

BOOK REVIEW

OUR CONSTITUTION DEFACED AND DEFILED (1974) by N.A. Palkhivala, Macmillan Company of India, Limited, Delhi, pp. 175.

On 15th August 1947, at the stroke of the midnight hour, India awoke to life and freedom. A new nation was born; we did so legally speak, by an act of the British parliament, the Indian Independence Act of 1947, that provided for the creation of a constituent assembly to prepare the constitution for our country.¹ The glory of the Indian Independence struggle has imbued within the hearts of all Indian citizens a deeply rooted sense of honour and pride. However, the journey from the birth of a new constitutional republic to 75 years of independence has not been as easy as it may appear to be. In this context, the Indian constitutional history owes its gratitude to Shri N.A. Palkhivala, the greatest advocate of all times, often regarded as the centrepiece of the rights of the citizens.²

This academic piece attempts to review the book titled, “Our Constitution Defaced and Defiled” which is the collection of Mr. Palkhivala’s essays. Broadly, the book can be divided into two parts. The Part I of the books consists of ten essays concerning the area of fundamental rights, freedom and others. Part II of the book interestingly includes, one essay which talks about the power of the Union Parliament to amend the Indian Constitution. The book is commendable work of Mr. Palkhivala which is a great contribution to the study of the fundamentals of Indian constitutional framework. The book is credible work of excellence and brilliance. The title of the book itself attracts the attention of the reader to analyse and identify the grounds which impelled the author to accept such title. Through this book, the author elaborates his thoughts and ideas over the critical issues of parliamentary supremacy, rule of law, human rights and others.

The author in his introductory remarks of the book notes, “1947 and 1973 are the key dates in India’s twentieth century history. The first marked the end of the

¹Rohinton Nariman On Guardian Angel of Fundamental Rights *available at*: <https://www.youtube.com/watch?v=2ImP3E86OxY> (last visited on April 19, 2022)

² *Ibid.*

struggle for winning freedom.”³ The terminology of words used by the author reflects that 1973 marked the beginning of the struggle of the Indian republic to protect the fundamental ethos of the Indian constitution particular the initially thought to be ‘eternal idea’ of freedom. The texts express the intent of the author to reflect that the spirit of Indian constitutionalism from the acts of the people occupying the corridors of political power was under grave threat. The tyranny of the majoritarian rule attempted threatened the very basic ideals of judicial independence, human rights and others. The author in the chapter titled, ‘Democracy and Freedom’ lists three prerequisites for the continuance of a free democracy⁴-

- sense of discipline,
- spirit of moderation,
- willingness for unbiased participation in public life.

The author terms liberty to be an ‘Eternal Flame’ and argues the institutions, ideals and notions of democracy always evolve with time and changes in society. He enumerates three conditions for survival of free democracy, namely, a sense of discipline, the spirit of moderation and the willingness and capacity of the people to take disinterested part in public life.⁵ The author in the other essay argues for the significance of guaranteed fundamental rights to limit the power of the state. The author advocates the guaranteed fundamental rights protects the people from the tyranny of the state. He argues that mere presence of elected government is not enough and thus, fundamental rights must be constitutionally guaranteed to the citizens for due protection of their human rights.⁶ Further, in the other essay, the author supports the institution of protection to individual property and argues for importance of the fundamental right to property. The author goes

³ N.A. PALKHIVALA, OUR CONSTITUTION DEFACED AND DEFILED, P- 8 (Macmillam, Delhi, 1998).

⁴ *Id.* at 13-14.

⁵ *Id.* at 17-18.

⁶ *Id.* at 20. The author writes:

The mere fact that the country is governed by the elected representatives of the people is no guarantee. that the basic human rights will be respected. Some of the worst tyrannies in history and even today-and some of the most ruthless suppressions of the voice of dissent-are to be found in countries where the legislature consists of the elected representatives of the people (...). *Id.* at 30-33.

on to argue that without the fundamental right to property several other crucial fundamental rights could not be enjoyed by the people.⁷

The author in another essay also criticizes the Article 31C of the constitution and argues that insertion of the designated article has the potential to subvert several intrinsic features ensuring fundamental freedoms to the citizens.⁸ The author discusses within the chapter titled, “Deviations from the Constitution” several instances where, the union government in name of exercising powers under legitimate jurisdictions, acts to encroach upon the jurisdictions of the state government.⁹ The author discusses how the acts passed by the central government in name of entries in the union list actually severely impacted the jurisdiction of the state governments in terms of administration and legislative powers. The essay titled, ‘The Supreme Court and High Court as guardians of liberty’ analyses the legal significance of following cases decided by the Supreme Court:

- Parliamentary Privileges case¹⁰
- Bank nationalisation case¹¹
- Privy purse case¹²

The author while, analysing the legal relevance of the above stated cases also studied important role played by the supreme court of India as the supreme judicial institution of the Indian republic. The author noted that the Supreme court in its capacity as the highest constitutional court of appeal worked to the expectations of the founding fathers of the constitution. The author noted that the

⁷ *Id.* at 39, 40. The author notes:

It would be no exaggeration to say that without the right to property it would be impossible to work the Constitution. For example, many of the legislative entries in the Seventh Schedule, including entries which set out the subject-matters in respect of which taxes can be levied by the Union and the States, necessarily presuppose the right to private property. The existence of the separate States would be in direct jeopardy, and the democratic way of life — the very institution of Parliament with its necessary incidents like free elections, freedom to oppose and the right to dissent — would be paralysed, if the right to private property were abolished.

⁸ *Id.* at 53-61

⁹ *Id.* at 72-73.

¹⁰ *Id.* 79-80. Keshav Singh vs Speaker, Legislative Assembly, AIR 1965 All 349, 1965 CriLJ 170

¹¹ *Id.* 87-89. R.C. Cooper v. Union of India AIR 1970 SC 564; 1970 SCR (3) 530.

¹² H.H. Maharajadhiraja Madhav Rao Jiwaji Raoscindia Bahadur v. Union of India, 1971 AIR 530, 1971 SCR (3) 9.

court while, ensuring due adjudication of disputes in the case, which also involved the interests of ordinary citizens, executed its constitutional role in the best manner as was expected from the institution. Further, the author also discussed the controversies concerning the appointment of the Justice A.N. Ray as the Chief Justice of India in the other chapter titled, 'A Judiciary Made to Measure'. The author in this chapter discussed the detrimental impact of a committed judiciary in the country. He stated: "It would be a work of supererogation to spell out the frightening consequences for the entire country if the executive is permitted to appoint judges who share the philosophy of the ruling party". The author further stated, "Every judge of the Supreme Court could then be selected on such reprehensible considerations". The author remains extremely critical of a committed judiciary and the interference of the executive in the functions of the judiciary.¹³ In the last essay titled, 'Parliament's Power to Amend the Constitution' the author discusses that the power of the parliament to amend the Indian constitution is limited. He argues that in India, the Indian Constitution is supreme and the parliament is its creature thus, the parliament cannot destroy the basic and fundamental features of the Indian Constitution. The author also discusses the *Kesavananda Bharati v. State of Kerala*¹⁴ case which propounded the doctrine of basic structure. The purpose of which is that while, the constituent powers of the union parliament to amend the constitution is plenary yet, it should not be exercised in such a manner as would destroy or abrogate the constitution's basic structure. Further, the author lists following essentials of the constitution:

1. The supremacy of Indian Constitution,
2. Sovereignty of Indian Republic,
3. Integrity of India
4. Republican Character of the State,
5. Democratic Nature of the country which does not merely means adult franchise
6. Secular nature of Indian State

¹³ *Id.* at 100. The author writes:

In other words, what the Government really wants is that the Chief Justice should subscribe, not to the philosophy of the Constitution but to the philosophy of the ruling party. In all other democratic countries, a judge is expected to shed his political philosophy after he takes his seat on the Bench; whereas our government expects our judges to injecting politics into justice.

¹⁴ AIR 1973 SC 1461.

7. Independence of the Indian judiciary and other judicial institutions
8. Indian form of federalism
9. Balance between the Legislature, Executive and the Judiciary
10. Amending nature, feature and also the procedure of the Indian Constitution

ANALYSIS and CONCLUSION: India is a constitutional democracy where every institution is controlled and regulated by the constitution. The checks and balances system particularly, the separation of power (limited usage of power) can be attributed as the most significant cornerstone of constitutional democracy. Further, it has been consistently laid down by the supreme court that all organs of the state are creatures of the constitution, with no unfettered powers. The constitution has thus, devised a structure of power relationship with checks and balances. However, judicial institutions in India, in several instances of judicial overreach have breached this principle and consequently upset the delicate balance, which the framers of the Indian constitution had thought to exist. Such acts of breaching the idea of balance of power (*Lakshman Rekha*) could also be postulated by one as a species of "acts defacing and defiling the constitution".

The Indian Constitution fundamentally postulates for the creation of a democratic state.¹⁵ The foundational notion of a democratic state indicates a fundamental framework where with the simultaneous existence of an independent judiciary, policy decisions are taken by an institution which is 'of the people, for the people, by the people'. The term, 'of the people, by the people and for the people' signifies that, the government of the day is made for the people, by the people (through elections) and answerable to the people.¹⁶ This intrinsic feature establishes a framework of political accountability of governance towards the people and the system of popular government. The acts of judicial overreach in terms of judicial review interfering in the sphere of policymaking and discretionary wisdom of the executive leads to governance by judges which, if not stopped would lead to

¹⁵ Sumant Batra, *Constitution of India: Of the people, for the people and by the people* (Ministry of External Affairs, Government of India).

¹⁶ "Why do we say Government of the people, by the people, for the people?", (Apr. 19, 2022), https://www.bookbrowse.com/expressions/detail/index.cfm/expression_number/600/government-of-the-people-by-the-people-for-the-people); "The Gettysburg Address: Transcript of Cornell University's Copy", (Apr. 19, 2022), https://rnc.library.cornell.edu/gettysburg/good_cause/transcript.htm.

judicial imperialism without political accountability. Judges are not only free from appellate review (in case of the Supreme Court) but of elections also and have an issue tenure. Thus, governance by judges, is unable to include some critically sensitive features of democracy. Therefore, public law must in principle respect conventional limitations on judicial power which are fundamentally crucial to the functioning of a democratic state ensuring absence of the tyranny of the unelected and also meeting such necessary essential features of democratic governance that are indispensable to the Indian Constitutional framework.

No governance mode is perfect. The actual unfolding of democracy and the working of a constitution and institutions under it may suffer from inadequacies and imperfections. However, such inadequacies must not give the Judicial institutions in India the ground for redressal by judicial drafting or redrafting of legislative provisions or formulation of policy frameworks. While judicial modesty and restraints must be well accepted in matters of policy and law, the executive and legislative branches of the state must only exercise the right to experiment over policy-related affairs. Even though, the Constitution of India is the supreme legal document and all the three organs' functions under the constitutional framework yet, the importance of Indian parliament cannot be undermined and its role cannot be performed by the Judiciary. Since, judicial interferences within the realms of legislature or executive could also deface or defile the constitution.

Rebant Juyal*

* Faculty, Dr. Ambedkar Center of Excellence (DACE), Central University of Assam, Silchar. India.