

**DARE NOT BE LITTLE : JAWAHARLAL NEHRU'S
CONSTITUTIONAL VISION AND ITS RELEVANCE
IN THE EIGHTIES AND BEYOND***

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I

THE INCREDIBLY free-flowing discourse of Jawaharlal Nehru on life and law is difficult to put together in an integrated frame. In many senses, he was a philosopher of praxis; and the contexts of his political action also form a part of his texts—what he said and what he wrote. The interplay of text and context is so imperious in Nehru's discourse that it gives to it a totality which resists analytic summation. Nehru's articulation is like a flowing river; and the Heraclitan flux and flow interrupt any endeavour to fixate the 'essence' of his thought.

When one revisits his contributions to the *Constituent Assembly Debates*—and this is all I propose to do—one is struck by the metaphor "change". Change is the hallmark of Nehru's discourse on constitution-making. If one is able to trace the myriad ways in which the figure of change dominates the Nehruvian discourse, one arrives at his constitutional vision. And, at the same time, one locates the confusions, cross-purposes, and conflicts which necessarily shaped that vision; in these, too, lie the elements of a critique, which I reserve for another occasion.

Change is a category heavily mediated in Nehru by notions of past and of future. The Constituent Assembly is a consecrated site in Nehru's vision; consecrated both by India's past and future. "Our past is a witness to what we are doing", he says; "the eyes of our entire past are upon us." And the future "though unborn...too somehow looks at us..." And the historic present of the constitution-making is constituted by a "nation which is full of the passion for freedom." It is this passion for freedom which constitutes "the turmoil of the present and the great and unborn future that is going to take place soon."

The passion, the turmoil, signify a moment of birth. The imagery of birth is incessantly present. The "New India is taking birth—renewed, vital, fearless." And the new birth is marked by the global horrors of the Second World War (and vague and wild nightmares of "wars to come") of the partition of India. And the birth is witnessed by the whole world ("because the eyes of the world are upon us"); the birth of democratic India emerging out of the "valley of the shadow" is a "fact which changes and is

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changing history." Shaping India's democratic Constitution is thus a world historic task; "the hopes and aspirations of a great part of the world are upon us." Change, above all, lies in, as it were, globalizing Indian independence, a process in which the framers of the Constitution have to appreciate their world-historical mission, the accomplishing of a *visvamanav* (the citizen of the world) consciousness. Nehru insists on that quality of transcendence which comes only out of an apperception of India's role in world history. Therefore, he insists: "We dare not be little..." If we do so, "we do an ill service to this country of ours and to those hopes and aspirations which surround us from other countries."

II

This lack of daring to be 'little', an aspect of change *in* and *of* India, is a critical component of Nehru's constitucinal vision. In what does 'littleness' lie? It lies in the lack of a sense of the Indian mission, in squandering historical time, in the orgy of detail inimical to the steadiness of the vision, and in "conflict" consolidating "gains... by overbearing manners."

The littleness arises out of twofold loss of the sense of mission, apart from the loss of the sense of the world-historical role of India. First, it arises out of the loss of vision of India as democratic nation state. And Nehru vivifies it thus :

The one thing that should be obvious to all of us that there is no group in India, no party, no religious community which can prosper if India does not prosper. If India goes down, we go down, all of us, whether we have a few seats more or less, whether we get a slight advantage or we do not. But if it is well with India, if India lives as a vital free country, then it is well with all of us to whatever community or religion we belong.¹

This is the lyric of an emerging nation-state; Nehru emerges as the poet of the Indian nation-state, the bard of the commonplace transfigured by the romance of freedom struggle.

But *who* lives when India lives and prospers? And how is that which is India to live and prosper? The answers are interconnected and expressed by two phrases : the mass poverty of India and parliamentary sovereignty.

For Nehru the "greatest and the most important question is how to solve the problem of the poor and the starving. "Wherever we turn, we are confronted with the problem." Unless addressed and solved, with a missionary zeal, "all our paper Constitution will become useless and purposeless." Nehru expressed the trust that the Constitution itself "will lead us to real freedom that we have clamoured for;" and that real freedom

1. Kashyap, C. Subhash, *Jawaharlal Nehru and the Constitution* 126 (1982).

in turn "will bring food to our starving people, clothing for them, housing for them and all manner of opportunities of progress."

And it was Parliament of India which for Nehru symbolized the turn of this real freedom. Parliament, acting out its constitutional roles, was to ensure that mass poverty is redressed. And in this process it must possess and exercise supreme legislative and amending powers. Parliament can and must alter property relations, if necessary by constitutional changes. Speaking on the occasion of the Fourth Amendment, Nehru asserted the supremacy of Parliament as a pedagogue of freedom. And freedom here is, of course, an aspect of change. The change which Parliament should lead and celebrate is the change in values and ideologies which preserve and persevere these values. It was for Parliament of free India to repudiate "the sanctity of private property" which invested property with "divine or semi-divine" status. And since property relations codify images of society and state, Nehru urges, vehemently, the repudiation of the advocacy of a view which articulates public good as nothing more than the protection of private property. This "astounding and amazing statement" should be rejected "summarily and absolutely." Only when that happens, the state and law can address the problem of impoverishment. In introducing article 24 of the Draft Constitution (a formulation of right to property which it took free India 30 years of crisis to return to) Nehru emphasizes that balance between rights of the individual and community can only be achieved by the institutional authority of the legislature and ultimately by the sovereignty of Parliament of India. As the inheritor of the Constitution, it is Parliament and it alone who can proselytize changes in our approaches to law, power, rights and justice. It is Parliament which alone can guard against the theft of the Constitution especially by the traditions of lawyering. A "lawyer represents precedent and tradition and not change... Above all, the lawyer represents litigation." Within a year of the working of the Constitution he was bitterly to complain :

Somehow we have found that this magnificent Constitution that we have framed was later kidnapped and purloined by the lawyers.²

In Nehru's constitutional vision, the legislatures and Parliament were to be the supreme seat and source of ideologies of change. Legislators were to be the ideologues of the fight against mass impoverishment; as such, they were to lead to a radical restructuring of the nation's ways of looking at its past and its future.

The second source of 'littleness' is the loss of historical time. A "nation which is full of passion of freedom" insists that expedition is an integral part of excellence and equity; due deliberation on the Constitution, while essential, should not thieve the moment of freedom for the people. Within six weeks of the presentation of the Objectives Resolution (which took in

2. *Id.* at 247.

the event more than eighteen months to pass), Nehru is quick on his feet complaining: "...ages have slipped by while we are waiting... We have waited long enough and now we cannot wait any longer." Similarly, in moving the original draft article 24 concerning property rights, Nehru refers to difficulties which might arise and singles out above all the "question of time." Legislation which affects millions of people, he argues, cannot be left to "long, widespread and continuous litigation"; if it is, the "future of millions of people may be affected,...(and) the whole structure of the state may be shaken to its foundations." Democratic time, the time of the Constitution, the time of political action, is here contrasted with adjudicatory time, which must follow its own appellate rhythms, even when the life of the impoverished millions be at stake. Nehru respects the complexity of the adjudicatory time but he wishes to invest in legislature and executive a morality of expedition, and even urgency, through notions of democratic time where delays constitute denial of the passion for freedom. His constitutional vision underscores democratic time as a historic asset of the Indian masses, which their representatives may not purloin by daring to be little.

The third device of littleness in detail. "Petty details" which hold up consideration of great ideas and grand formulations bring out, over and over again, the imperious anger of Nehru in the texts of the *Constituent Assembly Debates*. The Constitution for Nehru is not a site for detail; the realm of detail is the realm of legislation. Not that details, petty or otherwise, are unimportant; and even constitutions have to textualize some matters of detail and in detail. But they are and must remain secondary. The Constitution should house the spirit of India insofar as "cold print" can do so. The Constitution must reflect the spirit with a view to maintain it at the highest level "all the time." The Constitution must reflect the "basic principles," "the fundamental and basic content" of a programme for change, of transformation of the Indian destiny and its values should resonate with the masses as well as the classes. Orgies of detail will make this unattainable. As it turns out, with all the hauteur of Nehru's dismissal of detail, the Constitution emerging under his leadership is probably the most detailed document of its kind in the world history. Perhaps, an explanation of this partly lies in the overweening concern for legislative supremacy, a concern which requires details to cohabit the domain of basic principles if judicial incursions of a predatory kind are to be avoided. Nehru was clearly not averse to valorization of detail to safeguard parliamentary sovereignty; outside that framework his disdain for detail was uncompromising, hurrying and harrying many a constitutional formulation.

The fourth locus of littleness is manifest in the lack of cooperation and presence of power as "threat." In urging expeditions but deliberate consideration of the Objectives Resolution, Nehru insists:

...let us not trouble ourselves too much about the petty details of what

we do, those details will not survive for long, if they are achieved in conflict. What we achieve by cooperation is likely to survive. What we gain here and there by conflict and by overbearing manners and by threats will not survive long. It will only leave a trail of bad blood...³

The true criterion of democratic greatness is thus cooperation for a common end, an end shaped by the mighty past and a future which is already looking at us. The sharp edge of domination by threat and by overbearing manners will only reinforce conditions of political alienation which will deprive this "ancient land", awakened to freedom, from making its "full and willing contribution to the promotion of world peace and the welfare of the mankind. "Gentle manners" in pursuing cooperatively national and global goals here define the Indianness through which India is to be constituted. And it was, perhaps, Nehru's inarticulate hope that as later generations read the *Constituent Assembly Debates* they would be richly reminded of the values of discourse and the cooperative constitutional endeavour.

III

Outside this discourse on littleness, lies that of permanence. The way Nehru handles notions of stability and change is fascinating, indeed. "Stability in the land", he says, requires respect for the Constitution." A Constitution, he insists, "must not be made the plaything for some fickle thought or fickle fortune. The *cognoscenti* will recall the deft use of "plaything" in Justice Hidayatullah's opinion in *Golak Nath*.⁴ For Justice Hidayatullah, Constitution was not to be allowed to be a plaything of majorities; but he clearly had 'legislative' majorities in mind, not the 'judicial ones. That was in 1969; in 1951, for Nehru legislative majorities stood invested with the power of comprehensive constitutional change. He would have most strongly drawn attention to antimajoritarian thought of Justice Hidayatullah. In the Nehruvian vision, what democracy, and its dignity requires us to proscribe is the felicity in unwriting and rewriting the Constitution of India: "Some fickle thought or fickle fortune" were later to be exemplified, tragically by article 329-A immunising the election disputes involving the Prime Minister, among other high constitutional *karmacharis*, from judicial scrutiny. The invalidation of that article, at the time of emergency by the Supreme Court, could have derived much substance from the "fickle thought, fickle fortune" metaphor of Nehru. The same metaphor would have wholly delegitimated Sanjay Gandhi's ventures at reformulating the entire Constitution as a prelude to the Forty-Second Amendment. Fickleness of thought, for Nehru, was *not* a democratic virtue; and fickleness of fortune was never, according to him a good enough justification for the modification of the basic personality of the Constitution.

3. *Id.* at 126.

4. *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

The jurisprudence of gentle manners and cooperative articulation of the ends of democratic power ensured stability of the Constitution and with it that of the nation.

What set legitimate limits to powers to amend the Constitution was the consideration of stability in the land. Constitutional changes stood justified to the extent these promoted the nation-state formative practices; regime or leadership needs, however, acute, offer *no* legitimate bases for tinkering with the magnificent edifice of the Indian Constitution.

That having been said, Nehru was steadfast in his image of parliamentary sovereignty, whose overriding attribute was the power of amendment of the Constitution. He would have been repelled by the notions in *Golak Nath* that Parliament was not supreme in this sphere and that exercise of amendatory power needed approval by the Justices of the Supreme Court. Indira Nehru Gandhi was doing no more than to assert the Nehruvian vision against the insurrectionary jurisprudence in seeking to legislate the Twenty-Fourth and the Forty-Second Amendments. But it was only a formalized assertion of Nehruvian heritage; amending power according to Nehruvian vision and practice was intended to enrich the democratic content of the original Constitution, not to impoverish it or attenuate its democratic promise.

The secular and democratic Nehru combined in articulating parliamentary sovereignty over constitutional change. On the occasion of the First Amendment in 1951 he deplored the notion of permanence of Constitution, particularly through its deification:⁵

...we have in India a strange habit of making gods of various things, adding them to our innumerable pantheon and having given them our theoretical worship doing exactly the reverse. If we want to kill a thing in this country, we deify it. ... So, if you wish to kill this Constitution make it sacred and sacrosanct—certainly, ... if you want it to be a dead thing, not a growing thing, a static, unwieldy, unchanging thing, then by all means do so, realising that that is the best way of stabbing it in the front and in the back...

The choice in Nehruvian discourse is stark: it is a choice between life and death. The Constitution can be deified but only in necrophillic not biophillic, ritual. But the Constitution is to be a life-giving (biophillic) force, not a death-bestowing (necrophillic) entity. It must articulate the future and not just archive a dead past. A Constitution is not a relic but a horizon.

The majestic figure of 'change' is here inscribed all over again in Nehru's discourse. The world changes "mightily" and so must Constitutions. He said, memorably:

5. *Supra* note 1 at 135.

We have seen the most perfect of Constitutions upset, not because they lacked perfection but because they lacked reality, because they lacked dealing with the real problems of the day. Do you know of any better framed or better phrased Constitution than the Constitution of Weimar Republic...? It was perfect in wording, phraseology, balance and adjustment. Yet that whole Constitution went lock, stock and barrel. Away it vanished into the dustbin of history.

Do you know a better Constitution than the Constitution of the Republic of Spain which was unhappily killed, assassinated about eleven, twelve years ago? It was a magnificent Constitution. It went so far as to say that it would not go to war with any country or make any treaty with any foreign country unless the League of Nations of the day permitted it to do so or agreed to its doing so. It was a Constitution of fine idealists. Yet these fine idealists are spread over the various corners of the world and that Constitution has no place in Spain.⁶

History is no conscientious respecter of Constitutions; if Constitutions are to impact history, they ought to accommodate forces of change and be flexible. But how so? In a striking imagery, Nehru says that the Constitution must be aligned, kept near the "curving growth of the nation's life." This must be so because "life is a curve—it is not a straight line—and the life of a nation in the present day of changing humanity is very curvy." Logical and straight lines, Nehru maintained, are "tangents which go off the curve and if the tangent goes too far off the curve of the growth of a nation, then there is conflict, an upheaval, and after that upheaval, well, something new emerges." Nehru prophesies: "You come back, as you are forced to come back, to the line of life because you cannot depart too far from it."

The "line of life", is, of course, provided by the "passion for freedom." Amendments which go too far off that line only invite a return to it; Nehru's future-gazing has been amply borne out by events leading to the Forty-Second Amendment and its aftermath. The doctrine of basic structure, whether justices and jurists realize it or not, Nehru would have said, marks free India's line of life; judicial power emerges as an instrument of history when the executive and legislative power emerge as momentary adventurists forgetting India's mission.

And yet through his political praxis, Nehru himself illustrated ways of amending power, the exercise of which did not transgress the line of life. He practised what he preached to others when it came to amending the Constitution. Speaking on the First Amendment restricting the right to free speech and press now by three additional grounds, Nehru articulated what I might call the circumstantial limitation on freedoms. ("Every freedom in the world is limited not by law so much, limited by circumstances.") He asserted: "We cannot imperil the safety of a whole nation in the name

6. *Ibid.*

of some fancied freedom which would put to an end to all freedoms." (Here his reference was to such freedom of press as would, hypothetically, provoke conditions of war). In effect, he was insisting that freedom, in a democratic society, is responsible freedom. Freedom entails responsibility:⁷

Freedom brings responsibility; of course, there is no thing as freedom without responsibility. Irresponsibility itself means lack of freedom. Therefore, we must be conscious of this tremendous burden of responsibility which freedom has brought; the discipline of freedom and the organized way of working freedom.

Nehru did not just preach this gospel of freedom and responsibility to justify accretion of more legislative competence in Parliament. He himself remained aware of it in initiating the exercise of supreme powers of amending the Indian Constitution. The fourteen constitutional amendments he piloted and sustained illustrate the ways in which notions of constitutional stability and change could be combined in biophillic, as distinct from necrophillic, ways. The same, alas! may not be said of all the amendments which followed and seem to be in store. For Nehru, numerical legislative majority had also to be a democratically moral majority and as such had to be disciplined by history and vision, avoiding the daring to be little.

IV

The imposing motif of 'change' in Nehru's discourse assumes a particular and a poignant relevancy in the context of the dialectic between the provisions of Part III and Part IV of the Constitution. For Nehru, the critical distinction was between "static" and "dynamic." The directives signified to him "a dynamic towards certain objective." The fundamental rights "represent something static, to preserve certain rights which exist." Dynamic movements, by their very nature alter, vary or affect settled relationships which fundamental rights are designed to preserve, protect and promote. The rights must, of course, be protected and promoted (Nehru even speaks of their permanence). "But", he adds, "*somehow* and *sometime* it might so happen that the dynamic movement and the static standstill do not quite fit into each other."

Note, please, that Nehru does not use the dialectic between rights and principles as comprehensive and ongoing. The dislocation between the rights and directives arises "*somehow*" and "*sometime*." "*Somehow*" and "*sometime*" express relations of contingency and not of necessity. The conflict between rights and principles is not "*inherent*" because "*that was not meant*." And what is the "*sometime*" contingency which assumes dimensions of conflict (or as Nehru calls it "*the slight difficulty*")? That "*sometime*" is a contingency of judicial interpretation which emphasises

7. *Id.* at 129.

"the static element...a little more than the dynamic element. When that happens "we", simply "have to find out some way of solving it."

The way to do it, according to Nehru, is first of all to locate the political contingency. If the Supreme Court's judgments make inconsistent adherence to rights and fidelity to directive principles, then a situation of "slight difficulty" becomes an "inherent contradiction." What is the nature of this contradiction? Understanding of this emanates, for Nehru, from the totality of the Constitution, the totality of India's future as envisioned in the Constitution. That totality highlights the entire, the "whole purpose behind the Constitution leading to a certain goal, step by step...." And that goal is "not so gradual but a rapid advance, wherever possible, by a State where there is less and less inequality and more and more equality." The limits of the protection of individual liberty, according to Nehru are to be found in the identification of ways in which individual liberty fosters "individual or group inequality."

One locates here the extraordinary complexity of Nehru's constitutional vision. The Constitution is a catalyst for social transformation of modern India. The assurance of fundamental rights is itself a part of that transformation. So are the ends of state power and authority as expressed in the preamble and the directive principles. In this totality there exists no element of "contradiction." It is not inherent to the totality. But it may contingently arise by exercises of judicial or political power. When it does, it is for "Parliament to remove this contradiction and make the Fundamental Rights *subserve* the Directive Principles of State Policy." That subserving is *not* subservience. The rights retain their rightful places in the totality; it is only when they seek to become the whole of the Constitution, instead of one of its basic parts, that the processes of constitutional amendment must begin to restore the totality of Constitution, or to reconfigure its purposes and personality.

A great deal of fine understanding and rigour of analysis is here entailed—the understanding of the totality that the Constitution is, the grasp of the directions of dynamic movement from present into future India, a determination of when the "slight difficulty" arising between the rights and the directives turns out to be a "contradiction" and sculpting of ways in which subserving is accomplished without subservience. The true purpose of amending power can thus be only the restoration of the constitutional totality, not the reinforcement of "fickle fortunes" through "fickle thought."

The "flexibility" of Constitution is related by Nehru again and again to the tasks of societal transformation. Today, he said, "the world is in turmoil and we are passing through a very swift period of transition." "Relative facility" of amendment, even of Part III, must then remain the prerogative of all future Parliaments, each one of which would be, at a pinch, more "fully representative of every section of Indian people." They will understand and feel the totality differently at different moments of India's future time; but the central objective, that "permanent and solid" part of

the Constitution will remain "...to bring about a social change for the benefit of the largest number of people doing the least injury to any group or class."

The constitutional imagination which must be invested in acts of amendment of the Constitution must be indeed of very high order. The Constitution should remain the "road of your choice." Even if one "sees ahead rather dimly" it is one's duty to *see*. But one can only see when one is possessed by a sense of Indian destiny. Already in 1951, Nehru was to say "...I am a little frightened of the narrow-mindedness that begins to prevail in our country, of the lack of vision that spreads among the people..." In entrusting to Parliament the supreme powers of changing the Constitution, Nehru thought that Parliament will be the custodian of the Indian vision, and Indian dream. When the elected representatives of the people become, as it were soldiers of fortune, this vision, this dream perishes and we enter the period of nightmares. That is why it is historically necessary to recapture the Nehruvian vision in the late eighties and beyond. Above all, Nehru's mood, method and message invite recovery and reappropriation. The contemporary practice of politics has to be reoriented, reconceptualized, reconstitutionalized as politics of vision, not just on behalf of the Indian but of the global humanity.

Is this at all possible? Our answers may vary. But a Nehruvian answer will be, I believe, an optimistic one. "We have" he said moving the Objectives Resolution, "gone through the valley of the shadow. We are used to it and if the necessity arises we shall go through it again." And he said: "Some of us may be little men, some may be big, but whether we are small men or big men, for the moment we represent a great cause and, therefore, something of the shadow of greatness falls upon us." That moment, undoubtedly, has not passed; it is still with us. The Indian Parliament was in Nehru's vision a perpetual constituent assembly in motion, with the eyes of the future upon it. While the Supreme Court of India sustains much of the constitutional vision of Nehru, albeit ironically, it is the revitalization of the legislative power as a sword against injustice and exploitation and as a shield for democratic values that the future of democratic resurgence must turn. Nehru used to say that the critical problem of India was how to build a strong state with just means. Four decades of independence has seen the emergence of a very strong state; what is called for today is a return to just means, of dignity of discourse, of collective cooperative democratic endeavour, a transfiguration of arenas of legislative action. In this lies the prospect of the recovery of India from her expropriators, even if partly.