

Protection of Basic Constitutional Features in India and Europe

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PRAN CHOPRA (ed.), *The Supreme Court versus the Constitution. A Challenge to Federalism* (New Delhi, Sage Publications 2006) 287 p., ISBN 0761934456 & 8178295881

The reader may wonder why a book on a subject of *Indian* constitutional law is reviewed in a journal on *European* constitutional law? One reason is that there are similarities between the Indian subcontinent and the European Union, interesting enough to make a comparison worthwhile. A more particular reason is that the book centres on a question of Indian constitutional law which is also relevant to the European constitutional order.

There is a resemblance between India and the European Union regarding the enormous size of both territories (more than 3 million sq. km.) and the size of their populations, though India's population (more than 1000 million) is more than twice as large as the Union's (more than 450 million). In both (sub)continents there is a striking diversity within the population, both linguistically (there are at the moment 20 recognised languages in the European Union and 22 official languages in India) and religiously (the religious diversity of Europe is increasing because of immigration; in India there are six major religious communities). It is remarkable that both the European Union and India call themselves a 'Union': the Union of 25 member states, India of 28 States. Of course, the use of the same word cannot conceal the differences between the two: the European Union has a weak centre and cannot be called a federation, whereas India is a federation with such far-reaching central powers that it is often characterised as semi-federal. Both are governed by the rule of law, albeit with major differences: the lower strata of Indian society probably feel governed more by the whims of the mighty! However, in both, there are courts with considerable prestige and power. Most importantly, despite their size and diversity, both the EU and India are democracies, though not without flaws. In Europe there is the 'democratic deficit'. In India

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there is a semi-state of war in Kashmir and considerable money and muscle power.

An interesting similarity is the volume and nature of what could be called 'primary law'. In the EU this consists of the different Treaties. In India there is a Constitution, which, however, is one of the longest, if not the longest, in the world. Both types of 'primary law' contain details which in other systems are left to 'secondary law', and both have been amended frequently. These amendments are the result of political compulsions and perhaps do not have adequate regard always to basic principles. In such a situation, the question becomes relevant whether there is some judicial protection against 'primary law', including amendments, violating basic principles of the constitutional order.

In India, this question is emphatically answered in the affirmative. In the present book the relationship between the Supreme Court and Parliament in India is discussed, more particularly, the well-known case-law of the Supreme Court on judicial review of constitutional amendments.¹ The Supreme Court declared in 1973 and maintains since then that it has the far-reaching power to declare constitutional amendments void if they violate the 'basic structure' of the Constitution. Judicial review of legislation has a partial basis in the Constitution and, in fact, has never been in doubt, but the Constitution provides no textual basis for judicial review of constitutional amendments on substantive grounds, and a constitutional amendment of 1976 prohibits this review in so many words. This amendment and several others were later invalidated by the Supreme Court. Some observers regard this situation as a power struggle between the Supreme Court and Parliament, with the Court ending up on top; others believe the Court has only protected basic constitutional values without really impeding necessary constitutional amendments.

The conflict between the two constitutional bodies started with the *Golak Nath Case* of 1967. That Case concerned constitutional amendments aiming to limit judicial review of the amount of compensation to be awarded for compulsory acquisition of property by the state. The Supreme Court accepted the validity of these amendments but, at the same time, declared that any future abridgement of fundamental rights by constitutional amendment would be inadmissible. This view was not tenable in the long run. In 1971, a new paragraph was inserted in Article 368 of the Constitution, declaring that 'Parliament may in exercise of its constituent power amend ... any provision of this Constitution ...' In the *Kesava-*

¹ According to Article 368, the Constitution can be amended by a bill passed in each House of Parliament by a double majority: a majority of the total membership of that House and a majority of not less than two-thirds of the members of that House. The bill also needs presidential assent, but that cannot be refused. Only if the amendment seeks to make changes in provisions of a federal nature (such as the lists of competences of the Union, the States and the Concurrent List), does the amendment require ratification by the Legislatures of not less than half of the States; the States are not involved in amendments of fundamental rights.

nanda Bharati Case of 1973, the 1967 judgment was overruled. The Court now declared all provisions of the Constitution amendable, with however one important proviso: an amendment altering the 'basic structure' of the Constitution would not be allowed and would be void. The Constitution could not be regarded as providing for its own lawful 'hara-kiri'. A constitutional amendment was partly invalidated in this judgment, as it excluded judicial review of specific legislation. This judgment was widely criticised in India as going against democratic principles.

This majority view among the commentators changed dramatically following the *Indira Nehru Gandhi Case* of 1975. This case arose from a High Court judgment convicting Prime Minister Indira Gandhi of 'corrupt practices', consisting of obtaining the assistance of civil servants during the election campaign of 1971 in violation of the Representation of the People Act, 1951. On this ground, the High Court declared her disqualified from being a Member of Parliament for a period of six years from the date of the judgment. Pending her appeal, the Supreme Court allowed her to continue as a Member of Parliament, but denied her the right to participate in parliamentary debates and votes; her position as Prime Minister, however, was not affected. The next day, a proclamation of a nationwide State of Emergency was made, and soon thereafter, the right of any person to move any court for the enforcement of almost all fundamental rights was suspended. This was followed by large-scale arrests of Mrs. Gandhi's political adversaries, including important Members of Parliament. In this heated political atmosphere, Parliament adopted a constitutional amendment declaring that the Prime Minister's election continued to be valid in all respects and any judgment to the contrary always should be deemed to have been void and of no effect. The amendment also directed the Supreme Court to dispose of the appeal in conformity with these provisions. In the *Indira Nehru Gandhi Case*, the Supreme Court declared Mrs. Gandhi not guilty of the commission of 'corrupt practices', and her disqualification as a Member of Parliament was quashed. However, at the same time, the constitutional amendment was invalidated because of violation of the principle of free and fair elections, part of the 'basic structure' of the Constitution. The special majority of Parliament, needed for constitutional amendment, was not 'an oriental despot who can do anything he likes'. After the State of Emergency was lifted in 1977, this application of the 'basic structure' doctrine was widely applauded, as the amendment was seen as a flagrant misuse of parliamentary power. Other Supreme Court judgments given during the Emergency – particularly concerning the plight of detainees – had not been so courageous and were widely criticised.

In 1976, when the State of Emergency was still in force, the Constitution was amended by inserting the following provisions into Article 368: 'No amendment

of this Constitution ... shall be called in question in any court on any ground'; 'for the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution ...' Parliament clearly intended to do away with any judicial review of constitutional amendments. In the *Minerva Mills Case* of 1980, the Supreme Court declared these provisions invalid, for Parliament was not able to remove the limits on its own power of amendment by itself. They were part of the Constitution's unassailable 'basic structure', as was judicial review of constitutional amendments. In this same judgment, the Court also invalidated another provision, and, in the same year, yet another amendment was invalidated (*Waman Wao Case*, 1980). All of the provisions that were invalidated related to restrictions imposed on judicial review of legislation.

Since 1980, the Supreme Court has continued to apply the 'basic structure' doctrine. In two cases (of 1987 and 1997), provisions of constitutional amendments were invalidated, because they restricted judicial review and therefore violated the 'basic structure' of the Constitution. In 1992, an amendment was invalidated because of an infraction of the procedural provisions of the Constitution. Since 1980, the Supreme Court cases have not been in the same highly charged political league as the earlier ones; in Parliament, there has not been a cohesive political majority big enough to bring about a further constitutional amendment to challenge the Court's jurisprudence. For these reasons, the 'basic structure' doctrine became less controversial. A factor in the background may be that the Supreme Court's prestige has risen in the last decennia, as the exercise of judicial power is not seen as a threat to effective rule by the political organs, but as a response to their ineffectiveness. Parliament, on the other hand, has sunk in the public esteem because of the absence of serious debate, of corruption, the influence of criminal elements and communal factors (caste and religion).

Chopra's book contains several papers by Indian journalists, lawyers and politicians, which were presented at a seminar held in September 2004, as well as an overview of that debate. Why was it found necessary or desirable to have the seminar in 2004? Some contributors think that there are more urgent matters to discuss, such as the inefficiency of the judiciary below the Supreme Court and serious flaws in the functioning of Parliament. Others point out that now is a good time for debate, before controversies break out, which would make it difficult to discuss the issue in a calm atmosphere. All the arguments pro and con regarding the Supreme Court case-law are discussed extensively, or one could say: reshaped, as there is nothing new to be found.

Turning to Europe, we – of course – notice an important difference between Europe and India regarding the way in which the maintenance of the rule of law is organised. In India, there is only one judiciary with the Supreme Court at the

top; there is no double system of federal and state courts as in the United States. In Europe, the judiciary is divided between the European Court of Justice (ECJ) and the European Court of Human Rights at two distinct international levels and, at the national level, the courts of the member states. Judicial protection of fundamental features conceivably could be obtained in all these jurisdictions. The protected features would not be identical, because they would not belong to the same 'constitutional' order, but their content could be comparable.

The ECJ does not have the power to test primary law, including amendments of the treaties, against basic features of the EU constitutional order. The ECJ's opinion in 1991 that the draft agreement concerning the European Economic Area conflicted with the very foundations of the Community (par. 71 of Opinion 1/91 [1991] ECR I-6079) has been read by some as a hint that there would be a hard core of values that should not be modified even by formal amendment. However, this interpretation seems rather extreme and the ECJ has not given further hints in this direction. More relevant may be a recent judgment of the Court of First Instance (CFI). This court has in 2005 opened potential review of a resolution of the Security Council, implemented through a Council regulation, against a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible (CFI 21 September 2005, T-306/01, *Yusuf*). The CFI noted that according to the Vienna Convention on the Law of Treaties, a treaty is void if it conflicts with a peremptory norm of general international law (*ius cogens*). Logically, this reasoning should also apply to the EU treaties or amendments thereof. Of course, a direct application to the ECJ for annulment of such primary law is not allowed under the present treaties, but an indirect review of treaty law against the norms of *ius cogens* would seem possible. According to the CFI judgment, *ius cogens* contains mandatory provisions concerning the universal protection of human rights. Some of the rights mentioned by the CFI are the right to a fair hearing and the right to an effective judicial remedy, although in the specific case, the court accepted that the rights were lawfully restricted. These rights or principles to a certain extent are comparable to the basic features of Indian constitutional law. As an appeal to the ECJ is pending, it remains to be seen whether the CFI's findings hold. The very wide interpretation of *ius cogens* might not be accepted by the ECJ. Although effective judicial protection of the rights of individuals belongs to the general principles of law of the Community, in the past, the ECJ has been unwilling to go beyond the system of legal remedies in the treaties to offer protection to individuals, even if Community law does not provide a remedy and it could be shown that national procedural rules are deficient (*Unión de Pequeños Agricultores*, C-50/00).

The EU and the European Community are not parties to the European Convention on Human Rights, so any application to the European Court of Human Rights for infraction of the Convention by institutions of the EC or the EU (the latter does not even have legal personality) is out of the question. Until now, the European Court of Human Rights has refused to hold the member states collectively responsible for actions of EU institutions. The Court also is very reluctant to hold member states responsible when they act in compliance with EU/EC law, as long as the international organisation protects fundamental rights in a manner, which can be considered at least equivalent to that for which the Convention provides. Such responsibility is not excluded totally if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient (ECtHR 30 June 2005, *Bosphorus*).² If a member state, however, freely enters into an international instrument, it is fully responsible for any breach of the Convention by applying it, and an application to the European Court of Human Rights is possible. That was the situation in the *Matthews Decision* of 18 February 1999. This case concerned the anomaly that the citizens of Gibraltar are bound by EC law but do not have the right to take part in elections to the European Parliament. This is the result of a Council decision which must be regarded as primary EC law, the validity of which cannot be challenged before the ECJ. The Council decision constituted an international instrument freely entered into by the United Kingdom, and the European Court of Human Rights held that country fully responsible for the breach of Article 3 of Protocol No. 1, which guarantees free elections to the legislature, by refusing to register a Gibraltar citizen as a voter at the election to the European Parliament. Therefore, this Court can and does offer protection against infractions of fundamental rights by member states complying with primary EU/EC law, though it does not have the power to annul such law and – in this case – grant voting rights. That is a problem: any solution for Gibraltar remains dependent on an agreement between Spain and the United Kingdom.

Finally, the acceptability of (amendments of) primary law also is checked at the level of the member states by their respective parliaments before ratification. In some countries, the people are involved through referenda. This political protection of basic constitutional principles is by no means illusory. Protection also is given by courts of some – not all – of the member states, either before or after ratification. Article 23(1) of the German Constitution declares Article 79(3), relating to unamendable basic principles of German constitutional law, applicable for the foundation of the EU as well as for changes in its contractual bases and comparable regulations. If the Constitutional Court is approached, it is able to

² See also the Case Note by S. Peers, 'Bosphorus. Limited responsibility of European Union member states for actions within the scope of Community law' in this issue of *EuConst*.

test any new European treaty or treaty amendment against these principles of constitutional law, such as the principle of democracy and inviolable and inalienable human rights. Comparable procedures exist in other member states: e.g., the Italian Constitutional Court guarantees the continuing compatibility of EU/EC law with the fundamental principles of the Italian constitutional order and the inalienable rights of man. Of course, such judicial protection of basic principles by a court of a member state can have effect only in the legal order of that member state, but it seems likely that a finding by such a court that basic principles have been violated will have wider political consequences in the EU. In other member states, e.g., the United Kingdom or the Netherlands, there is no such judicial protection of basic principles.

In conclusion, it is clear that there is no centralised judicial testing of primary law against basic constitutional principles in Europe, as there is in India. There is, however, to a certain extent a decentralised review. The standards used by the different courts may be comparable; they still differ from court to court and can even be contradictory. The argument against the Indian case-law, that the content of the basic structure doctrine is vague and undefined, certainly is applicable to the European decentralised review. A shortcoming of the European decentralised review is that the European Court of Human Rights does not have the power to take positive measures if it finds that a member state has violated the Convention. Judgments of courts of the member states cannot fill that gap, as they only have legal effect within the specific country. The most effective review would have to come from the ECJ. If that court would ever be so bold as to review primary EU/EC law against *ius cogens* and declare it null and void, for instance because of the non-existence or inadequacy of a judicial remedy against a measure affecting rights of individuals, the European system would become more comparable to the Indian one. However, such a judgment does not seem likely at this moment and a review of EU/EC law against fundamental features of EU/EC law is even more unlikely. If the ECJ took such a drastic step, one probably would hear comparable objections being advanced as against the Indian review: that there is no textual basis for it in the existing primary law and that it is undemocratic. On the other hand, the last argument may be less convincing in the EU than in India, because European primary law is not made by a parliament, but by governments, though not without parliamentary control. And judicial testing against fundamental features need not really hamper serious reform: more than ninety constitutional amendments have been accepted as valid in India since 1950, in spite of the 'basic structure' doctrine.

Whether the European Court of Justice, as an institution, could survive such radical jurisprudence would be another matter.

