SHOULD WE ALTER OUR CONSTITUTION?

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By

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Lord Macnaghten, one of the wisest and most learned of judges, observed towards the end of his life that he had given all his days to the study of the law and was satisfied that there was nothing in it.

You may or may not agree with the Irishman who said, "There is no such thing as a large whisky", but there can be no two opinions on the point that there is no such thing as a perfect law. Doubtless the law is imperfect, and it would be imperfect even if it were made by a committee of archangels.

The reason is that such is the infinite variety of situations in which justice is required to be done between citizen and citizen or between citizen and the state that situations are bound to arise in which justice begins only where the law ends. To expect a perfect system of justice based on rules of law is no more rational than to hope to balance soap bubbles on hat-pins.

However acute the recession, there is one activity which thrives and is in a state of perpetual boom—the law-making industry. What the nation needs more than anything else by way of legal reform is assurance of some respite from the Niagara of Rules and Notifications, Ordinances and Acts. No amendment of the law will boost the morale of the people so markedly as an assurance that no new laws would be passed for a stated period. Rulers and Bureaucrats perpetually mistake change for progress and amendment for improvement.

Whatever alterations we may or may not make in our legal system, we should never deprive the Supreme Court and the High Courts of their power to interpret the Constitution and other laws, and to give relief to the citizen under Article 32 or 226 of the Constitution against the executive. Lord Atkin, delivering the judgement of the Privy Council in *Eshugbayi Eleko's* case (1931 A.C. 662, 670), observed:

> "In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality

of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive."

Our Supreme Court has repeatedly quoted this passage with approval and pointed out that the same jurisprudence has been adopted in this country on the basis of which our courts exercise jurisdiction.

Even in the days of foreign rule the courts enforced the principle that any action by the executive against the citizen would have to be supported by law and that a court of law could go into the cases of detention and other interference with personal liberty, e.g. the right of free speech and free press. We should continue this elementary principle of a free democracy when we are governing ourselves. The Court's scrutiny is necessary, however limited, under the present laws which provide in effect that anyone can be put in jail without a trial, that no citizen can plead a right to liberty based on common law, natural law or rules of natural justice, that a Government official may not be permitted to disclose even to a court of law the grounds for detention, and that anyone who has been released by a court may be re-arrested and re-

imprisoned without a trial for undisclosed reasons which may be the same reasons for which he was first detained before his release by the court.

The Government is entitled to enforce the law that public order should be maintained and internal security should be preserved. But the question is whether a citizen should have the right to dissent, and the press should have its freedom, both to be exercised in such a way that public law and order and internal security are not in the least prejudiced. If there is a dispute on this point between the citizen and the state, surely the court of law alone can decide the issue.

The importance of having an independent judiciary to whom citizens can go for redress against the excesses of the executive may be illustrated by two seasonable examples. Maharashtra is a comparatively well-regulated State and has an able, cultured and reasonable man as its Chief Minister. Yet there is an Order of the Police Commissioner in Greater Bombay which prevents any assembly of five or more persons without the Police Commissioner's permission, irrespective of the question whether the meeting is public or private, irrespective of the place

where it is intended to be held, and irrespective of the purpose of the meeting. The net result is that tea or dinner parties, social gatherings, funeral assemblies, college lectures, board meetings and countless other meetings of five or more persons inevitably constitute millions of breaches of the Order since its inception. On December 18, 1975, the Bombay High Court struck down the Order as invalid and *ultra vires*. Next, the unreasonableness of the executive mind is well exemplified by the argument urged on its behalf before the Bombay High Court in *Bhanudas Krishna Gawde*'s case (77 Bom. L.R. 500, 602-3):

> "In fact, (counsel) went so far as to suggest that if the Conditions of Detention Order contained a clause that detenus are not to be allowed to eat any food, it could not be challenged and the petitioner would have no remedy by way of a petition under Art. 226 as long as the Presidential Order suspending the enforcement of the fundamental right under Art. 21, of which the right to eat is a part, is in force. Emboldened by this proposition of (counsel), which we cannot help observing is a startling proposition, the learned Government Pleader interposed and said that even if the Conditions of Detention Order were

to authorise that the detenu should be shot, such a clause could not be challenged during the subsistence of the Presidential Order."

MPs and MLAs represent their constituencies, but the High Court of a State stands for the whole State and the Supreme Court for the whole country. These Courts decide the fierce controversies which in some other countries are determined deplorably by the arbitrament of force; they maintain the most fundamental equilibriums of our society; they are the agency of a sovereign people to expound the Constitution and to ensure that its mandates are respected.

Since the Courts are the trustees of the law and charged with the duty of securing obedience to it, they have to stand high above the storms. They must necessarily judge the validity of other men's actions and act as a brake on their conduct. Wise men who are so judged and restrained yield with a grace to the judicial process which is the only way devised by the wit of man to maintain the rule of law. Every time a judge vindicates the rights of the citizen against repressive authority, he really protects the integrity of the Constitution.

When the history of our times comes to be written, the one institution which will be found to have covered itself with honour and earned the nation's lasting gratitude will be the judiciary.

In April 1973 the Supreme Court decided in *Kesavananda Bharati's* case that Parliament, in exercise of its power to amend the Constitution, cannot alter or destroy the basic structure or framework of the Constitution. A recent attempt to get the Supreme Court to overrule that decision and hold that Parliament has unlimited power of amending the Constitution, has happily failed.

Every thinking citizen should know the effect of *Kesavananda's* case, because our unfolding future depends crucially on constitutional amendments. In *Kesavananda's* case it has been expressly held that the right to property is not a part of the basic structure of the Constitution and, therefore, any amendment can be made to the Constitution in total disregard of the right to property. Thus, Parliament is at full liberty to make constitutional amendments or pass other laws for benefiting the poor or otherwise effectuating economic justice. It was further held in that case that Parliament can amend any part of the Constitution subject only

to one restriction, viz. that the power cannot be used to alter or destroy the basic structure or framework of the Constitution.

There can be little doubt that the following are among the essential features which go to make up the basic structure of the Constitution:

1. *The supremacy of the Constitution.* Ours is a "controlled constitution" *par excellence.* All institutions, including Parliament, are merely creatures of the Constitution and none of them is its master.

2. *The sovereignty of India.* This country cannot be made a satellite, colony or dependency of any foreign country.

3. *The integrity of the country.* The unity of the nation, transcending all the regional, linguistic, religious and other diversities, is the bed-rock on which the constitutional fabric has been raised.

4. *The republican form of government.* India cannot be transformed into a monarchy.

5. *The democratic way of life as distinct from mere adult franchise.* There is a guarantee of

fundamental rights to ensure justice—social, economic and political; liberty of thought, expression, belief, faith and worship; and equality of status and opportunity.

6. *A state in which there is no state religion.* All religions are equal and none is favoured.

7. *A free and independent judiciary.* Without it, all rights would be writ in water.

8. *The dual structure of the Union and the States.* It permits centralisation and de-centralisation to co-exist.

9. *The balance between the legislature, the executive and the judiciary.* None of the three organs can use its power to destroy the powers of the other two, nor can any of them abdicate its power in favour of another.

In short, *Kesavananda's* case ensures that India shall continue to remain a truly free democracy and a sovereign republic unifying separate States.

A paper containing "Some Suggestions" for amending the Constitution has gained wide circulation and has been adversely commented upon. It is

eminently in the public interest and in the Government's own interest that constitutional amendments should be the subject-matter of an open public debate and not of a whispering campaign. According to one journal, the paper "is understood to have the blessings of some of the Congress luminaries". I hope and trust this is not correct. The note contains proposals for the most far-reaching and disquieting changes in the basic structure of our Constitution.

The present Westminster system of government under which the chief executive of the country is the Prime Minister with Ministers chosen from among the members of Parliament is proposed to be replaced by the presidential system of government under which the President shall be the chief executive of the nation. The President would be elected directly by the voters at the time of the parliamentary poll.

This is not objectionable. My own view is that for India the presidential form of Government is preferable to the present system, provided a fair balance of power between the executive, the legislature and the judiciary is maintained. An acceptable presidential form of Government can certainly be introduced by

way of amendment of the Constitution without altering its basic structure.

However, the presidential system propounded by the paper is clearly undesirable, because it envisages a President who will be virtually uncontrolled by the Constitution or any other agency. The paper expressly mentions that our President shall "enjoy more authority and powers than even the US President . . . All the powers that are exercised by the US President and all those today exercised by the Union Cabinet will be exercised by the President."

The status and powers of Parliament will be substantially reduced. "The Council of Ministers shall be responsible and accountable to the President . . . and unlike in the USA the Legislature will not be too independent of the Executive."

The most questionable change is that proposed to be made in the judiciary. There will be a "Superior Council of the Judiciary". The President will be the Chairman of the Superior Council, of which the other members will be the Minister for Law and Justice, four persons nominated by the President, four persons elected by Parliament, the Chief Justice and two other

judges of the Supreme Court and two Chief Justices of the High Courts. Thus, ten out of the fifteen members of the Superior Council will be clearly amenable to the influence of the President and the party in power.

This Council is to be given the authority to interpret the Constitution and other laws, and is also to be empowered to pronounce upon the validity of any legislation. "The decision given by this Authority shall be final and binding on all Courts. Thus the Court's jurisdiction to decide these matters is automatically taken away." It is further proposed that the Superior Council or its Committee should be empowered to review the conduct of Supreme Court and High Court judges and their performance, to hear complaints against them, and to recommend to the President removal or even dismissal of any of the judges. This will reduce the higher judiciary to the level of (to quote Justice Staple) "mice squeaking under the Home Minister's chair".

Article 13 of the Constitution, which declares laws to be void if they are inconsistent with the fundamental rights, is proposed (according to that paper) to be deleted and it is sought to be provided that "no

law shall be called in question in any Court on the ground of legislative competence or any other ground". If there is a dispute as to the correct interpretation of any of the provisions of the Constitution, the interpretation given by Parliament by way of a resolution shall be final and conclusive and binding on everyone including the Supreme Court and the High Court.

Article 32 of the Constitution, which guarantees the right to move the Supreme Court for enforcement of the fundamental rights, is proposed to be wholly deleted.

The result of the proposed changes will be that the Supreme Court and the High Courts will become there appendages to the administration; and basic human freedoms, including freedom of religion and the rights of all minorities—religious, cultural, linguistic or regional, will cease to exist as guaranteed rights and will be unenforceable in the Court.

Further, the powers of the State will no longer be secure. If Parliament passes a law in respect of a subject which is exclusively assigned to the States under the Constitution but if Parliament resolves that such a law is valid, the law would automatically become valid and no court would have the power to

declare it to be void. The Constitution can thus be totally silenced by a majority in Parliament.

Leaving aside hypothetical examples, let us take the case of the Constitution (Forty-first Amendment) Bill which has already been passed by the Rajya Sabha in August 1975 and now awaits introduction in the Lok Sabha. It provides in effect the following :

1. No civil proceedings will lie against the President or the Prime Minister or the Governor of a State during his term of office in respect of any act done by him in his personal capacity whether before or after he entered upon the office. In other words, these dignitaries are placed above the civil law during their term of office in respect of their personal acts done before or after assuming office. A man may incur heavy debts or commit torts involving grave damage to fellow citizens but he has total immunity from civil proceedings during his tenure of office although the office has nothing to do with the debts or the torts.

2. As regards criminal law, lifelong immunity is granted to the same three categories of

dignitaries in respect of any and every crime committed before assuming office or during the term of office. If a man has sufficient political support to hold one of the three offices for any period of time however brief, he gets total immunity for the rest of his life from all criminal proceedings whatsoever. Pending criminal proceedings for any crime cannot be continued after he assumes one of the three offices.

This Bill has no parallel in civilized jurisprudence. An independent court may well hold that the proposed amendment is void because it alters the basic structure of the Constitution inasmuch as it destroys the first principle of republicanism, viz. equality of all citizens before the law. But if the question of its validity is to be decided, not by the judiciary but by another body like the Superior Council of the Judiciary where the majority represents the very party which has introduced the amendment, that body would naturally uphold the amendment. It is an elementary principle of jurisprudence that no man can be a judge in his own case and that no man, however highly placed, can decide upon the validity, or the right construction, of his own laws.

Every right-minded person would agree that the integrity and unity of the country, and the secular character of our state, which have been our greatest accomplishments since 1947, should never be disturbed.

"The Constitution of India is a charter of a peaceful, democratic, social revolution," as Mrs Indira Gandhi observed in February 1975 at the function held to celebrate the 25th Anniversary of the Constitution. She has further said, "Democracy vouchsafes freedom of political opinion, but this freedom does not include freedom to wreck democracy."

Once the implications of the proposed amendments to the Constitution are fully understood, it is difficult to believe that the Prime Minister with her background, her exemplary non-communal outlook, and her keen desire for national integration, would lend her support to the above proposals. The States and the minorities are bound to feel grave apprehensions at the prospect of the basic structure of the Constitution being held expendable. There can be no doubt that the proposals aim at drastically diluting the essence of our democracy.

In order to allay public fears it is eminently desirable that it should be publicly announced that these suggestions for amendment have not been sponsored by the Government.

An interesting case arose in the UK in early December 1975, which is very instructive on the necessity of clearing doubts in the public mind. A citizen challenged the administrative action of the Home Ministry relating to the revised licence fee for television sets. An eminent Q.C. who appeared for the Government said before the Court of Appeal, "If the Court interferes in this case, it would not be long before the powers of the Court would be called in question." The public and the press were greatly perturbed by the threat that the Court would have its wings clipped. Within four days the counsel for the Government apologised and made the following statement to the Court:

> "May I first make plain beyond any doubt that neither the Home Secretary nor anyone in his department, nor indeed anyone at all, instructed me or suggested to me that I should threaten this court in any way, or indicated to me, directly or indirectly, that if you were to

find against the Home Office the powers of the court might be curtailed."

That was a small affair involving a mere thoughtless statement by a counsel in Court. In our case, it is the entire structure of judicial powers and independence which is sought to be dismantled. How much more important it is, therefore, that there should be some formal pronouncement to assure the public that the proposals do not represent the official thinking of the Government of India and that there will be a free public debate before the Constitution is further amended.

We cannot remind ourselves often enough that the Constitution is intended not merely to provide for the exigencies of the moment but to endure through a long lapse of years; and that it was meant to impart such a momentum to the living spirit of the rule of law that democracy and freedom may survive in India beyond our own times and in the days when our place will know us no more.

Further, constitutional developments in India are not a matter of concern to our people alone. We constitute one-sixth of the human race and our choice between the two roads that diverge in the wood will

have an imponderable impact on the cause of democracy throughout the world.

In the words of Joseph Story, "It depends upon the present age, whether the national Constitution shall descend to our children in its masculine majesty, to protect and unite the country; or whether, shorn of its strength, it shall become an idle mockery, and perish before the grave has closed upon the last of its illustrious founders."

(Courtesy: "Illustrated Weekly of India", Jan. 4-10, 1976)

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Published by M. R. PAI for the Forum of Free Enterprise
235, Dr. Dadabhai Naoroji Road, Bombay-400 001,
and printed at TATA PRESS Ltd., 414, Veer Savarkar Marg,
Prabhadevi, Bombay 400 025.

20 Feb. 1976