1907

The appointment of the Chief Justice, the Government and the Supreme Court

By

S. P. MITRA

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Dedicated

to

the memory of my

FATHER

57, Anandlok,
New Delhi-49

18th July 1973

I welcome this book-let because its author Shri S.P. Mitra expresses a point of view which in my opinion is the correct angle from which to judge and examine the Government's action. Explanations have been given on behalf of the Government about the appointment of the Chief Justice; but the explanation given by the author, placing the issue in its proper context and perspective, is necessary. The public has a right to know it.

(Hardayal Hardy)
Ex-Chief Justice, Delhi High Court;
Senior Advocate, Supreme Court.

PREFACE

The appointment of the Chief Justice of the Supreme Court in April, 1973 has raised a sharp controversy in which the legal profession has been taking a leading part. The controversy has sometimes come down to the level of personalities, but at its core is an issue which is important.

The issue, to be considered and judged fairly, has to be seen in the relevant context and perspective. In this small booklet. I have tried to place the issue in that context and perspective and to consider it on that basis.

My approach in the matter has been not so much of a lawyer, which I happen to be but of a citizen of the country, which I basically am.

The Supreme Court is the final authority to interpret the Constitution. It is not the Constitution as it is but the Constitution as interpreted by the Supreme Court which is of practical importance.

The interpretation of Constitutional points by the Supreme Court, even of fundamental points, varies and, as the past has shown, it may vary even diametrically.

How the same written text can have diametrically opposite, even materially divergent, interpretations is a question. But this has happened in every country and in every sphere where the written word is of paramount importance. Perhaps the key to divergence in interpretations lies not so much in the written text as in the mind of the interpreter—his approach to a problem, the purpose he has in view.

A decision of the Supreme Court on a Constitutional point has not only a legal aspect affecting the parties to the case before it but also a political aspect, sometimes of profound significance, which affects every citizen in the country.

Curiously, there has been little public debate in the country over the decisions of the Supreme Court even on Constitutional points of fundamental importance and with far reaching significance for the political life and the development of the country. Such debate, I feel, is not only desirable but necessary to inform public opinion.

K—57, Jangpura Extension
(G. Floor)
New Delhi-14.
June 25, 1973.

S.P. Mitra.

I

On April 24, 1973 the Supreme Court of India delivered judgement in the Fundamental Rights case. The vital issue in that case was whether the Indian Parliament had the power under the Indian Constitution to amend the Fundamental Rights embodied in Articles 12 to 35 comprising Part III of the Constitution. By one of these Articles, Article 32, the Right to move the Supreme Court for enforcement of these Rights is guaranteed.

The Chief Justice of the Supreme Court was to retire two days later, on 26.4.73. On the evening of 25.4.73, the appointment of Shri A.N. Ray as Chief Justice of the Supreme Court, superseding three judges senior to him, was announced. On 26 4.73 Shri Ray took over as Chief Justice of India, the three superseded judges resigned and there were sharp protests in Parliament and from Bar Associations in the country.

Under the Constitution, the Chief Justice of the Supreme Court, like the other judges, is appointed by the President who, under the Constitution, is to act in this, as in other matters, on the advice of the Union Council of Ministers.

The Constitution does not provide that the seniormost judge of the Supreme Court is to be appointed as Chief Justice when the post falls vacant. The first Law Commission, consisting of eminent lawyers, had recommended in its 14th Report in 1958 that in appointing the Chief Justice of the Supreme Court, the principle of seniority need not be followed and a person pre-eminently suitable for the post, in the light of the criteria recommended by the Commission in its Report, should be selected. But in actual practice, the seniormost judge of the Supreme Court had invariably been

appointed as Chief Justice, even when his period of office was to be very short. Shri Ray's appointment was a rather sweeping departure from this prevailing practice.

From the beginning, the protest against the appointment of Shri Ray was on the ground that his appointment as Chief Justice was not based on any accepted canons of judicial preferment but was politically motivated. The charge was that Government wanted a "committed judiciary", who would follow the Government line and would not strike down important Government measures as *ultra vires* the Constitution, that this would mean the end of the independence of the judiciary.

That the charge had some substance became evident from speeches of members of the Union Government in and outside Parliament in defence of the appointment. It was said in Parliament by a Union Minister that in selecting persons for appointment as Chief Justice and judges, their social philosophy has also to be taken into consideration, that it was the prerogative of Government to appoint, as Chief justice and judges, persons who shared the social philosophy of Government so that Government's legislative measures to bring about socio-economic changes would not run the risk of being struck down by the Court as *ultra vires* the Constitution as has been happening in the recent past.

As the controversy rolled on, the charge acquired new dimensions. It was being said that the appointment of Shri Ray may not only signify the beginning of the end of independence of the judiciary but may even be a prelude to the end of democracy and of rule of law.

II

When India stepped into independence in 1947, she had no previous experience of democracy. There was a well-organised and well-established system of Courts and of judicial administration, a more or less independent judiciary

in which people had faith and, broadly, rule of law—all developments of the British period. Prior to that, the people had lived for centuries under complete, unfettered autocratic and arbitrary rule.

The people broadly were tolerant, patient and law abiding but the vast majority were quite poor and illiterate, particularly in the villages. The rural areas were caste-ridden and largely semi-feudal, with zamindars, jagirdars etc. owning and controlling vast land interests and dominating the people and the economy. The nationalist movement had brought political awakening to the rural masses and political awareness but that was broadly limited to the idea and ideal of national independence and did not extend to the idea and ideal of democracy, of individual liberty and individual freedoms. But even the rural masses had heard Mahatma Gandhi's call of "Ram Rajya" after Independence and had understood its meaning and content—a society permeated in all its aspects with justice, with friendliness and kindness, a society in which man would be free and happy, rid of the age-long shackles of the past, of caste and untouchability, of social and economic domination and exploitation of the many by the few. It meant that Indian society had to be profoundly transformed—socially, economically and politically.

In urban areas, there was a rising capitalist class controlling industries and business. There was also a substantial English-educated, western-oriented middle class which constituted more or less the country's intelligentsia and its most vital creative and idealistic political force. This class, by and large, had deeply imbibed the ideas and ideals of western liberalism and humanism—democracy, rule of law, equality, freedom of man They had also listened to Mahatma Gandhi's call of "Ram Rajya" after Independence and the substantial majority of them, more or less all who were not attached or committed to particular interests or creeds, had

accepted it as a goal to be sought after the attainment of freedom.

India's political leaders, when the country attained Independence, came from this English-educated, western-oriented class. They were inspired by the ideals of western liberalism and humanism. And very many of them, above all Nehru, deeply believed, within the limits of practicability, in Gandhiji's goal of "Ram Rajya"—in the need of a radical transformation of Indian society. It found clear expression in Nehru's tryst-with-destiny speech in Parliament on the midnight of August 14, 1947. He said : "that future is not one of ease or resting but of incessant striving that we might fulfil the pledges we have so often taken and the one we shall take today. The service of India is the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity."

It were these twin goals of establishing democracy—popular government, rule of law, the basic human freedoms—and of bringing about a transformation of Indian society socially, economically and politically, which the political leaders had when, on the attainment of the country's Independence, they got political power.

The two goals were not conflicting. They were basically complementary. Democracy and the basic freedoms of man, however institutionally perfect and protected, would have no broad supporting base and would have little meaning and content for the vast majority of the people, unless their dire poverty was ended and they got education, unless they could be freed of the domination of privilege, of caste, of the shackles of untouchability, unless the control and domination of the semi-feudal elements in rural areas could be ended and the power of capital, of concentrated money-power, in urban areas could be controlled, limited and diffused.

The real difference between the two goals was that the former was capable of more or less immediate achievement and did not involve any conflict with any major interest except in case of the former Indian States. The latter however could be achieved, even to a limited extent, only by a prolonged period of persistent endeavour, by "incessant striving" as Nehru said. And it involved conflict with major entrenched interests—that of caste and of semi-feudal land interests in rural areas, that of capital, of concentrated money power in urban areas. The last, that of capital, was potentially the most important and powerful. In 1947, the country was very little industrialized. After Independence, the pace of industrialisation was bound to increase and so also the power and domination of capital. And while the power and hold of caste and of the semi-feudal land interests in rural areas had steadily and perceptibly decreased and was being eroded during the later period of British rule, the power and hold of capital had steadily increased. Caste and the land interests were dying forces. Not so capital. It was the rising power.

III

The Constitution was framed with the twin goals of establishing democracy and of transforming society in view. It established complete parliamentary democracy, with elaborate and detailed provisions setting up the necessary institutions and prescribing the method and manner of their functioning. But before dealing with the form of government and other necessary institutions like the judiciary, the Constitution dealt in Part III, and in Part IV, with two basic and vital matters. In Part III, comprising Articles 12 to 35, are set down the basic human freedoms and rights—described in the Constitution as Fundamental Rights—which everyone in the country should have and enjoy. One of the Articles, Article 13, under clause (1) lays down that all pre-existing laws so far as they are inconsistent with the provisions of

Part III shall be void, and under clause (2) bars the State from making any law which takes away or abridges the Rights conferred by this Part and declares that any law made in contravention of it, shall to that extent be void. By Article 32, itself a Fundamental Right, the right to move the Supreme Court for the enforcement of the Rights conferred by this Part is guaranteed. The Supreme Court is, thus, made the guardian and protector of these Rights against executive or legislative arbitrariness or encroachment and also the final authority for the interpretation of these Rights, as it is of the rest of the Constitution. Under provisions in later parts, the independence of the Supreme Court (and also of the High Courts) was provided for as well and as thoroughly as could be. The Constitution not only conferred Fundamental Rights on everyone but ensured their safe enjoyment as effectively as a Constitution can.

In Part IV, which immediately followed Part III and comprises Articles 36 to 51, were laid down the Directive Principles of State Policy—Principles which the State should follow to bring about the transformation of society socially, economically and politically. These Principles, as laid down in Article 37, would not be "enforceable by any court" but shall, nevertheless, be "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

The basic Principle is laid down in Article 38. The Article states :

> "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

In subsequent Articles No. 39 to 48 and No. 50, more specific directions are given. For example, the first three clauses of Article 39 enjoin :

> "The State shall, in particular, direct its policy towards securing
>
> (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
>
> (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 means of production to the common detriment."

By the Directive Principles, the Constitution cast a positive and fundamental duty on the State to systematically work for the transformation of society, laying down not only the broad but certain specific lines along which the effort should be made. If the Fundamental Rights constituted the "Don'ts" for the power of the State, the Directive Principles constituted the "Dos". Each was to be complementary to the other.

The Directive Principles are not merely the aspirations of the political leaders, just as the Fundamental Rights are not their gifts to the people. The country's condition required a transformation of society. Even if the Directive Principles were not there, political forces in the country would have pressed for such a transformation. The Directive Principles give expression to that political necessity. They give the Constitution also a positively dynamic aspect, comparatively rare with Constitutions.

IV

If the Fundamental Rights and the Directive Principles were, in actual practice, to operate as complementary to each

other, there would have to be continuous adjustment between the two, in the light of experience, in the context of specific measures to bring about the transformation of society, of the pace of the change and developments in the country. The Directive Principles in Part IV had an adequate in-built mechanism for such adjustment. They were not only not enforceable by any court (Article 37) but Article 38, which imposes the duty on the State to strive to bring about the transformation of society, also provides that the State shall strive to do it "as effectively as it may."

The Fundamental Rights in Part III had also an in-built mechanism for such adjustment but of rather limited scope. That was of judicial interpretation of these Rights by the Supreme Court which, under Article 32, was made the final authority for such interpretation. But the scope of adjustment through judicial interpretation is limited, though not so limited as is often thought or sometimes asserted to be. Adjustment beyond the scope of judicial interpretation would require amendments to the Fundamental Rights. There is no provision in Part III providing specifically for amendment of the Fundamental Rights. But the necessity of amendment was bound to arise sooner or later, depending on the pace of the change and the nature of the measures.

The Fundamental Rights included the Right to property and the Right to freedom of enterprise. Any substantial transformation of Indian society socially, economically and politically, enjoined as a positive duty on the State by Article 38, would require major land reforms with the elimination of the semi-feudal land interests, like zamindaries, in rural areas as a first step and steady, persistent and increasing control and even reduction of the rising power and domination of capital. It was inevitable that legislative measures to these ends would conflict with the Right to property and also the

Right to freedom of enterprise, requiring their modification and partial curtailment, particularly in specific areas or for specific purposes.

The Right to freedom of enterprise is contained in Article 19(1)(g). It confers on all citizens the Right "to practise any profession, or to carry on any occupation, trade or business." The Right was not absolute. Under Article 19(6), reasonable restrictions in the interests of the general public could be imposed on the exercise of this Right. The Right to property is contained in Article 31. This Article provided, under clause (1), that no person shall be deprived of his property save by authority of law and, under clause (2), that no property movable and immovable, including any interest in any commercial or industrial undertaking, or in any company owning such an undertaking shall be taken possession of or acquired for public purposes under any law unless the law provided for compensation for the property and also fixed either the amount of the compensation or specified the principles and manner of determining the compensation and of giving it.

The Right to property under Article 31, because of the detailed provision as to compensation in clause (2), was much more securely protected than the Right to life or to liberty embodied in Article 21. That Article provided that no person shall be deprived of his life or personal liberty except according to procedure established by law. But it did not prescribe any condition or test, including the test of the basic principles of Natural Justice, which such law would have to satisfy. In respect of life or liberty, Parliament's power was not fettered by any such limitations. In case of property, it was circumscribed by a detailed provision as to compensation.

No Constitution, however carefully or elaborately drawn, can cover all angles or anticipate all developments. In normal course, the working of the Constitution and developments

in the country were bound to reveal the need of adjustment in the Fundamental Rights for protecting the country's vital interests—like public order, security of the state, independence and sovereignty of the country. If the adjustment was beyond the scope of judicial interpretation, amendment in this context would be required also.

V

The Constitution came into force on January 26, 1950. Within about a year and half, some of the Fundamental Rights were amended by Parliament by the Constitution (First Amendment) Act, 1951. A clause (4) was added to Article 15 which relates to protection against discrimination. A new Article 19(2) was substituted for the old Article, enlarging the grounds on which restrictions could be imposed by law on the Right "to freedom of speech and expression" conferred on all citizens by Article 19(1)(a). The latter part of Article 19(6) was substituted by a new provision which added a new ground, sweeping in its scope, for imposition of restrictions on the Right to freedom of enterprise under Article 19(1)(g). The State was empowered to carry on, directly or by a Corporation owned or controlled by it, any trade, business, industry or service and even to bar citizens, not merely partially but even completely, from undertaking such trade, business etc.

But the most material curtailment, though limited to a specific sphere, was made to the Right to property under Article 31 by the insertion of Articles 31-A and 31-B in Part III. This was done in the interest of legislative measures to bring about land reforms, particularly the abolition of estates—zamindaries, jagirs etc. By Article 31-A, any law for the acquisition of estates or of rights therein was made immune from any challenge on the ground that it infringed the Rights conferred by Part III. Article 31-B provided for the validity of quite a number of legislative measures already enacted by various State Legislatures, some before and some

after the coming into force of the Constitution and relating mostly to land reforms including abolition of estates, even if they infringed the Rights conferred by Part III and even if already struck down by Courts. A new schedule—the Ninth—listing these legislative measures was added to the Constitution. The insertion of Article 31-A, like the substitution of Article 19(2), was made with retrospective effect i.e. from the date from which the Constitution had come into force.

In 1955, the Right to Property was again curtailed by Parliament—and quite materially. By the Constitution (Fourth Amendment) Act, 1955, clause (2) of Article 31 was replaced by a new clause (2) and a further clause (2A), and clause (1) of Article 31-A was replaced by a new clause. The significant change in Article 31 was the addition of a provision in the new clause(2) which made a law acquiring or requisitioning property immune from challenge in a Court on the ground that the compensation provided by the law for the property acquired or requisitioned was not adequate. Under the new clause (1) of Article 31-A, which was substituted with retrospective effect, the scope of the provision was widened to cover legislative measures not only for the acquisition of estates or of rights therein but also other matters like taking over the management of any property for a limited period or extinguishing or modifying the rights of managing agents, managing directors or managers of corporations or the voting rights of the shareholders thereof.

In 1963, came a further amendment, this time to Article 19. By the Constitution (Sixteenth Amendment) Act, 1963 Parliament amended clauses 2, 3 and 4 of Article 19 by inserting therein new grounds on which restrictions could be imposed respectively on the Fundamental Rights "to freedom of speech and expression", "to assemble peacefully and without arms" and "to form associations or unions"

conferred on all citizens by sub-clauses (a), (b) and (c) of Article 19(1) respectively.

In 1964, there was again a curtailment of the Right to property—in the interest of land reforms. By the Constitution (Seventeenth Amendment) Act, 1964 Parliament amended Article 31-A by adding a further proviso to clause (1) and by substituting, with restrospective effect, a new sub-clause (a) of clause(2) for the old sub-clause. Under the new sub-clause, the meaning of the expression "estate" in the Article was materially enlarged to cover classes of land interests hitherto not included.

Thus, in a period of less than 15 years since the Constitution had come into force in 1950, Parliament had to amend the Fundamental Rights four times.

Under practically every amendment, a Right was either curtailed or a ground for imposing restrictions on it added. The Right that was most materially curtailed and most often—by three out of four Amendment Acts—was the Right to property under Article 31. The Right, in respect of which the most sweeping ground for imposition of restrictions was added, was the Right to freedom of enterprise under Article 19 (1) (g).

The amendments to clauses (2), (3) and (4) of Article 19 were made to safeguard the vital interests of the country, like security of the State etc. The successive curtailments of the Right to property under Article 31 were made in the interest of transformation of society in pursuance of the Directive Principles. The sweeping new ground for imposition of restrictions on the Right to freedom of enterprise under Article 19(1)(g) was added in Article 19(6), largely at least, in the interest of transformation of society.

By 1964, the superstructure of semi-feudal land interests in rural areas had been more or less eliminated. But land

reforms at the grass roots level were yet to be largely achieved. There was too much concentration of land in the hands of the bigger farmers and too many landless or near-landless cultivators. In spite of all measures yet taken, the power and domination of capital had increased remarkably and were still increasing. The concentration of money power had vastly increased. Big business houses had grown and were growing bigger. The disparity between the rich and the poor had increased and was increasing.

These problems had to be tackled if society was to be transformed to any substantial extent. And if they were to be tackled successfully, further amendments to Fundamental Rights would become necessary, the nature and extent of which would only be revealed in the context of specific measures and developments in the country.

Then, early in 1967, the Supreme Court, reversing its earlier view, ruled in Golak Nath's case that Parliament cannot amend the Fundamental Rights.

VI

The question whether Parliament, under the Constitution, has the power to amend the Fundamental Rights came up before the Supreme Court as early as 1951, immediately after the first amendment to these Rights by the Constitution (First Amendment) Act, 1951. It arose in Shankari Prasad's case over the challenge to the constitutional validity of Articles 31-A and 31-B, raised in the context of a number of acts for abolition of estates, passed by various State Legislatures, which but for these Articles, ran the risk of being struck down by courts on the ground that they infringed Fundamental Rights. The Supreme Court held that Parliament, under the Constitution, had the power to amend the Fundamental Rights. It was a unanimous decision of all the five judges, including the then Chief Justice, who had

heard the case. This view was followed in 1964 in Sajjan Singh's case in which the constitutional validity of the amendment to Article 31-A, made by the Constitution (Seventeenth Amendment) Act, 1964, was challenged.

In Golak Nath's case in 1967, the Supreme Court re-examined the question and held by a majority of 6 to 5 that Parliament, under the Constitution, had no power to amend the Fundamental Rights. The decision, however, was to be prospective in operation and the amendments already made to the Fundamental Rights would remain valid. The main judgement of the majority was that of Shri Subba Rao, the then Chief Justice, with which four other judges concurred. Shri Hidayatulla, in a separate judgement, agreed with the conclusion. The amendment whose validity had been challenged in the case was the amendment to Article 31-A by the Constitution (Seventeenth Amendment) Act, 1964. The Right at stake, as in the two earlier cases, was the Right to property.

The short legal point on which the decision rested was that an Act of Parliament amending the Constitution, passed under Article 368, was also 'law' for the purpose of Article 13 (2) which forbids the State from making any law which takes away or abridges the Rights conferred by Part III and also provides that any law made in contravention of it shall, to that extent, be void. Consequently, an Act of Parliament amending the Fundamental Rights would, under the Constitution, be void.

The five judges in minority in Golak Nath's case, like the five judges in Shankari Prasad's case, expressed the contrary view. They held that an Act of Parliament, amending the Constitution under Article 368, was not 'law' for the purpose of Article 13(2) and Parliament had the power, under the Constitution, to amend the Fundamental Rights.

As five judges in Shankari Prasad's case and five judges in Golak Nath's case had held that an Act of Parliament amending the Constitution under Article 368, is not 'law' for the purpose of Article 13 (2), the view of the majority in Golak Nath's case that such an Act was 'law' for the purpose of Article 13(2) could hardly be the inescapable view dictated by the plain meaning of the language of the relevant provisions of the Constitution or even by the scheme of the Constitution as a whole; or ten out of the sixteen judges, taking the Benches in the two cases together, could hardly have taken the contrary view.

The main reason which underlies and informs the decision of the majority in Golak Nath's case was not any such narrow legal point but much more fundamental. That reason was that for the secure protection of the people's basic rights and freedoms, the Fundamental Rights should be kept beyond the reach of Parliament, above the vagaries of parliamentary majorities. It was said that the Constitution intended it. In Shri Subba Rao's own words 'having regard to the past history of our country, it (the Constitution) could not implicitly believe the representatives of the people, for uncontrolled and unrestricted power might lead to an authoritarian State" and, consequently, the "Fundamental Rights are given a transcendental position in our Constitution and are kept beyond the reach of Parliament." Support for this view was sought in certain speeches of Nehru and Dr. Ambedkar in the Constituent Assembly. The fact that, under Nehru's leadership, Parliament had made a number of amendments to Fundamental Rights was not considered. Because, according to accepted canons of interpretation of statutes—borrowed from England which, incidentally, has no written constitution—it is the intention of the Constitution-makers as expressed in words at the time of framing of the Constitution and not their intention as expressed in action while working the Constitution, which would be relevant. It also escaped notice that the first victims of an authoritarian

regime are the Right to liberty, the Right to life and the Right of dissent, and under the Indian Constitution, the Right to liberty and the Right to life had no protection worth the name. If the Constitution-makers were really so apprehensive about the emergence of an authoritarian State, they would have made these two Rights more secure than by merely laying down in Article 21 that "no person shall be deprived of his life or personal liberty except according to procedure established by law." The expression "law" in this Article had already been held by the Supreme Court, as far back as 1950 in Gopalan's case, to mean only law passed by the Authority competent to pass it and not also "just" law—"just" according to basic principles of Natural Justice. And the Supreme Court had also held in that case that Article 19 is separate from Article 21 (in April, 1973 in Shambhu Nath Sarker's case, the Supreme Court changed this view and held that Article 19 is not separate from Article 21).

In the India of 1967, as today, some reasons, of course, could be advanced in support of the view that in the interests of the people's basic freedoms, the Fundamental Rights should be put beyond the power of Parliament. In spite of about 20 years of democratic government, India was, for practical purposes, a one-party state In the ruling party, power was not widely distributed but unduly concentrated. The accountability of the ruling party and of their elected representatives in Government and Parliament to the people was not so real as the vast majority of the people, particularly in rural areas, were poor, more or less illiterate, without any adequate political awareness and the only comparatively effective organ of mass media, the radio, was under the control of Government. There could, thus, be some ground for the apprehension that unless the Fundamental Rights were put beyond Parliament's power to amend,

the people's basic freedoms, being enjoyed by them for the first time in India's long history, could not be adequately safeguarded.

But the view suffered from a fatal drawback. The only provision in the Constitution relating to its amendment is Article 368. It provides for amendment by an Act of Parliament assented to by the President. There is no provision in the Constitution for referendum for this or any other purpose. There is no provision for calling a Constituent Assembly. If Parliament had no power to amend the Fundamental Rights, then these Rights could not be amended by any constitutional means. They would be immutable so long as the Constitution lasts. They could be amended only by ending the Constitution. Shri Subba Rao considered it. He said : "there is nothing to choose between destruction by amendment or by revolution." Opinions may differ.

A Constitution can be no more static than a country. It has to change with the country's developments. It was more so in case of the Indian Constitution in view of the country's problems. Experience of the working of the Constitution had shown the need to amend the Fundamental Rights on as many as three occasions during a period of about 15 years, in the interests of transformation of society. India had still a long way to go on the path of industrial development, of international relations and of transformation of society. Could it be said in 1967, or for that matter even now, that in the years ahead, the Fundamental Rights would not require any further amendments, any further adjustments in the context of the country's needs and developments, in the interest of the transformation of its society socially, politically and economically ?

Shri Subba Rao's view was that "all the Directive Principles can reasonably be enforced without taking away or abridging the Fundamental Rights." In other words, any

implementation of the Directive Principles, any transformation of society, in any context, if it required the abridgement of a Fundamental Right—in the light of past experience, primarily the Right to property and then the Right to freedom of enterprise—it would be unreasonable. The adjustment between the Directive Principles and the Fundamental Rights should be entirely at the cost of the Directive Principles.

The decision in Golak Nath's case marks a water-shed in the history of independent India, of its Constitution and of the Supreme Court. By this decision, the Supreme Court became, within the framework of the Constitution, the supreme power in the country in a most vital field relating to its future development, greater than the Executive, greater than the Legislature, greater than even the People. The developments of April, 1973 are among its consequences.

VII

The decision in Golak Nath's case barred the possibility of adjustment of the Fundamental Rights to measures for the transformation of society (or to the vital needs of the country) through amendment. There still remained the possibility of such adjustment, though to a comparatively limited extent, through judicial interpretation. The prospects of such adjustment through judicial interpretation shrank with the decision of the Supreme Court in the Bank Nationalisation case in 1970.

In 1950, in Gopalan's case, which arose over the detention of Gopalan under the Preventive Detention Act, 1950 and in which the Right at stake was the Right to liberty, the question arose whether Article 19(1)(d) was linked to Articles 21 and 22 or is separate from them. Under Article 19(1)(d), the Right "to move freely throughout the territory of India" is conferred on every citizen. Under Article 21, a person shall not be deprived of his personal liberty "except according to procedure established by law".

Under Article 22, if a person is taken in preventive detention, certain procedure like giving him the grounds of detention has to be followed and any law providing for such detention for more than three months has to be made by Parliament and has to fulfil certain requirements specified in the Article. If Article 19(1)(d) is linked to Articles 21 and 22, then any law providing for preventive detention under Article 22 would have to satisfy the test of "reasonable restrictions in the interests of the general public". For that is the only ground on which (leaving aside that of reasonable restrictions for the protection of the interests of any Scheduled Tribe) restrictions can be imposed under Article 19(5) on the exercise of the Right conferred by Article 19(1)(d). And it would be for the Supreme Court to decide, in view of Article 32, whether any particular restriction imposed by a legislative measure on the Right conferred by Article 19(1)(d) is reasonable in the interests of the general public or not. The Supreme Court decided against it, holding that Article 19 is a separate Article having no application to preventive or punitive detention, that a citizen has the Right under Article 19(1)(d) only when he is not deprived of his liberty under a law under Article 21 or Article 22.

The view taken by the Supreme Court in Gopalan's case that Article 19 is a separate Article was not only followed in cases relating to the Right to liberty but was also extended to the Right to property. In Bhanji Munji's case in 1954, the Supreme Court, following earlier decisions, held that Article 19(1)(f), conferring on all citizens the Right "to acquire, hold and dispose of property" and Article 31(2), relating to the Right to property, were mutually exclusive. That meant that a law for the purpose of Article 31 need not satisfy the test, laid down in Article 19(5), for imposing restrictions on the exercise of the Right under Article 19(1)(f), as well as of the Right under Article 19(1)(d) – that of reasonable restrictions in the interests of the general public (leaving

aside that of reasonable restrictions for the protection of the interests of any Scheduled Tribe).

In 1960, the position was changed in respect of Article 31(1). By a majority decision in Kochuni's case (a judgement of Shri Subba Rao with which two other judges concurred), the Supreme Court held that Article 19(1)(f) was linked to Article 31(1). The ground was that after the amendment of Article 31(2) by the Constitution (Fourth Amendment) Act, 1955, Article 31(1) and Article 31(2) related to different subjects—Article 31(1) to deprivation of property and Article 31(2) to acquisition and requisition of property.

In respect of Article 31(2), the position continued unchanged. Bhanji Munji's case was followed in Babu Barkya's case, also decided in 1960 but after Kochuni's case. In 1961, in Sabita Devi's case, it was specifically reaffirmed that Article 19(1)(f) and Article 31(2) were not linked.

That position was changed in the Bank Nationalisation case in 1970. In that case, the Supreme Court held, by a majority of ten to one (Shri A.N. Ray was the one dissenting judge), that Article 19(1)(f) and Article 31(2) are not mutually exclusive, that the guarantee under Article 19(1)(f) extends to concrete Rights to property for the purpose of Article 31(2).

The decision, reversing the view taken in a series of earlier cases, gave an added protection to the Right to property. (Three years later, in April, 1973 the Supreme Court in Sambhu Nath Sarker's case, following the decision in the Bank Nationalisation case which related to the Right to property, changed the view, taken in Gopalan's case, in respect of the Right to liberty and held that Article 19 is not separate from Article 21 or Article 22).

This decision of the Supreme Court in the Bank Nationalisation case, particularly as it was by a majority of ten to

one, dimmed the prospects of adjustment, through judicial interpretation, of the Fundamental Rights to the needs of legislative measures to bring about transformation of society, particularly of adjustment of the Right to property which would be most in issue in that context.

VIII

In the meantime, while the political Executive and Parliament were finding their power to bring about transformation of society through necessary legislative measures getting more and more circumscribed in the context of the Fundamental Rights, pressures to bring about such transformation were fast increasing. Social tensions were rapidly mounting. Extremist political movements for bringing about radical socio-economic change and that through extra-constitutional means were springing up. In one major State and in one major city, such a movement took an extreme form and assumed fairly serious proportions. If society were not to disrupt or to be ruled by the naked use of force—the Police and the Army—things had to move and that early.

In 1971, Parliament passed the Constitution (Twenty-Fourth Amendment) Act, 1971 amending Articles 13 and 368 empowering Parliament specifically to amend the Fundamental Rights. Parliament also passed the Constitution (Twenty-Fifth Amendment) Act, 1971, replacing clause (2) of Article 31 by a new clause and adding, after clause (2A), a new clause (2B) by which Article 19(1)(f) was de-linked from Article 31(2). A new Article 31-C was added bringing some of the Directive Principles effectively into operation for the purpose of legislative measures in pursuance thereof. By the Constitution (Twenty-Ninth Amendment) Act, 1972 two Kerala Land Reforms Acts were inserted in the Ninth Schedule to the Constitution.

The validity of these amendments was challenged before the Supreme Court in the Fundamental Rights case, in the

context of the land reforms measures adopted by the Kerala Government. The Supreme Court examined in the case once again the question whether Parliament, under the Constitution, has the power to amend the Fundamental Rights.

The 13 judges, headed by the Chief Justice, who heard the case, delivered 11 separate judgements—9 judgements by 9 judges one each and 2 judgements each by 2 judges. All the judges held that the Fundamental Rights can be amended by Parliament under Article 368 of the Constitution, thereby reversing the majority decision in Golak Nath's case. But seven of the judges—again a majority of one—further held that Parliament's power to amend under Article 368 is subject to inherent and implied limitations. The exact nature and extent of these limitations have been stated differently—at least in different language—in their judgements and would require clarification through future cases. According to Chief Justice Shri Sikri in his individual judgement, Parliament's power to amend the Constitution under Article 368 does not enable Parliament to abrogate or take away Fundamental Rights or to completely change the fundamental features of the Constitution so as to destroy its identity. In the other judgements, the limitation is stated as the lack of the power to abrogate the identity of the Constitution or its basic features or to abrogate or take away the basic freedoms; or as lack of the power to destroy or emasculate the basic elements or fundamental features of the Constitution; or as lack of the power to totally abrogate or emasculate or damage any of the Fundamental Rights or the essential elements in the basic structure of the Constitution or to destroy the identity of the Constitution; or as lack of the power to abrogate the Constitution or to alter its basic structure or framework. The limitations, under the different judgements, are not identical. But under each judgement, they are substantial and wide—covering the entire Constitution and not merely the Fundamental Rights. As the expressions like "identity of the Constitution", "basic structure of the Constitution", "funda-

mental features of the Constitution", "essential elements in the basic structure of the Constitution" have not been defined or described, a major element of uncertainty and indeterminateness has crept in. As regards the amendments made to the Fundamental Rights by the Twenty-Fourth and the Twenty-Fifth Amendment Acts, they were accepted as valid except partially in case of the new Article 31-C. The validity of the Twenty-Ninth Amendment Act was accepted.

By the judgement in the Fundamental Rights case, the rigidity of the bar imposed by Golak Nath's case on Parliament's power to amend the Fundamental Rights was lifted. But the bar was reimposed, by a majority of the judges, in a substantial measure over a much wider field covering the entire Constitution. Under Golak Nath's case, a legislative measure could be struck down on the ground that it infringed the Fundamental Rights in Part III of the Constitution. Under this judgement, a legislative measure could be struck down on the ground that it affects a feature of the Constitution or a part of its structure which may be considered by the Court to be fundamental or basic.

The power of Government and Parliament in the matter, which was so drastically restricted in 1967, still remained substantially restricted, with new and indeterminate bars put on. As under the Constitution, the people's power to amend the Constitution is only through their elected representatives in Government and Parliament, that power also remained similarly restricted. And in a democracy, it is the people who, ultimately, are sovereign.

IX

The Constitution has a social philosophy, the dynamic aspect of which is contained in the Directive Principles. This social philosophy, including its dynamic aspect, is binding on the State and, consequently, on all the three great organs

of State power—the Union Government, the Parliament and the Supreme Court. It is to be shared by all the three.

A key question inherent in this philosophy, the answer to which vitally affects its appreciation, is of the adjustment of its dynamic aspect with what may be called its static aspect, more precisely, in the context of experience, with the Right to property and the Right to freedom of enterprise which constitute an important segment of that aspect. The adjustment could be mainly at the cost of the dynamic aspect, keeping the Right to property and the Right to freedom of enterprise substantially intact. That would result in severe curtailment of the dynamic aspect, as any substantial transformation of society in pursuance of the Directive Principles, either in the context of land interests or of capital and concentration of wealth and property, would require material curtailment of these rights. The adjustment could also be substantially at the cost of the Right to property and the Right to freedom of enterprise. That would give adequate scope to the dynamic aspect and a substantial transformation of society in pursuance of the Directive Principles would be possible.

The absence of a broad unity of view on this point between the Government, Parliament and the Supreme Court may hamper and delay the transformation of society and even prevent its substantial achievement. For, while it is for the Government and Parliament to bring and adopt measures for such transformation, it is for the Supreme Court to decide whether they are legally valid and enforceable.

Upto 1966, the appreciation of this social philosophy by the Government, Parliament and the Supreme Court, including the view on this point of adjustment, was broadly similar. In the interests of measures for transformation of society, the Right to property and the Right to freedom of enterprise were materially amended by Government and

Parliament (and also some other Rights mainly for protection of the country's vital interests). The Supreme Court accepted it.

From 1967, there occurred a rather sweeping change in the appreciation of this philosophy by the Supreme Court. Reversing its earlier decision which had held the field for over a decade and half, the Supreme Court made the Fundamental Rights unamendable and then gave an added protection to the Right to property by linking Article 19 (1) (f) to Article 31 (2). The net effect of this was that the adjustment of the dynamic aspect of the philosophy with its static aspect, in the context primarily of the Right to property and the Right to freedom of enterprise, would be at the cost of the dynamic aspect. It is only the scope of transformation of society, the implementation of the Directive Principles which would be curtailed. The decision in the Fundamental Rights case has only partially undone it.

The appreciation of the philosophy by the Government and Parliament remained more or less the same. It did not materially change. It is more or less the same appreciation, including the view on the question of adjustment of the two aspects of the philosophy, as was held by the Supreme Court upto 1966. There is, however, a feeling of urgency, due to recent developments in the country, to go ahead with the partially completed task of bringing about a substantial transformation of society in pursuance of the Directive Principles.

In view of the conditions in the country, further substantial transformation of society could mainly be in the context of the increasing power and domination of capital, of disproportionate concentrations of wealth and property. Obviously, the transformation, if it is to be substantial, would require further material curtailment of the Right to property and also, probably, of the Right to freedom of enterprise.

It is in this context that the issue has arisen of looking to the social philosophy of a person, to be appointed as Chief Justice or as a judge, for ensuring that his views on the limited but vital question of adjustment of the two aspects of the philosophy of the Constitution, involving mainly the question of curtailment of the Right to property and the Right to freedom of enterprise, would broadly be the same as those being held by the Government and Parliament.

The question arises : whether it can be done and even if it can be done, whether it should be done ?

The letter of the Constitution does not specifically bar it. But the matter does not end there. The question remains of its propriety in the context of the independence of the Judiciary, a cherished tradition in the country and under the Constitution.

The answer to the question depends on the appreciation of certain broad facts. First, the conditions in the country and the need, in the interests of the country's political stability, of a substantial transformation of society in the context of the ever increasing power, concentration and domination of Capital, of disproportionate concentrations of wealth and property. Secondly, that Government and Parliament, on whom lies the primary and direct responsibility not only to bring about the transformation of society but for the governance of the country, are directly accountable to the people. These are, of course, political considerations but a Constitution is not merely a legal, but also, and perhaps basically, a political document. Thirdly, that the appreciation of the social philosophy of the Constitution held by the Government and Parliament, including the view as to how the two aspects of that philosophy are to be adjusted, in respect of which conformity of views is sought to be ensured, was also held by the Supreme Court itself upto 1966 and in the Fundamental Rights case, the Supreme Court has

shifted towards it from the view it had started taking from 1967. And finally, that the Government and Parliament and, consequently, under the Constitution, also the people have no adequate power to amend the Constitution on the point involved.

In this context and keeping the question confined to the limited point over which it has arisen, it is difficult to answer the question categorically in the negative. All that may be said is that it is not a happy development but, in the circumstances, more or less unavoidable.

X

Will the development destroy the independence of the Judiciary ?

It will certainly affect that independence in the sense that the Chief justice and judges, so appointed, would more or less broadly have the view that the adjustment of the dynamic aspect of the social philosophy of the Constitution with its static aspect should be substantially at the cost of the latter—to be more precise, if the interests of transformation of society require it, the Right to property and the Right to freedom of enterprise will have to be materially curtailed. This will affect the propertied classes and the financial and business interests. In this sense and to this extent, the independence of the Judiciary will be affected.

But only in this sense and to this extent. A Chief Justice or a judge does not lose his independence vis-a-vis the Government, just because his broad views on this question happen to be more or less the same as theirs. Upto 1966, the Supreme Court had more or less the same broad view on this question as the Government. That did not affect its independence.

As the question is a live issue in society, most persons likely to be appointed as Chief Justice or as a judge have

some view on this question. So have many sitting judges. For no one is, or can be, completely insulated from the influence of opinion in society or of cleavages therein. A judge is not more, nor less, independent because his view on this question is of one type and not another.

His view may colour, perhaps unconsciously, his decision in particular contexts. But that does not affect his independence. A judge's independence is affected only when he acts under a pressure or a restraint which is not self-imposed.

The position would not be different in case of a Chief Justice or a judge who, at the time of appointment, held specifically one type of view on this question and that was a factor in his appointment. During his functioning as Chief Justice or as judge, his own views on the question may affect his decisions. But these do not constitute any outside pressure or restraint. The effort to ensure broad conformity of views on this point is through selection at the time of appointment through the constitutional power vested in the President to make such appointments. There is no effort, nor can there be under the Constitution, to secure such conformity at any later stage. If a Chief Justice or a judge, so appointed, loses his independence vis-a-vis the Government, it would not be because he was so appointed but because of other factors. He would have lost it in any case.

The apprehension has been raised that judges, in the hope of ensuring or accelerating their promotion, may be tempted to follow the Government line as such to demonstrate conformity of their views with those of Government. If the prospect of promotion can be seriously regarded as sufficient inducement to make a judge of the Supreme Court or a judge or Chief Justice of a High Court lose his independence, then the independence of the Judiciary has probably been lost long ago. There are numerous high level Government assignments at the Centre as well as in the States which have been given for years to Chief Justices and judges on

retirement, at the discretion of Government. If the prospect of getting such assignments on retirement has not affected the independence of judges, the prospect of securing or accelerating promotion also will not.

The question has been raised as to what would happen with Chief Justice and judges, so appointed, when a Government with a different view on the question comes into power. Obviously, there would be a divergence of view on the point, for some time at least, between the Supreme Court and the Government as has happened from 1967 onwards.

The question has also been raised as to what would happen if a State Government and Legislature do not share the views of the Union Government and Parliament on this point. Obviously, a divergence of view on this point, between a State High Court and the State Government and Legislature, will ensue. As the process of appointment of the Chief Justice or a judge of a State High Court is initiated at State Level, the divergence may not last long.

The only significant change will be that if in the process of selection for appointment, conformity of views on this point is sought to be ensured as a regular matter of policy, then the inherent checks and balances in the Judiciary on this point, through different judges having different shades of view on the question, will be gradually eroded and the Judiciary as a body may gradually come to share broadly one view in the matter. There is some risk in such a development that the view may slowly tend to become extreme. That may not be particularly conducive to the country's political stability.

There, however, does not seem any reason to think that any such policy will be rigidly pursued. The conditions which developed from 1967 would hardly recur frequently. The compulsion of events which more or less led to such a step in April, 1973 would hardly recur again and again.

As regards the further apprehension that this development may endanger democracy or the rule of law, it has little substance. Neither democracy, nor rule of law is endangered if a Chief Justice or a judge does not regard the Right to property or the Right to freedom of enterprise as comparatively sacrosanct vis-a-vis the needs of transformation of society.

XI.

During the controversy that has ensued in the wake of the developments in April, 1973, attention has sometimes been focussed on the question of how to remove the possibility of such developments. Suggestions have been made, in that context, of controlling the power of the Executive over the appointment of Chief Justice or judges by providing some other authority for making the selection for appointments or by providing for prior approval of Parliament to such appointments.

Government and Parliament are accountable to the people, through elections, for the exercise of their power. Government is also accountable to Parliament. Even if Government has absolute majority in Parliament, that accountability remains sizeable because of debates, discussions and questions which are widely reported in the Press to inform public opinion.

Any Authority, outside Parliament, that may be created for making such selection would not be accountable either to the people or to Parliament. That would be creating power without accountability—rather unwise in a democracy. It would also be unwise to think that the persons composing such Authority, however selected, would be above personal predilections or pressures in making the selections. And to create an Authority, not accountable to the people, for making the selection for appointments to the higher judiciary when the smooth working of the Constitution depends on a broad unity

of views on basic issues between the Government, Parliament and the Supreme Court, would be fraught with serious danger.

Approval of Parliament to the selection by Government, prior to appointment, will be of some effect. But with the political tensions prevailing, the discussions in Parliament may sometimes be without any holds barred. That may irreparably damage the image of the Judiciary in the country and may also not be conducive to the self-confidence and self-respect of the judges. Such a procedure may increasingly bring in as judges persons who have been seasoned in the rough and tumble of politics, to having the lime-light of the Press focussed on them. This would not be particularly desirable.

The heart of this problem does not lie in the power of the Executives or of Parliament. It lies in the power of the Supreme Court.

The Supreme Court is the final authority to interpret the Constitution. It has the freedom, which it must have, to change its interpretation, even radically. The power of the Supreme Court to interpret the Constitution is unfettered.

But the Supreme Court is not accountable to the people, nor can it be. The only power the people have over the Supreme Court, under the Constitution, is through their elected representatives in Government and Parliament—that of appointment of the Chief Justice and the judges through the power vested in the President acting on the advice of the Union Council of Ministers and that of removal by impeachment under Article 124(4) of the Constitution. They have no other power.

If the people consider an interpretation of some point of the Constitution by the Supreme Court to be materially injurious to the country's interests as they appreciate and assess them—and they have the basic right to do so as India

is a democracy—and want to end the effect of such interpretation, the only way for them to do it, consistent with the dignity, position and prestige of the Supreme Court, would be to seek, through their elected representatives in Government and Parliament, a suitable amendment of the Constitution. But if they find, because of interpretation of the Constitution by the Supreme Court, that they cannot do it that way, either at all or substantially, no other way is left to them to bring this about except to use the power of appointment under the Constitution. It would, of course, be political use of that power which, normally, is undersirable. But there is no other alternative within the framework of the Constitution.

This is the problem at the root of the matter. It is, basically, a political problem. If, in view of the inadequacy of the political base for democracy in the country, that of informed and effective public opinion, and the inadequacy of the political checks and balances of a democracy, which is the mechanism of more or less adequately balanced parties, it is considered necessary that the power of the people, who are sovereign in a democracy, to amend the Constitution—which can be exercised, within the framework of the Constitution, only through their elected representatives in Government and Parliament—should be materially fettered through the Supreme Court, then political use of the power of appointment, at least occasionally, has to be accepted as a necessary and inevitable corrolary of it. For, there may be occasions when the people, again through their elected representatives, may consider that the country's urgent needs require that the fetter, in any particular context, should be removed or reduced. The only way for bringing it about, available to them under the Constitution, is through the power of appointment vested in the President, acting on the advice of the Union Council of Ministers. They have to use that power politically for this purpose. In the circumstances, this has to be conceded to them. It is a necessary safety valve for

such a position. Otherwise, their power to amend the Constitution should be made legally unfettered.

One or two other points, comparatively quite minor, also call for consideration. Should the position, that the judgement of the majority is the judgement of the court, continue in case of the Supreme Court in constitutional matters ? Should an unanimous decision of a Bench of 5 judges be over-ruled by a majority decision of 4 judges in a Bench of 7, on the basis that the decision of the majority was the decision of a Bench of 7 judges ?

Secondly, where the Supreme Court re-examines an earlier decision of the Court on a Constitutional point and the Bench is divided on whether the earlier decision should be over-ruled or even modified, would a bare majority of one in the divided Bench be enough to over-rule or modify the earlier decision? Article 368 of the Constitution prescribes certain requirements as to the extent of Parliamentary majority necessary for amending the Constitution. Should there be some such requirement as to the extent of the majority in a Bench of the Supreme Court for over-ruling or modifying an earlier decision of the Court on a Constitutional point?

These are comparatively small points but of importance in the interest of stability of interpretation of the Constitution. As Aristotle said long ago, law-abidingness is greater than law and if law frequently changes, law-abidingness is affected.

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2. **Golak Nath's case**——
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