Is a Constitutional Coup d'etat Possible in India?

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The subject of this paper is not only difficult in itself but is being approached by me with great trepidation because I am myself uncertain about the subject matter itself. What is more, I am no jurist. Nevertheless and especially in the light of what was attempted by Mrs. Indira Gandhi in June 1975 by declaration of Emergency, I decided to examine whether the Constitution is strong enough to prevent the imposition of authoritarian and totalitarian rule on India, or whether there are loopholes in the Constitution which an unscrupulous person can perhaps exploit.

Our neighbour, Pakistan, has had a number of military led coup d'etat in which the Constitution has either been bypassed, amended or even scrapped and then reconstructed. Pakistan started with the same administrative, legislative and judicial framework as India and with the same political philosophy which provided for a democratic polity. India continued to strengthen its democratic roots and institutions, whereas Pakistan chose the path of military dictatorship interspersed with some form of civilian government from time to time. In fact the ouster of Gen. Pervez Musharraf, the establishment of civilian government in which Asif Ali Zardari became the President and the peaceful succession of Nawaz Sharif as Prime Minister is a record in Pakistan because it is for the first time that transfer of power has occurred through a process of election. However, whenever Pakistan has had a military coup the Supreme Court of that country has stoically refused to intervene judicially by quoting what it referred to as "the doctrine of necessity ", That such a doctrine does not exist in Anglo Saxon Jurisprudence is conveniently forgotten.

In Germany the weakness of the Weimar Republic and the post First World War collective humiliation of Germany and its people did create a yearning for strong government. Hitler and the Nazi Party came to power in 1933 or the basis of an election in which the party won only forty four percent of the votes, but claimed power as the largest single party. With great reluctance an increasingly senile President, Field Marshal Hindenburg, agreed to invite Hitler to be Chancellor, that is, Prime Minister. Because Hitler was desperate for absolute power he arranged for a magnificent opening of Parliament, the Reichstag, by the President in which he spared no effort to massage Hindenburg's ego. Immediately thereafter on 5th March 1933 Hitler asked Parliament to enact the "Gesetz zur Behebung der Not von Volk und Reich". Its English translation is "The Law For Removing The Distress of The People And the Reich". In popular parlance it came to be known as "The Enabling Act". This is an amazing piece of legislation in that Parliament handed over all its constitutional duties and powers to the Chancellor and the Reich Cabinet. Under this Act laws were to be prepared by the Chancellor and could deviate from the Constitution. The budget, treaties with foreign powers, constitutional amendments were all to be within the exclusive jurisdiction of the Chancellor and cabinet. In other words, all legislative powers now passed to the Executive which, in practical terms, meant Hitler. Parliament virtually ceased to exist, though it was never formally abolished. On 9th March 1933 the Laender, or States, were abolished. In May 1933 trade unions were abolished and in July 1933 the Nazi Party became the sole political party in Germany. The transition to a single party dictatorship

was thus completed, ostensibly under a law enacted by Parliament and within the framework of the Constitution. Hitler thus used the Constitution to abolish the Constitution itself.

The question remains whether this frightening scenario can ever be repeated in India. The Constitution is very strong and one of immutable parts of the Constitution, the Preamble, defines India as a "Sovereign Socialist Secular Democratic Republic". But is the Preamble really immutable? Prior to the Forty-second Amendment of the Constitution in 1976 the wording was "Sovereign Democratic Republic". During the Emergency the words "Socialist Secular" were added. If the Preamble is a part of the basic features of the Constitution, how could it be amended? The fact that it was and that it has not been challenged raises doubts whether other features of the Constitution can similarly be amended.

Whereas in India we do not recognise the doctrine of necessity as part of our jurisprudence, the Supreme Court headed by Justice A.N. Ray came dangerously close to ruling along these lines during the Emergency. A full bench of the Supreme Court, which included Justice P.N. Bhagwati, ruled that during the Emergency not only did the fundamental rights stand suspended but even a citizen's right to life itself was not guaranteed. Virtually this meant that if the State arbitrarily decreed the death of a citizen he had no legal remedy. This was the darkest hour in the history of our Supreme Court, redeemed only by the landmark dissenting opinion of Justice H.R. Khanna in which he totally disagreed with the majority that the fundamental rights could be suspended. Nevertheless the majority opinion of the Supreme Court was in favour of executive arbitrariness, which is the essence of totalitarian rule. Fortunately we have had High Courts such as Delhi High Court under the Chief Justiceship of Justice Tatachar who, in the Bhim Sen Sachar case, ruled that even if writ jurisdiction under Article 226 was suspended the inherent powers of the High Court under section 482 Cr.P.C. were not and could not be suspended and, therefore, the High Court ordered the release of Bhim Sen Sachar, Kuldip Nayar and others. Put another way, the judiciary in India does have a very important role in ensuring that a constitutional coup d'etat does not occur.

I fully accept that the scheme of the Constitution provides for a separation of powers so that at no time can excessive power be concentrated in the hands of one wing of the State. But in a Westminster type of democracy, where the formation of government is dependent upon a majority in the House, there is a form of concentration of power in the Prime Minister and his Council of Ministers. Parliament is independent of the Executive, but in effect legislation depends on what the Prime Minister decides because with a majority in Parliament, by issue of a whip, the Prime Minister and the Council of Ministers can push any legislation through Parliament. Here the Legislature works at the beckoning of the Executive, provided that the Prime Minister is strong. If the Prime Minister is weak then legislation can come to a halt because government itself has to make compromises in order to survive. We thus have a piquant situation in which if the Prime Minister is strong Parliament becomes subservient and if he is weak government becomes ineffective and legislation cannot be pushed through Parliament. Both are highly tragic scenarios and bode no good for the country.

Does that mean that it is possible to make Parliament enact a law similar to the Enabling Act? Suppose a Prime Minister as strong as Indira Gandhi were to have Parliament enact such a law. To come on the statute book such a law would require the assent of the President who, under Article 74 of the Constitution, is bound to act in accordance with the

advice of the Prime Minister and the Council of Ministers. A Bill to which the President refuses to give assent under Article 111 does not become law, unless the President returns the Bill and Parliament, after considering it, resubmits the Bill for assent. On this the President cannot withhold assent, which would be as true of a normal Bill, a Money Bill or even the equivalent of the Enabling Act. What the President, however, can do is something which Giani Zail Singh chose to do with the Postal Bill. He neither gave his assent nor returned the Bill to Parliament, Instead he sat on the Bill and because there is no time limit given in Article 111 for the examination of a Bill by the President, he continued to delay it till the House was dissolved and the Bill lapsed. The President could do something similar to legislation of the Enabling Act type and this is one of the safeguards we have against constitutional dictatorship. Of course if the President is like Fakruddin Ali Ahmed we might end up with an Enabling Act being enacted and brought on the statute book.

Let us move to a hypothetical situation in which the President of India dissolves the House of the People. Of course in order to do so he would need the advice of the Prime Minister, but in case government loses the confidence of the House, then the President as per our conventions does not have to heed the advice of the Prime Minister. He may decide to continue with the House, invite an alternative party to form the government, or dissolve the House. Under these circumstances, because Parliament has to meet within six months of its last session under Article 85 of the Constitution, dissolution of the House has to be followed by election within the next six months. During this interregnum the President is bound to call upon a person to be Prime Minister, albeit a caretaker Prime Minister, because the Constitution does not permit the imposition of President's rule at the level of the Union. Supposing the President invites a person who is not a politician but is, say, the Chief of Army Staff or anyone else whom the President trusts and who would give the President the advice that he desires. Because Parliament would not be in session Article 123 would give the President the power to promulgate Ordinances which would have the effect of an Act. Article 368 provides for the amendment of the Constitution and the powers of Parliament in this behalf. The question is whether by Ordinance the President can exercise the power of Parliament to amend the Constitution. Articles 123 and 368 nowhere categorically state that the Constitution cannot be amended by an Ordinance and the legislative powers of the President do not extend to legislating for amendment of the Constitution. Perhaps the saving grace is that Article 368(2) states, "An amendment of this Constitution may be initiated only by introduction of a Bill for this purpose in either House of Parliament…" By any construction or interpretation this would rule out amendment by Ordinance, but because Article 123 is silent in this behalf, is this enough? An Ordinance requires that the President is satisfied that immediate action is necessary. Can a major security concern not call for immediate action, including amendment of, say, the Union List of the Seventh Schedule, empowering Parliament to legislate on police and law and order? This is a lacuna which needs to be studied and, if the constitutional experts feel that there is a loophole here which needs to be plugged, let it be plugged immediately, lest a President unduly influenced by the example of Hitler decides to be adventurist and explore the possibilities of Article 123 being used to negate Parliament itself. I know that many will consider me alarmist for referring to something which is unlikely ever to happen, but we have had the case of Justice Ramaswamy against whom thirteen charges of corruption and misuse of office were found proved by a tribunal of the Supreme Court under Article 124, but who continued in office because through political manoeuvring he was able to persuade that the Congress Party abstain and the absolute majority needed to be mustered under Article 124 (4) for

impeachment of a judge did not come through. The makers of the Constitution had never dreamt that a judge could ever do what Ramaswamy did and, therefore, let us not be complacent about the power of mischief of a renegade President, exercised under Article 123.

Of course the question still remains whether anyone would accept the validity of the equivalent of the Enabling Act. Would the courts rule such an Act to be constitutionally valid? Theoretically possible but in practice completely unlikely. Would the Civil Service acquiesce in the imposition of the dictatorship? Most probably yes, but during the Emergency we have had officers such as Y.N. Chaturvedi, D.M. Rewa and K.K. Chakraborty, D.M. Satna in Madhya Pradesh who refused to sanction the detention of Opposition Leaders under MISA because they ruled that they were not satisfied that there was any reason to do so. I myself wrote to all the editors of newspapers that so far as my departments were concerned censorship would not apply and they were free to give objective news coverage of all our activities. This means that there are elements in the Civil Service who would not carry out orders which are patently unconstitutional, though cloaked in the garb of a law. Still, I would hesitate to confidently and categorically state that the Executive as a whole would resist authoritarian rule.

This brings us to the real life situation of June 1975. Indira Gandhi, the Prime Minister, after a ruling of the Allahabad High Court that her election to Parliament was vitiated by electoral corrupt practices and, therefore, was set aside, should have resigned. In a democratic polity such a ruling has to be accepted with grace and the person ruled against must immediately demit office and step down. But if a person is imperious like Indira Gandhi what does that person do? He or she takes shelter under Article 352 of the Constitution which permits the President to proclaim a State of Emergency and thereafter virtually take over the Government of India. Indira Gandhi resorted to such a proclamation and under it assumed powers to rule absolutely. It is under such a proclamation that the fundamental rights were suspended by recourse to Articles 358 and 359. In this behalf I would like to recall certain words of Article 359, sub clause 1 of which reads , "Where a proclamation of Emergency is in operation, the President may by order declare that the right to move a court for enforcement of such of their rights conferred by Part VIII (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order" . In 1975 this was interpreted as a suspension of fundamental rights because Article 359 was read with Article 358. Article 358 merely states that nothing in Article 19 will restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in that Part, be competent to make or to take. As soon as the word 'law' is used, even if the letter and spirit of Article 19 does not apply, the State does not acquire the power of arbitrariness and, therefore, Article 19 would continue to be the guiding factor subject to legal restrictions which would neutralise the enemies of the State. The purpose of Articles 352, 358 and 359 is to protect the security of India, especially by war or external aggression, but none of these Articles are aimed at Indian citizens at large, nor do they permit the Executive to exercise arbitrary powers against citizens who do not constitute any threat to India. Indira Gandhi's interpretation of these Articles and the shameful surrender of the Supreme Court in this behalf will always stand out

as a huge black mark against both of them in their attempt to extinguish democracy from India.

The issue before us, however, is whether there can be a constitutional coup d'etat. Our institutions over time have struck deep democratic roots and it is unlikely that the country would accept a subversion of the Constitution by constitutional authorities themselves. At the same time one cannot altogether rule out some mad man, fortunate enough to be elected and projected to power, from trying to be adventurous. Constitutional experts must advise on whether or not the Constitution itself needs to be strengthened so that there are no provisions in it which can be misused to destroy the Constitution. For this purpose we must review the checks and balances in the Constitution and if there is any imbalance, then it must be corrected. In this behalf let me recommend what Article 20(4) of the German Constitution states, "All Germans shall have the right to resist any person or persons seeking to abolish the constitutional order, should no other remedy be possible". This has a constitutional appeal to the people not to accept anything which hurts the Constitution and gives them the right to individually or collectively resist it. Perhaps we need not go that far in India, but the time has come for us to collectively build into our Constitution safeguards which would prevent any would-be dictator, political adventurist, or buccaneer from attempting to take over the State.

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