



Constitutional Democracy, Judiciary and Social Justice in India

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I

India is the largest functioning democracy in the world. It achieved her independence after a prolonged national movement. The philosophy of the Constitution of India were evolved during its nationalist struggle. Very few Constitutions have the kind of experience Indian Constitution making had. Dr. Rajendra Prasad, the President of the Constituent Assembly observed during the concluding session of the Assembly : We have prepared a democratic Constitution. But the successful working of democratic institutions requires in those who have to work them willingness to respect the view points of others, capacity for compromise and accommodation. Many things which cannot be written in a Constitution are done by conventions. Let me hope that we shall show those capacities and develop those conventions. The way in which we have been able to draw this Constitution without taking recourse to voting and to divisions in lobbies strengthens that hope.

Whenever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the government it deserves. Our Constitution has provisions in it which appear to some to be objectionable from one point or another. We must

admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of the defective Constitution. If they are lacking in these, the Constitution can not help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it and India needs today nothing more than a set of honest men who will have the interest of the country before them. There is a fissiparous tendency arising out of various elements in our life. 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 interest 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 !!

The Constitution of India has entered into 64th year of its operation. One should remember that a Constitution is a fundamental law laying down basic objectives of a polity and procedures of institutional functioning to facilitate the attainment of the goals and fulfil the objectives. In our country's polity the legislature is the law making forum and the executive takes the directions of



the legislature for its implementation. The judiciary under our Constitution is watchdog of the Constitution. It looks into both law making and the law implementation by the other two wings of the Constitutional democracy. The functions and role of these institutions are essential for successful operation of Constitutional democracy in our country. A democracy means and provides a government by discussion. The representatives of people voice the wishes of the electorate for smooth operation of the socio-economic development thinking and their policy making.

At this stage, it will not be out of the way to examine what constitutes a Constitution. The first Written Constitution of the world, the U.S. Constitution contained only 7 Articles, as against the Indian Constitution (1950) had 395 Articles. For Americans, the Constitution was a legal document which established 'Rule of Law'. But for the Indians the Constitution was a manifesto, a confession of faith, a statement of ideals and a reflection of the culture.

In the *McCulloch v. Maryland* (1819) the U.S. Chief Justice Marshall observed; "A Constitution is to contain an accurate detail of all the subdivisions of which great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It should probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated and the minor ingredients which impose those objects be deduced from the nature of the objects themselves." Marshall thus, reiterated that the Constitution should contain the very minimum and that minimum to be the 'rules of law'.

Modern democracies are in conceivable without judiciary. This organ is not only guardian of the Constitution but also protector of

fundamental rights of the citizens. Bryce observed; "There is no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his knowledge that he can rely on the certain and prompt administration of justice." Similarly Garner put it; "A society without legislative organ is conceivable and indeed, fully developed legislative organ did not make their appearance in the life of the State until modern times, but a civilised state without judicial organ is hardly conceivable".

The judiciary is the protector of civil rights, it decides cases, it is the custodian of fundamental rights, it is the guardian of the Constitution, its role in a federal system as the arbitrator is well known and the power of judicial review has reposed faith of the people in the judiciary. Both legislative anti-people law making and the executive excesses can come under judicial scanner.

The importance of judiciary is more for the citizens than for the States. The judicial system is a part of the judicial process. According to Alan Ball (1978) there are two main reasons why this point, that the judicial system is part of the political process has to be emphasised. Firstly, liberal democratic theory has traditionally put a premium on the necessity of protecting the citizen from a too powerful state and therefore emphasised the impartiality of the judicial process, to increase the independence of the judiciary and to deepen the respect and confidence with which judicial decisions are received. Secondly, it has led to the emphasising of the aspects of the doctrine of separation of powers, both to prevent too much concentration of political power in the hands of government and guard against the 'excesses of democracy' or the 'tyranny of the majority'.

In Indian political system, the judiciary has carved out a very significant space for itself.



The transition from a feudal to a democratic order and from colonial bondage to a free society needed an institution to protect individual's life, liberty and property. These natural rights make meaning to the living in a democratic order. Without freedom and protection an individual can not survive despite phenomenal progress in all walks of life. These are essential ingredients of life in a state. The Indian Constitution has provided a well knit provision of civil and political as well socio-economic rights for its citizens. The making of our Constitution had the blessings of an international climate of according respect to individual rights through proclamation of the Universal Declaration of Human Rights. Both part-III and part-IV of the Constitution were immensely benefited by the UDHR. It finetuned the concept of giving rights to the people. No other Constitution was benefitted in the manner the Indian Constitution was benefitted by the Declaration. The Constitution accorded a place of respect to the judiciary.

Poverty, illiteracy, ignorance and prejudices were in abundance when India joined the freeman's club. It was a civilisational nation. It was also an old nation but a new country. The two centuries of the British rule kept us divided and to control us the colonial administration introduced plethora of laws to assist the administration in the conduct of the affairs of the State. It took steps to reorganise administrative structure but did little to arrest poverty and create climate of confidence. Instead the hidden agenda was to create divisions at each stage of country's life. Thus at the dawn of independence we were divided into Rich-poor, Urban-rural, Literate-illiterate etc. The centuries of injustice could come to the surface when Mahatma Gandhi led the nationalist struggle. He stood by the side of the poor, village and illiterate mass. He created a sense of solidarity among the people through his well designed non-cooperation movement

followed by civil disobedience agitation and finally the call for Quit-India. During his struggle he exposed the weaknesses of the colonial administration and he longed for 'Swaraj and Swadeshi'. After independence all the organs of the government attempted to bring harmony and justice. At this stage let us discuss the issue of social justice and role of judiciary.

II

Indian Constitution, says Granville Austin, is first and foremost a social document.¹ Its founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them. The ideals were national unity and integrity and a democratic and equitable society.² The new society was to be achieved through a socio-economic revolution pursued with a democratic spirit using constitutional, democratic institution. Thus unity, social revolution, and democracy, were goals, which were mutually dependent and had to be sought together and not separately.³

The above observation aptly describes the Indian State, as contemplated by the framers of the Constitution. In fact the Preamble to the Constitution, which is based on the objectives resolution" of Pandit Jawaharlal Nehru,⁴ asserts that 'We the people' of India, through this Constitution, aim at establishing a Sovereign, Socialist, Secular, Democratic, Republic of India and to secure to all its citizens, justice-social, economic and political. The Constitution for this purpose has put across certain fundamental policy choices in the Constitution, in the form of Parts III and IV.

In Part III, the Constitution, in no unmistakable terms, declares the great rights and freedom, which the people of India intended to secure to all citizens,⁵ and in certain instances to both citizens and non-citizens⁶, casting an onerous duty upon "the State" not to violate these Rights.⁷



In part IV of the Constitution furthers the guarantee of justice-social, economic and political, by providing for judicially non-enforceable obligations, on 'the State' in the form of Directive Principles of State Policy.⁸ But the fact that Principles stated in Part IV are judicially non-enforceable should not lead one to the conclusion that they are any less important than the Rights mentioned in Part III. A reference to the definition of the term 'State' in Parts-III and IV is enough to disperse any such notion. The fact that 'the State' has been defined in the same manner, in both Parts III and IV, is possibly an indication, that the founding fathers of the Constitution, were of the opinion that the nation's ideals viz, national unity and integrity and a democratic and equitable society, to be achieved through a socio-economic revolution pursued with a democratic spirit using constitutional, democratic institutions.⁹ The Supreme Court in *Minerva Mills v. Union of India*,¹⁰ observed,

*There is no doubt that though the courts have always attached very great importance to the preservation of human liberties, no less importance has been attached to some of the Directive Principles of State Policy enunciated in Part IV.... The core of the commitment to the social revolution lies in parts III and IV. These are the conscience of the Constitution.*¹¹

The Court said that, rights in Part III are not an end in themselves, but are the means to an end, the end is specified in Part IV. Together, the two realize the idea of justice, which the Indian State seeks to secure to all its citizens.

The Supreme Court through its decisions has tried to realize this goal of constitutional justice. In *Bandhua Mukti Morcha v. Union of India*,¹² the Court, while decrying in strongest possible terms the practice of bonded labour, held that Right to life, under Article 21 of the Constitution

means right to live with dignity, and that this evil practice was a clear violation of that. Similarly, in *State of H.P. v. Ummed Ram Sharma*,¹³ the Court held that access to roads in hilly areas is access to life, and the failure of the state to provide roads, in such regions amounts to denial of right to life to the people of the region. Then in *Vishakha v. State of Rajasthan*,¹⁴ it held that sexual harassment of a woman at workplace, is a denial of both her right to life and personal liberty under Article-21, as well as amounted to discrimination on the basis of sex, and thus violative of right to equality guaranteed under Articles 14 and 15. The Court went on to issue elaborate guidelines to protect women from sexual harassment at workplace. Also, *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*,¹⁵ failure on the part of the Government hospital to provide timely medical treatment to a person in need of such treatment has been held to be a violation of his right under Article-21.

In *Rural Litigation Entitlement Kendra v. State of U.P.*,¹⁶ as well as *M.C. Mehta v. Union of India*¹⁷ the Court held that, right to life includes right to live in a clean and healthy environment. Then in *Mohini Jain v. State of Karnataka*¹⁸ as well as *Unnikrishnan v. State of A.P.*,¹⁹ observing that a man without education was no better than an animal, the Court held right to education was an essential ingredient for a dignified and meaningful life.

In *Hussainara Khatoon v. Home Secretary, State of Bihar (I-V)*²⁰, turning its attention to the plight of under-trial prisoners languishing in jails, for years together, for want of proper legal aid, delay in conduct of trials, etc. held that, failure of the State to provide legal representation and accused person, amounted denial of personal liberty without a just, fair and reasonable procedure established by law. Earlier in *Maneka Gandhi's case*,²¹ the Court had held that a procedure under Article 21 must be a right,



just, fair and a reasonable procedure and that it must also satisfy the test of reasonableness in Articles 14, as well as 19, besides Article 21. On this basis the Court decried the practice of handcuffing of prisoners (both under-trials as well as convicts), in *Prem Shanker v. Delhi Administration*.²² Recently, in *Smt. Selvi v. State of Karnataka*,²³ the Court held that conducting of narco-analysis, polygraph test, etc. on accused persons, without their consent, was violation of both Articles 20 as well as 21, for it amounted to compelling a person to give evidence against himself, which was prohibited by Clause (3) of Article 20, and was not a just and a reasonable procedure under Article 21. In continuation of this trend of Court has also frowned upon custodial torture of the accused/convict and has issued elaborate guidelines to protect the accused/convict from custodial torture, in *D.K. Basu v. State of West Bengal*.²⁴ Recently, in *State of West Bengal v. Committee for protection of Democratic Rights, West Bengal*,²⁵ dismissing the appeal of the Government of West Bengal, against an order of the High Court, transferring the investigation of case involving violence and killing on the part of the ruling party in the State from the State police to C.B.I. the Court held that failure on the part of the police to carry out proper investigation so as to bring culprits to book, was a violation of the rights of the victims of that violence, for the State is under an obligation to ensure that a person committing a crime is apprehended and punished.

The above narration contains merely illustrative instances, where Court has tried to ensure that the Constitutional guarantee of justice-social, economic and political, is secured to people of India. However, there is still a long road to be traversed before it can be said that the State which the framers of the Constitution sought to create, has succeeded in fulfilling their aspirations.

References :

1. Austin, Granville Indian Constitution, the cornerstone of a Nation (New Delhi, Oxford University Press), 2007, p.50. Also see, *Minerva Mills Ltd. v. Union of India* [AIR 1980 SC 1789 (1805-1810)].
2. Austin, granville, Indian Constitution. The Cornerstone of the Nation (New Delhi, Oxford University Press), 2007 : p. ix (Preface). Also see, *Minerva Mills Ltd. v. Union of India* [AIR 1980 SC 1789 (1805-1810)].
3. *Ibid.*
4. Constituent Assembly Debates, Vol.I. [New Delhi, Parliament Secretariat], p.57. Also see, Rao, B. Shiva (Ed). *The Framing of India's Constitution, Select Documents*, 2. [Delhi, Universal Law Publishing Co. Pvt. Ltd.], 2006, p.3-4.
5. *Kesavananda Bharti v. State of Kerala* [(1973) 4 SCC 225 (424)].
6. For example, Article 21 of the Constitution guarantees Right of Life and Personal Liberty to all persons (both citizens as well as non-citizens).
7. Constitution of India : Article 13.
8. Constitution of India, Article 37.
9. Austin, Granville, supra : note.2. Also see, *Minerva Mills Ltd. v. Union of India* [AIR 1980 SC 1789 (1805-1810)].
10. AIR 1980 SC 1789.
11. *Minerva Mills Ltd. v. Union of India* [AIR 1980 SC 1789 (1805-1810)].
12. (1984)3 SCC 161.
13. (1988) 2 SCC 68.
14. (1997) 6 SCC 241.
15. (1996) 4 SCC 37.
16. (1987) Supp. SCC 487.
17. AIR 1987 SC 1087.
18. (1992) 3 SCC 666.
19. (1993) 1 SCC 645.
20. (1980) 1 SCC 81, 91, 93, 98, 108.
21. *Maneka Gandhi v. Union of India* (AIR 1978 SC 597).
22. (1980) 3 SCC 526
23. (2010)(4) Scale 690
24. AIR 1997 SC 610
25. (2010) 10 SCC 571.

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