OUR CONSTITUTION AND ITS SELF-INFLICTED WOUNDS

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The Constituent Assembly had its first sitting on 6th December 1946. On August 29, 1947, after India attained independence, the Constituent Assembly appointed a drafting committee which submitted the Draft Constitution in February 1948. After extensive discussion and various amendments, it was adopted by the Constituent Assembly on November 26, 1949. The result was the most elaborate Constitution in the world for perhaps the most diverse group of persons: of different religions, ethnic backgrounds and languages. It would be incorrect to give full credit to the Constituent Assembly for they did not draft the Constitution from scratch. The foundation for the new Constitution was the Government of India Act, 1935. Important portions that were added were the Preamble and the Chapters on Fundamental Rights and Directive Principles of State Policy. The chapter on Fundamental Rights was perhaps the most glorious chapter of the Constitution, which also provided for an elaborate judicial system to protect these rights. Before independence, India already had a complex hierarchy of courts administering civil and criminal laws although the executive was not fully separated from the judiciary. The Constituent Assembly decided to continue with the federal structure with a strong Parliament at the Centre. The Seventh Schedule set out the fields of legislation for Parliament (List-I) and for the State Legislatures in List-II. The Concurrent List (List-III) stipulated fields wherein both, the Parliament and the State Legislatures could make laws, subject, of course, to the primacy of Parliament.

The final product was a magnificent Constitution which provided the frame work for good governance and enabled all persons in India to achieve their dreams without forfeiting their basic human rights. On 26th January, 1950 we gave ourselves this noble Constitution. Little did we realise that, in the years ahead, the Constitution would suffer self-inflicted wounds from none other than our elected representatives – who ironically were obliged to preserve and protect the Constitution.

This article sets out the Constitutional amendments which, in the opinion of the writer, have done serious harm to the Constitution. Some of the amendments were to achieve certain social objectives, others were to protect certain individuals and yet others to achieve populist and politically

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expedient programmes. In *Dred Scott v. Sanford*[1], the US Supreme Court held that slaves had no rights and were chattel. Chief Justice Charles Evans Hughes characterized this decision as a "self-inflicted wound". This expression has been borrowed to characterize those amendments which have seriously damaged our Constitution. In some cases, the damage was restored by another amendment or by the Supreme Court striking it down. The wounds were healed but the scars remained. Fifty-seven years later, the Constitution has survived, enabling us to enjoy basic human freedoms that are virtually non-existent in most other third-world countries.

I have set out these amendments in chronological order. [Like the *Dred Scott* case, some judgments of our Supreme Court can also be characterised as self-inflicted wounds.] But limitations of time and space have made it necessary to confine this article only to Constitutional amendments.

§ The First Amendment & the Ninth Schedule

In the beginning of 2007, a nine-Judge Bench of the Supreme Court observed that the power of Parliament to include laws in the Ninth Schedule was limited and would be subject to judicial scrutiny. An amendment which violated the basic structure can no longer be protected by placing it in the Ninth Schedule.[2]

Most of us hardly know that the idea of the Ninth Schedule was conceived by none other than the former Advocate-General of Madras, V. K. Thiruvenkatachari. The transformation of this idea into the Ninth Schedule, inserted by the First Amendment made to the Constitution in 1951, is an interesting story.

Before independence, the Congress Party had promised to abolish Zamindari estates and large landholdings, and redistribute land to the farmers or tillers. Pandit Nehru called himself a socialist and a republican. Indeed, socialism was the preferred policy in several countries and was seen to be the best way for the equitable distribution of wealth and to attain social justice.

After independence, several land reform laws were enacted to implement the policy of redistribution of land. The compensation payable for the lands that were acquired was often less than the market value. These land reform laws were soon challenged before various High Courts, and some of the High Courts also granted injunctions against any acquisition of land by the State. The main complaint therein related to the quantum of compensation. Some civil servants suggested that the compensation must be

1 60 U.S. 393 (1856).

2 *I.R.Coelho v State of Tamil Nadu,* (2007) 2 SCC 1.

just and fair but others disagreed. Pandit Nehru felt that these socio-economic programmes would be slowed down by litigation and wrote to the Chief Ministers of various States telling them that the Constitution would have to be amended if it came 'in our way'. One suggestion was that land reform legislation should not be subject to judicial scrutiny by any court whatsoever.

While these amendments to the Constitution were being considered, the Patna High Court struck down the Bihar Land Reforms Act, 1950. The petition had been filed by the Maharaja of Darbhanga.[3] Less than a fortnight later, the Calcutta High Court struck down certain acquisition proceedings in the famous *Bela Banerjee* case[4] . Pandit Nehru asked the then Law Minister, Dr. Ambedkar, to prepare necessary amendments to the Constitution. Dr.Ambedkar suggested that the question of compensation should not be reviewed in any court if Presidential assent had been given for acquisition of property. President Rajendra Prasad raised several doubts and Sardar Vallabhai Patel, who was in Bombay, also wrote to Nehru asking for some further time till the doubts raised by the President were considered by the Law Ministry. The judgment of the Patna High Court was in appeal before the Supreme Court. It is believed that Nehru threatened to resign if Rajendra Prasad did not give Presidential assent to the amendment. The President signed the Bill but expressed his unhappiness at the urgency.[5]

At this stage, V. K. Thiruvenkatachari, in a letter to the Law Secretary, K.V.K. Sundaram suggested that a new schedule could be added to the Constitution. All acts pertaining to land reform laws could be certified by the President and inserted in this new schedule. These laws would be deemed to be valid retrospectively and could not be challenged for violating any provision of the Constitution.[6] Austin labeled the Ninth Schedule a 'genie that would have a profound impact on the Constitutional governance of the country.' V.K. Thiruvenkatachari's suggestion was later translated into Articles 31A, 31B and the Ninth Schedule. Under Article 31A, laws that related to acquisition of estates, nationalisation of industries, extinguishment of mineral leases or their premature termination could not be challenged on the ground that they violated Article 14 (right to equality), Article 19 (right to various

3 AIR 1951 Pat 91 (FB) – see also *State of Bihar v Kameshwar Singh* AIR 1952 SC 252 : (1952) SCR 889 – The method of calculating compensation was truly shocking.

4 AIR 1952 Cal 554 – see also *State of West Bengal v Bela Banerjee* AIR 1954 SC 170 (The impugned legislation fixed the market value of the land on 31.12.1946 as the maximum compensation payable irrespective of when the land was acquired. It was common knowledge that after the war, the value of land had increased considerably particularly in Calcutta. This provision was held to be violative of Article 31(2). The Supreme Court affirmed the decision of the West Bengal High Court.)

5 For an enlightening account, see Granville Austin, Working a Democratic Constitution.

6 Gravnville Austin, Working a Democratic Constitution, Chapter 3 (p. 69-74).

freedoms including the of speech association, etc) and Article 31 (right to property). Article 31B went even further: it stipulated that none of the Acts and Regulations specified in the Ninth Schedule shall be deemed to be void or ever to have become void on the ground that they abridged any fundamental right. Such laws could not be deemed to be void notwithstanding any judgment, decree or order of any court or Tribunal. The Ninth Schedule, initially contained thirteen land reform enactments.

The net result of the First Amendment was that any Act which was included in the Ninth Schedule would be completely immune from challenge in any court of law. At that time, this amendment was criticised in the media. Even the Supreme Court Bar Association passed a resolution expressing concern over the amendment. It was widely believed that the amendment had been made with undue haste.

There was no Constitutional justification for the Ninth Schedule. If the Government had to abolish zamindari estates or nationalise industries, just and fair compensation ought to have been paid. The large amount of litigation sought to be avoided could have been so if adequate compensation had been given to persons whose lands had been taken away. These laws also spawned dubious devices to circumvent land reform laws and created extensive illegal holdings.

Thus, we see, that the First Amendment set the precedent for the Constitution being frequently amended for the purposes of overruling judgments. It also set the trend of retrospective amendments regardless of the hardship that would be caused to the public.

The Ninth Schedule eventually was subject to substantial abuse. Thirteen laws were inserted in the Ninth Schedule in 1951, seven in 1955, forty four in 1964, two in 1972, twenty in 1974, thirty four in 1975 and another fifty nine in 1976. During the Emergency, more than eighty laws were included in the Ninth Schedule and the entire process of getting the approval of the Lok Sabha, Rajya Sabha and the ratification by two thirds of the States was completed in a few days! Thereafter, the number of laws included in the Ninth Schedule has kept on increasing and now contains 284 Acts.

Although several laws do relate to land reform legislation, a number of Acts have nothing to do with either zamindari abolition or nationalisation. The Essential Commodities Act, FERA and MRTP, among other laws, find a place in the Ninth Schedule. Consequently, these laws cannot be challenged on the ground that they violate a citizen's fundamental right. Legally, a law curtailing the freedom of the press could be included in the Ninth Schedule and nothing could be done – that is, till the basic structure doctrine was

evolved.

The greatest abuse was the insertion of amendments to election laws in the Ninth Schedule. After Mrs. Gandhi's election was set aside by the Allahabad High Court and the matter was pending before Supreme Court, amendments were made to put the elections of the President, Vice President, Speaker and Prime Minister beyond any challenge in a court of law. Including the amendments to election laws in the Ninth Schedule was a clear abuse of Parliament's power to amend the Constitution. It had nothing to do with land reforms or any socio economic reform. This demonstrated that the Ninth Schedule could be misused. H.M. Seervai, one of the greatest Indian Constitutional scholars, in his book[7], published after the Emergency observed:

> *"The power of acquisition under Article 31(2), and under Article 31B, had been abused at all times to secure party political ends of the parties in power, but more particularly during elections. The power to acquire property on payment of illusory compensation was used as a weapon of blackmail to secure "donations" for the election funds of the party in power from industrial and commercial concerns."*

Seervai points out that Article 31B and the Ninth Schedule enabled the Government to make laws that violated fundamental rights but were immune from any legal challenge. In his view, the "grossest abuse" of Article 31B was the inclusion of the dreaded MISA (Maintenance of Internal Security Act) in the Ninth Schedule. Seervai called for a repeal of Article 31B and the Ninth Schedule.

The Ninth Schedule was further misused by re-enacting laws which had been held to be unconstitutional and inserting them in the Ninth Schedule. In several cases, these laws were validated retrospectively. It cannot be disputed that the Ninth Schedule was used for purposes for which it was never intended. It was inevitable that the validity of the Ninth Schedule itself would be eventually questioned.

After the basic structure theory was laid down in the historic *Kesavananda* case[8], no law could be immune from judicial review. Parliament's power to amend the Constitution could not extend to altering the basic structure of the Constitution. The basic structure could not be violated indirectly by inserting unconstitutional laws in the Ninth Schedule. The Nine-Judge bench[9] has now clearly laid down the scope of legislative

7 "*The Emergency, future safeguards and the Habeas Corpus case: A criticism"*, p. 149, (1978).

8 *His Holiness Kesavananda Bharathi v State of Kerala* AIR 1973 SC 1461.

9 *I.R. Coelho, Supra n. 2.*

power. It has made it clear that the Constitution is supreme and there are certain parts of it which are inviolable. Chief Justice Gajendragadkar, speaking about the Ninth Schedule, remarked that our Constitution was the only one that contained a Schedule to protect laws against the Constitution itself.[10]

The Supreme Court has made it clear that Parliament cannot indiscriminately include laws in the Ninth Schedule and debar judicial review. The laws inserted in the Ninth Schedule after 24.4.1973, the date of the *Kesavananda* ruling would now be examined on the basic structure doctrine. The latest judgment should not be seen as a confrontation with the legislature. It has only declared that it is the Constitution that is supreme.[11]

Barring the controversial issue of compensation, there was no serious confrontation between the legislature and the judiciary. Pandit Nehru maintained the dignity of the judiciary, the legislature and the executive. In 1951, the Supreme Court had held that Parliament could amend any of the articles in Part-III of the Constitution. A Constitutional amendment was not a law under Article 13(2).[12] The Supreme Court upheld the validity of the Constitution (1st Amendment) Act, 1951 which had inserted Articles 31A and 31B. As long as Pandit Nehru was alive, one might not have felt the need for the basic structure doctrine to protect the Constitution from the elected representatives of the people.

§ The 24th Amendment – the onslaught begins

After 1951, the Constitution was amended 23 times. None 'wounded' the Constitution. On July 22, 1971 the 24th and 25th amendments were introduced in Parliament. They marked the beginning of repeated attacks on the integrity of the Constitution. Unlike the 42nd amendment, the amendments were brief but equally devastating. Like the first amendment, they were intended to overcome judgments of the Supreme Court. The only difference was that the first amendment had the policy objective of abolishing zamindari estates and providing nationalisation of industries. The 24th and 25th amendments would have the effect of placing the Constitution at the mercy of any ruling party that could command the requisite 2/3rd majority in Parliament and had the power to get it ratified by two-thirds of the State. In the well known *Golaknath*[13] case, the Supreme Court by a majority of 6:5 overruled the earlier decision which had held that Parliament had the power to amend any part of the Constitution including the portion relating to fundamental rights.[14] *Golaknath* ruled that Parliament would

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10 Austin, *supra* 5.
11 *I.R.Coelho, supra* 2.
12 *Shankari Prasad Singh v Union of India* AIR 1951 SC 458.
13 *Golaknath v State of Punjab* AIR 1967 SC 1643.
14 *Shankari Prasad v Union of India* AIR 1951 SC 458; *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845.

have no power to take away or curtail any of the fundamental rights which had been guaranteed by Part-III of the Constitution. The judgment in the *Golaknath* case was rendered in 1967. However, these amendment were introduced in 1971. There is no evidence of the *Golaknath* judgment being an obstruction to any programme of economic reform between 1967 and 1971. It was never demonstrated that fundamental rights had interfered with the implementation of any socio-economic reforms. The 24th amendment stipulated that Parliament could amend by way of "addition, variation or repeal" any provisions of the Constitution under Article 368. Under Article 368, the President had the power to send a bill to Parliament for being reconsidered. The 24th amendment provided that once the Constitution was amended by the requisite majority mentioned in Article 368(2), the President had no option but to give his assent to the bill.[15] A corresponding amendment to Article 13 made it clear that a Constitutional amendment under Article 368 could not be struck down on the ground that it took away or abridged any fundamental right. The intention of Parliament was clear: it would have the power to abrogate any or all the fundamental rights and there would be no judicial review.

§ The 25th Amendment

The 25th amendment was also introduced on 22nd July 1971. It consisted of just two effective sections. The first enabled Parliament to acquire any property without payment of 'compensation'. Article 31 provided for acquisition of property on payment of compensation. In the *Bank Nationalisation* case[16], the court held that the right to compensation would be the right to get the money equivalent of the property that had been compulsorily acquired. Further, the Court held that the law which provided for acquisition or requisition of property for a public purpose should justify the requirements of Article 19(1)(f).

The Statement of Objects and Reasons of the 25th amendment lamented that the adequacy of compensation was justiciable and the courts could determine whether the amount paid to the owner of the property could be reasonably regarded as compensation for loss of property. Article 31(2) was amended whereby the word "compensation" was replaced by the word "amount". The courts were barred from examining whether the amount was inadequate or that the amount was to be given *otherwise than in cash.* The word "amount", in any dictionary, means 'a sum of money'. For instance

15 In a speech at the Loyola College, Chennai in 1971, Nani Palkhivala bitterly criticised the 24th, 25th and 26th amendments. He pointed out that if the President could ask Parliament to reconsider a Sugar Control Bill but if the entire chapter on Fundamental Rights was sought to be deleted, the President would have no option but to give the assent immediately.

16 *R.C.Cooper v Union of India* AIR 1970 SC 564.

consider this hypothetical absurdity. The Government could acquire property worth crores of rupees and pay just a few lakhs as compensation. The person whose property was acquired would have no remedy. It was often forgotten that acquisition could be of a zamindari estate or other jagir property. The Government could acquire anyone's home, shop or factory and pay a paltry sum as an "amount" for the acquisition. Equally, the Government could give bonds repayable after ten years. The 25th Amendment also made clear that the acquisition of property would not be affected by Article 19(1)(f). Thus, the first part of the 25th amendment placed acquisition of property outside the pale of judicial review.

But the other amendment proposed by the 25th amendment was far more vicious. It sought to include Article 31C whose purported object was to save laws that gave effect to Directive Principles. Once again, it started with a *non-obstante* clause and declared that any law giving effect to the Directive Principles mentioned in clauses (b) and (c) of Article 39 could not be challenged on the ground that it took away or abridged the rights conferred by Articles 14, 19 or 31. The sting was in the last part of the Article. It stated that if a law contained a declaration that it was for giving effect to the Directive Principles of State Policy, it could not be questioned at any court on the ground that it did not give effect to the Directive Principles. In other words, a law, even if actually against public interest or to further private political ends, could merely contain a declaration that it was intended to give effect to Directive Principles and get the protection of Article 31C. Even if one could logically demonstrate that the law would actually defeat Article 39, one could not challenge it in a court of law.

Nani Palkhivala termed this amendment as being in utter contempt of Parliament and called it an outrage on the Constitution.[17] The effect of the amendment was that any law could be passed by Parliament and it had merely to contain a declaration that it was intended to give effect to the Directive Principles of State Policy. A simple declaration would close the door of judicial review.

Similarly, any State Legislature could pass laws with such declaration. The only requirement was that they should be reserved for the consideration of the President.

The 24th and 25th amendment in their original form, effectively destroyed the heart of the Constitution that envisaged a democratic system of Government consisting of the legislature, executive and the judiciary. These two amendments sought to place the legislature and the executive

17 *Supra* 12.

above any checks or controls by way the judiciary. If the 25th amendment had not been partly struck down in the *Kesavananda Bharati* case, it would have been definitely subjected to extensive abuse as in the case of Ninth Schedule. A frightening point to note is that six out of thirteen judges who heard the *Kesavananda* case did not think anything was wrong with Article 31C!

§ The 26th Amendment – Constitutional breach of trust

In July 1971, Parliament also passed the 26th Amendment Act that abolished the Privy Purses; a questionable event in our Constitutional history. The Republic of India reneged on its Constitutional commitment to the former rulers of the princely States. The amendment was not in public interest because the total amount that was given as privy purse to the former rulers was just Rs. 4 crores per annum and was diminishing year after year. The princely States covered 48% of the territorial area of undivided India and 28% of the population resided therein.[18]

The Indian Independence Act, 1947 provided for the lapse of paramountcy of the sovereignty of the British crown in India over the Indian States and each Ruler had the option of either acceding to the dominion of India or Pakistan or to continue as an independent sovereign State. The Government of India formed a Ministry of States presided over by Sardar Vallabhai Patel. The herculean task undertaken by Patel with the assistance of V. P. Menon need not be recounted here.[19] C. Rajagopalachari signed the Instrument of Accession as the Governor General of India accepting the various Instruments of Accession signed by the Rulers.

From the beginning, members of the Congress party were reluctant to give anything to the former rulers. Most of the rulers had done little to support the freedom struggle and they were looked upon as stooges of the British Empire. However, the Indian Independence Act, 1947 gave them complete freedom to join India or Pakistan.

As part of the settlement that was reached, several rulers joined India and Constitution guaranteed to them a privy purse which was to be free from income tax under Article 291. Under Article 362, this privy purse was charged to the Consolidated Fund of India. The privy purse that was paid was substantially less then the earnings of the Maharajas. In return for the privy purse, the rulers had given up assets worth Rs. 77 crores. Several palaces, houses etc. were surrendered to the Government and converted into Government offices in Delhi.

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18 *Madhavrao Scindia v. Union of India* AIR 1971 SC 530, 545 (para 21).

19 Menon V.P., *The Story of the integration of the Indian States,* Orient Longman (1961).

After independence, some Congress leaders once again proposed the abolition of privy purses. Sardar Vallabhai Patel threatened to resign. He reminded them that it was a promise given to the rulers for signing the Instrument of Accession and that India could not go back on its promise.

In the late 50s, Pandit Nehru wrote to the rulers asking them to "voluntarily" reduce the privy purse. This itself was highly objectionable; once a promise had been made and provisions in the Constitutions reflected that promise, it was wholly inappropriate to request any kind of reduction in the quantum of privy purse.

Several leaders of the Congress party proposed the abolition of the privy purses and privileges given to the rulers. To the credit of Pandit Nehru, he rejected this proposal on the ground that the Government should not break its promise. He had also pointed out that the cost incurred on the privy purses was also diminishing. Thus, a formal resolution moved at the Bhubhaneswar convention of the Congress party was rejected. This shows that Pandit Nehru respected the promises made in the Constitution and did not countenance any proposal for abolishing the privy purses.

With the death of Pandit Nehru and Lal Bahadur Sastri, respect for the Constitution died as well. Before their death the policies of the Government were kept within the framework of the Constitution. After 1967, the Constitution was sought to be brought within the framework of the policy of the ruling party.

Austin recalls that several rulers joined the *Swatantra Party* and many of them defeated the Congress candidates in the Parliamentary elections in 1967.[20] The Congress party returned to power but with drastically reduced strength. Once again, the proposal to abolish privy purses was raised by introducing the 24th Amendment Bill. This barely received 2/3rd majority in the Lok Sabha (332 votes in favour and 154 against) but was defeated in the Rajya Sabha (149:75) on 5th September, 1970. The same night an order was prepared derecognizing the Princes. President V.V. Giri was then in Hyderabad. An officer was sent by a special aircraft to get his signature. An order dated 6th September, 1970 was issued to all rulers withdrawing their recognition. Within a few days, Madhavrao Scindia (the Maharaja of Gwalior) and other princes filed a petition in the Supreme Court under Article 32 to strike down the Presidential order as unconstitutional. (Ironically, Madhavrao Scindia subsequently became a leader of the Congress party.) The matter was heard and judgment delivered by December, 1970. From the date of filing, disposal took less than four months ! The Supreme Court

20 Austin, *Working a Democratic Constitution* (p. 220 – 227).

struck down the laconic order derecognizing the princes. A Bench of eleven judges heard this case and Justice A. N. Ray supported the Presidential order on almost all issues. The judgments of Chief Justice Hidayutallah and Justice J. C. Shah judgment deserve to be read. Thus, a maladroit attempt to abolish privy purses was unsuccessful.[21]

In 1971, Mrs.Gandhi won the election with a substantial majority. The 26th amendment was introduced to abolish privy purses. It sought to delete Articles 291 and 362 of the Constitution. (The former guaranteed payment of privy purse which was exempt from income tax and was charged to the Consolidated Fund of India under Article 362.) The 26th amendment also inserted Article 363A which formally derecognized the Princes and abolished privy purses. This was upheld on the ground that it put an end to the distinction between erstwhile rulers and others which is a *sine qua non* for achieving common brotherhood. The 26th Amendment, the court held, did not violate the basic structure.[22]

§ 28th Amendment – another breach of trust

Perhaps even more shameful was the 28th amendment which sought to delete Article 314. This provision guaranteed to former civil servants, the same conditions of service as prevailed at the time of just before independence. In other words, former civil servants would be entitled to salary, pension etc. in accordance with the rules that prevailed before independence. The preamble to the 28th amendment stated that

> *"The concept of a class of officers with immutable conditions of service is incompatible with the changed social order. It is, therefore, considered necessary to amend the Constitution to provide for the deletion of Article 314 and for the inclusion of a new Article 312A which confers powers on Parliament to vary or revoke by law the conditions of service of the officers aforesaid and contains appropriate consequential and incidental provisions."*

Social orders may change but the guarantee given under the Constitution should be respected. Just as a guarantor cannot unilaterally revoke his guarantee on the ground that subsequent circumstances have changed, equally, the nation cannot go back on its promise on the ostensible ground of change of "social order". In this context, it is interesting to recall a passage from a lecture delivered by Fali S. Nariman.[23]

> *"... here were two aspects of British rule which we jettisoned with the*

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21 *Madhavrao Jiwajirao Scindia v Union of India* AIR 1971 SC 530.

22 *Raghunathrao Ganpatrao v Union of India* AIR 1983 SC 1267, 1287-1288.

23 Nariman F.S., *Quest for Justice,* First Nani A.Palkhiwala Memorial Lecture, 2004.

British Raj. They were mentioned – somewhat pompously- by a British historian, G.M.Trevelyan. He wrote that the reason why the British ruled India for so long was because (to quote him) "we were looked upon as a nation which kept our promises; and, as rulers, we took no bribes."

§ 39th Amendment – Touching new lows

Mrs. Indira Gandhi, the former Prime Minister, had won the Lok Sabha election from the Rae Bareli Constituency against Raj Narain. He challenged her election alleging certain corrupt practices. The details of this case are contained in an excellent book[24]. In June, 1975, Justice J.M.L.Sinha of the Allahabad High Court set aside her election and she was disqualified for six years. The matter was challenged before the Supreme Court. Justice V.R. Krishna Iyer was the vacation judge and late Shri Nani Palkhivala appeared for Mrs.Gandhi along with Shri F.S. Nariman who was then the Additional Solicitor General. The Supreme Court refused to grant a complete stay of the operation of the Allahabad High Court judgment but granted only a limited stay. Two days later, Mrs.Gandhi proclaimed the Emergency.[25] The worst amendments to the Indian Constitution came during this period. Within six weeks of the declaration of Emergency, the Constitution (39th Amendment) Bill was presented to the Lok Sabha. The Statement of Objects and Reasons pointed out that the President was not answerable to a court of law for anything done while in office in the exercise of his powers. It then stated:

A fortiori, matters relating to his election should not be brought before a court of law but should be entrusted to a forum other than a court. The same reasoning applies equally to the incumbents of the offices of Vice-President, Prime Minister and Speaker. It is accordingly proposed to provide that disputes relating to the election of the President and Vice-President shall be determined by a forum as may be determined by a parliamentary law. Similar provision is proposed to be made in the case of the elections to either House of Parliament or, as the case may be, to the House of People of a person holding the office of Prime Minister or the Speaker. It is further proposed to render pending proceedings in respect of such election under the existing law null and void. The Bill also provides that the parliamentary law creating a new forum for trial of election matters relating to the incumbents of the high offices abovementioned shall not be called in question in any court.

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24 Prashant Bhushan, *The Case that Shook India,* Vikas Publishing House Pvt. Ltd.

25 Nariman F.S., *Turning Points,* (2006) 8 SCC (J)13.

This reasoning is untenable. The President is not elected like the Prime Minister or Speaker. The purpose of making the President not answerable in a court of law is entirely different and has nothing to do with an election of a Member of Parliament being challenged on grounds of corrupt practices. The 39th Amendment sought to create a forum or authority for deciding the validity of such election. It expressly stated that this authority would not be the High Court which normally tried election disputes under Article 329(b).

The entire amendment was introduced with the sole objective of ensuring that the order of the Allahabad High Court was nullified. This is made clear by Article 329A(4) which stated that any law made by Parliament before the commencement of the Constitution (39th Amendment) Act would not apply to the election of the President, Vice President, Prime Minister and Speaker. *Further, any decision of a court declaring an election to be void would be of no effect.* Despite any such judgment, the election would continue to be valid in all respects and "shall be deemed always to have been void of no effect". The amendment took no chances. At that time, Mrs. Gandhi's appeal was pending before the Supreme Court and Clauses (4) to (6) of Article 329A read as follows:-

> *(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 to any such person as it 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 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.*
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> *(5) Any appeal or cross appeal against any such order of any court as is referred to in Clause (4) pending immediately before the commencement of the Constitution (Thirty Ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of Clause (4).*
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> *(6) The provisions of the Article shall have effect notwithstanding anything contained in this Constitution.*

This amendment illustrates the complete disregard for the Constitution. It is the most glaring example of how the Constitution could be subverted to save the election of one individual.

The 39th amendment was presented to Parliament on 6th August 1975. The entire process of obtaining the necessary majority in the Lok Sabha, Rajya Sabha and the Presidential assent was completed within four days! With most of the opposition in jail, a rubber stamp Parliament passed the 39th Amendment without any discussion or debate.

The validity of the 39th amendment was considered by the Supreme Court in *Indira Nehru Gandhi*[26] and Article 329A(4) was held unconstitutional.

Khanna J. observed that Article 329A(4) violated the principle of free and fair elections which were an essential postulate of democracy and part of the basic structure. He held:-

(i) Clause (4) abolished the High Court's jurisdiction without providing for another forum for going into the disputes relating to validity of election of Mrs. Indira Gandhi;

(ii) It prescribed that the dispute of Mrs.Gandhi's election would not be governed by any election law and the validity of the said election was absolute and not liable to be assailed;

(iii) It extinguished both the right and remedy to challenge the validity of election.

Mathew J. termed Clause (4) as a legislative judgment, which, like a bill of attainder, disposed of a particular election dispute (that of Mrs. Gandhi). The essential feature of a democracy included the resolution of an election dispute by the exercise of judicial power after ascertaining the adjudicative facts and applying the relevant law for determining the real representative of the people. When there was a dispute between parties as regards adjudicative facts, there could be no legislative validation of an election. Mathew J. in the context of the basic structure made an interesting observation. He held that basic structure was a "terrestrial concept" having its habitat within the four corners of the Constitution.

Chandrachud J., third member of the majority, delivered an equally well reasoned judgment. He described Clauses (4) and (5) of Article 329A as an outright negation of the right to equality under Article 14. No doubt different rules would apply to different conditions and even a single individual, by his uniqueness, may form a class by himself. But in the absence

26 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299.

of a differentia, reasonably related to object of the law, justice must be administered with an even hand to all. He rightly pointed out that a democracy is sustained by the common man's sense of justice. Our Constitution provided a system of salutary checks and balance. "Whatever pleases the emperor has the force of law" is not an article of democratic faith.

This judgment, delivered during the Emergency, rightly held Articles 329A(4) and (5) to be unconstitutional. It was an unfortunate attempt to amend the Constitution to save the office of one individual. The inclusion of the Speaker, Vice President and the President was only a façade to cover up the real object of the amendment. This case was the first instance of the basic structure doctrine coming to the rescue of the Constitution. If it had been held that the power to amend the Constitution was absolute, this amendment could not have been struck down.

§ 42nd Amendment – a Constitutional outrage:

The 42nd amendment made the largest number of changes in the Constitution. It was also the worst in the history of the republic and it is hoped that such an exercise is never repeated again. The amendment was based on the recommendations of the Swaran Singh Committee. The Statement of Objects and Reasons makes remarkable reading and deserves to be reproduced in full.

1. *"A Constitution to be living must be growing. If the impediments to the growth of the Constitution are not removed, the Constitution will suffer a virtual atrophy. The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active mention of Government and the public for some year's now."*

2. The democratic institutions provided in the Constitution are basically sound and the path for progress does not lie in denigrating any of these institutions. However, there could be no denial that these institutions have been subjected to considerable stresses and strains and that vested interests have been trying to promote their selfish ends to the great detriment of public good.

3. It is therefore proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing

the directive principles. It is also proposed to specify the fundamental duties of the citizens and make special provisions for dealing with anti-national activities.

4. Parliament and the State Legislatures embody the will of the people and the essence of democracy is that the will of the people should prevail. Even though Article 368 of the Constitution is clear and categoric with regard to the all inclusive nature of the amending power, it is considered necessary to put the matter beyond doubt. It is proposed to strengthen the presumption in favour of the Constitutionality of legislation enacted by Parliament and State Legislatures by providing for a requirements as to the minimum number of judges for determining questions as to the Constitutionality of laws and for a special majority of not less than two-thirds for declaring any law to be Constitutionally invalid. It is also proposed to take away the jurisdiction of High Courts with regard to determination of Constitutional validity of Central laws and confer exclusive jurisdiction in this behalf on the Supreme Court so as to avoid multiplicity of proceedings with regard to validity of the same Central law in different High Courts and the consequent possibility of the Central law being valid in one State and invalid in another State.

5. To reduce the mounting arrears in High Courts and to secure speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under Article 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under Article 226.

6. It is proposed to avail of the present opportunity to make certain other amendments which have become necessary in the light of the working of the Constitution.

7. The various amendments proposed in the Bill have been explained in the notes on clauses.

8. The Bill seeks to achieve the above objects."

An examination of the first five paragraphs indicates that every reason mentioned therein was totally unsound. It was never demonstrated that a provision of the Constitution had been an impediment to growth and social justice. The absence of adequate growth in later 60s and 70s was the

consequence of pursuing the wrong policies. Social justice had not been delivered due to the extensive corruption at the Centre and State Governments. Large funds which were meant for providing basic infrastructure were simply siphoned off. There is no point in blaming the Constitution for the continuance of poverty, ignorance, disease and inequity of opportunity. Unfortunately, these continue to be rampant even after 60 years of independence.

It is difficult to understand how a Constitution "to be living must be growing". The Constitution is not a child that has to grow to survive. The Statement does not spell out the possible impediments to the growth of the Constitution. Indeed, there can be none and it does not require even elementary intelligence to understand that no country has achieved socio-economic development by amending the Constitution.

The real object of the 42nd amendment was to substantially reduce the power of judicial review of the High Courts and Supreme Court. It was a direct attack on the judiciary. Several amendments are shocking to read and what is worse is that they were passed without any discussion whatsoever. There was no reference to any Parliamentary Committee for careful discussion on the need for these amendments and their consequences. The Supreme Court of India was not entitled to consider the Constitutional validity of any such law under Article 32. It could do so only if the Constitutional validity of any Central law was also in issue in such proceedings. Now, when the validity of a State law is challenged, it is very unlikely that a Central law is also challenged at the same time. Consequently, the power of the Supreme Court to decide the validity of a State law was taken away. No person could approach the Supreme Court directly for any violation of his fundamental right if these were breached by any State Government. Article 131A provided that only the Supreme Court could decide the Constitutional validity of any Central law. If any case was pending before the High Court, concerning the Constitutional validity of a Central law, it had to be referred to the Supreme Court. The High Courts could not deal with the validity of any Central legislation.

To add insult to injury, Article 141A stipulated that the minimum number of judges of the Supreme Court who have to sit to determine any question as to the Constitutional validity of any Central law was seven. The Central/State law could not be declared Constitutionally invalid unless a majority of two third of the seven Judges held so! This was obviously to get over the 6:5 or 7:6 verdicts that were rendered in *Golaknath*[27] and *Kesavananda*

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27 AIR 1967 1643.

Bharati[28]. In the US Supreme Court, a number of important cases on Constitutional law have been decided by a 5:4 majority. If such a majority was required, many laws would not have been declared as unconstitutional.

The campaign to humiliate the Supreme Court touched new lows. Article 77 was amended prohibiting any court (including the Supreme Court or a High Court) to require production of any rules of business. In other words, the Supreme Court could not direct the production of any rule that may be relevant for the decision of a case before it.

The onslaught on the High Courts was even worse. The power of the High Court to decide the validity of any Central law was excluded. The writ jurisdiction was substantially curtailed and Article 226 was resubstituted. The power to grant interlocutory order was drastically limited.

Another amendment which had sinister implications went unnoticed. Part XIV-A, relating to Tribunals, was inserted. This introduced Articles 323A and 323B of the Constitution providing for administrative and other Tribunals. In fact, both the Articles 323A and 323B sought to exclude the jurisdiction of all courts. Under Article 227, the High Court had the power of superintendence over courts subordinate to it as well as Tribunals. The superintendence of Tribunals was excluded. Thus, the intention was to create a parallel justice system which was outside the purview of the High Courts. It may be noted that this amendment was made in 1976 when we did not have the benefit of the Supreme Court judgment in *L.Chandra Kumar*[29] wherein it was held that the writ jurisdiction was part of the basic structure and could not be taken away.

Like the Supreme Court, in the High Court only a bench of five Judges could decide the Constitutional validity of a State law and, even there, the decision had to be by a 2/3 majority. If the High Court had less than five Judges, then all the Judges have to sit to decide the issue and the verdict would have to be unanimous.

A part of Article 31C (inserted by the 25th Amendment) was held unconstitutional in *Kesavananda Bharati*. Parliament could not merely declare that the law purported to give effect to such abolition and put it beyond judicial review. The 42nd amendment expanded the scope of earlier part of Article 31C. While the erstwhile Article 31C was to give effect only to directive principles under Article 39, the 42nd amendment protected laws that purported to implement *any* of directive principles and make them immune from attack on grounds of Articles 14, 19 and 31. The consequence was that directive

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28 AIR 1973 SC 1461: (1973) 4 SCC 225.

29 *L.Chandra Kumar v Union of India* AIR 1997 SC 1125: (1997) 3 SCC 261.

principles would prevail over fundamental rights. This provision was struck down in the *Minerva Mills* case[30].

The 42nd amendment made another devastating change. It sought to insert Clauses (4) and (5) in Article 368 which made *any* Constitutional amendment made at *any* time, unquestionable in *any* court on *any* ground. The provisions are so shocking that they deserve to be reproduced.

(4) No amendment of this Constitution (including the provisions of Part-III) made or purporting to have been made under this article [whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court or any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

This amendment was also declared as unconstitutional in the *Minerva Mills* case.

Thirty years later, it is hard to believe that any one could make such amendments to the Constitution. H. M. Seervai observed that "from any point of view, the 42nd amendment can only be described as a Constitutional outrage". The Janata party which came to power in 1977 had promised to repeal the entire 42nd amendment as part of its election manifesto but Seervai points out that the Janata party did not make this attempt because they did not have the requisite majority in the Rajya Sabha.[31] Much of the damage done by the 42nd amendment was rectified by the 44th amendment. Strangely, the 44th amendment did not delete Clauses (4) and (5) of Article 368. As mentioned above, these were struck down in 1980 by the *Minerva Mills* case.

§ Reservation and the issue of backward classes:

The reservation of seats in educational institutions and reservation in public sector employment for other backward classes has been a sensitive political issue. In 1992, the *Mandal* case[32] considered 11 issues pertaining to reservation in public employment. While rightly emphasising the need for reservation for the socially and economically backward classes, the Supreme Court has also emphasised the need to exclude the creamy layer and held

30 *Minerva Mills Ltd. v Union of India* AIR 1980 SC 1789 : (1980) 3 SCC 625.

31 Seervai H.M. "*The Emergency, future safeguards and the Habeas Corpus case: A criticism*", (1978).

32 *Indra Sawhney v Union of India* AIR 1993 SC 477 : (1992) Supp (2) SCC 212.

that reservations should neither exceed 50% nor could there be reservation in the matter of promotion. In several subsequent cases, the Supreme Court has repeatedly emphasised the need to exclude the creamy layer. Arun Shourie has pointed out that there are serious flaws in the manner in which the Mandal Commission of 1980 and the Kalelkar Commission of 1952 had identified the castes which would be classified as the backward classes. After 1931, there has been no caste-wise census of the population. The Mandal Commission assumes that the same percentage on the total Hindu population would continue in 1980.[33] If Articles 15 and 16 are to be implemented in the spirit in which they were enacted, it is necessary to identify the castes that are really socially and educationally backward and ensure that the benefit of reservation reaches them. There are enough studies to indicate that the creamy layer has cornered the substantial benefit of reservation.

No political party has yet been able to take an objective stand on this issue and every judgment of the Supreme Court has been nullified in the recent past. The 77th amendment nullified the view taken in the *Mandal* case that reservations could not be made in matters of promotion. The 85th amendment also ensured that persons who had the benefit of accelerated promotion would also get consequential seniority. This amendment nullified the view taken in another Supreme Court judgment.[34] Similarly, the 81st amendment permitted the carry forward of backlog vacancies which were not to be taken into account for calculating the ceiling limit of 50% laid down in the *Mandal* case. Finally, the 82nd amendment inserted a proviso in Article 335 to enable relaxation of qualifying marks and standards of evaluation. The Supreme Court had pointed out that relaxation in qualifying marks or lowering standards was not permissible.[35] The 82nd amendment nullified this sensible and common sense view.

All these amendments have been upheld by the Supreme Court with certain limitations. It is outside the scope of this article to discuss the scope of these amendments and the recent judgment of the Supreme Court.[36]

What is objectionable is the tendency to overrule Supreme Court decisions for politically expedient reasons. There has been no objective examination of any mistake or flaw in the Supreme Court decisions before the Constitution is amended. There has also been no examination of the consequences of carry forward of vacancies without the 50% limit or the effect of relaxation of qualifying marks. In the years to come, the country

33 Arun Shourie, *Falling over Backwards, Rupa & Co.* (2006).
34 *Union of India v Virpal Singh Chawhan* (1995) 6 SCC 684 : AIR 1996 SC 448.
35 *Vinod Kumar v Union of India* (1996) 6 SCC 580.
36 *I.R.Coelho v State of Tamil Nadu,* (2007) 2 SCC 1.

will have to pay dearly for amendments that have sacrificed Constitutional principles at the altar of vote-bank politics.

In contrast, decisions of the US Supreme Court have been overruled only five times in over 230 years.[37]

Conclusion:

The Constitution has thus survived despite tragic attacks. The basic structure doctrine has repeatedly saved its integrity and sanctity. There is now a proposal in certain quarters to have a new Constitution to achieve "social objectives". The Constitution has not failed us but it is us who have failed the Constitution. It is absurd to expect that conditions of millions of Indians will change by having a new Constitution. Our Constitution does not contain any provision that obstructs a genuine measure to improve the economic and social conditions of our people. I can only conclude with the words of Joseph Story that were quoted by Sachidananda Sinha in his inaugural address as the Provisional Chairman of the Constituent Assembly on 6th December, 1946:

> *" The structure has been erected by architects of consummate skill and fidelity; its foundations are sold; its compartments are beautiful as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers, THE PEOPLE. Republics are created – these are the words which I commend to you for your consideration – by the virtue, public spirit, and intelligence of the citizens. They fall, when the wise are banished from the public councils, because they dare to be honest,and the profligate are rewarded, because they flatter the people, in order to betray them."*[38]

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37 The Eleventh Amendment (the only amendment removing part of the jurisdiction of federal courts) was passed in response to the Court's decision in *Chisholm v Georgia* (2 Dallas 419,1793); the passage of the Thirteenth and Fourteen amendments overturned *Dred Scott v Sandford* 60 U.S. 393 (1856); the Court's decision striking down a federal income tax, in *Pollock v Farmers' Loan and Trust Co.* (158 U.S. 601, 1895), was overturned by the Sixteenth Amendment; and the Twenty-sixth Amendment, extending the franchise to eighteen-year-olds, overturned the Court's five-four decision in *Oregon v Mitchell* (400 U.S. 112, 1970) – extracts from *Views from the Bench – The Judiciary and Constitutional Politics*, Asian Books, New Delhi.

38 *Constituent Assembly Debates,* Vol.-I.