



Maladies and remedies for redesigning the Indian constitution

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Abstract

The Observations of Mr. Sachchidananda Sinha (Provisional President of Constituent Assembly) and Dr. Ambedkar the Chairman of the Drafting Committee are most important in drafting of the Indian Constitution while discussing about the maladies and remedies of our constitution.

The Observations of Mr. Sachchidananda Sinha in the first session of the constitution assembly on 9th December 1946. "The Structure has been erected by the architects of the consummate skill and fidelity. Its foundations are solid - Its compartments are beautiful as well as - Its arrangements are full of wisdom and order and its defences are impregnable from without. It has been reared for immortality if the worth of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly or corruption or negligence of its own keepers - the people. Republics are created - those were the words which I commend to you for your consideration - by the virtue of public spirit and intelligence of the citizens. They fall - when the wise are banished from the public councils because they have to be honest and the profligate are rewarded because they flatter the people in order to betray them

2. Observations of Dr. B.R. Ambedkar, (Chairman of the Drafting Committee) in the concluding session of the constituent assembly dated 26th November 1949. "No doubt we have produced the most excellent Constitution and dedicated to the people of India. Our Constitution written in black and white is the most ideal Constitution in the entire world. But I expect that the men who operate this Constitution must also be ideal. Otherwise it will become a toy of the children in the hands of power hungry politicians".

But the above mentioned observation made by the constitutional experts have been belied by the actual working of the constitution. In the light of these comments, I have pinpointed the maladies and suggested remedies.

Keywords: constituent assembly, abrogation, maladies, remedies, conditional stay order, definition of property, national identity, egalitarianism, validation of certain acts and regulations, eminent domain

Introduction

It was in 1934 that the idea of the Constituent Assembly for India was put forward for the first time by Mr. M.N. Roy. A pioneer of Communist Movement leader and an advocate of radical humanism. In 1935 the Indian National Congress officially demanded a Constituent Assembly for the first time to frame the Constitution. In 1938, Jawaharlal Nehru declared the Constitution of free India must be framed, without outside interference by the Constituent Assembly elected on the basis of adult franchise. The demand was finally accepted in principle by the British Government in what is known as the August offer of 1940.

In 1942, Sir Stafford Cripps, a member of the British Cabinet, came to India with a draft proposal of the British Government on the framing of the Independent Constitution to be adopted after the Second World war. The proposals of Sir Stafford Cripps were rejected by the Muslim League which wanted India to be divided into two autonomous states with two separate constituent assemblies. But the cabinet plan rejected the idea of two independent states and two constituent assemblies. The British Cabinet appointed a Mission consisting of 3 members (Lord Pethick Lawrence, Sir Stafford Cripps and AV Alexandar) The Mission arrived in India on 24th March 1946 and the Mission published its plan on 16th May 1946.

Composition of the Constituent Assembly

The Constituent Assembly was constituted in November 1946 and the scheme was suggested by the cabinet mission plan as mentioned below-

1. The total strength of the Constituent Assembly was fixed at 389. The Constituent Assembly had 292 members elected by Legislative Assemblies of the then 11 British Provinces 93 members were nominated by the rulers of the Princely States While 4 members represented the Chief Commissioners Provinces of Delhi - Coorg - Ajmer and Merwara - Andaman and Nicobar Islands.
2. According to the Mountbatten plan of 3rd June 1947, there was partition of the country into two halves. Accordingly a separate Constituent Assembly was set up for Pakistan. The Representatives of East Bengal, West Punjab, Sind and Baluchistan, North West Frontier Province and the Sylhet District of Assam which joined Pakistan ceased to be the members of the Constituent Assembly. The Indian Constituent Assembly reassembled on 31st October 1946 and its membership was reduced to 299. But the Constituent Assembly was not directly elected by the people of India on the basis of adult franchise. The Constituent Assembly comprised representatives of all sections of Indian society -

Hindus Muslims, Sikhs, Parsis, Anglo-Indians, Indian Christians, Schedule Castes and Schedule Tribes.

Chronological sequence of Events leading to the Constituent Assembly Proceedings

1. The Assembly held its first session on 9th December, 1946. The Muslim League boycotted the session and insisted for a separate state and separate Constituent Assembly. The session was attended by only 211 members. During the session of 9th December 1946. The oldest member - Dr. Sachchidananda Sinha was elected as Temporary President of the Assembly.
2. On 11th December 1946 - Dr Rajendra Prasad and Hiren Mukherjee were elected as President and Vice President respectively. In the same session - Mr. B.N. Rau was appointed as Constitutional Advisor to the Constituent Assembly.
3. On 13th December 1946, Mr. Jawaharlal Nehru moved the historic Resolution known as - "Objectives Resolution" In the Assembly. It laid down the fundamentals and philosophy of the Constitutional structure. The Resolution contained comprehensive statement of 8 objectives and it unanimously adopted on 22nd January 1947.
4. On 29th August 1947, the Assembly setup the Drafting Committee under the Chairmanship of Dr. BR Ambedkar. The Drafting committee consisted of 7 members.
 - Dr. B.R Ambedkar Chairman
 - Gopal swamy Iyengar Member
 - Allaidi Krishna swamy Ayyar - Member
 - Dr. K.M. Munshi Member
 - Syed Mohammed Member
 - N. Madhav Rau (resigned due to ill health and he was replaced by B.L. Mitter
 - T.T Krishnamachari Member (he died and hence was replaced by D.P. Khaitan)
5. The Constituent Assembly had appointed 8 major Committees and 15 Sub-Committees to deal with different matters of Constitution making.
6. On 4th November 1948 Dr. Ambedkar released the final draft of the Constitution. The Assembly had general discussion of the 1st reading for 5 days upto 9th November 1948.
7. Second reading of the draft started on 15th November 1948 and lasted upto 17th October 1949. 7653 amendments were proposed but only 2473 amendments were discussed and accepted.
8. The third reading of the draft started on 14th November 1949. Dr. Ambedkar moved the motion - "The Constitution as settled by the Assembly be passed." The motion was declared as passed on 26th November 1949 and it received the signatures of 284 members out of total 299 members of the Assembly.
9. For the first time the Constituent Assembly met as Dominion Legislature on 17th November 1947 and elected Mr. G.V. Mavalankar as its Speaker.
10. The provisional parliament ceased to exist on 17th April 1952 and first elected parliament with the two houses came into existence in May 1952.
11. The following additional functions were performed by the Constituent Assembly.
 - a. It ratified India's membership of the Common Wealth of Nations in the month of May 1949.
 - b. It adopted National Flag on 22nd July 1949.
 - c. It adopted the National Anthem on 24th January 1950.
 - d. It adopted the National Song on 24th January 1950.
 - e. It elected Dr. Rajendra Prasad as the first President of India on 24th January 1950
12. The whole work of the Constituent Assembly was completed on 17th October 1949 and the coping stone was placed on 26th November 1949. The Preamble was adopted to complete the structure of the edifice of the basic law of the land. Thus, the Constituent Assembly conducted 11 sessions. It took two years, 11 months and 18 days. The Constitution makers went through the Constitutions of 60 countries and Draft Constitution was discussed for 114 days. The total expenditure for drafting, revision and passage of the Constitution amounted to 64 lakhs. The Assembly held its Final session on 24th January 1950 but continued as provisional parliament from 26th January 1950 to May 1952.

Criticism of the Constituent Assembly

The Critics have criticised the Constituent Assembly on various grounds -

1. Our Constituent Assembly was not a representative body. Because members were not directly elected by the people of India on the basis of Universal adult franchise.
2. Our Constituent Assembly was not a Sovereign body since it was created by the proposals of the British Government. The sessions of the Assembly were held with the permission of the British Government.
3. The Assembly took unduly long time to make the Constitution. But the American Constitution makers took only 4 months.
4. The Assembly was dominated by the Congress party. It was a one party body in a one party country.

The Observations of Mr. Sachchidananda Sinha

The Observations of Mr. Sachchidananda Sinha in the capacity of Provisional President in his inaugural address of First session held on 9th December 1946 quoted the statement of Joseph Story - "The Structure has been erected by the architects of the consummate skill and fidelity. Its foundations are solid - Its compartments are beautiful as well as - Its arrangements are full of wisdom and order and its defenses are impregnable from without. It has been reared for immortality if the worth of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly or corruption or negligence of its own keepers - the people. Republics are created - those were the words which I commend to you for your consideration - by the virtue of public spirit and intelligence of the citizens. They fall - when the wise are banished from the public councils because they have to be honest and the profligate are rewarded because they flatter the people in order to betray them.

Similarly while dedicating the text of the Constitution to the people of India on the concluding session of the Constituent Assembly - on 26th November 1949, Dr Ambedkar the Chairman of the Drafting Committee made an observation "No doubt we have produced the most excellent Constitution and dedicated to the people of India. Our Constitution written in black and white

is the most ideal Constitution in the entire world. But I expect that the men who operate this Constitution must also be ideal. Otherwise it will become a toy of the children in the hands of power hungry politicians.

Maladies of the Indian Constitution

1. First Malady

There is a fine but vital distinction between two cases of Constitutional Amendment. Constitution breaking law is validated and there is a repudiation of the Constitution. Where the law is unconstitutional in reality but it is deemed by fiction of law not to be so. If article 31 is valid, it would be equally permissible to Parliament so as to amend Constitution so as to declare all laws to be valid which are passed by Parliament or state Legislature in exercise of their legislative competence. It would be equally permissible to have an Omnibus Article - notwithstanding anything contained in the Constitution, no law passed by the Parliament or the state Legislature shall be deemed to be void on any ground whatsoever. The insertion of such article would toll the death-knell of the Constitution. Article 31C clearly damages or destroys the supremacy of the Constitution. It gives black charter to the Parliament and the state Legislature to defy and ignore the Constitutional mandate regarding human rights.

2. 2. Second malady; Article 31C subordinates the fundamental rights to the directive principles of the state policy and in effect abrogates the laws which the legislature intends to do for giving effect to the directive principles.
3. Third malady; It is a fundamental principle of the Constitution that it can be amended only in the form and manner laid down in article 368. That article virtually authorises abrogation of the fundamental rights.
4. 4) Fourth malady; Fundamental rights constitute an essential feature of the Constitution. Article 31 authorises outright confiscation of any property large or small belonging to anyone.
5. Fifth malady; A citizen is not even permitted to rise the question whether the proposed law will result in securing the directive principles. This right is destroyed when the fundamental rights are made unenforceable.
6. Sixth malady; One of the essential features of the Constitution is the provision for due compensation to the minorities and their cultural and educational rights. The fundamental rights under articles 14- 19 and 31 are sought to be superseded under article 31C.
7. Seventh malady; In sum- Article 31C is a monstrous outrage on the Constitution. It is measure of the communist stay and betrayal of basic freedoms but these violations have not excited really any public debate.

Thus the four attributes of totalitarian states are found in the Constitution,

1. Constitutional permission to the ruling party to favour its own members
2. Denial of the right to dissent or to oppose
3. Denial of various personal freedoms
4. The right of the state to confiscate any body's property. All these four attributes of a totalitarian states are found in Article

31C. This Article has a built-in mechanism for the dissolution of democracy.

Remedies have been suggested by the Late Legal Luminary Mr. Nanipalkivala for redesigning India for the 21st centenary. The following are the seven pillars of remedies:

1. First and foremost pillar is a sense of National identity. The greatest enemy of India is not Pakistan or China but Indians themselves. We have millions and millions of Bengalis - Maharashtrians - Gujuratis - Keralities - Andhrities and Kannadigas but very few Indians.
2. The second pillar is the maintenance of law and order. In order to have an honest and efficient police force- it is imperative that it should be fully insulated from political domination.
3. Third pillar is the family planning
4. Fourth pillar is education which is the heart and soul of the matter. Confucius wrote - if you plan for a year - plant a seed, If you plan for 10 years plant a tree, If you plan for 100years educate the people,
5. The fifth pillar is the Constitutional integrity. While Pakistan has gone for religious fundamentalism, India has gone for secular fundamentalism.
6. Sixth pillar is egalitarianism. India should become to call itself not Socialist but egalitarianism. Egalitarianism means the involvement of human and material resources in an imaginatively planned manner which can contribute to the vitality and progress of the whole nation. The late G.D Birla said - Though I am a capitalist, I believe in more wealth, more employment, more opportunities and fair standard of living.
7. Seventh pillar is Socially responsible business. We can effect transformation if business houses are socially responsible. But today the malpractices of many businessmen have made the society hostile to the class.

Unhealthy Developments During Emergency of 1975

In 1971 Mrs. Indira Gandhi had contested the lokasabha election from Raibareilly constituency and Mr Rajnarayan was a rival candidate contesting against Mrs Indira Gandhi. Mr. Jagamohanlal Sihna set aside. Election of Mrs Indira Gandhi as illegal, (Allahabad High Court judgment dated 12-6-1975 and evil consequences of 42nd amendment) unconstitutional and ultra-vires of the provisions of the Constitutions. Since she had indulged herself in electoral malpractices under section 123 (7) of the representation of people act 1951. Hence Mrs Indira Gandhi had filed an appeal in the Supreme Court. The appeal came up before V.R Krishna Iyer, the then vacation judge of the Supreme Court Mr Nani Palkiwala represented Mrs Indira Gandhi and MrShanthi Bhushan represented Mr Rajnarayan. All the three persons were great legal luminaries. The historic judgement delivered by Mr Jagamohanlal Sinha changed the fate of our country

Argument of Mr Nani Palkiwala

"An unconditional stay was appropriate and essential because, it was sanctioned by some President. There were momentous consequences to the country if anything less than total suspension of the order under appeal were made and the Nation was solidly behind petitioner as Prime Minister. The propriety and urgency

of the court taking into consideration the national situation even by exercising its discretion. The court will have to take into consideration the propriety urgency of the National Situation even by exercising its discretion.

Argument of Mr Shanthi Bushan

No republic can surrender its democratic destiny a single soul without being guilty of over powering the Parliamentary process by personality cult. The petitioner having come with unclean hands was not entitled to seek equitable relief of stay. So absolute stay was unprecedented and appellant must be treated like any other ordinary citizen. The corrupt practices were corrupt in law and alleged solid support by millions of people mentioned nothing since similar phenomena could be organised by any strategist in the top office and rule of law cannot be drowned by the drums and shouts of numbers.

Conditional Stay Order of the Supreme Court

After listening to the arguments of the both the luminaries, Mr V.R Krishna Iyer passed the conditional stay order to the effect - "Let me sum up the operative order which I hereby pass." Subject to para - 3 - The appellant and petitioner Mrs. Indira Gandhi - Lokha Sabha member will be entitled to sign the register kept in the house for the purpose and attend the sessions of the lokasabha but she will neither participate in the proceedings of the lokasabha nor vote nor draw any remuneration in her capacity as a member of lokasabha and independently of the restrictions on her membership, her rights as Prime Minister and Minister so long as she fills that office. There will be a stay of the operation of the judgement and order of the High Court. Prior to this judgement - Mrs Gandhi had unblemished and distinguished political career as a member of Congress working Committee, member of the Central election Committee and member of the Central Parliamentary Board. Finally, she became the President of the AICC. During the regime of the Prime Ministership of Lal Badhur Shashtry, she had become the minister for Information and Broadcasting. After the death of Lal Badhue Sashstry in 1966, she became the Prime Minister. After the elections of 1967, she became quite popular. There was split in the Congress Party and the split was great boon for Mrs. Gandhi. She reached dizzy heights of glory by launching bank nationalisation scheme, abolition of the privy purses scheme and 20 point programmes. In spite of this marvelous achievement Mrs Indira Gandhi became nervous after the judgement of Allahabad High Court. Mr Jayaprakash Narayan - The socialist leader began to instigate the defence forces and police forces to protest against Mrs Indira Gandhi. Thus the circumstances compelled her to declare internalemergency under article 352. After getting the stay order from the Supreme Court, Mr Nani Palkiwala boarded the plane to Bombay. During his flight journey one Gandhian Ashramite wearing kadhi dress was sitting in the next chair. The Ashramite causually entered discussion with Mr Nani Palkiwala. The ashramite was totally a stranger and he asked about the details of stay order. Mr. Nani Palkiwala explained all the details. The ashramite told Mr. Nani Palkiwala that Mrs. Indira Gandhi would be a revolutionery leader and she would be losing in the next general Election. Her reputation and fame would fade away. So her victory would be a temporary phase of life. Mr Nani Palkiwala did not meet Mrs Gandhi till the evening 22nd of March 1977 and related the incident of his conversation with the

total stranger. She had tears in her eyes and began to weep. Mr Nani Palkiwala puts this queer incident in the words of Professor Stephen Hawking- "I do not agree with the view that universe is a mystery. To me, it is not only assembly of the most profound measure but a infinite cluster of millions and millions of incredible - intolerable mysteries which the mind human mind will never be able to unravel. There are incontrovertible examples of authentic happenings and phemonena which science is only unable to explain.

Articles 31A - 31B and 31C deal with property Cases

The right to private property is weakest of all social and civil rights and appropriation of private property in the public interest is an incident of social justice. To appropriate the property of the citizens for the necessities of the state is known as the right of Sovereignty Eminent Domain. This is inherent right in the sovereignty of every state. The Constitutional provisions do not virtually confer this right but only recognize and generally surrounded with safe guards in the interest of private owners in property. The right to property is no doubt a personal right. The rights and interest of the persons are subordinated to the larger interest of the public.

Article 31A

1. 77 laws providing for acquisition of states have been protected 15 laws providing for acquisition of states have not been protected

Article 31B

It deals with validation of certain acts and regulations. None of the acts and regulations specified in the 9th schedule nor anyone of the provisions thereof shall be deemed to be void on the ground that such acts and regulations abridged or take away the rights. 284 invalid laws have been given protection through the process of validation Even the pre-constitution invalid laws have been protected. It follows that where an act had been incorporated in 9th schedule but amendments made therein are not included in that schedule, the amending acts do not get protection of article 31B unless the amending acts are also included in the schedule. Thus article 31B gives full protection to an act and its provisions in the schedule on the ground of inconsistency

Text of Article 31C

Saving of laws giving effect to certain directive principles Notwithstanding anything contained in article 13, no law giving effect to the policy of the state towards securing (all or any of the principles laid in part IV) shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by articles 14, 15, 16 and 19) and no law containing a declaration that it is for giving effect to such policy shall be called in question, in any court on the ground that it does not give effect to such policy - provided that where such law is made by the legislature of the state, the provisions of this article shall not apply there to unless such law, having been reserved for the consideration of the President has received his assent). This article was inserted by the Constitution 25th Amendment Act 1976 with effect from 20th April 1972

Definition of Property

In R.C. Cooper Vs Union of India, a attempt was made do define the property in the following words. In its normal connotation, property means the highest right, a man can have to anything, being that right which one has to lands or tenements, goods or chattels and interest in corporeal things. The first amendment - 4th amendment - 17th amendment - 24th amendment 25th amendment. 29th amendmant - 42nd amendment - 43rd amendment - 44th amendment and 99th amendment are most important in the history of Constitutional crisis of India.

References: Table of Important Cases

Statement and Judgment cases of valid and invalid Laws under the provision of the Indian Constitution. (R.G. Chaturvedi: Law of Fundamental Rights, third edition, Law Book Agency, Allahabad 1985. These cases have been quoted from this book.)

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2. Miss Champakam Dorairajan Vs State of Madras AIR 1951SC 226
3. A.K Gopalan Vs State of Madras AIR 1950 SC27
4. Ethiraj Ramanuja Jeer Swami Vs state of Tamilnadu AIR1972 SC1586
5. Bijoe Emmanuel and others Vs state of Kerala
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8. Christian Medical College Hospital employees union Vs Christian Medical College Vellore Association and others AIR1988 SC37
9. Kameshwara Singh Vs state of Bihar AIR 1951 Pat 911LR30 Pat 454
10. Sajjan Singh Vs state of Rajasthan
11. Shankari Prasad Vs Union of India
12. Golaknath Vs state of Punjab AIR 1967 Sc1643
13. Keshwananda Bharati Vs state of Kerala AIR 1973 SC1461
14. Minerva mills Vs Union of India AIR 1980 SC1787
15. State of West Bengal Vs Union of India - AIR 1963 SC1241
16. Babulal Parate Vs state of Bombay AIR 1960SC51
17. President of India under article 143 in respect of Berubai union AIR 1960 SC845
18. Bank nationalisation case R.C Cooper Vs Union of India AIR 1970 SC564

Statement of Valid and Invalid laws under provisions of various articles of fundamental rights,

Article 13

65 laws have been held valid and three laws have been held invalid.

Article 14.

798 laws have been held valid and 185 laws have been held invalid.

Article 15.

23 laws have been held valid and 6 laws have been held invalid.

Article 16.

57 laws have been held valid and 25 laws have been held invalid.

Article 19.

443 laws have been held valid and 124 laws have been held invalid.

Article 20.

27 laws have been held valid and only one law relating to Bihar sales tax act 1947 has been held invalid.

Article 21.

35 laws have been held valid and 7 laws have been held invalid. Article.

11 laws have been held valid and 9 laws have been held invalid.

Articles 25-28.

37 laws have been held valid and 7 laws have been held invalid:

Laws immune from challenge under article 31C -

1. Income tax Act 1961.
2. Kerala Debt relief Act 1977
3. Law grappling with concentration and concealment of wealth by acquisition of property
4. Andra Pradesh land reforms Act 1973
5. Law providing for acquisition of surplus land - that is land in excess of ceiling and its distribution among the poor and the landless
6. Law providing for acquisition of bus permits of large scale operators
7. Law making provision for protection of tenants from eviction on payment of arrears of rent only in part.

Laws not immune

1. Defence of India Act 1939
2. Industrial disputes Act 1947.

Just as one cannot be compelled to start a business, one cannot also be compelled not to close down his business. There is an nextus between articles 39B and 39C and objects of a law of self-acquisition of property, the law has to be upheld. If the inputs of the valuation prescribed by the law are wholly irrelevant or unconnected with social good, the law cannot be protected. The effect of article 31C is that the scope of argument that any restriction imposed on fundamental rights by articles 14 and 19 in furtherance of the directive principles is reasonable. A restriction imposed on fundamental rights conferred by the said article in furtherance of the directive principles, even if it is unreasonable will be held valid and will not be challengeable. The scope of article 31C is not confined to the individual sphere but also involves agrarian reforms, Article 31B and C would take within its fold both individual as well as agrarian reforms,

Article 310C

In conclusion, the amending powers of Parliament have been circumscribed by the limitations of Basic Structure Theory Propounded by Honourable Justice S.M. Sikri in respect of Keshav ananda Bharati case in 1973 and Minerva mills case 1980.

Protection of laws giving effect to directive Principles

No law giving effect to the policy of the state towards securing any of the directive principles laid down in part 4 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights and no long containing a declaration that it is for giving effect to such policy shall be questioned in any court.

Conclusion

No responsible leader ever suggested in the Constituent Assembly that in the exercise of amending power of the Parliament, Fundamental rights could be abrogated. A reading of the Constituent Assembly debates leaves no doubt that if the leaders had provided for abrogation of fundamental rights, by parliament in the exercise of amending power the large sections of people - specially the linguistic and religious minorities could have never agreed to accept the Constitution. The integrity and identity of India could have been achieved. We must be proud of our eminent intellectuals like Dr. B.R. Ambedkar, Dr. S. Radhakrishnan, Dr. Dadabhai Navroji, Mr. Sardar Vallabhi Patel, Pandit Nehru and Sir Ashutosh Mukerjee who was the greatest educationist of Modern India. He was devoid of any parochial approach and who was ever ready to accept what is valuable in western civilisation - In his convocation address in 1918 to the Mysore University said. "We cannot sit on the lovely snow-clad peaks of the Himalayas in contemplation of our glorious past. We cannot waste our precious time and strength in defence of theories and systems which however valuable in their way, have been swept away by the irresistible avalanche of worldwide changes." The institution of armed forces imbued with the tradition of being totally apolitical. Today, when we see corruption and degradation all around in India, the one institution of which, we can justly be proud is that of the armed forces. In point of discipline and dedication, the efficiency and competence, it is equal to the Counter Part anywhere in the world.

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