

Does the Indian Constitution Need a Basic Overhauling? A Case for Convening a Constituent Assembly

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“Like the Indian Society, the Indian constitution is passing through a crisis.”
P.B. Mukharji¹

I

It is three years since the silver jubilee of the Indian Constitution has been celebrated. The country is still at cross-roads after having a second political revolution. The economic revolution is limping, halting and moving at a snail's pace in a pedestrian way. The basic problems of the country still remain unsolved. The different goals adumbrated and set in the preamble of the Constitution are still as distant to realise as they were at the time of the adoption of the Constitution. The fact that the question has been raised seriously in important and learned quarters about the necessity or otherwise of the basic overhauling of the Constitution of India shows the gravity of the gap between the Constitution in law and the Constitution in fact. Genuine doubts were expressed about the success, relevancy, suitability and dependability of the existing Constitution with its 42 or 43 amendments to solve the problems facing the country.

The question is: Has the Indian Constitution fulfilled its function or does it require a basic overhauling?

II

Broadly speaking, there are three different schools of thought with respect to the assessment of the Indian Constitution vis-a-vis the national objectives, problems and solutions. One's own political, economic and social philosophy or even interests determine the view that one takes.

The first view is that the Constitution was framed by a galaxy of great national leaders and legal luminaries with deep understanding of the needs

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1. P.B. Mukharji, *The Critical Problems of the Indian Constitution* (v) (University of Bombay, 1966).

of the country, reconciling individual freedom with social justice. The distribution of powers between different organs of the State is sound. The Parliament is given sufficient powers under the Constitution; if not, it has acquired more powers than required by a series of amendments made so far. It can achieve the goals set by the Constitution without any further amendments.² It has got all the legislative and executive powers to do social justice. The reasons for the failure of the government in this regard are not to be found in the document of the Constitution. Constitutional amendment is a vain attempt. The institutions are sound. But the men who run the institutions are neither competent nor honest nor sincere in their professions of establishing an egalitarian society. Those that take this view may cite the late Ambedkar, Chairman of the Drafting Committee of the Constitution of India who said long ago that it was workable, that it was flexible and it was strong enough to hold the country, together both in time of peace and war. If anything went wrong with it, it was not because the constitution was bad but the men who worked it were vile.³ Hence, it is a human failure. The governments are in search of one alibi after another to cover their defects and throw the blame on the judiciary or more compendiously on the Constitution as interpreted by the judiciary. So any number of amendments may worsen the situation, because, it increases only the power of the government damaging irreparably the constitutional safeguards against tyranny and misrule. In sum, the Constitution should not be changed.

The second view is that law is an instrument of social engineering. It is a means to an end and not an end in itself. It must be developed to meet changing social values. It is not immutable, infallible and unalterable. It is not a sacred book to worship. It is a condensed literal framework of the socio-economic and political philosophy for the guidance of the Nation in its march towards progressive society. Change is the only unchanging law of the universe. Society and man are no exceptions. So also the law and the Constitution. Nevertheless our Constitution is not basically defective. Hence it is neither desirable nor permissible to alter the basic structure.⁴ Certain articles in some parts require amendment due especially to the legalistic dictionary-

2. "In short, the Constitution on paper and in action were so totally different that one might say that the constitution had practically lost its sanctity... [B]etter results could have been achieved under our original Constitution with a little more time, patience, expense and adaptability." K. Subba Rao, *Some Constitutional problems* 54 (University of Bombay, 1970). See also *Golak Nath v. State of Punjab*, A.I.R. 1967 S.C. 1643 for fundamental rights cannot be abridged.

3. See Vol. XI-XII, *C.A.D.* 1975 (Government of India Publication, 1949)

4. "...the Constitution cannot be made to suffer a loss of identity through the amending process. [I]ts essential features have to be preserved". N.A. Palkhivala, *Our*

oriented mechanical interpretation by the highest courts of our country. Either the judiciary has to give dynamic progressive interpretations to the provisions of the Constitution according to the changing needs and values of society as the U.S. Supreme Court has done to U.S. Constitution or the Constitution has to be suitably amended occasionally if the courts take a static view of it.

On the other extreme, according to the school of thought diametrically opposed to the first view, the Constitution has failed the Nation. The Constitution was a mixture of opposite philosophies, irreconcilable principles and conflicting ideologies. It was framed by the agents of the vested interests. The Constituent Assembly was not a true representative of the people being constituted on the limited franchise based on educational qualifications and ownership of property. It was designed to project the entrenched vested interests in our society and deceptive in its ornamental, platitudinous rhetorical pious preamble and declarations of directive principles of state policy enmeshed in an ineffective part of the Constitution. It is impossible to establish an egalitarian society working within the four corners of the Constitution as interpreted by a conservative judiciary. The Constitution is not sacrosanct. It is not superior to the Nation. The Constitution of India is a grand superstructure over a loose soil of undeveloped socio-economic infrastructure. Hence it should be thrown out lock, stock and barrel and a new constitution is to be framed.

III

There are abundant and varied reasons for repealing the entire Constitution and framing a progressive, socialistic native, simple and brief *Bharat* Constitution:

Though the Constitution of India was framed by great national leaders, the Assembly as such which passed the Constitution, cannot be said to be a representative one, because, firstly, it has been elected indirectly from

Constitution Defaced and Defiled 150 (Macmillan, 1974). See also *Kesavananda Bharati's* case, A.I.R. 1973 S.C. 1461 'Basic structure' of the Constitution is unalterable (as per Chief Justice Sikri and Justices Shelat, Grover, Hegde, Mukherjea, Jaganmohan Reddy and Khanna. As per Justice Ray "An amendment would leave an organic mechanism providing the constitution...." As per Justices Palekar, Mathew, Beg, Dwivedi and Chandrachud, Parliament's power to amend the Constitution is plenary. See also P.B. Gajendragadkar, *Indian Democracy—Its Major Imperatives* 69-70 (B.I. Publications, New Delhi, 1975). P.K. Tripathi, *Some Insights Into Fundamental Rights* 43 (University of Bombay, 1972) accepting the view of *Sankari Prasad's* case. See also *Sankari Prasad v. Union of India*, A.I.R. 1951 S.C. 458; *Sajjan Singh v. State of Rajasthan*, A.I.R. 1965 S.C. 845.

the provincial assemblies and not by the people directly.⁵ Secondly, the provincial Assemblies were themselves not elected by universal adult franchise as the voting rights were conferred on the basis of educational qualifications and ownership of property. It means even the indirect elections were vitiated as those who elected the members of the Constituent Assembly were themselves elected on a limited franchise. Thirdly, with widespread illiteracy and general abject poverty of the mass of the people, the substantial majority were not represented by their own members of the class. The elite might have sympathies. But it cannot be said that they could effectively represent the interests of the people. The peasants and workers went unrepresented.

Most of the members of the Drafting Committee and all the important members of the Constituent Assembly⁶ were trained in Anglo-American Jurisprudence. They were indoctrinated, being influenced by the Western concepts of *laissez faire* philosophy and the supremacy of individual rights over social justice and public welfare. Their conception of justice was only corrective⁷ in nature and court-oriented. In spite of the fact that they participated in the national struggle and led the people, they lacked comprehension of the genius of the people.

The conditions at the time of the framing of the Constitution, after attaining independence, were fluid, unsettled, confusing, complex and complicated. There were a series of economic, political, social, internal and international problems. The country faced gigantic immediate problems relating to partition, migration of refugees, communal conflagrations, rehabilitation after the Second World War, integration of recalcitrant princely states, abolition of intermediaries in the agricultural sector, Kashmir problem, communist insurrections in Telangana, Naga problem, threat to unity and integrity of India from Pakistan, etc. These problems had influenced the minds of the framers of the Constitution and resulted in finding short term solutions for long term problems. The party in power was a conglomeration of different groups with differing ideologies

5. H.M. Seervai, *Constitutional Law of India*, Vol. I, 75 (Tripathi, Bombay, 1975). See also, *Kesavananda Bharati's case*, *supra* note 4 at pp. 1623-4, 1921, 1927-8; Wheare, *Modern Constitutions* 89-90 (Oxford, 1960), B. Shiva Rao, *The Framing of India's Constitution: Select Documents*, Vol. I p. 287-310.

Granville Austin in his book *The Indian Constitution: Cornerstone of a Nation* (Oxford, 1966) says, "The Constituent Assembly was, in effect, a one party assembly, in the hands of a mass party, the Indian National Congress". p. 2.

6. B. Shiva Rao, *supra* note 4 at 302-310.

7. For the importance of distributive justice and the role of the legislature in a developing country. see, P. Koteswara Rao, "Law, Justice and Society," 4-17 *Lawyer*, (1975).

including extremists on the right and the left. The party lacked coherence, clarity and consistency in philosophy and conviction for action.

The Constitution of India with due respect to the framers is a patch work copied from different constitutions of the world. It lacked originality. The Government of India Act, 1935, passed by the British Parliament in accordance with their constitutional philosophy and protection of their interests and native vested interests and isolated parts from different constitutions of the world picked up and twined together, formed the basis for framing the Constitution.⁸ It was based more on Western models. It lacked deep foundations in the historical, political, cultural, temperamental ethics of the Indian Nation.

The basic needs of the common man are ignored. More importance was given to individual liberty and property rather than to the right to work and other economic needs of the common man. Fundamental rights were given primacy and superiority over social justice. There was lack of awareness of the urgent needs of the people and sense of priorities.⁹ The Constitution if it is to be really democratic both in political and economic sense should not merely list out many ideals but create effective institutional machinery to translate those ideals into practice.

The Constitution is bulky. It is the most voluminous Constitution in the world. It leads to confusion. The reasons¹⁰ for making our Constitution a lengthy one might appear to be convincing because of the peculiar precarious circumstances and the immediate problems that confronted the Nation at the time of its framing. At any rate, these reasons are no longer in existence, e.g. integration of states, communal conflicts, refugee problems etc.

The petty protracted litigations especially indulged in by the vested interests in the High Courts and the Supreme Court challenging every

8. "From the United States we have borrowed our fundamental rights and the doctrine of judicial review; from Great Britain we have taken the parliamentary system and prerogative writs for judicial control over administrative action; from Eire we have drawn our Directive Principles of State Policy; from Canada we have received the various doctrines relating to the distribution of legislative powers and indeed the very name "Union" applied to Bharat in preference to the epithet "Federation"; from Australia, we have extracted the famous "freedom of commerce" clause, and last but not the least; from the Japanese constitution we have abstracted the diluted and attenuated "due process clause"—Justice P. Jaganmohan Reddy in his foreword to G.C. Venkatasubba Rao, *Commentary on the Constitution of India* (vi) (C. Subbiah Chetty & Co., Madras, 1st ed, 1967).

9. P. Koteswara Rao, "Theory of Relativity of Fundamental Rights and Directive Principles of State Policy under the Indian Constitution", *Lawyer* 125-140 (1975).

10. For reasons see Durga Das Basu, *Commentary on the Constitution of India*, Vol. I, 9 (S.C. Sarkar & Sons, Calcutta, 3rd ed., 1955).

social legislation, bye-law, regulation, order etc., invoking the jurisdiction on fictitious, frivolous and flimsy grounds to kill progressive action resulted in a plethora of decisions on most of the aspects of the constitutional provisions, especially, the fundamental rights, resulting in accumulation of case law requiring tedious commentary on propositions of law leading to confusion, uncertainty, and unpredictability. These in turn lead to litigious gambling. Ultimately a distracted conflicting, inconsistent, incoherent, ambivalent state of law emerges. Even the experts in law find it difficult to give legal opinion with certainty on any important issue, let alone a common man understanding the Constitution. This was illustrated by the most voluminous judgement of *Kesavananda Bharati's* case, with 11 judgements. The *ratio decidendi* of this case, four years after its delivery, is still a mystery and requires another judgement of the Supreme Court to decipher it. In the process of judicial interpretation the Constitution lost its identity. Hence, codification has become an urgent necessity.

The stream of amendments to the Constitution at the rate of nearly two amendments per year has further confused the subject of constitutional law with the Forty-third amendment reaching the statute book. Many more amendments are in the offing. With these amendments, some of the articles, which are very important, completely lost their original shape and content. It is very difficult to comprehend those articles which run into several pages with too many qualifications, provisions, explanations and exceptions. Article 31 dealing with the right to property is an instance on this point. Some of the amendments made many radical changes containing a number of provisions which by themselves are sufficient to constitute a new constitution. To illustrate, the Forty-second Amendment to the Constitution has 59 clauses, perhaps, equal to the latest constitution of the People's Republic of China.

The parliamentary form of government adopted in the Constitution resulted in too much of politics at the highest executive level with too many compromises for the preservation and continuation in office. In the presidential type of government the chief executive is not dependent upon the majority of the members in the legislature, but is independent to choose his ministers on the basis of expertise, merits and character and not on the basis of the number of Members of Parliament behind a particular minister.

For several reasons many parts of the Constitution require repeal, revision and redrafting. To illustrate:

- (1) To start with, the word 'India' in the preamble of the Constitution

shall be omitted by the substitution of the word 'Bharat'.¹¹ To describe our country by the word 'India' does not represent one Nation in its continuity from the ancient past. It is uninspiring. It is not a native word being coined and corrupted by foreign usage.

(2) Similarly, in clause (1) of article 1 of part I of the Constitution of India the word "India, that is" should be omitted.¹²

(3) Article 3 in part I of the Constitution of India is a Damocles' sword in the hands of the Union of India hanging over the federal structure. The Union parliament under article 3 has unlimited, uncontrolled plenary powers to destroy the identity, and existence of any state or states which might be found inconvenient to the ruling party at the Centre for reasons of the state Government being in the hands of a different party. The reasons for giving such plenary power at the time of the framing of the Constitution like the problems of integration of states and reorganisation of the provinces and states on a linguistic basis are no longer in existence. Hence article 3 has to be repealed and a new article which permits changes in the boundary and name only with a substantial consent of the concerned state legislature is to be substituted.¹³

(4) Next in line for a total redrafting is Part II. This Part was made on the basis of the fluid conditions of citizenship following continuous migration on a large scale of people, from Pakistan to India and vice versa. Curiously, the temporary provisions are in the Constitution and permanent provisions dealing with citizenship are incorporated in the Citizenship Act, 1955.

(5) Due to many amendments and catena of judicial decisions on each clause of many articles in Part III, fundamental rights became confusing and controversial. For example, the lengthy, confusing, cumbersome, small cluster of articles dealing with right to property have to be repealed by substituting a single small article giving plenary power to the Parliament and state legislature to bring about economic reforms contemplated in the Preamble and directive principles of state policy. Moreover some of the provisions in part III can be dealt with by ordinary legislation¹⁴ and some of the articles need not be mentioned in this part.¹⁵

11. P. Koteswara Rao, "Bharat and the Indian Constitution," *Lawyer* 161-166 (1976).

12. P. Koteswara Rao, "Is Formation of Multilingual States Inevitable?" *Andhra Weekly Reporter* 50 (1973).

13. P. Koteswara Rao, "Art. 3 of the Indian Constitution—A Damocle's Sword on Indian Federalism," (Paper submitted to the 5th All-India Conference on the Problems of Federal Polity held at Calcutta from Jan. 21-26 1978).

14. See articles 17, 18, 23 and 24, The Constitution of India.

15. See articles 33, 34 and 35.

Thus entire part III requires redrafting to be consistent with the imperatives of socio-economic justice.

(6) Part IV requires complete overhauling, removing certain articles like the one dealing with cow slaughter and separation of judiciary from executive which is almost accomplished.

New provisions to further promote socio-economic justice have to be added.¹⁶

(7) Part V, Chapter I has to be completely changed if presidential system is to be adopted which it is advisable to do so. Even otherwise it requires redrafting to demarcate the powers of the President vis-a-vis the cabinet, etc. Article 105 has to be amended and enlarged to discontinue the ridiculous application of privileges of the British Parliament of 1950 and for the codification and incorporation of the privileges in the Constitution.¹⁷ Chapter IV of Part V has to be modified to bring the judicial process in tune with the societal facts and for speedy socio-economic reforms.

(8) Some parts of the Constitution can be completely omitted or reduced to single articles, as for example, Part XVII dealing with language.

(9) Part XV dealing with elections has to be modified in order to make elections really democratic by freeing the candidates from the clutches of caucuses of parties who monopolise the purse and distribute tickets. Thus the collusion between money bags and political parties can be avoided. The parties should be freed from the attraction of money in the hands of land lords and industrialists by granting money by the state for the parties to participate in the election. The individuals must be freed from the parties by providing facilities to them to contest in elections.

(10) The federal provisions of the Constitution require thorough revision to make the Indian polity a real Federation by giving full political control to the Centre for maintaining the unity and integrity of the Nation and by giving more financial powers to the states to enable them to make progress in increasing production and equitable distribution of wealth.

(11) The emergency provisions to the Constitution have to be revised to empower the Union Government only to preserve the territorial sovereignty and integrity of our country against external aggression and internal

16. P. Koteswara Rao, "25 years of Indian Constitution: Part III and Part IV, A Functional Study in Time-Frame Continuum," *The Year Book of Legal Studies*, Vol. II, 71-90 (1975).

17. P. Koteswara Rao, "Privileges of Legislature, Judicial review and Liberty of the Individual," *Dharma Chakra Journal of the Law College, Gulbarga*, Vol. I (1964-65).

insurrection, subversion and secession without disproportionately curtailing personal liberties by providing really independent authority to check excesses that are likely to be committed by opportunists by taking advantage of the situation.

IV

Our Constitution is neither Indian nor Gandhian. It is not the people's Constitution. It is unduly prolix, confusing and inconsistent. It does not reflect the Nation's ethos and the people's genius in its provisions. It has become outmoded. The raw material for the making of the Constitution is not drawn from the native soil. The inspiration is not taken from the ancient wisdom. The needs and aspirations of common man are couched only in rhetorical platitudinous and empty propositions without creating any machinery for their realisation. There was no people's participation in framing the Constitution. The Western concepts of political, economic and social ideologies are imported without relevance to the conditions. It lacks a proper sense of priorities. It needs revision in many parts, deletion of many portions and incorporation of many new provisions. Hence it is high time to take stock of things realistically and boldly repeal the constitution lock stock and barrel by replacing it by the native a, socialistic and genuinely democratic constitution. Hence it is justified to give a call for convening a new constituent assembly to frame a new constitution combining our ancient wisdom and culture with scientific outlook and social justice instead of tinkering half heartedly periodically.

It may be concluded, in the telling words of criticism of Karl Marx on copying from other constitutions :

Karl Marx once wrote that the simple German who would utilise the North American constitution resembles the native merchant who copies the book of his rich competitor and believes that in possession of this copy he is also in possession of the envied riches.¹⁸

18. Review by R. Vaidyanath in 12 *J.I.L.I.* at 711-12 (1968) of *New Elements in the Evolution of Socialistic Constitution*—by Istavan Kovacs—Budapest—Akademiai Kiado—1968—pp. 464. *Ibid.* "Thus Marx opened vials of lampoon and scorn upon those who advocated the creation of abstract constitutional forms without taking into consideration the socio-economic conditions. According to Marx a constitution is a political document that serves particular interests of the class that is in power. A constitution which so well serves at a particular point of time might become a dead weight or scarecrow on the subsequent period... Constitution, like any political instrument, he argues, has a myriad social functions. An enquiry into the nature and significance of constitution nestles around a study of social forces."