Amendability of Fundamental Rights under the Constitution of India

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I

"The Government and the Opposition today agreed that the 'basic features' of the Constitution should not be changed without a referendum to the people on the specific proposals concerned. A separate proviso for this purpose is to be added to Article 368 of the constitution. The Government-Opposition agreement which is of far-reaching importance in view of the Parliament-Judiciary controversy, provides that a referendum will be necessary in case of constitutional amendment which has prejudicial effect on the democratic rights of the people; abridges fundamental rights except the right to property; has a bearing on the holding of direct elections to the Lok Sabha or State Assemblies, affects the accountability of Governments to the Lok Sabha or Assemblies; has a bearing on the federal character of the Constitution and the secular character of the state."[1]

The 'basic features' controversy whipped up after the *Kesavananda Bharati*[2] case has now become an acceptable proposition to their critics as well. In that case Justice Khanna had observed that power of amendments under article 368 did not include the power to abrogate the Constitution nor did it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment was plenary and included within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to the essential features.[3]

The implied limitations on the amending power focussing from the 'basic features' doctrine were indirectly accepted and highlighted by the majority[4] in the *Kesavananda* case. Justice Khanna was so specific and assertive on the 'basic feature' doctrine. Yet the question was still shrouded in uncertainty as to what are the basic features. Chief Justice Sikri no doubt, made an illustrative enumeration of the basic features to include the

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1. See *Indian Express*, 1-1-1978.
2. A.I.R. 1973 S.C. 1461.
3. *Id.* at 1859-61.
4. Chief Justice Sikri and Justices Shelat, Hegde, Grover, Reddy, Khanna and Mukerjea.

supremacy of the Constitution, republican and democratic form of government, secular character of the Constitution, separation of powers between legislature, executive and judiciary, federal character of the Constitution, etc.

Justices Shelat and Grover further amplified that the amendment power was not unlimited so as to include the power to abrogate or destroy the basic features, that even if the amending power includes the power to amend article 13(2) it is not so wide as to include the power to abrogate or take away the fundamental freedoms. They observed that an understanding of the historical background, preamble, entire scheme of the Constitution and the relevant provision will enable one to discern the basic elements of the constitutional structure.

Justice Khanna made it clear that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated. The word "amendment" postulates that the old Constitution survives without the loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with, it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or the framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or frame work of the Constitution has been destroyed would not amount to retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adopt the system to requirement of the changing conditions it is not permissible to touch the foundations or alter the basic institutional pattern.

The 'basic features' doctrine enunciated by the majority in *Kesavananda* evoked apprehension to the then ruling party. *Kesavananda* decision is only an extension of *Golak Nath* even though the 24th and 25th Amendments, except the last part of the latter, were validated. It is an extension in the sense that where as in *Golak Nath*, fundamental rights alone were made beyond the reach of the amending power of Parliament, in *Kesavananda* the 'basic features', *i.e.*, the wider area of the Constitution, is taken out of Parliament's amending power.

The impact and implication of the 'basic features' concept was foreseen by the then ruling party and mounting pressure was exerted for a reconsideration of the theory. It is in this background that the then Chief Justice of the Supreme Court passed a written order *suo motu* on an oral request by the Attorney-General on 20-1-75 to reconsider and review its view in *Kesavananda* decision as to whether the theory of basic structure

propounded therein and in the *Bank Nationalisation* case[5] was correctly decided. All the thirteen judges participated to decide the two questions. This is another instance that the highest court of the land, the guardian and protector of civil liberties, becomes so feeble and sensitive to be influenced by certain extraneous philosophy than the one contemplated by the Constitution.

The Attorney-General highlighted the impact of the basic structure doctrine by referring to the Court decision in the *Indira Gandhi Election* case[6] wherein clause 4 of the 39th constitutional amendment was struck down.[7] He argued that litigation was going on on the concept of basic structure in most of the High Courts with the probability of conflicting views on the same issue. Hence the Attorney-General canvassed the immediate necessity of a reconsideration of the basic structure concept by the Supreme Court. The arguments were effectively countered by Palkhiwala who argued, *inter alia*, that such reconsideration will be obnoxious to the procedure and tradition of the Supreme Court, that the Bench which was not larger than the one which gave the ruling in *Kesavananda* should not seek to reconsider that decision. To an inquiry by Justice Beg (as he then was) whether a clarification was not necessary, Palkhiwala replied that it did not require a Full Bench to reconsider the decision. On the third day of hearing a surprise announcement dissolving the Full Bench was made by Chief Justice Ray. He directed that the Constitution Bench would first hear a pending matter from Andhra Pradesh where the issue of basic structure had been raised, and a larger Bench would sit if that Constitution Bench were of such opinion after the hearing.

II

In *Golak Nath*[8] a 6 to 5 majority of the Supreme Court overruled the major premises in *Sankari Prasad*[9] and *Sajjan Singh*,[10] cases by holding that

5. *R.C. Cooper* v. *Union of India*, A.I.R. 1970. S.C. 564.

6. *Indira Nehru Gandhi* v. *Raj Narain* A.I.R. 1975 S.C. 2299.

7. Clause (4): No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

8. A.I.R. 1976 S.C. 1643.

9. A.I.R. 1951 S.C. 459.

10. A.I.R. 1965 S.C. 845.

an amending Act of the Constitution is 'law' as defined in article 13 (3) and so such law should undergo the rigorous test of article 13 (2). It was also held that article 368 envisages only the procedure for amendment and does not confer 'a power to amend' which is not contained in the legislative lists and, therefore, Parliament is quite incompetent to abridge fundamental rights. It was also suggested that a Constituent Assembly may be set up by Parliament under its residuary power to effect amendment to fundamental rights.[11]

The majority stressed the sarcrosanct character of fundamental rights. Hence, some implied limitations must be inferred against uncontrolled power of amendment. This implied limitation is given a further dimension by the judges who endorse the basic feature concept in *Kesavananda* by extending its coverage to all such basic features.

The leading minority ludge in *Golak Nath*, Justice Wanchoo (as he then was) brushed aside, as a mere "argument of fear"[12]—when it was canvassed that Parliament with a comfortable majority could do away with fundamental rights.

However, the subsequent developments and invasion over fundamental rights have exposed the truth that it was not a mere "argument of fear" but one of possible eventualities which has since materlialised.[13] Most of the amendments to fundamental rights after *Golak Nath* case exemplify that the executive was so adamant to use Parliament as a mere puppet and a convenient instrument to aggrandise more powers and to deprive the judiciary and the citizens of their legitimtate jurisdiction and privileges envisaged under the Constitution.

The Twenty-fifth Constitution Amendment by inserting article 31-C has authorised the state legislatures to ignore totally the fundamental rights under articles 14, 19 and 31 in the guise of implementing the directives under article 39 (*b*) and (*c*). In other words, state legislatures can make laws to implement the directives under article 39 (*b*) and (*c*)[14] thereby indirectly invading the fundamental rights under articles 19 and 31. This is an authorisation to the legislatures to amend in effect, though indirectly, the above guaranteed rights. That what the legislatures are not competent to do directly under the Constitution can now be performed easily in an

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11. This view creates another problem. If Parliament itself has no *locus standi* to amend fundamental rights how can it create a body which will amend fundamental rights.

12. *Supra* note 8 at 1673.

13. This is evident from the impact of Twenty-fourth, Twenty-fifth, Thirty-eighth, Thirty-ninth and particularly the Forty-second Constitution Amendments.

14. These provisions are aimed at providing equal distribution of material resources and prevention of concentration of wealth.

indirect way. This is nothing but the commission of a fraud on the Constitution.

The only consolation to this desperate situation is provided by the Supreme Court in the *Kesavananda* decision when a majority asserted the right and jurisdiction to adjudge whether there is correlation between the impugned legislation and the directives under article 39 (*b*) and (*c*). Hence, the second part[15] of article 31-C introduced by the Twenty-fifth Amendment was held to be one of excessive delegation. Justice Khanna boldly asserted that the second part of articte 31-C contains seeds of national disintegration by empowering states to make laws with a regional or local basis. This assertion is reinforced by the 'basic feature' doctrine when the judges clarified that judicial review is a basic featute of the Constitution and the vesting of power of exclusion of judicial review in a legislature including state legislatures contemplated by article 31-C strikes at the basic structure of the Constitution.[16]

Perhaps this farsightedness might be one of the reasons why the architects of the Constitution gave due importance and sanctity to fundamental rights and protected the citizens from the onslaught of executive and legislature by investing judicial power in the higher courts. Even during the independence struggle when the foreign rulers imposed control over the press and personal freedoms, the national leaders deprecated such invasions. Having secured independence the makers of the Constitution naturally thought it wise to give primacy to such basic rights.

History of nations speaks that the clashes between the subjects and the rulers were mainly over the aggrandisement of powers in the latter. Having fought out and secured independence most of the nations gave primary importance to ensure the basic rights of the individual from the onslaught of executive tyranny and legislative invasion. As Justice Jackson said in the *West Virginia State Board of Education Case*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[17]

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15. This part says: ...and 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.

16. For more details see, *Kesavananda* decision, *supra* note 2.

17. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 at 638 (1943).

The above view of the learned judge is equally applicable to the fundamental rights in our Constitution. Yet another motivating force was also there behind the incorporation of these guaranteed freedoms in the Indian context. The Gandhian philosophy that the means should be equally justifiable as the ends and that the attainment of socio-economic justice should be consistent with the preservation of the values of individual's life has influenced the makers of our Constitution. Hence the objectives in the Constitution particularly envisaged in part IV are to be balanced with the freedoms guaranteed in part III of the Constitution. But herein we witness the novel experiment of 'democratic socialism' that the Republic of India has launched in the mid 20th century.

Freedom against discrimination,[18] the seven freedoms,[19] freedom of person,[20] protection against exploitation,[21] right to religion,[22] cultural and educational rights of the minorities,[23] right to property,[24] and the right to constitutional remedy,[25] these are broadly the freedoms guaranteed under part III of the Constitution. None of these freedoms can be absolute. In fact securing absolute freedom is obnoxious and impracticable in an ordered society and hence, there can be only regulated freedom. Therefore, each of the above freedoms is qualified by some restriction, in its exercise.

These freedoms form an integral part of the basic structure of our body polity and no Parliament can trench upon or slice down the ambit of these freedoms. However Justice Khanna in the *Kesavananda* case rightly provided a reservation to this position when he held that the right to property does not form part of the basic structure or frame work of the Constitution. When right to property is brought outside the basic framework of the Constitution, Parliament is free to amend article 31 in any way it likes withln the scope of article 368, provided the power is not otherwise abused.[26] Therefore, the legislature and executive need not blame the judiciary for putting blocks in the way of streamlining socialism.

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18. Articles 14-18, *The Constitution of India.*
19. Article 19.
20. Articles 20-22.
21. Articles 23-24.
22. Articles 25-28.
23. Articles 29-30.
24. Article 31.
25. Article 32.
26. In that context the relevance of Ninth Schedule in the Constitution is totally diluted considering the original purpose of its insertion. In fact, the Ninth Schedule has been enormously misused by giving blanket protection to laws which have not even remote bearing on agrarian reforms.

The Constitution empowers the State to impose restrictions by law in the exercise of the freedoms, provided such restrictions are within the permissible limits enjoined in the corresponding provisions. In this process the wisdom of the legislature will be scrutinised by the judiciary which is endowed with that duty expressly by the Constitution. The reasonableness of the legislative restrictions will be standardised by the higher courts. Herein lies the dynamic role committed to the judiciary in the interpretation of "a living and growing organism" to be made viable to the changing needs of the society. In the discharge of this onerous duty the court is not expected to endorse the mere political or administrative expediency of the government. On the contrary, the court should evaluate the social values involved in the freedom with the social values involved in the particular measures and strive to make a balance in the light of constitutional philosophy, and not be influenced by any other philosophy, political or economic. Given such a treatment, the necessity for any formal amendment to fundamental rights may be ruled out. A sophisticated judicial process with an awareness of the contemporary socio-economic problems will facilitate the reconciliation of fundamental rights with social control without eating away the contents of such freedoms. If the judiciary fails to discharge this constitutional responsibility, it may lead to an impasse which can be settled only by placing the matter before the people. Thus referendum comes in the picture 'as a last resort.'

III

Popular will in a democratic framework may be ascertained through the initiation and proposal of constitution amendments by popular approval as in the Swiss Constitution and a few American States' Constitutions. Contrary to this, the Danish, Irish, Australian and most of the American States' Constitutions require the proposed amendment to be actually referred to the people after it has been passed by the legislature. A third method provided and followed by countries like Belgium, Holland, Sweden and Norway is that the legislature has power to make amendments but its final passage is deferred till the general election when the people may express their views upon the proposal in voting for the candidates of the election[27]. These categories of amending process as such are unsuited to the Indian context.

Under the Constitution of India most of its provisions can be amended within the range of article 368. But the essential or basic features, which include fundamental rights also, are not amendable under article 368. Any

27. For an exhaustive analysis of the amending process in various constitutions see Markandan, *The Amending Process and Constitutional Amendments in the Indian Constitution* (Sterling, New Delhi, 1972).

change therein demands the mandate of the people.[28] Hence the government's and opposition's reported agreement to adopt the referendum device is quite commendable and a matter of profound significance and breakthrough. The agreed basic features are thus sought to be protected from the immediate convenience of the ruling parties. This will give a new and added dimension to the sovereignty of the people in India's democratic framework. The unpleasant developments India witnessed in the recent past convince us that the direct sanction of the people on vital matters is not only desirable but imperative. The safeguard involved in the two-thirds requirement to amend certain provisions of the Constitution can be whittled down by the executive which tends to have a firm grip over Parliament and thereby reverse the very concept of accountability. Such disasterous situations can be averted by adhering to the referendum device. This will provide an insurance against a party with overwhelming powers playing ducks and drakes with the Constitution. It will highlight the fact that, in the ultimate analysis, Parliament is only an instrument of the people's will, and it is not necessarily or always the sole repository of the people's sovereignty.[29]

The gigantic size of the electorate and the vast illiteracy of our population might be projected to attack the referendum idea, that it is not feasible and can be only a farce. This argument fizzles out in the light of the successful working of the universal adult franchise since independence. If the reported agreement is respected it will be only vindicating the stand taken by the majority in *Golak Nath* and fully conceding the basic frame work concept evolved by the seven judges in *Kesavananda.* These are truths which must be engrafted and institutionalised in our body polity.

Such changes requiring referendum if incorporated in artice 368 "by Parliament" what will be its fate and utility? The same Parliament or a reconstituted Parliament is not barred from amending this newly inserted clause to article 368 and bring *status quo ante.* If the present Parliament is competent to insert a change in article 368 a future Parliament is equally competent to undo the same. Therefore, a change to article 368 sanctified by referendum alone is the salvation to introduce referendum as the only method for amendment of the basic features of our Constitution.

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28. The editors would like to add that the requirement of a mandate from the people is not as yet a constitutional imperative for amending the basic features. The Forty-fifth Constitution Amendment Bill, 1978, intends to introduce this requirement into the amending process (Ed.).

29. See the Editorial in *Indian Express,* 3-1-1978.