

CHAPTER-II

CONSTITUTION – CONSTITUTION MAKING : A BRIEF OVERVIEW OF CONSTITUTIONAL DYNAMISM : THE INDIAN EXPERIENCE

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OVERVIEW OF CONSTITUTIONAL DYNAMISM : THE
INDIAN EXPERIENCE.****I**

It is generally believed that the constitution of a country not only specifies the institutional form but reflects the ideals and aspirations of the nation concerned. More precisely, constitutions are regarded as “Vehicle for social advancement”. It is not a mere ‘metaphysical abstraction’ and it has the task of regulating power-relations in the society. Relationship exists of different levels: between the state and the individual, among individuals themselves and between the individual and other social agencies.

The whole notion of socio-political relational structure is not static but dynamic. It changes with the changes in the socio-economic environment and calls for dynamism in the constitution itself. At the sometime, it should be mentioned that the fundamental rules in a constitution act as the ‘fountain head’ of authority for the exercise of state power. Moreover, they provide the state with an institutional

framework, a container within which the dynamic process of government and politics can operate.¹

This idea will bring a number of issues relating to the nature and role of a constitution. Generally speaking, the capabilities of a constitution can be viewed from four important aspects: extractive, regulative, distributive and symbolic. In fact, this forms the foundation of David Easton's understanding of the systems theory. These are essentially concerned with some vital matters like survival, stability and maintenance of the political system. It also seeks to highlight the concepts like disturbances, stress, regulation and purposive redirection all of which lend a significant dynamism to the analysis of the system and its maintenance². David Easton has very correctly observed the idea of system persistence extends far beyond that of system-maintenance. It's oriented towards exploring change as well as stability which are alternative avenues for coping with the challenges to the system.³ The stability of a political system may, for all practical purposes, depend on the capability of the constitutional mechanism to understand the need of the

time. There may be needs for suitable alterations or adaptations or adjustments in the basic framework of the political system. But every political system passes through many ups and downs of varied magnitude and in this respect, constitution can play the most important part.

The nature of conflicts may be of two types: systemic and non-systemic or issue conflict. Systemic conflicts generally touch the basic foundation of the system and are of central nature. Non-systemic or issue conflict emerge out of certain issues which may be of temporary nature and are peripheral in character. Non-systemic conflicts may not ultimately threaten the very foundation of the political system but systemic conflict may destroy the system itself.

Against this general idea about the political system and its relationship with the constitutional mechanism, a fresh look at the issues of change and stability. In the words of Lord Brougham:

“Constitutional must grow, if they are of any value; they have roots, they ripen, they endure. Those that are fashioned to resemble painted sticks, planted in the ground, as I have

seen in other countries which are called trees of liberty. They strike no root, bear no fruit, swiftly decay and ere long perish".⁴

It appears that the greatest task of the constitution-makers is to strike a balance between flexibility and stability. Any wrong decision on their part might bring serious problem before the political system. One may refer to the observation of Dickinson which appears to be of great relevance for this present discussion:

"The largest number of controversies and causes of dissatisfaction that arise under a written constitution are connected with the question of progress the function of a written constitution is to provide such a principle and framework of order within which change can proceed without endangering stability. It is the function of a constitution to provide resistance to change merely as such. If that were not so, a constitution would be an incitement to revolution rather than a means of avoiding them. On the other hand, a constitution which left the door open to any and every kind of change could not perform its function, since the function of a

constitution is to ensure a stable progress and certain types of changes are incompatible with stability.”⁵

That a constitution needs safe passage for its growth and development has been highlighted by Thomas M. Colley in this observation:

“As change in government is according to the order of nature, a good constitution should provide for safe growth and expansion. Here, a gain it may be easily concluded the unwritten has advantages. What growth can be better, it may be asked, them that which is going on from day to day, imperceptibly, and is finally officially and formally recognized when it is complete? But on the other hand, this method of change is accompanied by dangers that may threaten the very existence of government..... We have found the better way when we have agreed upon a method, whereby the peaceful ballot may determine whether the time is ripe for change, and if so, what the change shall be, instead of leaving the question of change to the arbitrament of force. The choice of methods is thus between ballot and battle, with a reasonable certainty that the one, while it is peaceful, will

truly express the actual public judgement, while the other, besides being destructive, may prove nothing beyond the fact that the fortune of war for the time being inclines to particular party.”⁶

After making this observation, he concludes:

“The written Constitution thus prepares the way for growth and expansion by steps which give security against public disorder and violence: its provision may be moulded to new thoughts, new aspirations and new methods, as peaceful as the simplest law on the statute book may be modified; perhaps with as little discussion:”⁷

With regard to the nature of the Constitution, Jefferson further remarked:

“Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the Covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human and suppose what they did to be beyond amendment. I know that age well. I belonged to it and labored with it. It deserved well of its country. It was very like the present but without the

experience of the present..... I am certainly not an advocate of frequent and untried changes in laws and constitutions But I know also that laws and institutions must go hand in hand with the progress of the human mind".⁸

There is a section of opinion that constitution makers are infallible and work under all circumstances. But this opinion has been overwhelmingly rejected keeping in mind the forces of changes that take place in the society, economy and polity.

One may recall what Dr. B.R. Ambedkar said on November 4, 1948 when he was explains the nature of scope of amending power in the Indian constitution:

"The provisions of the constitution relating to the amendment of the constitution divide the Articles of the constitution into two groups. In the one group are placed Articles relating to (a) the distribution of legislative powers between the centre and the state, (b) the representation of the states in parliament and (c) the powers of the courts. All other Articles placed in the second cover a very large part of

the constitution and can be amended by parliament by double majority, namely, a majority of not less than two-thirds of the members of each House present and voting and by a majority of the total membership of each House. The amendment of these articles did not require ratification by the state.⁹

On another occasion, he observed:

“We divide the articles of the constitution under three categories. The first category is one which consists of articles which can be amended by Parliament by a bare majority. The second set of articles are articles which require two-thirds majority. If the future parliament wills to amend any particular article which is not mentioned in Part-III or article 304, all that necessary is to have two-thirds majority. Then, they can amend it. Mr. President: of members present. Dr. Ambedkar: yes. Now we have no doubt put certain articles in a third category where for the purpose of amendment the mechanism is somewhat different or double. It requires two-thirds majority plus ratification by the states”.¹⁰

At this point, the nature of social contest and political culture of a country call for closer examination. These forces go a long way in determining the nature of the constitution and its course of action. It is told that-

“The prevailing consensus of attitudes and beliefs which sustain a constitutional frame-work, provide the necessary support and give a sense of legitimate authority.”¹¹ A ‘living’ Constitution should embody the legitimizing process at hand and from an existing consensus that embodies some substantive and most procedural concerns of the government.¹² The legitimacy, acceptability and normative quality of the constitution will depend largely on specific techniques or methods of constitution making which is a resultant of the configuration of socio-political forces at that time.¹³

II

With regard to the issue of constitution making, there are at best three theories which are generally accepted by the scholars. Constitution may come into existence through evolution, through the deliberations of an assembly or by

fiat.¹⁴ Of these three methods, the second one, i.e. constitutions through deliberations has two advantages over others.¹⁵ The written constitution, on the other hand, “Imparts certainly and clarity”, while, on the other hand, “the participation of many social groups in its making promises protection for the interests and objectives of the ordinary citizen.¹⁶ At the some time, one should not ignore the limitations of such system. It may so happen that the participation of various groups with conflicting interests “may force on the assembly dysfunctional compromises in a vague, contradictory or even unworkable constitution.¹⁷

Thus the issue of legitimacy occupies the central position in such an analysis. It has been very correctly explained in this following observation: “It is, however, quite possible that a constitution may acquire legitimacy at inception, but may not be actually lived up to, thus creating a hiatus between the norms and the existential reality. Such cases of incipient legitimacy or legitimacy gap, after a period of time, may be conveniently corrected by a scheme of constitutional amendments.”¹⁸

Such an issue is closely related with the nature of the assembly which is entrusted with the task of drafting the constitution. It is historically true that the Constituent Assembly which drafted the Constitution of India had been suffering from a number of limitations. Basically two questions were raised:

- (a) was it a representative body ?
- (b) was it a imposed one?

It is true that the Constituent Assembly was not fully a representative body. The socialist and the communists were not represented.¹⁹ Leaders like Sapra and Jayakar who took active part in the Round Table conference did not participate in the deliberations of the Assembly.²⁰ Persons like Radhabinode Pal, P.R. Das, M. Ismail and Sir Sultan Ahmed were also absent. It is rightly held: It would have been better “ to associate all other parties willing to live together under one constitution, give them equal status and importance and arrive at a Constitution based on the greatest amount of agreement among them.”²¹

With regard to the nature of the Constituent Assembly, Dr. Ambedkar observed:

“This Constituent Assembly has come into being with a number of limitations many of which we will have to bear in mind as we proceed I also believe that it is competent to break limitations attached to it at its birth.”²²

Nehru held the same view and observed with a note of optimism:

“You know that the Constituent Assembly is not what many of us wished to be. It has come into being under particular conditions and the British Government has a hand in its birth. They have attached to it certain conditions we shall endeavour to work within its limits.”²³

The status of the Constituent Assembly was questioned by Mahavir Tyagi, K. Santhanam and other members. Serious reservations were expressed by Ivor Jennings regarding the legal status of the Constituent Assembly.²⁴

Regarding the nature of the Constituent Assembly, Dr. Rajendra Prasad who was elected its Chairman, observed:

“The Constituent Assembly has come into being with a number of limitations many of which we will have to bear in mind as we proceed I also believe that it is competent to break limitations attached to it at its birth.”²⁵

The general outcome of the debates in the Constituent Assembly establishes the fact that “in the tussle between the pro-Gandhian and pro-western believers, the latter prevailed and the Constitution that finally emerged was pattern.”²⁶ It does not mean that Gandhian ideals have found no place in the constitution itself. The chapter on Fundamental Rights and the Directive Principles are the best examples where the Constitution embodies the basic values advocated by Gandhiji. In a word, the Constitution has really been, what Austin has called, an example of “Consensus and accommodation”.²⁷

K.M. Panikkar, while commenting on the nature of the Constitution, held that the influence of British constitutional philosophy can be found in the principles on the Constitutional norms have been developed and these are to

be understood and interpreted in terms of the unwritten conventions of the British Constitution.²⁸

It has been rightly pointed out that the Gandhian principles and ideals have found place in the chapters on Fundamental Rights and the Directive Principles of state policy of the constitution. It is clear that the framers of the Constitution were primarily guided by the desire to bring about integration of the different elements of the society and thereby initiate the process of development.

At this point, the nature of circumstances in which the Constitution was drafted may be cited. The task of decision making mainly rested on the political elite who took part in the deliberations of the Constituent Assembly. These conditions have been depicted in this observation:

“The social structure within which the framers assembled, did not prove to be conducive to such functions. The economy was essentially dilapidated and shattered. The administrative structure was about to collapse. The society was in egalitarian in nature and consequently fragmented in all senses - economic or other wise.”²⁹

It is further observed:

“The sense of national unity that was brought about immediately after Independence was not a positive one. Naturally, the social integration that was achieved during the days of the Constitution-making was a forced one”.³⁰

The Constitution-making body tried to accommodate the different principles within the Constitution, its actual realization suffered a serious set-back because of the very nature of the Indian society which was based on certain inherent diversities. (Further details can be seen in these works: G. Myrdal , Asian Drama vol. I; Ronald Segal, The Crisis of India; Carl Friedrich, Trends in Federalism in Theory and Practice; K.M. Panikkar, Foundations of New India). In this context of the process of political development in India, Myron Weiner’s description of two political cultures “elite” and “ mass” and Morris Jones; reference to “ languages”, “idioms”, “manners”, “styles” and “fashions” of politics in India as falling into three categories of “modern”, “traditional” and “saintly”, inspite of its apparent crudity

perhaps accurately reflect the state of politics serving as the backdrop for the process of political development".³¹

In These circumstances, the Constitution was taken as a "symbol of national aspiration" and a "modernizing instrument" with the primary aim of bringing about a dynamic and purposive future. It is interesting to note that "although the political system envisaged by the Constitution was more evolutionary than revolutionary, the frames tried to incorporate elements of dynamism in it by setting their goals in clear terms in the forms of the preamble and the Directive principles of state policy. The goals and aspirations contained in the preamble, Part-III and Part-IV of the Constitution, not only embody the gains of the social revolution of the past century "and the ideas of freedom which modern India cherishes" but make the Constitution, in Austin's famous observation, a vehicle for social revolution."³²

III

The Constitution, to become a true vehicle for 'social revolution' should have dynamism of its own and "comparative studies of change need always to reflect the

impact of government upon society”.³³ If the success of a political system depends on a satisfactory balancing between stability and change, this can be best promoted by a viable system of constitutional dynamism.³⁴

Looking from this perspective, Loewenstern’s ontological classification of constitutions as “normative”, “nominal” and “semantic” appears to be appropriate.³⁵ He holds: “It is essential to recognize that the reality of a specific functional arrangement of power depends to a large measure on the socio-economic environment to which the pattern is applied”.³⁶

To Loewenstern, normative constitutions prevail in the west where it serves as the procedural frame for the compromise of the power contest,” (Ibid). A ‘nominal’ constitution simply embodies “ a declaration of constitutional intent, a blue print expected to become a reality in future” .³⁷ The nature of semantic constitution, in many cases, enables the power-holder to legalize and perpetuate the existing socio-political order and it can not bring about satisfactory change in the society.

Thus a constitution which does not contain the elements of dynamism cannot change the life of the nation as it fails to break beneath the pressure of national forces, (Annotated Constitution of the Australian Commonwealth). Any stagnation, resulting from the absence of this essence of workableness is sure to cause steadily deepening discontent and to invite recourse to extra constitutional or semi constitutional devices which border revolution".³⁸

Rules in the constitution, however pragmatic they may be, cannot be divorced from the increasing evolution of society.³⁹ In case of a situation, when these principles fail to maintain relevance to reality, they are to be modified, redefined or totally discarded.⁴⁰

There is a close relationship between the issue of constitution making and the diffusion of powers. It has been very correctly observed; "Where temperate diffusion of powers prevails as a positive value, both constitutional rules and political practices will preserve their diffusion and will help prevent the emergence of a privileged ruling elite". Great Britain's history of constitutional development" is marked by

the expansion of the diffusion of power.”⁴¹ The birth of the U.S constitution, on the other hand, was preceded by “a painstaking search for a system which would permit the interaction of many parties and interests.”⁴²

The Constitution of India upholds the principle of “Temperate” diffusion of powers. The leaders were aware of the fact that a vast country like India with many different racial, cultural, linguistic and religions groups needed a basic document spelling out the rules of the new State in elaborate detail.⁴³ In the words of L. M. Singhani, a noted scholar on constitution, the story of the framing of the Indian constitution is “by far the most massive and ambitious enterprise in the world wide history of constitution-making.”⁴⁴

Every constitution, during the time of its framing and adoption, “should incorporate the dominant socio-economic beliefs and interests with a view to making a compromise between conflicting view points of the framers.”⁴⁵ It may be relevant to cite the observation of Dr. Charles A Beard who held that economic considerations do play a prime force behind the making of a constitution. He observed that the

members who met at the Philadelphia convention to draft the American Constitution “were, with a few exceptions, immediately, directly and personally interested in and derived economic advantages from the establishment of the new system.”⁴⁶ He further held: “the constitution that was drafted and adopted was essentially an economic document based upon the concept of that fundamental private rights of property are inferior to government and morally beyond the reach of popular majorities”.⁴⁷

That economic considerations cause constitutional changes can best be illustrated from the American Constitution. When in 1787, “the American Constitution was framed, the Congress was given the power to ‘regulate commerce’ among several states in the beginning, the Congress had nothing to do with the “Commerce Clause” because most of the states were agricultural in character”.⁴⁸ But that condition did not last long and some changes were effected to the functioning of the constitutional system. “With the advancement of industrialization, interstate commerce became an important aspect of administration which

ultimately gave the Congress the opportunity to exercise tremendous influence over states through the mechanism of regulating commerce and trade relations of different states".⁴⁹

Side by side, there is another factor which, though not tangible, is of great importance in such a discussion i.e., the attitude of the people towards the Constitution. It is widely accepted that a Constitution is a means to an end a vehicle through which ideals can be translated into practice It has been observed: "If a Constitution is regarded with veneration, if what it embodies is thought to be prima-facie right and good, then there exists a force to preserve the Constitution against light hearted attempts to change it. Though the formal process of amendment is there, it will be seldom and hesitatingly invoked. The Constitution of the United States occupies such position in the eyes of the citizens."⁵⁰ That is why, the Constitution of the United States "has turned out to be perhaps the most successful example in history of a legal instrument that has served both as a safeguard of individual freedom as a ligament of national unity."⁵¹

The process of the Constitution making in India reveals that the makers were, right from the beginning, tried to incorporate the elements of dynamism within it so as to make the Constitution a “living organism” in the true sense of the term. In India, the constitution has been regarded as a “symbol of social aspirations rather than as the formalized rules for the exercise and control of political power”.⁵² But at the same time one can also notice that the political system as specified in the Constitution has been more evolutionary than revolutionary.”⁵³

Consequently, the framers tried to add elements of dynamism and modernism by specifying the goals and objectives of the state in the preamble and the Directive Principles of state policy and by the establishment of the process and instruments necessary for the attainment of such goals.⁵⁴ These ideas “seek to provide for the creation of a modern society and a modern political system through democratic institutions”.⁵⁵

Thus, in consideration of there variety of pulls and pressures, the Constitution tried to effect curious compromise between "contradictory principles".⁵⁶ That such attempts at compromise could not work well became evident since mid sixties, when there had been phenomenal changes in the power configuration in India. A new kind of political polarization emerged on the national scene resulting in the appearance of some "explosive issues" which assumed the proportions of a serious confrontation between "ideologically differentiated political forces."⁵⁷ It is interesting to note that even in the face of these challenges, "The constitution has been able to keep itself in working with a surprising degree of adaptability to changing circumstances".⁵⁸ This has been possible because of the attitudes of the makers of the Constitution who, in spite of their differences on many issues, agreed to make the Constitution as flexible as possible so as to make it more adaptable to the changing circumstances. The drafting of the amending provision clearly establishes the fact that the members of the Constituent Assembly wanted to make the constitution a

vehicle for social change by using built in mechanism in different periods".⁵⁹

In the debates that took place in the Constituent Assembly, K.M. Munshi argued:

"In framing a Constitution as we are doing under great pressure, there are likely to be left several defects, and it is not necessary that we should have a very elaborate and rigid scheme for amending these provisions in the first three years".⁶⁰ It may be noted that the Constituent Assembly did not agree with the proposal of B.N. Rau to make all provisions very flexible but accepted the idea of making some provisions easily amendable by following a simple majority. Granville Austin, while commenting on this aspect, observed, inter alia: "It appears that Rau was stretching the customary meaning of the removal of difficulties clause into a device for the easy amendment of the Constitution - the need for which he strongly believed".⁶¹

The members of the Constituent Assembly began their debate on the amending article (Art. 304 of the Draft Constitution which was remembered as Art. 368 in the

present Constitution) on 17th September, 1949 “in the relative calm following the stormy controversies on the questions of compensation, preventive detention and language, that had occupied the previous weeks”.⁶²

There was a debate regarding the scope of the state legislatures to take part in the amending process where it was made mandatory to have ratification of the state legislatures in relation to certain provisions of the Constitution.

Mr. Brojeswar Prasad, while rejecting the idea of associating the state legislatures in the amending process, referred to the Australian practice, which, in opinion, would be helpful for the Indian federation. He argued:

“A provision exists in the Australian constitution to the effect that if there is a conflict between the two houses of parliament, or if either house does not pass the amending Bill of the other, then the whole matter have to be referred to the electorate. It would be beneficial if we incorporate that provision of the Australian constitution in our constitution

..... I do not want to associate the state legislature in the process of amending the constitution".⁶³

While supporting the device of referendum, he observed:

Referendum is democratic as it is only appeal to people and no democratic government can have any objection to resorting to referendum in order to resolve a deadlock, when there is a conflict between the parliament and the provincial governments."⁶⁴ He was in favour of a referendum because "it cures potent defects in party governments."⁶⁵ Finally, he considered referendum to be a "strong weapon for curbing the absolutism of a party possessed of a parliamentary majority".⁶⁶

On the nature and scope of the amending provision of the Indian Constitution, Dr. Ambedkar observed that the Assembly had proposed to divide various articles into three categories. In one category, certain articles which would be open to amendment by the parliament by simple majority had been included, besides this there are other articles which would require two-thirds majority support and in some cases, ratification by half of the state legislatures.⁶⁷

Since the constitution is a fundamental document which defines the position and powers of the three organs of the state it must prescribe some limitations on the authorities of these organs. If no such limitation is imposed on the authority of these organs in the opinion of Dr. Ambedkar, there will be "complete tyranny and complete oppression".⁶⁸

It is interesting to note that throughout the debate regarding the amending mechanism, Nehru kept silence. His silence attracted the attention of all and Austin has sought to give a reason for this:

"Perhaps he had changed his mind and had come to believe that the amending process was sufficiently easy in such cases as the language provisions and the creation of new states, and the other mechanism were necessary in inspiring confidence in the performance of federal structure. If his silence indicates dissent, it is perhaps also a measure of the opposition facing him. Even if Nehru held to his earlier view, it is extremely doubtful if the members of provincial governments in the Assembly would have agreed to an

amending process that would have put them at the mercy of the United Parliament”⁶⁹

This survey would suggest that in the making of the constitution in general and the amending mechanism in particular, the framers were determined to make a compromise between two extremes -flexibility and rigidity. They considered the federal frame and made room for the states to play in some areas where their interest would be considered.

The proceedings of the Constituent Assembly clearly show that the whole Constitution was taken in a broader perspective, keeping in mind the nature of history, society and economy of the whole country. The Indian political system, right from the beginning was confronted with the dual tasks of system maintenance and system-persistence. It directed its actions towards exploring change as well as stability and the system has been constantly engaged in a conversion process, producing outputs (decisions and policies) and altering the environment.⁷⁰

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