A federal dilemma

Constitution or Court ?

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Experts in constitutional and judicial matters are increasingly voicing their anxiety about a persistent stand-off between Parliament and the Supreme Court over the power of each in amending the Constitution. The fear is that unless it is resolved soon the stand-off may one day spark a constitutional deadlock. Successive Benches of the Court have also been deeply divided over the issue. Now this fear has spilled over into public debate. Among those who have joined in recently are a former judge of the Supreme Court, three Senior Advocates of the Supreme Court, a former Secretary General of Lok Sabha, and many academic and lay voices.

The stand-off itself is as stark as it could be. In the clearest possible and unusually mandatory terms the Constitution says in Article 368 that "Notwithstanding *anything* in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal, *any* provision of this Constitution in accordance with the procedure laid down in this Article." (Emphasis added) The Article also makes it clear, very specifically, that Parliament can amend Fundamental Rights as well according to the same procedure, and the purpose of the procedure is not to restrict the amending powers of Parliament but only to ensure that any amendment which affects the rights of the constituents of the Indian federation is made only if it has their support to the extent and in the manner prescribed in that Article. The procedure is also a tribute to the care taken by the authors of the Constitution to ensure that the federal centre respects the rights of the federating states.

In the same mandatory language the Article goes on to make it clear that the right to amend the Constitution belongs *only* to Parliament because it adds: " An amendment to this Constitution may be initiated only by the introduction of a bill for the purpose in either House of Parliament." This clearly means that while the Court may *interpret* an Article, just as it may interpret a law, it may not make "any

addition" or "variation" in "any provision of this Constitution", nor may it "repeal any provision", because that would constitute an *amendment*. With the same emphasis in its language Article 368 also adds that when an amendment has been adopted according to the prescribed procedure "it *shall* be presented to the President who *shall* give his assent to the Bill and thereupon the Constitution *shall* stand amended in accordance with the provisions of the Bill."

But these categorical assertions in the letter and meaning of the Constitution face the assertion of an unprecedented "doctrine" which was propounded by the Supreme Court thirty years ago. The doctrine is not sanctioned by any provision of the Constitution, its ambit is neither defined nor perhaps definable, and its application is unpredictable. But that makes it all the more comprehensive. What it says amounts to saying that Parliament cannot amend any provision of the Constitution which the Court may, going by its own (unstated) criteria and whenever it may decide to do so, consider to be a "basic feature" of the Constitution.

What happens then if Parliament passes a constitutional amendment by a procedure which is in full compliance with Article 368, and the Court declares under its own "doctrine" that the amendment touches an Article which the Court finds on the given occasion to be a "basic feature" ? Would the Supreme Court be in conflict with the Constitution, which is the sole source of all authority of all institutions of governance, including the Supreme Court itself ? Would the Court be intervening to protect the people against their Parliament, or Parliament against the Constitution, or the Constitution against those who wrote Article 368 in such clear language ? Such questions are not imaginary. As the result of a number rulings, though most of them were given by divided Benches, the Court has held so many and so loosely defined "features" to be "basic" that many an amendment is likely to touch one or another provision of the Constitution. What prevails then, Article 386 or the "doctrine", and what would a conflict between them do to the equation between the three most obviously basic features of our entire political system, the Constitution, Parliament, and the Supreme Court ?

Mr Justice S. Ranganathan contemplated this dilemma in his Memorial Lecture in honour of Sir Alladi Krishnaswami Ayyar, one of the great luminaries who wrote the Constitution. Justice Ranganathan says " It does not seem likely that the Constitution makers intended to repose in the judiciary the power to pronounce even on the validity of a

constitutional amendment." In his own Lecture later Senior Advocate Mr P.P. Rao said " I have selected a topic which I doubt whether Sir Alladi would have comprehended during his lifetime." He described the concept of the "doctrine" to be as "vague and undefined" as most of the "basic features chosen to illustrate it". Even more serious is his view that " This single decision has deflected the balance of power decisively in favour of the judiciary at the cost of Parliament and cast a cloud of uncertainty over the amending power." Another Senior Advocate, Raju Ramachandran, says the "doctrine" is "anti-democratic" because in its garb "unelected judges have assumed vast political power not given to them by the Constitution".

They could not have made these comments by way of praising Parliament as the flag bearer of democracy. How could they, when similar analysts have also shown how Parliament itself and so many of its members have brought down the flag of democracy. They have only underlined a situation which causes concern because a steep decline in the people's respect for Parliament is one of the main reasons why the Supreme Court has felt so free to expand its powers beyond the known intentions of those who wrote the Constitution. Another Senior Advocate, Mr Andhyarujina, has meticulously traced how incremental "interpretations" by the Supreme Court have introduced the far reaching concept of "due process" into the Constitution though "the framers of the Indian Constitution had rejected it ..,after deep deliberation."

But the issue here is not which institution has erred more, but how the due responsibilities of each may best be restored to and assumed and exercised by each, so that all may stop nibbling away at the Constitution. They did not at one time. The leaders of public opinion inculcated the right values among the people, Parliament embodied these values in laws, the courts fine tuned the laws for meeting real life situations and dispensing expeditious justice, and the Constitution remained true to its magisterial role as the final point of reference for everyone, leaving no one free to misconstrue it for his own benefit. But with legislators now doubling as street fighters and judges as preachers, the law's delays grow endlessly long and disorderly impatience among the people becomes the norm.

All that will take time to fall back into place. But in the meantime the Court should uphold the laws or strike them down as required by the Constitution, not by novel doctrines, Parliament should stop making the blatant misuse of the Ninth Schedule as it used to make at one time,

legislators should spend more time in their seats than in various "wells", and the Constitution should be allowed to remain the referee it is meant to be so that under its due authority our democratic federal parliamentary system, which is the most complex of all forms of government, may resume the admirable progress it was making until recently.

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