

FOR THIS WE STAND—XII

# ***Fundamental Rights***

**OUR PROTECTION AGAINST TYRANNY**

**Sriraj Meghrajji, M. P.**



**A SWATANTRA PARTY PUBLICATION**

The Supreme Court in its majority judgement (in I.C. Golaknath & others vs the State of Punjab, &c.), delivered on 27 February 1967, declared that it was not within the power of Parliament to abridge or take away a Fundamental Right incorporated in Part III of the Constitution of India.

A Bill by Shri Nath Pai — securing such power to Parliament — was introduced by him in the Lok Sabha on 7 April 1967.

A Bill by Shri Sriraj Meghrajji, — requiring that any Bill to amend Fundamental Rights must be passed by *two successive Parliaments* and that in the period between the two, and simultaneously with notifying the general election of the Lok Sabha, the President must cause the Bill, called 'Referendum Bill', to be published to the electorate, in the regional languages, — was transmitted to the Secretary, Lok Sabha, on 22 June 1967. The Bill was passed by the Committee on Private Members' Bills and Resolutions and tabled for introduction in the Lok Sabha. But as it had not been formally approved by the Party, the mover acquiesced in the request to abstain from introducing it.

A second bill, by Shri Sriraj Meghrajji — providing that any amendment of the Fundamental Rights must be the subject of a Referendum — was transmitted on 25 September 1967, for introduction in the Lok Sabha and was introduced on 1 March 1968. The recommendation of the President for the consideration of the Bill by the Lok Sabha (which was required as the Bill involved expenditure) was not however received until 10 July 1968.

In the meanwhile Shri Nath Pai's Bill had been referred to a Joint (Select) Committee and that Committee recommended the passing of the Bill, as amended, in its report dated 13 July 1968. Shri Sriraj Meghrajji's Bill was therefore recast as an amendment to Shri Nath Pai's Bill and transmitted to the Secretary, Lok Sabha, on 21 August 1968.

The text of Shri Nath Pai's Bill and the amendment moved to it by Shri Sriraj Meghrajji are reproduced at the end.

## Fundamental Rights

### OUR PROTECTION AGAINST TYRANNY

Sriraj Meghrajji

Mr. Speaker, I share Shri Nath Pai's faith in the people of India and it is for this very reason that my amendment provides for a Referendum.

Before I go to that, I should like to make one or two observations on the points made by my learned friend, Shri N. C. Chatterjee. He says that article 368, on the amendment of the Constitution, has the words: "the Constitution shall stand amended". (Meaning that every part of it is amendable.) I may point out that actually the words are: "the Constitution shall stand amended in accordance with the terms of the Bill." Elsewhere in the Constitution, the Constitution provides what the terms of the Bill may be or what they may *not* be. As to Constitutions being vital, living, dynamic instruments, nobody has ever denied it. When Shri Nehru said that he had not made the Constitution 'so rigid', he meant surely that he had made it 'partly rigid', that there was some rigidity about it. A house can be repaired and renovated but in repairing or renovating a house one does not change the foundations of the house. That is the point. I hope hon. Members will bear it in mind.

Sir, the Constitution, the Polity of India, stands at a fork in the road. The passage of the Bill presently before this House... or its rejection at the hands of Parliament... will determine for all time the future of democracy in this country.

The Constitution of a country is its supreme fundamental law. But a political or statutory Constitution does not embody and exhaust the whole of the fundamental social law or Constitution of a people or society. The political Constitution, whether written or unwritten, is but a part of the *total social constitution*. The latter, which governs all social and organic relationships, is a product of long evolution, the result of generations of social experience and wisdom. It includes in it such elementary things as the respect for parental authority. We do not include these things in a written Constitution. But our not doing so, does not invalidate them.

A written Constitution simply codifies a part of the fundamental constitution. Its primary concern is the superstructure of society, the body politic, rather than its foundations. But some written Constitutions go further than this. They touch the foundations of society. Ours is one. Not all Constitutions embody a

declaration of Fundamental Rights. But this does not mean that those societies do not possess Fundamental Rights or that they are not recognised and enforced by their legislatures and their judiciaries.

### Why Fundamental Rights form a Separate 'Chapter'

The wise and farseeing framers of the Constitution of India saw fit to delve into the foundations of society, ... to pick out what they thought was essential (*Hear, Hear*), ... and they included a statement of Fundamental Rights in our Constitution. The object of their doing so was to give these rights *preeminence*; ... to invest them with *an aura of sanctity*; ... to guide, curb, and inhibit the future rulers of society; ... and to make these rights—whether of majorities, minorities, or individuals, — justiciable in the courts of law. *These natural rights belong to the people and are a part of the fundamental constitution of any civilised society.* The object of selecting these particular rights and codifying them was not to expose them to the power of passing parliaments but to *safeguard* them from legislative interference (*Hear, Hear*).

Otherwise, what was the object of codifying them at all? Since most of these rights are natural rights in any democratic society, the future legislatures might have been trusted to respect them ... as the judiciary was bound to enforce them. It is, therefore, clear that the object was to place these Fundamental Rights beyond the reach of the ordinary legislative process. ....

This object is fully revealed and categorically stated in Article 13, ... the fateful article, of the Constitution.

As I have said, the Constitution is not exhaustive. Neither is the Part on Fundamental Rights. If I may give a homely example, ... the love of a mother for her child is something natural and fundamental. It does not find a place in Part III. But if it did, it would not mean that it would then come within the reach of Parliament and that it could be snatched away by a two-thirds majority or even by unanimity. Nor do I believe that any judge worth the name would fail to recognise, uphold, and enforce such a fundamental thing in society, whatever the consequences (*Interruption*).

**Shri Nath Pai:** Why are you interrupting? Mr Speaker, I want to listen to him carefully. How can we hear when members keep up running dialogues? I want to listen to this speech.

**Mr. Speaker:** Order please.

### Historic Reasons

**Shri Sriraj Meghrajji:** The historic reasons for in-

cluding a statement of Fundamental Rights in our Constitution has been most cogently dealt with by Shri Justice Hidayatullah (as he was then) in the Supreme Court judgement in the Golaknath case — an epochal judgement which I hope will be read by every lover of freedom and democracy in India.

I may quote here from the 1928 Report, on this subject, by Pandit Motilal Nehru:

"It is obvious", he said, "that our first care should be to have our Fundamental Rights guaranteed in a manner which will not permit of their withdrawal *under any circumstances.*"

Almost 20 years later ... this high, once-distant, goal was at length achieved. On 30th April 1947, Pandit Jawaharlal Nehru, proposing the Interim Report on Fundamental Rights, for adoption by the Constituent Assembly, said:

"A fundamental right should be looked upon, not from the point of view of any particular difficulty of the moment, but as something that you want to make *permanent* in the Constitution."

Note the distinction between things permanent and things that can be amended.

### Justice Hidayatullah

Now, what are the things permanent which find a place in the Third Part of our Constitution? I cannot do better than quote Shri Justice Hidayatullah. Summing up the judgment in the Golaknath case, he said:

"Our liberal Constitution has given to the individual all that he should have — freedom of speech, of association, of assembly, of religion, of motion and locomotion, of property and trade and profession. In addition, it has made the State incapable of abridging, or taking away, these rights to the extent guaranteed, and has itself shown how far the enjoyment of those rights can be curtailed. It has given a guaranteed right to the person affected to move the court. The guarantee is worthless if the rights are capable of being taken away."

These are the rights of the people, given by the people, unto themselves in their Constituent Assembly ... Who, hon. Members, shall take them away?

### The Late Dr. B. R. Ambedkar

Let us turn to the avowed intentions of the Constituent Assembly itself. The Hon'ble Dr. B. R. Ambedkar, while explaining that the procedure for amending the Constitution was simple, expounded on the necessity of curbing the powers of Parliament.

He said:

"In considering the Articles of the Constitution, it (the Constituent Assembly) has no eye on getting through a particular measure. The future Parliament if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some article of the Constitution which has acted as an obstacle in their way. *Parliament will have an axe to grind: while the Constituent Assembly has none.*" (Constituent Assembly, 4 November 1948.)

**Shri Ranga:** This is the distinction which Shri N. C. Chatterjee has forgotten—conveniently.

**Shri Sriraj Meghrajji:** I beg to draw the pointed attention of hon. Members to the distinction made between the nature and spirit of a Constituent Assembly and that of a Parliament. This is a distinction well-known and repeatedly emphasised. The purpose of the framers of our Constitution was that the distinction *must endure as long as the Constitution itself*. I submit that the effect of this Bill... will be to arrogate the functions of a Constituent Assembly to the existing legislatures of the day.

#### The Power to Amend

This idea, of thus empowering the existing legislative bodies, had not escaped the broad vision of the Founding Fathers of the Constitution. They were not unaware that the legislative bodies of the land would be elected bodies, ... composed of the chosen representatives of the people. They did reserve certain amending powers to these bodies collectively. But they, in their corporate wisdom, ... acting under the mandate of the whole people, ... *did not bequeath* to Parliament or to the legislative bodies collectively, ... the power of abridging or abrogating Fundamental Rights. This was made explicit by Dr. Ambedkar during the discussions on Draft Article 304 (now Article 368). He said:

"If the future Parliament wishes to amend any particular article, which is *not mentioned in Part III*, or Article 304, all that is necessary for them is to have two-thirds majority. Then they can amend it." (Constituent Assembly, 17 September 1949.)

Had there been any intention to vest the power collectively in the existing Parliament and State Legislatures... Part III would have been included in the proviso to this Article, — as is now being sought to be done. Instead, the Fundamental Rights were placed beyond the reach of amendment by the legislative

process. But let it be noted that the articles in Part III already do contain built-in provisions for the legitimate curtailing of Fundamental Rights.

Sir, the life and health of democracy depend not so much on written Constitutions as on traditions and the enjoyment of freedoms such that are embodied as 'Fundamental Rights' in our Constitution. The Supreme Court, after deliberating the Constitution, has concluded that the State is "incapable of abridging or taking away these rights to the extent guaranteed". In other words, the people may perhaps yield up a right of their own volition, but even the supreme legislature, or all the legislatures put together, do not have the power of depriving them of it without their consent (*Hear, Hear*)... That is to say, *so long as national supremacy and the springs of power are conceived and deemed to reside in the people*, and so long as India has a *parliamentary democracy* and not a *parliamentary autocracy* (*Hear, Hear*). Parliamentary supremacy is only safe where the democratic tradition is deep — ingrained and unassailable. Therefore, comparisons with other countries,—comparisons which ignore the governing factors and circumstances of their whole polity and society, — are not merely naive and irrelevant, but highly dangerous.

Sir, certain Fundamental Rights may be inscribed in the Constitution, but they *transcend* the Constitution. They are now, if they were not before, part and parcel of the fundamental constitution and of our self-given way of life. They are inherent in the people. They are their birthright (*Hear, Hear*). If they are to survive, without danger from the variable five-yearly parliamentary preponderances and pre-dispositions, — indeed from the mid-term fluctuations of legislative majorities, — they must be shielded from the passing tempers and prejudices of the times and have a sanctity *above the Constitution itself*. This is clearly the whole trend, the anxiety and motivation of the judgement of the Supreme Court, — ... which body cannot be too highly praised as the repository and vigilant guardian of the Law and the Constitution (*Hear, Hear*). The independence of the judiciary, also a fundamental provision, is one of the brightest ornaments of our national polity (*Hear, Hear*).

Sir, we, Members of Parliament, have been elected to protect and promote the people's interests, ... not to abridge or derogate their rights. We have sworn to uphold the Constitution. How can we, ... by what right can Parliament, turn itself into a sort of Constituent Assembly and so assume to itself the powers which the Constitution has expressly denied to it? We have neither asked for, nor been given, such a mandate. Sir, I ask:

*"Has any hon. Member put the issue to his electorate in clear and explicit terms that, if elected, he*

*will try and procure for Parliament the comprehensive power to amend, not this or that right, but the entire gamut of Fundamental Rights embodied in Part III of the Constitution?"*

If any one has, ... he alone has the right to speak in support of this Bill.

#### Parliament — Its Limitations

I grant that Parliament, the national legislature, is supreme ... but only so in the legislative sphere, just as the national executive and the national judiciary are supreme in their respective spheres. ... I deny that Parliament is supreme in India. It has no such warrant from the people. It can only attain such supremacy by the trespass and usurpation of the rights which, under the Constitution, belong to and are vested in the *Republic of India*. I am sure, no member will claim that *Parliament* and *Republic* are interchangeable terms.

I therefore hold, and most respectfully submit that the basic features of our Constitution, including the Fundamental Rights enshrined in it, cannot be amended by the legislatures of the day. The Parliament of the day ... means the Party in power, ... which in turn means the Government of the day. No Government, — and I do not mean the present Government, — but any Government, however much to the right or to the left, — should be enabled to undo what the Constituent Assembly has so painstakingly done.

But if I am wrong in what I have submitted, and it has always been open for Parliament to exercise or give itself a power *it does not at present possess*, then must Article 13 be deprived of all meaning and be redundant. Clause (2) of this article says:

“(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”

Here ‘law’ cannot mean only the ordinary laws enacted by public authority, since any law which contravenes *any part whatsoever* of the Constitution would be *ultra vires* and void. It must therefore specifically include ‘constitutional law’. Else, this clause would have been redundant *ab initio*.

In the matter of the constitutional innovation introduced by Article 31B, which bars the jurisdiction of courts from the Acts placed under the shelter of this Article, Shri Justice Hidayatullah had this to say (in the judgement I have referred to before):

“By this device which can be extended to other spheres, the Fundamental Rights can be completely emasculated by a two-thirds majority even though

they cannot be touched in the ordinary way by a unanimous vote of the same body of men. The State Legislatures may drive a coach and pair through the Fundamental Rights and the Parliament by a two-thirds majority will then put them outside the jurisdiction of the Courts. Was it really intended that the restriction against the State in Article 13(2) might be overcome by the two agencies acting hand in hand?”

That is to say, an ordinary Act *unanimously* passed if it contravenes a Fundamental Right would be void. But passed as a *Constitution Amendment Act*, by just *two-thirds majority*, it would become law. Shri Justice Hidayatullah went on to observe:

“If a halt is to be called, we must declare that right of Parliament to abridge or take away Fundamental Rights. Small inroads lead to larger inroads and become as habitual as before our freedom was won.”

Put in another way, it can be said that the process can gradually take away the freedom we have so painfully won.

#### The Constitution — Sheet-anchor or Plaything?

Sir, the Constitution as it stands, is the sheet-anchor of our freedom, of our democracy, and of Parliament. Of this sheet-anchor the weightiest part, the most valuable part, is the fundamental provisions. The vital question before this House is whether the Constitution should be the *sheet-anchor* or the *plaything* of Parliament. I cannot here resist quoting Shri M. C. Setalwad (who has been hailed as one of the great jurists of the English-speaking world). He said:

“Amendments of the Constitution have been too frequent and if I may use the expression, without any disrespect to Parliament, too irresponsible.”

His proposal is to replace the *two-thirds* majority by a *three-fourths* majority, ... a suggestion which I strongly commend as a fit subject for the serious consideration of the House.

**Shri Surendranath Dwivedy:** He had supported the Bill (*Interruption*).

**Shri Nath Pai:** When you are quoting Mr Setalwad, you may quote also what he has said about this Bill.

**Shri Virendrakumar Shah:** Let him quote as he likes (*Interruption*).

**Mr. Speaker:** Order please. Let him have his say.

**Shri Sriraj Meghrajji:** Sir, I put it to the supporters of the Bill that the present is the most inopportune time they could have chosen. I do not believe that the object can be simply to provoke a

debate, or a confrontation between the legislative and judicial branches of government, which would put a further strain on the Constitution, in these troublous times, when our whole attention and energy should be concentrated on keeping the country together and upholding the Law (*Hear, Hear*), ... on strengthening rather than weakening our constitutional and administrative institutions.

### Why this Bill?

Then, what is the need? ... I submit, Sir, that there is none. There is no particular need or practical measure in contemplation for utilising the new power now sought to be assumed by Parliament. Then where is the hurry? ... As I have said the articles on Fundamental Rights themselves contain built-in provisions for their modification. Are we then to open a door which at present does not need to be opened ... but which, once opened, cannot be shut?

We shall have opened the way, if not for this Parliament, then, for a future Parliament, ... and the Party which rules that Parliament, ... to do what Hitler did to the German Constitution. I am not being far-fetched. In the process we shall have made the national judiciary impotent. Even the able Mover of this Bill, Shri Nath Pai, cannot predict the future course and complexion of things. Let him not, then, lead us away from the shelter of the Constitution. He has himself, I believe, said that he finds no difficulty with the Constitution as it stands. On the contrary, he has claimed to be an ardent champion of Fundamental Rights. I therefore conjure him to support my amendment instead of his own Bill.

I do not say that an occasion may not arise for amending something in Part III of the Constitution. But I would still say and hope that the fundamental values of human life and society must remain. For example, Article 11 of the Japanese Constitution declares that the Fundamental Rights are *eternal and inviolable*. And Article 97 provides that these rights are *to be held inviolable for all time*.

### Let the People Decide

But if we are to alter the Fundamental Rights, ... then, it is my humble but most earnest submission, ... that the arbiter must be the people themselves (*Hear, Hear*). My amendment to the Bill provides for a Referendum. The device is known to other Constitutions, such as the Swiss. In Australia, *no part of the Constitution* can be amended without this recourse. Let the matter be put to the people themselves, in the simplest language, and unclouded by any other issue. ... Let them weigh the pros and cons.... Let

them judge and decide. It would be an exercise in real democracy.

Mr. Speaker, I thank you and the House for the patient hearing you have given me. I am afraid I am no orator. I beg of you, hon. Members, to search your hearts and minds. Should there not be *something basic and permanent* in the grand contract of the Constitution, by which *all the people of India* have consented to be governed? Let us not go down in history as the witting or the unwitting subverters of Indian democracy, and of civic rights and liberties, for which our people have so long struggled under an autocratic power. *I beg of you not to do this thing*. Let us not, in this Fourth Lok Sabha, incur the future woes and opprobrium of posterity. There is no pressing need for justification for this Bill. Then where is the hurry?

This is a matter calling for the most sober consideration. It is too momentous for routine or summary disposal. It is not, please do not let it become, a party issue. It is an all-time national issue, a matter for your *individual political conscience* and *sober statesman-like judgement*.

There are a fair number of us in this honourable House and Parliament, and a large body of intelligent and enlightened opinion in the country, that are deeply agitated by this proposal ... and dreadfully apprehensive of its ultimate consequences. Will you not consider it possible, hon. Members, that there may be good reasons for this anxiety and agitation? Will you not give yourselves time to ponder these reasons? I include in my appeal the hon. Mover of the Bill and the Treasury Benches. I remind you of the oath you have taken to uphold the Constitution. I beg of you to give plenty of time, and even more reflection, to this fateful measure, ... *which may seal the doom of democracy* in India.

And when you have considered the issue, ... I pray that you will be moved to relegate the Bill as it stands.... In so doing, you will be hailed and be acclaimed in history as the defenders and champions of a free democracy ... and a free society (*Hear, Hear*).

Sir, I now beg to commend my amendment to the Bill for the consideration of this honourable House.

**TEXT OF MR. NATH PAI'S BILL AS REPORTED  
BY THE JOINT (SELECT) COMMITTEE OF  
PARLIAMENT**

**A BILL**

further to amend the Constitution of India

BE it enacted by Parliament in the Nineteenth Year of the Republic of India as follows:

1. This Act may be called the Constitution (Amendment) Act, 1968.
2. In the Constitution,—
  - (a) in article 368, for the marginal heading, the following marginal heading shall be substituted, namely:—  
“Power to amend the Constitution”;
  - (b) the said article shall be renumbered as clause (2) thereof, and before clause (2) as so renumbered, the following clause shall be inserted, namely:—  
“(1) Parliament may by law amend any provision of this Constitution in accordance with the procedure laid down in this article”;
  - (c) in clause (2) as so renumbered, in the proviso, in clause (b), before the words and letters “Chapter IV of Part V”, the following shall be inserted, namely:—  
“Part III,”; and
  - (d) after clause (2) as so renumbered, the following clause shall be inserted, namely:—  
“(3) Nothing contained in article 13 shall apply to any law made in pursuance of this article”.

**TEXT OF THE AMENDMENT**

**MOVED BY SRIRAJ MEGHRAJJI, M.P.**

Page 2, for lines 1 to 14, substitute—

- (b) the said article shall be renumbered as clause (1) thereof, and after clause (1) as so renumbered, the following clause shall be inserted, namely:—  
“(2) In the case of a Bill seeking to amend any of the Provisions relating to fundamental rights contained in Part III of the Constitution—
  - (i) after the Bill has been passed by the House of Parliament in the manner specified in clause (i) and presented to the President for his assent, the President shall, before giving assent to the Bill, ascertain the views of the electorate on the proposed amendment through a referendum which shall take place during a period when the Houses of Parliament are adjourned other than the period in which the elections to the House of the People take place;
  - (ii) if the electorate, through the same referendum, approves the proposed amendment, the President shall give assent to the Bill; and
  - (iii) Parliament shall, by law, make provision with respect to all matters relating to, or in connection with the referendum and such a law shall also be amended in the manner specified in clause (i).’