

Revision of the Constitution

S. V. KOGEKAR

R. R. KALE MEMORIAL LECTURE, 1976

**Gokhale Institute of Politics and Economics,
Poona 411 004**

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REVISION OF THE CONSTITUTION

I

I am thankful to the authorities of the Gokhale Institute of Politics and Economics for inviting me to deliver this lecture in honour of the founder of the Institute. It showed remarkable foresight on the part of the Late Rao Bahadur R. R. Kale to have thought of founding a Research Institute of this kind at a time when whatever research work was being done in the field of economics or politics was confined to a few universities which had established teaching departments in these subjects. Even there the emphasis of research work was on organising whatever material was readily available in the library rather than on collecting and analysing fresh data on the basis of field work which became the distinguishing feature of much of the work at this Institute. The reputation which the Institute has acquired through the years as a national centre for the study of social and economic problems is due as much to the initial impulse provided by the founder, as to the life-long work done here by Prof. D. R. Gadgil, its first Director. Prof. Gadgil built up this institution from scratch, almost brick by brick, until it grew into a magnificent edifice which has become the envy of most universities and a model of dedicated scholarship for all of them. It is but fitting that the Institute should pay its tribute to the Founder in the form of this series of memorial lectures. I should like, with your permission, to join the name of the first Director to that of the Founder in paying my own humble tribute to their memory on this occasion.

Though the main thrust of the Institute's work has been in the field of economic studies, it is quite clear from the name it bears that it was not intended to remain confined to that field alone. Indeed Prof. Gadgil himself had played a remarkably active part in expounding the basis of Indian federalism and in offering thoughtful comments on the draft constitution when it was on the anvil of the Constituent Assembly in the initial years of our Independence. He had also evinced keen interest in the Panchayat Raj scheme when it was introduced in our state and the Gokhale Institute had taken the lead in organising training courses for the elected as well as official personnel entrusted with its implementation. With the active, expanding and even aggressive role of the state in the economic life of the community, the comprehension of reality requires the pursuit of economic studies in conjunction with, and not in isolation from, the study of political forces and developments. Perhaps this was the implicit assumption underlying the name given to the Institute by the Founder. May I, on this occasion, take the liberty

to express the hope that in the years to come, the Institute will be known as much as a centre for political studies as it is already widely recognised as a centre for economic studies.

I shall now turn to the theme of my lecture this evening, viz., the Revision of the Constitution.

II

Though this subject has been much in the news for the past few months, it is not generally realised that the revision of the constitution has been going on almost since its adoption. Even while framing its provisions, the Constituent Assembly was conscious of the need for changing them to suit changing conditions. In order to facilitate such changes, the method of its amendment was deliberately made simple and easy in comparison with the elaborate procedures laid down for the purpose in some other federal constitutions of the world. Except for a few specific matters where amendments were required to be ratified by half the state legislatures, all other Articles of the constitution were left to be amended by Parliament. The only limitation was that it should do so by a majority of not less than two-thirds of the members present and voting and by a majority of the total membership of each House.

Amendments to the constitution are necessitated by various factors. Some of them are purely procedural; others arise out of changes in the basic conditions of organised political life. In a written constitution there is also another factor of importance which demands a change in the constitution, viz., the judicial interpretation of its provisions. If such interpretation is at variance with the intentions of the framers of the constitution or inconsistent with the needs of the changing social situation, it can be corrected by means of a constitutional amendment. All these factors have had their influence in varying degrees on the amendments effected so far in our constitution.

By a curious coincidence, the first amendment to the constitution was passed by the Provisional Parliament, as it then was, on the first Saturday of June 1951; to-day—the first Saturday of June 1976—marks the completion of a period of 25 years since then. During this period there have been as many as forty occasions when the constitution was amended. The first twenty amendments took place in the first fifteen years of this period, while the last decade—which has been currently described as the decade of achievement—has seen the remaining 20 amendments, indicating a quicker pace of development of the constitution.

These 40 amendments have involved 148 Articles, and all the 10 schedules of the constitution. Of the 148 Articles, 23 are new additions as against the repeal of 24 old Articles, while 101 Articles, out of the original total of 395 Articles, have been subjected to some modification. Two schedules have been added to the original eight but one of them has been subsequently repealed. Leaving aside the purely consequential and minor amendments made in the

wake of the reorganisation of states in 1956, there have been changes in 60 existing Articles. 17 of these were amended more than once, 12 of them were amended twice, 3 three times, 1 five times and 1 six times. Similarly 4 of the ten schedules were amended more than once.

The 40 amendments made so far can be broadly classified as follows: 9 were primarily procedural, 13 arose out of the reorganisation of states and territories from time to time, 3 were concerned with changes in the 7th and 8th schedules, 4 affected the powers of the judiciary, 2 dealt with the question of privy purses and privileges of the I.C.S., while 9 affected fundamental rights which naturally include those relating to additions to the 9th schedule. Of course, this is not a precise classification of the amendments which becomes difficult on account of the overlapping character of many of their provisions.

It is pertinent to consider the effects of all these changes on the constitutional structure as it was originally fashioned by the founding fathers.

First and foremost among these is the decided improvement in the nature of the constituent units of our federal polity as a result of the reorganisation of states and territories and the elimination of the remaining pockets of foreign rule. Compared to the position at the time of the inauguration of the constitution, we now have a more rational arrangement of states. At the same time a number of small states have come into existence which from the standpoint of economic viability as it was understood at the time of Independence would not have qualified for that status. Obviously there has been a change in the approach to this question in the intervening period. Central assistance is no longer considered an aberration from the norm of financial propriety, and considerations of political stability take precedence over economic viability.

The scheme of distribution of legislative powers between the centre and the states laid down in the 7th schedule has undergone some change in favour of the centre, especially in respect of the regulation and control of industry and interstate commerce and in the matter of acquisition and requisitioning of property.

The time limit for the reservation of seats in the legislatures for the backward classes has been extended from the original 10 years to 30 years from the commencement of the constitution.

The original balance between the legislature, the executive and the judiciary has been substantially affected. The executive has been made stronger in its ordinance-making and emergency powers by restricting the jurisdiction of the judiciary in such matters. Similar is the case in election disputes involving the President and the Prime Minister. Parliament's position has been both weakened and strengthened: weakened by the claims of the judiciary to sit in judgment over the validity of constitutional amendments in addition to legislative enactments, and strengthened by the removal of several Acts from

the scope of judicial review in the context of the enforcement of certain fundamental rights. This latter development applies to several state enactments. Election disputes involving the Vice-President who is the Chairman of the Rajya Sabha and the Speaker of the Lok Sabha have also been removed from the jurisdiction of the courts. The appellate powers of the Supreme Court in civil cases have been somewhat restricted while the powers of the High Courts to issue writs have been somewhat enlarged so as to cover parties not located within their territorial jurisdiction, provided the cause of action arises within those territories.

Last but not the least, the original scheme of fundamental rights has been considerably modified by reason of the amendments to Articles 13, 15, 19, 31 and the addition of Articles 31A, 31B and 31C as also the 9th schedule. Apart from that, the interpretation of the provisions in that part of the constitution by the Supreme Court and the High Courts has given rise to a bitter controversy regarding the relative positions of Parliament and the Courts in our constitutional structure. It is this aspect of the matter which has given rise to the present debate on the revision of the constitution. It is necessary to go into it in greater detail in order to understand the nature of the problems involved in it.

III

In a federal constitution in which the powers of the federal or central government and those of the federating units or states are demarcated, both these sets of authorities have necessarily to function within the limits of that demarcation. If they outstep those limits, whether in the executive or in the legislative sphere, such acts run the risk of being challenged in the courts and declared unconstitutional and therefore null and void. It is thus for the judiciary to interpret the constitution and determine in the light of that interpretation the validity or otherwise of such acts. Apart from the distribution of legislative powers enumerated in the 7th schedule of the constitution, both the sets of authorities have also been limited in the exercise of their powers by the fundamental rights given in Part III of the constitution. Therefore no law (which by definition includes any ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law), even if it falls within the sphere clearly demarcated for the concerned authority under the 7th schedule, can be valid if it violates any of the rights guaranteed to the individual under Part III. Again, it is for the courts to decide on the constitutional validity of a law which may be challenged on the ground of violating any of the fundamental rights. In performing this function the judiciary helps to uphold the constitution which lays down the framework within which the executive and legislative authorities must exercise their powers.

It is quite possible that the interpretation of the relevant Articles of the constitution given by the judiciary in a case is considered quite wrong by the

legislature whose law has been declared unconstitutional. It has nevertheless to be accepted until the particular Articles in the constitution are suitably amended. Fortunately for us the method of amending the constitution is comparatively easy and except for the loss of time involved in the process no irreparable damage would result.

That, at any rate, was the accepted position regarding the working of our constitution from 1950 to 1967. During this period when progressive legislative measures passed with a view to bringing about agrarian reforms were declared unconstitutional on account of being in conflict with one or other of the fundamental rights, the constitution was suitably amended so as to override the negative veto exercised by the Supreme Court on such legislation.

The divergence between the views of the judiciary and the legislature regarding the interpretation of the fundamental rights was sharpened by a peculiar feature of the constitution namely, the inclusion in it of Part IV enumerating the directive principles of state policy. Unlike the fundamental rights these principles were not enforceable by any court. Nevertheless they were declared by the constitution as "fundamental in the governance of the country" and it was laid down as the duty of the state to apply them in making laws. (Art. 37). Now, right from the drafting stage of the constitution this Part was regarded as something of a joke. Here was a list of many 'pious resolutions' which could not be legally enforced; then what was the point in putting it in the constitution, the critic would ask. The reply of Dr. Ambedkar, the Chairman of the Drafting Committee of the Constituent Assembly, to such criticism was:

"We do not want merely to lay down a mechanism to enable people to come and capture power. The constitution also wishes to lay down an ideal before those who would be forming the Government. That ideal is of economic democracy. Have we got any fixed idea as to how we should bring about economic democracy?... Now having regard to the fact that there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking, with regard to the reaching of the ideal of economic democracy, to strive in their own way, to persuade the electorate that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act ... It is no use giving a fixed, rigid form to something which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing." (*Constituent Assembly Debates*, Vol. VII, p. 494).

That the existing property relations in the country would need to undergo a change if economic democracy was to be introduced here was quite obvious

from the wording of clauses (b) and (c) of Art. 39 which says that

“the state shall, in particular, direct its policy towards securing
 (b) that the ownership and control of the material resources of the
 community are so distributed as best to subserve the common good;
 (c) that the operation of the economic system does not result in the
 concentration of wealth and the means of production to the common
 detriment;”...

It was also implicit in the act of framing the constitution that the transformation of the community into an economic democracy was to be brought about by peaceful and lawful means.

It was probably believed by the framers of the constitution that the very fact that the directive principles were solemnly incorporated in that document would compel the judiciary to take them into account while interpreting other parts of the constitution.

Unfortunately when the time for testing came, the judiciary was found to be hopelessly behindhand in its thinking and methods of interpretation. As in the operation of the bureaucratic system after Independence, the judiciary too proved to be a prisoner of the old ways of thinking, hardened into a tradition under the British system of justice, rooted as it was in the sanctity of private property and the freedom of contract. But Britain has neither a federal nor a written constitution and the doctrine of judicial review does not operate there. No parliamentary legislation can therefore be set aside as being unconstitutional by the judiciary in that country. The role of the judiciary in a country like ours is far more important in the smooth functioning of the constitution. The interpretation of the fundamental rights as a part apart and the scant respect given to the directive principles of state policy indicated less than adequate appreciation of the differences between the two systems on the part of the judiciary in this country.

The expectations of the framers of the constitution were belied also in another matter closely connected with the state policy of bringing about economic democracy. That was with regard to Article 31 relating to the right to property. After declaring that no person shall be deprived of his property 'save by authority of law,' it was stated in that Article that the law authorising the taking over of property should either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation was to be determined and given. When Article 31 was proposed for adoption by the Constituent Assembly it was described as a kind of compromise which protected a person from being deprived of his property "save by authority of law," and likewise sought to protect the legislature from being frustrated in its attempts to introduce land reforms or undertake nationalisation of industry etc. by the judiciary by interpreting the adequacy of compensation by commercial criteria. Moving the adoption of this Article Pandit Nehru emphasised that it was for Parliament to fix the compensation

or specify the principles on which it should be determined. He said:

"There is no reference in this to any judiciary coming into the picture... Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in". (*Constituent Assembly Debates*, Vol. 9, p. 1193).

On the relative roles of Parliament and the judiciary in this context when the question of the abolition of zamindari was raised, he said:

"It is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of third House of correction. So it is important that with this limitation the judiciary should function... Ultimately the fact remains that the legislature must be supreme and must not be interfered with by courts of law in such measures of social reform. Otherwise you will have strange procedures adopted. Of course, one is the method of changing the constitution. The other is that which we have seen in great countries across the seas, that the executive which is the appointing authority of the judiciary begins to appoint judges of its own liking for getting decisions in its own favour, but that is not a very good method." (*Constituent Assembly Debates*, Vol. 9, pp. 1195-96. Italics ours).

These utterances must now be regarded as prophetic. The 'eminent lawyers, who advised Pandit Nehru regarding the role of the judiciary in this matter were proved wrong. The judiciary did come into the picture from time to time and gave its own interpretation of, *inter alia*, the concept of compensation, in declaring certain Acts or parts of them *ultra vires* of the constitution. But that did not mean a complete stultification of the process of peaceful economic change. At the most there was some delay in the pursuit of the directive principles in question due to the necessity of amending the constitution.

So long as the power of Parliament to amend any part of the constitution in accordance with the procedure laid down in Article 368 was conceded by the courts, the contingent exercise of their negative veto on progressive legislation was capable of being overridden by subsequent amendment, if the requisite majority was available to support such a measure in both Houses of Parliament. Such was, in fact, the position until 1967, before the Supreme Court handed down its decision in the Golaknath case.

IV

By a 6:5 majority judgment in that case, the Supreme Court denied to Parliament the power to amend the Articles dealing with fundamental rights. It was considerate enough to apply this ruling prospectively and not retrospectively. After 17 years from the commencement of the constitution and many judgments to the contrary, why that court felt called upon to declare

against Parliament's competence in this matter is difficult to explain. The decision was not only contrary to the intentions of the framers of the constitution as can be gleaned from the discussions in the Constituent Assembly, but also incompatible with the current and possible future compulsions of the social situation. The court was clearly arrogating to itself the right to prevent Parliament from functioning in its constituent capacity for the purpose of bringing the constitution in line with the contemporary needs and requirements of the community. At the same time it did not clearly indicate any other method within the framework of the constitution for that purpose. The implication of the decision clearly was that no change in the scheme of fundamental rights could be effected by any legal authority in the country until the court reversed its ruling. In other words, if a change in that scheme was called for, it would be so decided by the Supreme Court and not by the elected representatives of the people. In effect, the Supreme Court was thus inevitably entering the field of politics, claiming to interpret the needs and aspirations of the people better than could be done by their elected representatives. This was clearly an untenable view. The judiciary thus gave a big blow not only to the original balance of the constitution but also to the maintenance of its own independence in future.

One unfortunate result of this judgment has been to create distrust in the people's minds about the scheme of fundamental rights itself, posing it as a hurdle in the way of necessary social reform. If the judiciary treated the directive principles with scant respect, the danger was now created of the people's representatives doing the same to the scheme of fundamental rights, in their state of injured enthusiasm for the directive principles. The judiciary had lost a splendid opportunity of harmonising the two by the operation of judicial review.

Another equally deplorable result of this judgment from the standpoint of the political health of our republic was the tendency it helped to foster of looking upon the judiciary as the protector of reactionary vested interests in the people's struggle for economic democracy. When in the past also the judiciary had declared legislative measures as unconstitutional, there was a remedy available to Parliament in the form of suitably amending the constitution. The Golaknath judgment took away that remedy so far as part III of the constitution was concerned. The resulting stultification of legislative initiative in bringing about necessary economic reforms was what led to the belief that the Court stood for a policy of no change except at a pace which it can approve.

Parliament's reaction to the judgment was to pass the 24th amendment asserting that Article 13 in Part III shall not apply to constitutional amendments made under Article 368. The latter Article was also suitably modified in order to negative the view held by the Supreme Court that it dealt only with the procedure for amendment but did not expressly confer the power of amendment of all the provisions—including those in Part III—on Parlia-

ment. The amending measure went a stage further, possibly to forestall future difficulties from another quarter, and made it obligatory for the President to give his assent to an amendment bill presented to him after being duly passed in accordance with the procedure laid down in Article 368. A few months later it also passed the 25th amendment modifying Article 31 under the right to property in Part III substituting, *inter alia*, the word 'amount' for the word 'compensation'. Parliament also inserted by this amending measure a new Article 31C to the effect that no law in pursuance of clauses (b) and (c) of Article 39 under the directive principles of state policy shall be deemed to be void by reason of inconsistency with Articles 14, 19 or 31 in Part III. This was the first time that such a declaration giving precedence to certain directive principles over certain fundamental rights was made part of the constitution. But Parliament perhaps went too far in its distrust of the courts in further laying down that "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."

How did the Supreme Court view these amendments made in the face of its judgment in the Golaknath case? The test came in the Kesavanand Bharati case in 1973, in which by a 7:6 majority judgment it substantially yielded to the position taken up by Parliament and reversed its earlier stand in the Golaknath case. But while the power of Parliament to pass an amendment relating to Part III of the constitution was thus conceded, the Court did not give up its stand that constitutional amendments were also subject to judicial review. The purpose of such review was to prevent them from altering the basic structure of the constitution. Though the basic structure of the constitution was not clearly spelt out by the Court, it may have had in mind certain features of the constitution which need to be preserved in order to maintain its character as an effective instrument of our sovereign democratic republic, capable of securing justice, liberty, equality and fraternity as laid down in the preamble of the constitution. This was a new principle laid down by the Supreme Court for judicial review of constitutional amendments.

The last clause in the first paragraph of the new Article 31C which is quoted earlier was struck down by the Court in exercise of its powers of review. The clause had provided that the declaration by the legislature concerned was enough to put the law made under Article 31C outside the jurisdiction of the courts. This was clearly an encroachment on the judicial sphere. A declaration to this effect by an ordinary legislative enactment was not capable of displacing the court's function to decide on the constitutional validity of ordinary laws. Otherwise this mode of operation would enable the legislature to keep any piece of legislation under an appropriate amendment of the constitution from falling under the jurisdiction of the courts. This would be against all accepted norms of the working of a federal constitution.

In a written, federal and democratic constitution like ours, all organs of government have to operate within certain procedural, functional or

jurisdictional limitations. If earlier the Supreme Court erred in claiming too wide an authority for itself, Parliament did the same thing in respect of the above clause. The Supreme Court was therefore on solid ground in taking the decision that it did in striking down this clause. Perhaps this decision gives a clue to what it meant by the basic structure of the constitution. The exercise of arbitrary authority being repugnant to a democratic constitution, the validity of a legal provision capable of being used in this way must be questioned. History tells us that Parliaments no less than individuals are capable of assuming arbitrary authority and thus negating the accepted norms of democracy. That is why constitutions are required to provide for checks and balances in the working of the various organs of government. Judicial review is one such device to keep the legislature and the executive within the limits of their constitutional powers. The tendency of any organ to encroach on the powers of other organs is ultimately harmful to the maintenance of a proper balance between them. The principle of the 'basic structure of the constitution' is therefore a useful device for ensuring that each organ of government carries out its legitimate role in that structure.

The same conclusion will be reached if we consider the decision of the Supreme Court in striking down clause 4 of the new Article 329A introduced by the 39th amendment. Under that clause the election to Parliament of the Prime Minister and the Speaker of the Lok Sabha was sought to be retrospectively validated by putting them retrospectively beyond the application of any law relating to election disputes made by Parliament before the commencement of the amending Act. This clause meant that the law which governed certain matters relating to elections to Parliament would be retrospectively dispensed with in the case of persons subsequently elected to certain positions by the majority party or the House. If the law in question was made by Parliament with a view to ensuring free and fair elections which are essential to the democratic system of government adopted by our constitution, it cannot be dispensed with in the case of an elected member because he is subsequently appointed to a high office. Such a course would clearly be inconsistent with 'free and fair elections' which constitutes one of the basic features of our constitutional structure.

At the same time one cannot ignore the dangers of leaving to the vagaries of the Supreme Court the power of judicial review of constitutional amendments without some guidelines as to what are the essential elements in the basic structure of the constitution. A conflict of views on this issue between Parliament and the Court would perpetuate a situation of confrontation which is not likely to be in the larger interests of the community and which would definitely upset the balance of the constitution.

One solution to the problem which suggests itself to me, and which I would like to submit for your consideration, is this. Let Parliament itself draw up in the form of an amendment to Article 368 a list of essential features of our constitution which will not be abrogated by any amendment. Such an amend-

ment should be passed in accordance with the procedure laid down in the proviso of clause (2) of that Article so that the legislatures of the states may also have a say in this matter. Parliament will thus be imposing on itself, by way of self-discipline and self-regulation (आत्मनियन्त्रण) certain limits to its amending power. If it fails to observe those limits, the Supreme Court will be there to declare such amendments invalid in the light of the essential features laid down by Parliament itself. It will, of course, be open to Parliament to amend these essential features if conditions so warrant, by following the same procedure as above.

Parliament's approach to this question should be governed by the thought that just as the Supreme Court can commit errors, Parliament too can err—may be under popular pressures to achieve quick results or party pressures to make quick political gains—and such errors may cost the country dear in terms of its progress or stability.

I give below a tentative list of what I consider to be the essential features of our constitution as it has evolved so far. Such a list should include the maintenance of:

1. the sovereignty and integrity of the Indian Union;
2. the supremacy of the constitution over ordinary law;
3. the secular character of the state;
4. the republican form of government;
5. the federal form of government;
6. the parliamentary system of government;
7. free and fair elections; and
8. the independence of the judiciary.

It will be easy to criticise such a proposal on the ground that if Parliament can amend this list from time to time, there can be no sanctity attaching to it. It will therefore be difficult to ensure its inviolable character. It can also be argued that by putting its own interpretation on each of these items the Supreme Court can so distort them that the remedy may prove worse than the disease. Such criticisms are not without some substance. But then what is the alternative? As practical men looking at problems in a constructive way, we should be prepared to give a trial to some such device. It is ultimately on the wisdom and the capacity for self-restraint on the part of all concerned that the success of any scheme of constitutional government depends. But as these qualities may not always come into play, certain institutional checks are also necessary to remind people of the limitations under which they have to function. That is the only and, I think, adequate justification for such a proposal, though it can certainly be improved upon by further deliberation.

V

It will be appropriate at this stage if I were to draw your attention to what I consider to be a disquieting feature of some recent amendments made to

the constitution. I refer to the tendency to use the 9th schedule as a mode of withdrawing from the operation of the fundamental rights Acts which do not belong to the type of legislative measures for which this schedule was initially devised. Introducing the 1st amendment bill as it emerged from the select committee in the Provisional Parliament on May 29, 1951, Pandit Nehru said:

"It is not with any great satisfaction or pleasure that we have produced this long schedule. We do not wish to add to it for two reasons. One is that the schedule consists of a particular type of legislation, generally speaking, and another type should not come in. Secondly, every single measure included in this schedule was carefully considered by our President and certified by him....." (*Proceedings*, Vol. XII, 1951, Col. 9632).

All the 13 Acts included in that schedule then were concerned with the abolition of zamindari and allied matters relating to agrarian reforms. That schedule has been amended six times since then and now consists of 188 Acts. Even accepting the necessity of extending the scope of the schedule to all types of measures involving urgent economic reforms, one fails to understand how the Representation of the People Act, The Election Laws Act, The Maintenance of Internal Security Act, and the Prevention of Publication of Objectionable Matter Act can find a place in that schedule. There is no question here of a conflict between the directive principles and fundamental rights.

This development is rather a reflection of what I described earlier as an unfortunate result of the Golaknath case. It bodes ill for the maintenance of the democratic system so labouriously built up by the framers of our constitution and equally assiduously nurtured by Pandit Nehru and his colleagues in the early years of our republic. Perhaps it needs to be emphasised that the fundamental rights are as vital a part of our constitution as any other. While they were not intended to hold up necessary economic reforms, nor were they intended to be dispensed with for the purpose of protecting from the operation of judicial review ordinary legislative enactments dealing with other matters. To generalise from the unfortunate experience of judicial review in respect of certain measures of economic reform and to hold that all fundamental rights are a hindrance to the progress of the community is to do great injustice to all those who participated, each in his own way, in the struggle for Independence and for securing recognition to such rights as fundamental, in the sense of being inviolable, in our political life and organization. These rights are available to all citizens of this republic whether they belong to the weaker sections of the community or otherwise. It is in the interest of the health and vigour of our democracy that they should continue to be so recognised. Both the Preamble and Article 38 under the directive principles speak of 'Justice—social, economic and *political*' as a worthy aim to be achieved. Political justice is unthinkable in the absence of the civil

rights included among fundamental rights, albeit with such reasonable restrictions as may be laid down in the interests of all.

So much for the revision of the constitution that has already taken place.

VI

I shall now turn to the proposals* contained in the report of the Swaran Singh Committee of the Congress. The Committee's proposals are divided into 9 sections and I shall deal with them in their serial order:

I. *System of Govt.*: The Committee has not suggested any departure from the parliamentary system of government as it is best suited to our conditions. It has thus put an end to the speculation which had been going on for some time regarding a change over to the presidential form of government with some variation in its pattern elsewhere. This is a wise decision. Though we have a multi-party system, we do not really have the problem of instability in government on that account. Our real problem arises out of the weakness of the opposition. But that is not a situation which can be corrected by a change in the constitutional provisions.

II. *The Preamble*: The Committee has suggested the inclusion of the words 'secular' and 'socialist' in the expression 'Sovereign, Democratic Republic' in the Preamble of the constitution. This clearly shows that whatever may be the criticism voiced by some leaders in respect of the idea of 'the basic structure of the constitution' the Congress party is keen on emphasising that 'secularism' is one of its basic elements. The provisions made in relation to religious freedom for all citizens and the absence of a state religion in the constitution, as also the policies pursued by government so far and the decisions given by the courts on this question, clearly establish the secular character of the state. The inclusion of this word in the Preamble is therefore only a recognition of fact. The same cannot, however, be said of the word 'socialist'. With not less than 70% of the national income being derived from private effort and with practically the whole of the agricultural sector involving not less than 70% of the population of the country being untouched by any socialist ideas, it is difficult to describe the republic as 'socialist' in character. Socialism of whatever variety must still be regarded as an aspiration rather than an achievement. It has still to become an established feature of the state. We shall not therefore be true to ourselves if we go on proclaiming that ours is already a 'socialist' state.

III. *Amendment*: The Committee has proposed that a new clause should be inserted in Article 368 to the effect 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 on any ground. I would have also subscribed to this view before the passing of certain recent amendments

* Text of the proposals in *The Times of India*, Bombay, dated 23-5-76.

to which I have already referred at length earlier. Parliament being the representative body of the adult population of the country, it is best able to interpret the will of the people and translate it into law. Yet the examples of the amendments to which I have alluded earlier warn us that Parliament too can go wrong and, under the influence of pique or passion, adopt in the name of the people what is really a strategy meant to serve the party in power. Parliament too therefore requires some constitutional check on such tendencies which are common to all parties everywhere. It is for this purpose that I have suggested the drawing up of a list of basic features of the constitution and all amendments should be subject to the maintenance of such basic features.

IV. Power of judicial review:

(i) As against the present system under which the constitutional validity of a law can be challenged in any High Court or in the Supreme Court, the Committee has suggested that the validity of central laws may be challenged only in the Supreme Court and that of state laws in the respective High Courts with a right to appeal to the Supreme Court. Also where in a case the validity of both a central and a state law is challenged, the case might be decided only by the Supreme Court.

The Committee's proposal thus to take central laws out of the purview of the High Courts may be intended to reduce the burden of litigation on the High Courts; or it may be made on the ground that since in most such cases an appeal is made to the Supreme Court, it is as well that the Supreme Court should deal with them in the first instance. In a large country like ours, with the Supreme Court located in any one place, such a requirement may cause hardship to parties involved in such litigation. Besides the volume of original cases before the Supreme Court may increase to such an extent that their hearing may be delayed even beyond the already long delays experienced to-day. If the proposal extends to the grant of stay orders in appropriate cases pending their hearing, the resulting hardship will be all the greater. An earlier proposal of the Committee to provide for the Supreme Court sitting in circuit in three other zones besides Delhi has not been pursued by it in the final report. However, this is primarily a matter of cost and convenience and must be dealt with as such.

It is further proposed to prescribe the minimum number of judges hearing the cases of this class in the Supreme Court at 7 and in the High Courts at 5 and a decision invalidating a law must be taken only by a two-thirds majority of the Bench. Where in a High Court there are less than five judges, the full court should hear such cases and the decision regarding validity should have the support of the whole court. This proposal will no doubt make it difficult for the courts to declare a law void on constitutional grounds, but it will also save us from the strange practice of a binding judgment to that effect being given by a majority of 6:5 or 7:6. The proposal is therefore to be welcomed.

(ii) In regard to Article 226 under which the High Courts are empowered to issue directions, orders or writs for enforcement of fundamental rights and also for any other purpose, the Committee has suggested that this power should be confined to the enforcement of fundamental rights only. By the extension of this power to cover 'any other purpose' the High Courts have, according to the Committee, been given extraordinary jurisdiction which even the Supreme Court does not enjoy. It may be noted here, however, that the Supreme Court is so situated that an aggrieved party in any part of the country would not be able conveniently to move it for seeking redress. The High Courts are more conveniently situated for the purpose. Besides, under Article 139 Parliament can by law confer a similar power on the Supreme Court. The fact that Parliament has not thought it fit to do so shows that no such need was felt, presumably because of the adequacy of the present provision under Article 226.

In this connection, the Committee has drawn attention to the report of a sub-committee appointed by the Congress Working Committee in 1954 under the chairmanship of Pandit Nehru which had also favoured the deletion of the words 'for any other purpose' at the end of Article 226(1).

But is it not significant that no action was taken on it thereafter even though Pandit Nehru continued to be the head of the government for a decade longer?

The great merit of the present system is that it provides the aggrieved citizen with the means of securing relief where no adequate alternative remedy is available and where justice requires that as an interim relief, the *status quo ante* should be preserved. Secondly, the Committee itself has observed that it was forcefully represented before it that Article 226 "had proved to be the real constitutional safeguard for a citizen against what was broadly described as 'bureaucratic excess'".

In deference to such representations the Committee has modified its earlier view somewhat and has proposed to let this power continue only in cases where there has been a contravention of any provision of the constitution or of a statutory law resulting in a substantial failure of justice. I am not sure that this meets the needs of the situation. Even more than the exercise of this power by the High Courts, the knowledge that there is in existence an independent Authority which can be approached in order to prevent injustice being done by any other authority or any of its agents is itself a check on their excessive tendencies. To do away with this extended jurisdiction of the High Courts may in effect encourage the exercise of arbitrary authority by various functionaries.

Another proposal of the Committee in this connection is also of doubtful validity. That is in the matter of interim stays or injunctions. The proposal is that such orders should not be allowed to be issued unless prior notice of the proposal to move the Court in that behalf is served on the respondent and all documents in support of the plea are filed in the court and served on the

opposite party and opportunity given to the respondent to be heard. Hedged about with such conditions, the interim stay when granted will not serve the purpose for which it was sought and it may be futile to secure it after all these stages are over.

(iii) The Committee has proposed the setting up of tribunals for dealing with (a) service matters (b) industrial and labour disputes and (c) matters relating to revenue, land reforms, procurement and distribution of food-grains and other essential commodities. The writ jurisdiction of the High Courts and the Supreme Court under Articles 226 and 32 respectively is proposed to be excluded in these matters. While the establishment of administrative tribunals for the expeditious disposal of such matters on the basis of expert knowledge of the subjects in question would be a desirable step, there is one aspect of the Committee's proposal in regard to writ jurisdiction which calls for further consideration. Now the writ jurisdiction of the Supreme Court under Article 32 and that of the High Courts under Article 226(1) (except for the last four words) is a part of the right to constitutional remedies for the enforcement of fundamental rights. It appears very strange to suggest that because certain special tribunals are set up for deciding specific matters, the power to issue writs which are in support of maintaining fundamental rights should be withdrawn in such matters. To take an example, under Article 16(2) no citizen can be discriminated against for any employment or office under the state on grounds only of religion, race, caste, sex etc. If a person in the employment of the state is, in fact, discriminated against on any of these grounds he can move the Supreme Court under Article 32(1). That right is guaranteed to him or her under the constitution. But the Supreme Court will now be prevented from issuing an appropriate writ for the enforcement of the right under Article 32(2) because this would be a service matter under the jurisdiction of a tribunal. In the case of the High Court, its powers in respect of the enforcement of the fundamental rights are derived from its writ jurisdiction under Article 226. If the latter is withdrawn, a high court will have no jurisdiction over this case at all. The exclusion of the jurisdiction of the High Courts becomes complete because the Committee has later proposed that the tribunals should be excluded from Article 227 under which the High Courts can to-day exercise superintendence over all courts and tribunals within their territorial jurisdiction.

The result of all these proposals is that a citizen in the employment of the state whose fundamental right not to be discriminated against on grounds only of religion, race, caste, sex etc., is violated (i) will have no right to move the High Court, (ii) will have the right to move the Supreme Court but that Court will have no power to issue any writ in his favour, (iii) will have to move the appropriate administrative tribunal for the enforcement of his right and if he gets no decision in his favour, may have to ask for special leave of appeal to the Supreme Court.

It is presumed in this argument that the Committee does not consider

administrative tribunals to be the proper authorities for the enforcement of fundamental rights. In order to maintain the sanctity of the guarantee given in the constitution for the enforcement of fundamental rights, it may be desirable if matters involving them are excluded from the recommendation of the Committee regarding the withdrawal of the writ jurisdiction of the Supreme Court and the High Courts. In matters which do not involve fundamental rights the Committee's recommendation may be accepted.

V. *Directive Principles*: Precedence is sought to be given by the Committee to all the directive principles over all the fundamental rights except for the special safeguards or rights conferred on the minorities, scheduled castes and tribes and other backward classes under the constitution. As I have already dealt with this question earlier I shall not dilate on it. I would only suggest that in order to correct a widespread and altogether wrong notion about the place of fundamental rights in the scheme of our constitution, a new Article should be added under the directive principles to the effect that in applying those principles in making laws the State shall not overlook the importance of preserving, as far as possible, the fundamental rights enumerated in Part III, in the interests of maintaining the democratic system of government. As in the case of other directive principles this Article will not be enforceable by any court. But it will at least serve to emphasise that it is not intended to consign civil liberties to the scrap heap.

VI. *Disqualification of membership*: The Committee has proposed that disputes relating to the election of members of Parliament and of state legislatures should be decided by a separate body as in the case of election disputes relating to the President, Vice-President, Prime Minister and the Speaker. As the present practice in this matter is extremely dilatory, this suggestion may be welcomed from the standpoint of expeditious disposal of cases. Now that the principle underlying the provision of Article 329A is being made applicable to all M.Ps., M.L.As. and M.L.Cs., the same body could be asked to deal with election disputes concerning all members of Parliament including the Prime Minister and the Speaker, and there should be corresponding bodies in all the states and in such Union Territories as have legislative assemblies. Elections of the President and Vice-president fall into a different category and may be dealt with by a differently constituted body.

The Committee also wants Parliament and the state legislatures to prepare exhaustive lists of offices of profit the holding of which would disqualify a person from being chosen to the legislature concerned. This is expected to be an improvement on the present law which extends the disqualification to the holders of any office of profit except such as are specifically exempted. The present system is said to cause uncertainty which can be removed under the proposed method. If the Committee's proposal is found to be practicable, there is nothing to object to it.

VII. *Emergency*: The Committee has recommended that the declaration or lifting of emergency under Article 352 may be allowed to be confined to specified areas if the President is so satisfied, instead of being made applicable to the whole country.

This is an extraordinary proposal.

The declaration of emergency under Article 352 is a grave and exceptional step to be taken when the security of the country is threatened by war, external aggression or internal disturbance. It must also be borne in mind that ours is a federal constitution where the centre and the states both share in the exercise of the sovereign power of the state in accordance with the constitution. Except in specified circumstances the centre cannot override the authority of the states. They are not subordinate to the centre in their normal working. Unless the security of the country is threatened by any of the reasons mentioned, no emergency can be declared. A threat to the security of any part of the country is undoubtedly a threat to the security of India. If thus the security of the country is in danger, how can emergency be declared only for a part of the country? Similarly, if the danger to security has passed, the whole country must be presumed to be out of it. Then how can the emergency be lifted only from some part and continued in another part of the country?

The committee is perhaps thinking of an emergency which is not due to any threat to the security of India. But the constitution does not recognise any such situation under Article 352. Nor does it contemplate the use of emergency powers by the President under that Article for the resolution of any other problems such as, say, those of centre-state relations.

The Committee's suggestion is extra-ordinary also because it implies that citizens in different parts of the country will be differently treated in respect of the exercise of their fundamental rights. In some parts those rights will remain suspended due to the emergency; in others they will be enforceable. This would indeed be a very strange exercise in promoting national integration.

VIII. *Centre-state co-ordination*: The subjects of agriculture and education were proposed by the Committee to be included in the concurrent list in the 7th schedule, in view of their importance in the country's progress and the need to evolve All-India policies in relation to them. Subsequently agriculture was dropped from the proposal. It was said that other methods were already being effectively used for securing that objective. The demand for the inclusion of education in the concurrent list had been voiced for quite some time and that has now been conceded. Let us hope that some good may come out of that proposal.

The second proposal under this item is that the centre should have the power to deploy police and other similar forces under its own superintendence and control in a state whenever the centre's help is sought by a state

in a grave situation of law and order. The Committee also suggests that the centre should consult the state, 'if possible' before exercising this power. The words 'if possible' appear very strange in the context. If the centre's help is sought by a state, surely the state would also indicate the extent of that help. The question of the centre acting in any manner without consulting the state therefore should not arise.

IX. *General:*

The Committee has rightly pointed out that certain consequential amendments in various parts will follow the acceptance of its proposals.

The latest development in this connection is that the Committee has been asked to formulate proposals to insert in the constitution 'fundamental duties and obligations of citizens to the nation'. This was also a long-felt need and deserves to be welcomed. The Committee has yet to finalise these proposals. Further comment must therefore wait.

VII

It will be observed that the main issue which has dominated the proposals of the Swaran Singh Committee has been that of the relative positions of the judiciary and the legislature in our constitutional set-up. I have tried to indicate the background of this issue in the earlier part of the lecture. If these proposals are finally incorporated in the constitution, we shall have a far more powerful Parliament which, in a parliamentary system such as ours, inevitably means a far more powerful executive at the centre, than what we have had so far in normal times. While the view of the ruling party that once it gets its mandate from the electorate, it should be able to function unfettered by any judicial or other limitations is understandable, we must constantly remind ourselves that ours is a federal and democratic polity. The supremacy of Parliament in such a polity is limited not only by the powers allotted to the states but also by the accepted norms of democracy as enshrined in the constitution. The exhortation by responsible leaders in government to all sections of the population to participate in a wide ranging debate all over the country on the vital questions of amending the constitution must be treated as a recognition of the need to proceed in this matter on the basis of a consensus among the people irrespective of their political complexions. Unfortunately the conditions which obtain in the country to-day are hardly conducive to such a debate. I would therefore like to conclude this lecture with an earnest appeal to the powers that be not to delay the return to normalcy in view of the admitted importance of this debate.

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5. A. V. TEAKKAR	<i>The Problem of the Aborigines in India †</i>	1941
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