholly owned Government corporations have been wrongly assessed by the Income-tax authorities to pay taxes amounting to crores of rupees. In such a case there is an alternative remedy under the Income-tax Act, *viz.*, an appeal to the Appellate Assistant Commissioner. But the remedy is not adequate where no stay of recovery is granted. Surely, in such cases the Court should have the power to interfere.

The Committee further recommends that in a writ petition the Court shall not have the power to "issue any interim stay or injunction . . . unless prior notice of the proposal to move the Court in that behalf is served on the respondent". This would be unjust to the citizen unless the law at the same time prohibits the executive authority from taking any further steps after receiving the notice of the application to move the Court. But if the executive authority is at liberty to act otherwise, the citizen would be wholly without legal redress.

A typical case in point is where a man is threatened with a notice requisitioning his flat. If he has to tell the executive in advance of his intention to move the Court before he is dispossessed, and such notice galvanizes the authority into action, where would the houseless citizen stay during the years that the litigation takes to run its prolonged and painful course? It is only the victim of executive excesses who knows the value of legal redress.

Finally, the indefensible proposal regarding the special majority by which a law can be struck down by the Court as being unconstitutional. The Swaran Singh Committee proposes that as regards any case involving the question

of the constitutional validity of a law, a Bench of at least seven judges must sit in the Supreme Court and of at least five judges in a High Court, and that no law can be invalidated except by the decision of "not less than two-thirds of the number of judges constituting the Bench".

The proposal violates the rudiments of arithmetic. Neither two-thirds of 5 nor two-thirds of 7 is a whole number, and a fraction of a judge cannot vote for or against the validity of a law. Larger Benches are not practicable, except in the rarest of cases. Consequently, what the proposal really amounts to is that four-fifths of the normal High Court Bench and five-sevenths of the normal Supreme Court Bench alone can strike down a law.

In substance, it means that a law declared and held to be unconstitutional and invalid by a majority (of less than two-thirds) of the Supreme Court or the High Court would still be enforced by the executive against the citizens. This is patently destructive of one of the basic features of the Constitution and is violative of the rule of law.

Lord Acton, the most learned of historians, after a profound examination of historical processes, came to the central conclusion that within every democracy there is a conflict between abiding law and arbitrary power:

> "The fate of every democracy, of every government based on the sovereignty of the people, depends on the choice it makes between these opposite principles: absolute power on the one hand, and on the other the restraints of legality and the authority of tradition. It must stand or fall according to its choice, whether to give the supremacy to the law or to the will of the people; whether to constitute a moral association maintained by duty, or a physical one kept together by force."

We, the people of India, made our choice in 1949. Twenty-seven years later, we are invited to make the other choice.

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