Constitutionalism versus Adventurism

■ **Dr. M.N. Buch**

The Constitution of India, despite the amendments which have been introduced from time to time, has a high degree of immutability, partly because its basic structure is sound, partly because it establishes a balance between public good and the constituent organs of the State, the Executive, the Legislature and the Judiciary, partly because amendment of the Constitution cannot be done whimsically because both Houses of Parliament have a role to play and this provides a check against arbitrariness and partly because there are certain inbuilt constitutional structures and organisations which in a way stand outside the normal executive, legislative or judicial structures, but which nevertheless given an independent voice and opinion to issues of national importance concerning governance. The immutability of the Constitution also rests on the Preamble which has been amended only once on 3.1.1977 and that, too, for the better. The immutability of the Constitution is further strengthened by Part III which contains the Fundamental Rights and, according to me, equally importantly through Part IV which contains the Directive Principles of State Policy, which has increasingly been used by the Supreme Court to remind the State from time to time of its basic duties towards the citizens.

An immutable constitution is not a static constitution and this has been reinforced by some fairly sensible amendments which pushed the frontiers of fundamental rights, fine-tuned and enhanced the meaning of words such as justice and equality by conferring on the underprivileged and the voiceless a whole set of rights and by the proactive role of the Supreme Court, the Comptroller and Auditor General and the Election Commission. In many ways these institutions, through interpretation, pronouncement, by public reporting have furthered the cause of constitutionalism beyond the mere letter of the law and have reinforced and strengthened the basic structure of the Constitution. I do not comment at length in this paper on the Supreme Court and High Courts which are part of the judicial components of the Indian State, except to state that through its pronouncements the Supreme Court has given a new meaning to Article 141 which says that a law declared by the Supreme Court is binding. Article 141 does not confer the power to legislate on the Supreme Court, but by interpretation of law the Supreme Court has given a whole series of judgments which to an extent do create a new legal environment, if not a new enactment. Instead, I would like to comment on four different constitutional authorities which are creatures of the Constitution and have a vital role to play in constitutionalism.

In this context the word 'constitution' is narrowly constructed by me as per one of the definitions given in the Twenty-first Century Chambers Dictionary, which reads, "Constitution:- the supreme laws and rights upon which the country or state is founded, especially when it is seen as embodying the rights of its people". The four authorities to whom I refer are the Attorney General of India appointed under Article 76, together with the Advocate General of each State appointed under Article 165, the Comptroller and Auditor General of India as appointed under Article 148, the Union Public Service Commission and the State Public Service Commission appointed under Article 315 and the Election Commission of India appointed under 324 of the Constitution. Whereas there are a number of commissions, such as the National Human Rights Commission and tribunals such as the Central Administrative Tribunal, which are

created under the relevant provisions of the Constitution, they are not an integral part of the Constitution and are, therefore, the creatures of law. In a way they come one step below the organs of the State which are an integral part of the Constitution itself.

Let us begin with the Attorney General of India and in this I shall include, mutatis mutandis, the Advocate General of each State, both officers being responsible for giving advice on legal matters to the Government of India and the Government of a State as the case may be. Though the Attorney General holds office during the pleasure of the President and is appointed by the President on the advice of his Council of Ministers, he is expected to be nonpartisan in the rendering of legal advice and performing the legal duties assigned to him. It is for this reason that the Attorney General has the right of audience in all courts in India and, under Article 88, has the right to speak or otherwise participate in the proceedings of either House of Parliament or any committee of Parliament. The legal advice given by the Attorney General and the Advocate Generals has to be based directly on law and the constitutional implications of the issue on which advice is required to be rendered and, therefore, such advice has to transcend the narrow confines of politics. We have had great Attorney Generals in the past who have fulfilled this role admirably and we have had a few whose conduct has been suspicious and whose advice has been tainted by politics. Constitutionalism requires the Attorney General and the Advocate General to be completely free of such bias and to the extent that he performs his duties according to the Constitution, the Attorney General, standing outside the three organs of the State, still performs the vital function of protecting the interests of the people of India by advising the State to act according to the Constitution.

In a parliamentary democracy or, for that matter, in the American pattern of democracy, one of the functions of the Legislature which cannot be tampered with by any one is its control over public funds. Britain was pushed towards a constitutional monarchy by the fact that the purse strings are controlled by Parliament and without parliamentary sanction the Crown cannot spend even a penny from the exchequer. This role of Parliament and of the State Legislature is enshrined in the Constitution in Articles 112, 113, 114,115 and 116 in the case of the Union and Article 202, 203,204,205 and 206 in the case of the States. It is Parliament and the State Legislature which alone can permit withdrawal of funds from the Consolidated Fund of India and that of the State concerned, which means that without the approval of the annual financial statement of receipts and expenditure, the assent of the Legislature to a demand for grants, enactment of the Appropriation Bill, sanction of supplementary, additional or excess grants or a vote of account on exceptional grants, government may not spend anything from the Consolidated Fund. In order to ensure that government is functioning strictly in accordance with what has been sanctioned for it by the Legislatures. Parliament and the State Legislatures through discussions, deliberations of committees such as the Public Accounts Committee and the Estimates Committee and other procedures which have been adopted from time to time, call government to account, which acts as a very healthy check on the executive. It is to help Parliament and State Legislatures to fulfil this role that the Constitution provides for the Comptroller and Auditor General with wide ranging authority. The CAG, constitutionally, determines the manner and form in which the accounts of the Union and of the States will be maintained, he has overriding powers to audit all expenditure directly from the Consolidated Fund or indirectly on the basis of grants, etc., and he has the constitutional authority under Article 151 to present his audit report to the President or the Governor as the case may be, who

will then cause such report to be laid before Parliament or the State Legislature. In a way the CAG is the chief police authority and investigating agency in all matters relating to public revenues and expenditure and to that extent, whilst standing outside the Legislature, he still is the public instrument to help the Legislature in determining whether government has acted strictly according to the approved budget. By doing his duty CAG adds to constitutionality because he forces the Executive to render accounts and to face the consequences for wrongdoing. Public funds are involved in all state expenditure and this constitutional authority helps to ensure that the funds are spent wisely.

Articles 53 and 154 vest the Executive power of the Union and the States in the President and the Governors respectively and such powers are to be exercised by officers subordinate to the President or the Governor. Because the Preamble mandates justice and equality and Article 14 further mandates equality before law, the officers who help the President or Governor in exercising his powers have to ensure that whereas the aid and advice given to the President or Governor by the Council of Ministers may be and will be based on the political agenda of the party in power, the decisions taken thereon will be implemented totally impartially and without any form of political bias. For this we need independent Civil Services and, therefore, we have Chapter 1 of Part XIV of the Constitution. That recruitment to the Services should also be impartial and based on merit, under Chapter 2 of Part XIV there is a constitutional provision for setting up Public Service Commissions for the Union and the States. Whereas UPSC members are appointed by the President and State PSC members by the Governor under Article 316, in the matter of removal of the Chairman or a member of any Public Service Commission, Union or State, this can only be done by an order of the President and that, too, after an enquiry by the Supreme Court conducted as per provisions of Article 145 of the Constitution. Further, to ensure that members of Public Service Commissions remain independent and are not amenable to government pressure, under Article 319 a member of a Public Service Commission who ceases to hold office is not eligible for any further employment under the Government of India or of a State. The idea is to immunise the Services from undue blandishment right from the time of recruitment up to the time of retirement by giving independent Public Service Commissions the key role in this behalf. This is another example of constitutionalism in India.

In a democracy it is through elections that one constitutes the Legislature which, in turn, causes the government to be formed. In this behalf we have Part XV of the Constitution which governs elections and provides for an Election Commission which has superintendence, direction and control over elections to Parliament and State Legislatures. The Commission enjoys sweeping powers in this behalf, partly under the Constitution, partly under the Representation Of the People Act, but very largely through the manner in which successive Chief Election Commissioners have enhanced their own role in conducting free and fair elections and bring the entire machinery of the State under the control of the Commission for the duration of the election process. Whatever else works in India or not, certainly the Election Commission of India has won universal recognition and admiration for the manner in which democratic elections are conducted in this country. The apex of constitutionalism, therefore, can rightly be considered to lie in the Election Commission.

This paper is not only on constitutionalism but it is also on political adventurism. In this behalf unfortunately the Congress Party has played a most unwanted role in that whenever any of

the constitutional authorities have been inconvenient to it the party has tried to bring about constitutional amendment which could curb constitutionalism. Of this the Forty-second Amendments of the Constitution was the most notorious because through it Parliament tried to give a special status to the Prime Minister in matters of election, it tried to reduce the role of the Supreme Court, it tried to restrict the powers of superintendence of the High Courts under Article 227, it tried to constitute tribunals under Part XIV –A which would not be under the High Courts and it used Emergency provisions under Part XVIII in a manner redolent of wanting to impose authoritarianism on India. Fortunately the Forty-Second Amendment was negated by the Forty-fourth Amendment of the Constitution, but on the horizon could be seen the danger of political adventurism. It is here that the Supreme Court, in the Keshwanand Bharti case, defining what constitutes the basic features of the Constitution, ruled what lay outside the purview of Parliament in the matter of amendment of the Constitution and laid down the vital legal principle that the amending powers of Parliament did have limitations and Parliament could not, therefore, negate what was provided by the Constitution as a part of its basic structure. The present Comptroller and Auditor General, by his own interpretation of his role, has also enhanced constitutionalism, though there is a political move to reduce the role of CAG, first by trying to set up a multi-member audit organisation and then by trying to see how legally CAG's independence can be curbed. One sincerely hopes that these efforts come to naught because in the present state of political flux India needs constitutional activism of its constitutional authorities. In particular, Parliament must also realise that in India it is the people, collectively, as represented by constitutional authorities and institutions, who are sovereign and that the organs of the State are restricted to the role assigned to them the people. This would be the most effective curb on political adventurism of the 1975 mould, as now articulated by a junior minister in the Prime Minister's Office.

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