

## CHALLENGES IN CONSTITUTIONAL LAW

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*“I must study politics and war that my sons may have liberty to study mathematics and philosophy. My sons ought to study mathematics and philosophy, geography, natural history, naval architecture, navigation, commerce, and agriculture, in order to give their children a right to study painting, poetry, music, architecture, statuary, tapestry, and porcelain.”<sup>1</sup>*

-John Adams, May, 12, 1780.

Ever since the discovery of genes, the embarkation on the human genome project and information accumulation about the origin of *Homo sapiens*, attempts are being made at drawing a new history of life on earth, described as the lucky planet. The phenomenal explorations in the fields of physics and chemistry, propelled by quantum physics and mechanics and the relativity theory have blessed, in a manner of speaking, humanity with the ability to communicate, so profoundly and so swiftly, it appears that history is being written at each moment of our lives. Heads of Governments, economists and political thinkers, representatives of people, all seem to be converging on the need for the most beneficial and constructive use of science and technology to make quality of life better and the world a good place to inhabit for all.

Is this management of science and technology, a course of action that can be devised on rational scientific principles? Whether organization of lives and affairs of people in a divided society, divided by economic, social and political factors is distinct from science and technology management? Whether the liberal democratic state, described as the “end of history”<sup>2</sup> will be able to sustain the momentous challenges that have arisen post World War II? Regardless of the fact that revolutionary aspirations and laboriously built social theories vouching a great human future of equality and liberty have failed to deliver, whether the deficiencies of the liberal democratic state will be ammunition for revival of new types of totalitarianism

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<sup>1</sup> John Adams, *Letter to Abigail Adams* (May 12, 1780), available at <http://thefederalistpapers.org/founders/adams/john-adams-letter-to-abigail-adams-12-may-1780-2>.

<sup>2</sup> FRANCIS FUKUYAMA, *THE END OF HISTORY & THE LAST MAN* (Simon & Schuster 2006).

with the availability of invasive technologies? The list of such questions seems to be as endless as the list of issues, dialogues, conflicts, hostilities, and schisms between human beings and groups and sections of humanity.

At first blush, for a constitutional lawyer, teacher, student, legal practitioner, judge or a law maker, the above questions may seem like abstractions, far removed from reality and fairy tales of distant connections. While we may be wrong in our apprehensions, these questions are neither mere theoretical class room debates, nor mere political statements of an arm chair theorist. The somewhat cynical observation of Kant that “out of timber so crooked as that from which man is made nothing entirely straight can be built.”<sup>3</sup> seems to be hanging around us.

Walter Bagehot wrote the book ‘English Constitution’<sup>4</sup> in 1867. He wrote it at a time when the representative government in England was undergoing changes in its representative character. The ascendancy of the working class was a phenomenon still being studied. Bagehot’s book is a good deviation from the standard accounts of English Constitution which traditionally talked about the Queens, Lords and the commons and the first principles traceable to Magna Carta. He wanted to talk about the real secret of the British Representative Government –what once was “the appendages of monarchy” had been converted into the essence of a republic. He was, however, concerned about the contrast between the paper description of the constitution and the reality that went into constitutional practice. With the emergence of majoritarian rule through the electoral process, universal suffrage theoretically granted to all, the great vigor of participation in the representative government. Bagehot was also, therefore, looking at “the supremacy of ignorance over instruction and of numbers over knowledge”.

While literacy and education have transformed the human landscape, it still seems to be a matter of great debate as to whether “the supremacy of ignorance over instruction and of number over knowledge” continues to be the challenging dimension of people’s participation in the political sphere within the framework of the constitution (any constitution, anywhere). Writing about the Crises of Equality, Pierre Rosanvallon makes the following observation:

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<sup>3</sup> Isaiah Berlin, *The Bent Twig*, in the CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS 246 (New York, 1991).

<sup>4</sup> WALTER BAGEHOT, *THE ENGLISH CONSTITUTION*, (Chapman & Hall 1867).

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*“Democracy is manifesting its vitality as a regime even as it withers as a social form. The sovereign citizenry has steadily increased its ability to intervene in government and magnified its presence. Citizens are no longer content to make their voices heard sporadically at the ballot box. They exert an increasingly active power of oversight and control. The very vigor of their criticism of the representative system demonstrates their determination to keep the democratic ideal alive. This is a characteristic of our times. The aspiration to expand freedom and establish powers responsive to the general will has toppled depots everywhere and changed the face of the globe.”<sup>5</sup>*

This rather long prologue to understanding the challenges of constitutional law is to move away from, and not being confined to, doctrinaire analysis of constitutional issues. Challenges in constitutional law in essence are challenges to the human genius and ability to manage its existence through shared processes, accommodating diversity and its attendant tensions. May be political theory can no longer erect hypotheses and claims outside constitutionally articulated statements? *“Constitutional discipline”* can be said to be the mantra for all social, political and economic actions. All agreements on what governments and people would seek to accomplish towards equality and liberty are contingent upon the fact that only publically reasoned agreements matter and that, first we must agree to do all this. This is where the first challenge in constitutional law viz., constitutional practice, arises. We may proceed to state that by constitutional law, we do not have in mind mere digests of case law or judicial pronouncements and interpretations. We visualize the whole practice of reading and working the constitution by all – the people with their public spheres, governments, parliaments and the judiciary – as constitutional law. We shall move away from theories and debates on constitutional interpretations by courts, and focus on the complete canvas.

It is only through continued adherence to constitutional disciplines and to social compacts and promises built and rebuilt that the challenges noticed above can be wisely handled. We also need to remind ourselves that we need to handle them as nearly as possible through tools and methods of *ahimsa*(non-violence). All coercive processes and methods are futility incarnate being worse than a temptation to try to get someone to believe something whether he wants to believe it or not.

In other words, all political practice is constitutional practice and vice versa. All individual and sectional or group claims are made within divided domains and seek resolutions which will in due course dissolve the

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<sup>5</sup> PIERRE ROSANVALLON, *THE SOCIETY OF EQUALS* (Harvard University Press 2013).

divisions or at-least tame their rough edges and usher in greater sublimation in human relationships. What challenges have we, as humans and as a nation, thrown upon ourselves that are both within and beyond the constitutional document? Is the constitutional document comparable to an expanding universe following constant big bangs in the community?

As we shed constraints of the past, we are asking ourselves to dig, sometimes controversially deep, into meanings of rights, fundamental rights, human rights etc. Sometimes rights can be controversially asserted (e.g., the claim of women of any age to enter certain places of worship), sometimes rights can be legitimately expanded to test even nationality concerns (e.g., law of sedition) and sometimes contests can be raised to question, or even tease religious or other faiths governing our affairs (e.g., women's rights to dignity and in matters of personal law).

The political space is primarily occupied by political parties or similar associations. They exist not merely as entities that get voted to power and to form governments. They exist as spaces which seek to permeate people's minds and thoughts and to legitimize their occupation (colonization!) of people's minds and to guide their conduct. They are necessary historical products as the proletariat is of capitalism. It is interesting to see how competing political formations can still, in due process of intense political combat, produce good constitutional byproducts for e.g., in Austria "the declarations of independence was signed by the leaders of the (then) Socialist Party, the People's Party, the (Soviet-influenced) Communist Party and the Austria Party System."<sup>6</sup>

The Indian Constitution like almost all constitutions is silent on political parties. It offers no theory of government. It contains no doctrine of economic blueprints. It has no binding declarations on how to balance faith and diversity, innovations in resource exploitations and management and economic regulation, or to preserve history and tradition while embracing great leaps of science, technology and globalization of our affairs of life. It is because of all these that we have challenges! But they are no barter bargains for a community where the silence of the grave, and the sound and fury of arms and ammunitions will rule. Non-violence, as human and State conduct, as the foundation towards building saner and peaceful existences, is the next challenge in constitutional law. How should people handle their own *abimsas* and how should governments and parliaments handle violence and intolerance in the political space? How is this relevant to democracy and rule of law?

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<sup>6</sup> XENOPHON CONTIADES, *ENGINEERING CONSTITUTIONAL CHANGE* (Routledge 2012).

Law schools teach about rights, about governments limited by constitutional provisions, about federalism, about the lofty connection between the preamble and directive principles, about judicial review and compulsively about judicial activism; eulogize Frankfurter, Montesquieu and separation of powers. At the end of the day the following statements are made, in the study of U.S. Constitutional law:

*“Today, more than thirty years removed from the retirement of Chief Justice Earl Warren, that hope seems remarkably naïve. Contemporary constitutional scholarship is dominated by articles and books arguing that judges are ill-equipped to solve the social problems that trouble us, that their past efforts to do so have been inept, ineffectual, or worse, and that when their decisions do not merely reinforce current sentiment, they unjustifiably impose the views of cultural and economic elite on the rest of us.”*

*“Why do the elected officials, who may be short-sighted, poorly informed, or venal, have the final say on constitutional disputes? There may be good reason for judicial restraint, but they should be put on the table just like the justifications for any other constitutional theory.”<sup>7</sup>*

The constitution cannot sleep. It is the antithesis of *Kumbhakarnai*<sup>8</sup>. It is unlike a Shakespearian play, without an end. All these questions become doctrines in the course of our quest for agreements on goals, means and the pursuit of individual and collective liberty. It is destined as an idea and as a process to pass through periodic discoveries about what is best. The deeply rooted element in human consciousness to grasp, fathom, and project civilizational urges, will inform and enrich these discoveries. Institutions may be designed, experimented and discarded as, after all, even among altruists there can be serious disagreements. Challenges in constitutional law are, thus, challenges by the people and for the people. They are challenges to political parties, representatives of people, judges and civil servants. They test our fidelity to the constitution and test our commitments to an open society. This perennial test to our commitment to an open society is the next challenge. It is only in an open society that all heritages of civilization can be accessed without impediments and shared with empathy and bondage. Long ago R. H. Tawney exclaimed:

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<sup>7</sup>LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* (Yale University Press 2001).

<sup>8</sup> A figure from the epic *Ramayana*.

*“Some classes should be excluded from the heritage of civilization which others enjoy, and that the fact of human fellowship, which is ultimate and profound, should be obscured by economic contracts, which are trivial and superficial. Should the constitution be minimal in size and should judicial roles be minimal too? Or should all possible political misadventures and sin become irresistible diet for judicial review? Neither will the governments be Lilliputians always; nor will the Judges be pigmies. The spirit of peeping into respective faults and one’s own black holes is a game worthy of playing.”<sup>9</sup>*

As we saw earlier, the list of challenges is plenty. We noticed that the few challenges we shortlisted are essentially social and political but the point is, that these challenges, viz., commitment to an open society, strengthening or deepening the appeal of non-violence in all our conduct, the commitment to work within the constitutional framework despite slippery slopes, can no longer be seen from a 17<sup>th</sup> to 19<sup>th</sup> century lens.

The rhetoric of equality and liberty echoing through the French and Bolshevik revolutions is different from programming equality. This programming is not the same as Pragmatism. Views from the bench on the best way of organization of judicial decisions and the scare that courts are all equipped to deal with socio-economic rights ignore that programming equality can never be a legislative contemplation alone.<sup>10</sup> Current constitutional equality statements are to be seen as programmatic, rather than mere aspirations. It involves social restructuring through education, equal opportunities to know science, to handle technology, ensuring that no claims to greater share of community, wealth and incomes are conceded or grabbed. But how does one ensure that the resources needed for all these are generated, rationalized, and put into the assembly line of implementation? Some skeptical voices in this context also need to be seen, as we continue to see the vast glaring disparities between cities and villages, between educationally fortunate and those suffering from lack of instruction. It is said:

*“...a general theory of equality requires an ordering of its various dimensions. Equality as relation must come first, not only because it defines the spirit of equality but also because it has a universalizing dimension. Everyone can agree that it is preferable to live in a society of equals. Equality as relation is to everyone’s advantage: it makes the world a calmer, less dangerous, more convivial place. It also makes it possible to*

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<sup>9</sup> JACK BALKIN & REVA SIEGEL, *THE CONSTITUTION IN 2020* (Oxford University Press 2009).

<sup>10</sup> RICHARD POSNER, *LAW, PRAGMATISM & DEMOCRACY* (Harvard University Press 2005).

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*include liberty in a theory of equality, because liberty can also be defined as a relation. [...] Equality as distribution and equality as redistribution are secondary concerns.”<sup>11</sup>*

Isaiah Berlin argued that there is a fundamental conflict between liberty and equality when he said:

*“Both liberty and equality are among the primary goals pursued by human beings through many centuries, but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted.”<sup>12</sup>*

Dworkin has however talked about competing conceptions of liberty some of which can be compatible with equality. Thus, understanding and programming equality is probably the most challenging constitutional task.

Liberty is both a rhetorical call and a demand on all human beings to give up hegemony in all aspects of life. It is both the freedom which produces art, literature and culture, the freedom which propels towards realization of spiritual truths, and the freedom which guarantees personhood and dignity. Learned Hand J. grasped some element of them in powerful language:

*“..liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few - as we have learned to our sorrow.”*

*The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interest alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded’*

-The Spirit of Liberty speech, 1944.<sup>13</sup>

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<sup>11</sup>ROSANVALLON, *supra note at 5*.

<sup>12</sup>ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* (Princeton University Press 1959).

But unlike equality, liberty does not need programmatic voyages. That we grasp this and give credible connections between liberty and to equality is the related challenge. Let us not attempt at any final theory on all these matters, except being vigilantly wedded to the constitution itself as a *dharmā* and discipline. As long as that “liberty which lies in the hearts of men and women”, which no constitution can take away is understood as our eternal guide, scripts of constitutional challenges will be well-written.

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<sup>13</sup> Judge Learned Hand, *The Spirit of Liberty Speech* (May 21, 1944), available at <https://texashistory.unt.edu/ark:/67531/metaph183520/>.