

CONSTITUTIONAL DEVELOPMENTS

-Pavani Parameswara Rao*

The Constituent Assembly Debates and B. Shiva Rao's *'The Framing of India's Constitution'* are helpful to understand the Constitution, its aims and objects, the overall scheme and the infrastructure designed for achieving the goals.¹ The leaders who led the freedom struggle were statesmen who had made great sacrifices for the noble cause. They ensured that eminent persons from different walks of life and leaders representing different communities and sections of society were elected to the Constituent Assembly. At the first meeting, Dr. Sachchidananda Sinha, provisional Chairman, in his address reminded the Assembly, quoting Joseph Story, the famous American Jurist: "*Republics are created by the virtue, public spirit, and intelligence of the citizens. They fall, when the wise are banished from the public councils, because they dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them.*"² His concluding words are "*where there is no vision, the people perish*".³

Dr. S. Radhakrishnan, philosopher-statesman, in his speech quoted Ashoka, "*Samavaya eva sadbhuh*" (*Concord alone is the supreme good*).⁴ He said:

*"India is a symphony where there are, as in an orchestra, different instruments, each with its particular sonority, each with its special sound, all combining to interpret one particular score. It is this kind of combination that this country has stood for. It never adopted inquisitorial methods. It never asked the Parsis or the Jews or the Christians or the Muslims who came and took shelter there to change their creeds or become absorbed in what might be called a uniform Hindu humanity. It never did this. 'Live and let live' - that has been the spirit of this country."*⁵

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¹ B. SHIVA RAO, FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS (Universal Law Publishing Co. 2015).

² 1, CONSTITUENT ASSEMBLY DEBATES 5 (Lok Sabha Secretariat 1955).

³ *Id.* at 7.

⁴ *Supra* note at 2.

⁵ *Supra* note at 2.

In his concluding speech in the Constituent Assembly Dr. B.R. Ambedkar, Chairman of the Drafting Committee, voiced his apprehensions about the future. *“What would happen to India's independence? India was once independent but lost it by the infidelity and treachery of some of her own people. On the 26th January, 1950 India would be a democratic country with a Government of the people, by the people and for the people. What would happen to the democratic Constitution?...We must hold fast to constitutional methods and abandon the bloody methods of revolution. We must abandon the method of civil disobedience, non-cooperation and Satyagraha. We must not lay our liberties at the feet of even a great man, or to trust him with powers which enable him to subvert the institutions.”*⁶

Dr. Ambedkar advised the people to make political democracy a social democracy as well. According to him, liberty, equality and fraternity formed a union of trinity. He asked, *“How long shall we continue to deny equality in our social and economic life?” If we continued to deny for long, we will be putting our political democracy in peril.”*⁷ Dr. Rajendra Prasad, in his concluding address observed *“if the people who are elected are capable and men of character and integrity they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country.”* He added *“we have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance.”*⁸

The pithily worded Preamble of the Constitution records the solemn resolve of the people to secure to all citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The Constitution has provided for a democratically elected Parliament for the country and a Legislature for each State. The Prime Minister gets M.Ps of his choice appointed as Ministers and Chief Ministers do likewise. The Council of Ministers exercises the executive power i.e. to make policies, to initiate legislation and to implement decisions taken and the laws enacted. The Legislatures enact laws and the Judiciary interprets the Constitution and the laws. The power of judicial review has assumed vast proportions. Every Minister, every Member of Parliament or of a State Legislature and every Judge takes the prescribed oath inter alia swearing allegiance to the Constitution and

⁶ B. SHIVA, *supra* note at 1, ¶ 944-45.

⁷ *Id.*

⁸ 11, CONSTITUENT ASSEMBLY DEBATES 984-85 (Lok Sabha Secretariat 1955).

promising to discharge his duties faithfully. As observed by P. B. Gajendragadkar, former Chief Justice of India, in Special Reference No. 1 of 1964:

“all the three wings of the State, the Executive, the Legislature and the Judiciary must function not in antinomy nor in a spirit of hostility, but rationally, harmoniously and in a spirit of understanding within their respective spheres, for such harmonious working of the three constituents of the democratic State alone will help the peaceful development, growth and stabilization of the democratic way of life in this Country.”

The Constitution has been in operation for over 67 years. It has been amended over a hundred times. However, from the beginning, there was no common understanding of the scheme of the Constitution by the three wings. The Judiciary frustrated the agrarian reforms initiated enthusiastically by different States soon after Independence due to lack of appreciation of the Directive Principles of State Policy and their dynamic character. According to the Supreme Court, they were subservient to the fundamental rights. It was a serious error of interpretation. It took the Court over two decades to realise its mistake and correct it. The damage done in the meanwhile was irreversible. The framers of the Constitution, functioning as the interim Parliament till the first general election to the House of the People (Lok Sabha) was held in 1952, suffered a jolt when the Patna High Court declared the Bihar Land Reforms Act unconstitutional¹⁰. Parliament got over the obstacle by amending the Constitution and inserting Articles 31A, 31B and the Ninth Schedule consisting of various enactments introducing land reforms which could not be challenged on the ground of violation of any fundamental right.¹¹ The Supreme Court accepted and upheld this and similar amendments initially, but in *IC Golaknath v. State of Punjab*¹² a larger Bench overruled the earlier decisions and declared that Parliament cannot in exercise of its amending power, take away or abridge a fundamental right. In *Kesavananda Bharati v. State of Kerala*¹³ a still larger Bench overruled *IC Golaknath* and declared that Parliament's power to amend the Constitution does not include the power to alter the basic structure or frameworkk of the Constitution.

⁹ (1965) 1 SCR 413, 447.

¹⁰ Maharajadhiraj Sir Kameshwar Singh v. State of Bihar, 1959 AIR 1953 Pat. 167.

¹¹ Art. 31, amended by The Constitution (First Amendment) Act, 1951.

¹² (1967) 2 SCR 762.

¹³ (1973) 4 SCC 225.

Parliament did not accept this fetter on its power under Article 368 of the Constitution. The Union Government led by a strong Prime Minister retaliated by superseding three senior most Judges of the Supreme Court who supported the basic structure theory and appointed the fourth puisne Judge as the next Chief Justice of India. The entire Bar rose in protest, but in vain. Yet another supersession took place when the senior most puisne Judge of the Supreme Court gave a strong dissenting judgment in *ADM Jabalpur v. Shivkant Shukla*¹⁴ rejecting the contention of the Government that during the emergency when the right to move a Court for the enforcement of the fundamental right to life and personal liberty was suspended, Courts could not entertain a writ petition. The New York Times hailed the verdict. The Central Government had already announced its policy to appoint committed Judges. The Bar and the public were deeply concerned about the independence of the Judiciary. The Bar knows who is a committed Judge and who is not. These developments raised the question whether it is safe to allow the Executive to have unbridled discretion in the matter of appointment of Judges.

In the *Supreme Court Advocates-on-Record Association v. Union of India*¹⁵, a Bench of nine Judges was persuaded by the Bar to overrule *SP Gupta v. Union of India*¹⁶. The Court declared that consultation with the Chief Justice of India, as required by Article 124 (2) for appointment of a judge means, in substance accepting and appointing the candidates recommended by a Collegium consisting of the CJI and his senior colleagues. If the Government has any reservation about any candidate recommended, it may put forward the same before the Collegium for reconsideration, but shall abide by the final decision of the Collegium. No Government would like to part with its power to appoint Judges in favour of the Judiciary. Ever since, there have been bottlenecks and long delays in the appointment of Judges recommended by the Collegium. Some of us who had successfully persuaded the Court to assume the responsibility of selecting candidates could not reconcile to several poor choices made by the Collegium from time to time on considerations other than merit. The assumption that Judges' selection would be infallible has turned out to be incorrect. Even the author of the majority judgment, J.S. Verma, J. was disillusioned about the outcome of the law declared. Parliament tried to get rid of the Collegium system by the Constitution (99th Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014, but the Supreme Court declared both of them unconstitutional¹⁷ and requested the Government to revise the Memorandum of Procedure so as to make the selection transparent and accountable. It is not yet finalized for want of consensus. The

¹⁴ (1976) 2 SCC 521.

¹⁵ AIR 1994 SC 268.

¹⁶ AIR 1982 SC 149.

¹⁷ Supreme Court Advocates-on-Record Association v. UOI, (2016) 5 SCC 1.

present stalemate and the state of affairs is not at all satisfactory. Over the decades, the Judiciary has accumulated vast powers by interpretation and reinterpretation of the Constitution which can be exercised properly only by outstanding Judges of integrity, ability and judicial acumen. The country needs the most competent, incorruptible and independent judges selected by a Selection Committee in which all stake holders, namely, the Judiciary, the Government and the Bar (on behalf of litigants) are represented. Ideally, it should consist of the CJI, two senior most Judges, the Union Law Minister and an eminent leader of the Bar. The inclusion of a Bar leader will enhance transparency. The selection shall not only be transparent, but based on objective criteria. This will be possible only when both the Executive and the Judiciary wholeheartedly agree and act in tandem.

The Constitution aims at a classless and casteless society. Secularism is a basic feature of the Constitution. Dr. Ambedkar had declared that castes are anti-national and fought all his life for annihilation of the caste system. The Constitution prohibits discrimination on the ground of caste, religion or race. All Governments including the Central Government have made lists of castes and communities describing them as backward classes and provided reservations in the matter of admissions to professional courses and public employment. Regrettably, a nine-judge bench of the Supreme Court in *Indra Sawhney v. Union of India*¹⁸, permitted identification of backward classes through castes. As a result, members of backward classes, some of whom have ceased to be backward, have developed a vested interest in castes and communities. Forward castes have been exerting pressure to be included in the backward classes. Governments are eager to expand the reservations far in excess of 50% limit for gaining political mileage, unmindful of the deleterious consequences to public interest. Public employment is meant for public service. As Lal Narain Sinha has pointed out, “*the community at large has to pay for and avail of the benefits of the public service. It is this section whose interest is sought to be safeguarded by Article 335.*”¹⁹

Efficiency of administration is essential for good governance. Reservations cannot eradicate backwardness; only upliftment through intensive quality education with economic support can create the level playing field necessary to enable the weaker sections to compete with others on equal terms with dignity. E.S. Venkataramaiah J²⁰ and SB Sinha J²¹ have indicated the steps to be taken for upliftment of backward

¹⁸ (1992) 3 SCC 217.

¹⁹ MALHOTRA BROTHERS, INDIAN CONSTITUTION – A FRESH LOOK (1993).

²⁰ KC Vasanth Kumar v. State of Karnataka, (1985) Supp. SCC 714, 811, at ¶ 150.

classes. Perpetuation of caste system will defeat the Constitutional goal of “*promoting fraternity among all citizens, assuring the dignity of the individual and the unity and integrity of the Nation.*” Today the concern of political parties is more for votes than the voters or the unity of the country.

One of the daring decisions taken by the Constitution-makers was to provide for universal adult suffrage. Lord Bryce had cautioned long ago “*do not give to a people institutions for which it is unripe in the simple faith that the tool will give skill to the workman's hand.*”²² The framers were constrained to empower the poor and illiterate masses in order to make democracy meaningful. Article 326 provides that elections to the House of the People and Legislative Assembly of every State shall be conducted on the basis of adult suffrage. By the Constitution (Sixty first Amendment) Act, 1988 the minimum age for voting has been lowered from 21 years to 18 years. Successive Governments have failed to take necessary measures to equip the voters to exercise their precious right, objectively in public interest.

The Election Commission has been recommending amendments to the law to make elections free and fair. It is common knowledge that all is not well with the elections. The 170th report of the Law Commission of India²³ noted that there has been a steady deterioration in the standards, practices and pronouncements of political class which fights the elections. Money power, muscle power, corrupt practices and unfair means are being freely employed to win elections. N.N. Vohra Committee's report²⁴ (1995) has disclosed the powerful nexus of the bureaucracy and politicians with mafia gangs, smugglers and the underworld. A vast section of voters are accustomed to receiving bribes from candidates and political parties. In some parts of the Country they are reportedly demanding bribes for their votes. Atal Bihari Vajpayee in the course of the 13th Desraj Chaudhary Memorial Lecture²⁵ in 1998 highlighted the defects of our democracy:

- “i) Neither Parliament nor the State Legislatures are discharging the legislative function with competence or commitment;*
- ii) The elected representatives are neither trained formally or informally in law-making nor do they have an inclination to develop the necessary knowledge and competence;*
- iii) Serious debate has ceased to take place in the House where noisy confrontation is the norm. Elective bodies resemble akharas (arenas for fighting bouts);*

²¹ EV Chinniah v. State of AP, (2005) 1 SCC 394, 435 at ¶ 114.

²² 1 VISCOUNT JAMES BRYCE, MODERN DEMOCRACIES 206 (Macmillan 1921).

²³ LAW COMMISSION OF INDIA: ONE HUNDRED SEVENTIETH REPORT ON REFORM OF THE ELECTORAL LAWS (1999).

²⁴ VOHRA COMMITTEE REPORT, (1993).

²⁵ *Fifty years later: What hope for India?*, REDIFF (Aug. 8, 2017, 11:38 AM), <http://www.rediff.com/news/1996/2611atal.htm>.

- iv) Individuals who are genuinely interested in serving the people find it increasingly difficult to succeed in elections because the elections are totally subverted by money power, muscle power and vote bank considerations of castes and communities;*
- v) The elections are not entirely free and fair;*
- vi) The natural inclination of today's MPs and MLAs is to get involved in executive functions without accountability and capability. According to them power is the passport to personal prosperity;*
- vii) Corruption in the governing structures has corroded the core of electoral democracy;*
- viii) Casteism, corruption and politicization have eroded the integrity and efficacy of our civil services which were non political and impartial.”*

The National Commission to review the working of the Constitution (2002) in its report²⁶ noticed increasing concern about the decline of Parliament, falling standards of debate, erosion of its moral authority and prestige. The Commission pointed out that criminalisation of politics, political-corruption and the politician-criminal-bureaucratic nexus have reached unprecedented levels needing strong systematic changes. As Nani Palkhivala had pointed out, *“the grim irony of the situation where the one job for which you need no training or qualification whatsoever is the job of legislating for and governing the largest democracy on earth.”* To the question whether the Constitution has failed, his answer was: *“It is not the Constitution which has failed the people but it is our chosen representatives who have failed the Constitution.”* Long ago, the far-sighted statesman C. Rajagopalachari had anticipated the present state of affairs. He wrote in his prison diary in 1922, *“Elections and their corruption, injustice and tyranny of wealth and inefficiency of administration, will make a hell of life as soon as freedom is given to us.”*

The election law prescribes a ceiling on expenditure that could be incurred by a candidate contesting for membership of a State Assembly or Parliament. In most cases, the actual expenditure incurred is far in excess of the ceiling limit. Bribing voters has become common. A substantial section of votes polled are tainted due to bribery, undue influence and extraneous factors like caste and community. As a consequence, the quality, ability and integrity of the elected representatives of the people, barring a few exceptions, is visibly poor. Whenever there is a hung assembly, horse trading takes place. Defections continue notwithstanding the provisions of the Tenth Schedule to the Constitution. At times, defecting legislators are rewarded with ministerial berths. The Speakers of Legislative Assemblies, who are vested

²⁶ NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION: A CONSULTATION PAPER ON PROBITY IN GOVERNANCE (2001).

with the power to decide questions of disqualification on the ground of defection, seldom exercise their power objectively or on time. Due to large scale abuse of power, experts have suggested that the power needs to be exercised in accordance with the opinion of the Election Commission.²⁷ There are several cases in which former Chief Ministers and Ministers are accused of serious crimes and some of them have been convicted. What happens when law makers become law breakers? Unless Parliament and State Legislatures consist of capable men and women of character and integrity who are committed to the Constitutional values, there can be no good governance. It is necessary to lay down suitable conditions of eligibility for candidates contesting at any election, be it to Parliament, a State Legislature, a local body or a professional body like a Bar Council, Medical Council, Institute Chartered Accountants of India and the like. Those who catch votes by hook or crook and win elections cannot be worthy of the office they occupy.

Part XIV of the Constitution provides for Public Service Commissions for the Union and for each State but does not prescribe strict conditions of eligibility for membership. Taking advantage of this omission, several State Governments appoint party men and supporters and manipulate selection of candidates of their choice. Several cases of alleged misbehaviour of Chairmen and members of State Public Service Commissions have been referred by the President of India to the Supreme Court for inquiry under Article 317. The position is the same with other Recruitment Boards and Selection Committees. Neutrality of civil services, which is a basic postulate of the Constitution has been eroded beyond repair. Of late, public offices including Constitutional posts like Governors are being filled mostly by members, followers or sympathisers of the party in power. Public offices ought to be filled by the most deserving persons in public interest. Political interference with investigation of crimes is not uncommon. Impartial decision-making is becoming increasingly difficult, resulting in growing dissatisfaction among the people. Terrorist outfits are deeply entrenched in some parts of the country. They have been challenging the authority of the State day in and day out. A Parliament consisting predominantly of members who have no commitment to the values and goals of the Constitution, and who get elected for self advancement using money power, muscle power and relying on factors like caste and community, cannot be expected to reform the system. There is no dearth of honest, patriotic and competent citizens who can administer the State well and provide good governance, but the present system does not allow them access to public offices.

The Constitution shows great concern for women and children and permits special provisions to be made for them. What is the ground reality? Do women enjoy equal rights? Are they safe? Is the law and order

²⁷ *Jagjit Singh v. State of Haryana*, (2006) 11 SCC 1.

situation satisfactory? What about the Universities and other educational institutions? Why the standards of education are not up to the mark in most of them? Why there is so much of white collar crime and crime indulged in by persons with political connections?

The Constitution was designed for a two-party system as in the UK, but we have too many political parties which are mostly bereft of ideology. Their object appears to be to capture power and retain it by means fair or foul. Justice Sarkaria Commission on Centre-State Relations²⁸ noticed that a large number of splinter groups with shifting loyalties and narrow interests tend to encourage irresponsible political behaviour. Formation of a stable government with a strong opposition has become difficult. Coalition Governments cannot provide good governance. It is not possible to check abuse of power by the ruling party, without an effective opposition party in Parliament. In the earlier days political leaders of the ruling party and of the opposition used to respect each other. Now, there is open denigration of one another. It appears that some political parties are determined to destroy one another. There is no law to effectively regulate political parties and make them accountable. To recall the words of Nani Palkhivala, *“By voting ignorant professional politicians to power, we have kept a singularly gifted and enterprising nation in the ranks of the poorest on earth. The time has come when citizens must wrest the initiative from professional politicians and from political parties, and insist upon men of knowledge, vision and character being chosen as candidates for parliamentary and state elections. It is only such men who can give India the type of government it needs.”*

The situation calls for comprehensive reforms. Within the framework of the Constitution it is possible to set things right and ensure good governance to achieve the Constitutional goals speedily, provided necessary reforms are undertaken without delay. If elected representatives fail to reform the system to make the Executive, the Legislature and the Judiciary function better, the people should make them act. Otherwise, the Constitution which was drafted with great care will not survive.

²⁸ JUSTICE RANJIT SINGH SARKARIA COMMISSION ON CENTRE STATE RELATIONS, (1988).