

Constitutional Values and the Indian Ethos

A M Ahmadi

R R KALE MEMORIAL LECTURE, 1996

**GOKHALE INSTITUTE OF POLITICS AND ECONOMICS
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Mr. Justice A.M. Ahmadi, the Chief Justice of the Supreme Court of India, was born at Surat on March 23, 1932. After completing Bachelor of Law, he commenced his career with joining the Bar in the year 1954. He was appointed Judge, City Civil and Sessions Court, Ahmedabad in 1964 and the Judge, High Court of Gujarat in September 1976. He worked as Chairman of the Advisory Board under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, of the Advisory Board under Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 and of the Gujarat State Third Pay Commission. He also worked as a Member of the Ravi and Beas Water Disputes Tribunal under the Rajiv-Longowal (Punjab) Settlement. He was subsequently appointed Judge, Supreme Court of India in December 1988 and elevated to the position of Chief Justice, Supreme Court of India in October 1994.

Mr. Justice Ahmadi worked as President of the Supreme Court Legal Aid Committee in 1989 and as Executive Chairman, Committee for Legal Aid Schemes in India from November 1990 to October 1994. He is also the Patron-in-Chief for Legal Aid Schemes in India.

In recognition of his work, Doctorate Degree, Honoris Causa, was conferred on him by the University of Kurukshetra in 1994, by the Maharshi Dayanand University, Rohtak in 1995 and by the University of Kanpur in 1995. He is also elected as an Honorary Bencher of the Honourable Society of the Middle Temple Inn, London.

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Constitutional Values and the Indian Ethos*

A M Ahmadi**

I feel deeply honoured at having been invited to deliver the 1996 Kale Memorial Lecture. The Gokhale Institute of Politics and Economics is an Institution of great repute in the field of social sciences and I am grateful to its Director, Dr. D.C. Wadhwa, for granting me the opportunity to be in your midst today. The Lecture series, which has been consistently held since the year 1937, has featured eminent stalwarts from every walk of Indian public life and I must confess to being in the grip of an overpowering sense of diffidence at the prospect of being counted amongst them.

The topic on which I wish to share my views with you today is :

Constitutional Values and the Indian Ethos

Some time ago, I came across a quotation which endeared itself to me for the beautiful truth that it sought to express :

"The good or bad fortune of a nation depends on three factors: its Constitution, the way the Constitution is made to work, and the respect it inspires."

Georges Bidault

At the turn of the century, the Constitution of India, which has the distinction of being amongst the longest written Constitutions in the world, will complete 50 years of existence. Amongst Constitutional scholars, there are those who will point out, and rightly so, that as Constitutions go, this is not an unusual occurrence. They will draw our attention towards the Constitution of the United States of America which celebrated its bicentennial a little less than a decade ago. However, other scholars would remind us of the experience of nations like France, which has, since the French Revolution in 1789, changed its Constitution as many as five times. The Indian experience becomes noteworthy because of the political uncertainty that is so characteristic of the times that we live in. A decade ago, the Soviet Union was one of the two superpowers of the planet; today, the many small independent States that formed part of the erstwhile Soviet Union are tussling with immense uncertainties in their social, economic and political arenas. The Republic of India will celebrate 50 years of its independence next year; the event will be a fitting tribute to the sagacity, wisdom and foresight of the Framers of its Constitution. Those great visionaries succeeded in engraving into one document, the values and policies that enabled the diversities that abounded within the many small states that comprised the territory of nascent India, to be blended into one single nation.

Having said that, it must be noted that the efforts of the Framers, and the results thereof, have not always met with unanimous approval: the *grundnorm* of our nation has been criticised on several fronts and, any serious attempt at evaluating the Constitution must address these criticisms. Every now and then, scholars publish articles and treatises exhorting the need for setting up a new Constituent Assembly.

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However, before we embark upon such ambitious and tumultuous changes, it is necessary that there be a considered debate on whether there is at all a need for such drastic changes. It is one thing to logically evaluate the virtues of a system of government, but it is quite another to actually try and administer it. To adapt the memorable words of the great American jurist, Oliver Wendall Holmes, "The life of the law has not been logic; it has been experience". And, experience informs us that in making decisions for the governance of human beings and human conduct, factors other than logic alone must weigh heavily upon the minds of the makers of such decisions.

For more than four decades now, we, the citizens of India, have been governed under a particular Constitutional order. There have, undoubtedly, been problems in implementing the Constitutional Scheme and, in certain respects, we have come to realise that some of the predictions of the Framers have not materialised. However, we must bear in mind the fact that our society is conditioned to the present system. Moreover, we must not lose sight of the practical difficulties of imbibing within our large population, the spirit of a new Constitutional order. We must, therefore, ensure that every effort has been expended towards rectifying the defects, such as they are, within the present system, before we rush to embrace a wholly new Constitutional system, whose untested theoretical formulations may bear more thorns than roses for our political flower-beds.

For such an exercise, it is necessary that we understand the circumstances under, and the processes by which, our Constitution came to be adopted. It is equally necessary that we analyse how its provisions have withstood the test of time and understand whether they have proved to be capable of implementation. However, this is an ambitious agenda, one that is suited more for a voluminous treatise than for a lecture. I shall, therefore, necessarily have to restrict my views to certain specific aspects of this vast subject of Constitutional law. I shall begin by briefly describing the historical background of the nation which confronted the Framers when they were entrusted with the awesome task of preparing a Constitution for Independent India, and how these and other contemporary events influenced their decisions. Thereafter, I shall turn my attention towards an aspect which is of great interest to scholars of comparative Constitutional law: the peculiar nature of the Indian Federation and how it seeks to maintain harmonious Centre-State relations. In this regard, I shall endeavour to gain an insight into the reasons behind the Framers' choices and how the system envisaged by them has worked in practice. Lastly, I shall attempt to analyse a provision of the Constitution which has, in our times, gained far more significance than could possibly have been imagined for it by the Framers - that provision being Article 21 of the Constitution. A related aspect, which also deserves close scrutiny, is how the Directive Principles, despite being judicially unenforceable, have been given meaning by the artful construction of Article 21. Since so much of the jurisprudence evolved by the Supreme Court over the past two decades has centered around this aspect, it would be interesting to contrast the expectations of the Framers with the actual working of the provisions in question, and the interpretation accorded to them by the Supreme Court.

I realise that the aspects I have selected for discussion may appear to be extremely disparate, bereft of a common thread coursing through them. I have, however, chosen them for scrutiny for they provide examples of areas where the vision of the Framers has been severely tested by practical developments and are, therefore, areas that provide rich

fare for analysing the extent to which the values enshrined in the Constitution have been moulded into the Indian ethos. The Constitution of India has unabashedly adopted features of other Constitutional systems. The Framers acknowledged their debt to these systems but chose only those aspects which they believed would be suited to the conditions prevailing within the sub-continent. Fifty years later, we are perched at a historical vantage-point and we must endeavour to ascertain whether the chosen mores have been woven into the fabric of Indian Society or whether they have remained as patches of material precariously suspended from the social textile, retained only by the force of Constitutional prescriptions.

Historical Events that Influenced the Framing of the Constitution

Before analysing the circumstances that confronted the Framers, it is important to place events in a historical perspective to understand why the Framers acted as they did.

After the First War of Independence in 1857, the British Government assumed sovereignty over India, replacing the East India Company. Thereafter, the British Government, by a gradual process, introduced a form of Government that was loosely based on the Westminster Model. Through the Government of India Act, 1858, the Indian Councils Acts of 1861, 1862 and 1909, and the Government of India Acts 1919 and 1935, the British introduced a form of Government that was partially representative and, thus, laid down the basis of a federal polity within India.

When the Framers were entrusted with the onerous task of drafting a Constitution for Independent India, they had to contend with the fact that the British had, for over a century and a half, administered the territory of India through the various laws analysed above. The Indian citizenry had not only been acquainted with principles of western democracy, but had also imbibed some of its basic tenets as being suitable for the governance of its social and political conduct. For a number of reasons, many of which were a direct result of the social, political and historical compulsions of the time, the Framers decided in favour of continuing the basic infrastructure and system of governance established by the British, and concentrated their efforts on improving upon its defects and shortcomings by incorporating values and ideals which would enable newly independent India to successfully quell the tremendous pressures that it would inevitably face.

A very interesting and illuminating account, based on authentic primary and secondary sources, of how the Framers formed the crucial decisions resulting in the text of our Constitution, is to be found in Granville Austin's classic work, "The Indian Constitution: Cornerstone of a Nation". This scholarly work has been accepted as an authoritative text on the subject by leading Constitutional scholars and I would commend this monumental study to all those who seek deeper insight in matters relating to our Constitution.

The Framers had to make important choices for the shape of Independent India's governmental structure. They had to choose political institutions which would, while fostering the creation of an environment where social and economic inequities could be erased, ensure that the unity and stability of the Indian Union would be maintained.

There were those in the Constituent Assembly who believed that instead of following the Euro-American Constitutional tradition, a quest should be launched to probe India's ancient heritage to find indigenous institutions that would be more suited

to serving the chosen ends. These members, influenced by the Gandhian concept of the State, envisaged a system which had the Village Panchayat at its base and would evolve into a decentralised government, formed on the basis of indirect elections. Since Mahatma Gandhi had, on many occasions, expressed his view that the village should be the fulcrum of Indian social life, the entire Assembly devoted much attention to this proposal, which promised to bring democracy at the grass-roots level.

However, the Framers had to keep several factors in mind whilst deciding upon a specific form of government. From the late 19th century onwards, Indians had been increasingly allowed to participate in local self-government and, in the 20th century, they had progressed to becoming acquainted with the process of decision-making in the Executive and Legislative sides of government, both at the Provincial and at the Central level. Although Indians had never been allowed to have the final say on decisions affecting their lives, those who had been given opportunities to work the system, had become well-versed in the intricacies of the centralised form of governance which was in existence. K.M. Munshi, amongst the most prominent Framers, reflected such an attitude when he queried whether it would be wise for the Assembly to turn its back on a hundred-year-old tradition of Parliamentary Government in India.

There were also more pressing factors that the Framers had to contend with. As India neared Independence, its internal economy was in a state of great disarray: a number of Provinces were prone to famines, food-prices were rising alarmingly and, grain reserves were extremely low. Communal riots across the nation, resulting in huge tolls of deaths, had revealed that when faced with critical situations, the local law enforcement and the local self-government measures were woefully inadequate. The issue of the amalgamation of the Princely States into the Indian Union and other political factors posed a serious threat to the internal security of the nation. These events signalled to the members of the Assembly the need for a centralised form of government which would ensure the stability and the unity of the Indian Union.

The most significant reason why the village system was not accepted as the basis for government was its basic premise which postulated that the local bodies at the village level would act as electoral colleges for the bodies at higher levels, and the entire system would be based on indirect elections. This scheme was at odds with the process of direct elections by adult-suffrage, which had come to be accepted by almost the entire Assembly as an essential requirement for Indian Democracy. The Assembly was convinced that "the introduction of democratic government on the basis of adult-suffrage" would "bring enlightenment and promote the well-being, the standard of life, the comfort and the decent living of the commonman".

For these reasons, the Assembly decided to reject the proposed decentralised, indirect form of government and adopted a democratic, centralised, Parliamentary governmental framework. However, in the spirit of accommodation and consensus that was to become a hall-mark of the functioning of the Assembly, it did not completely cast aside the Panchayat system. The Assembly came to the conclusion that while the Panchayat system could not be accepted as the basis for India's political structure, it could be the base for its administrative functioning. To this end, Article 40 was incorporated within the Directive Principles and exhorted the State to ensure that Village Panchayats could function as units of self-government. The situation envisaged was one where the villager would be connected by the electoral process to government,

both at the State and the Central level. In this manner, the Framers sought to harmonise the conflicting pressures for providing a stable democracy which would also meet with existing indigenous conditions.

In the years immediately before and after Independence, India was subjected to several jolts and it became evident that, had it not been for the strong leadership exerted at the central level, it would not have been possible for the Indian Union to survive those threats to its integrity.

Having ensured the survival of the Indian Union as a political unit, the Union Government embarked on a massive economic programme whereby the basic infrastructure for developing a stable economy and for achieving wide ranging social reforms was laid down. The wide powers conferred upon the Union Government enabled it to implement the policies it chose to pursue. As the years progressed, more threats were posed to the stability of the Union when secessionist forces reared their presence and when the nation had to go to war, but even these were quelled by making use of powers vested in the Union Government by the Constitution.

Initially, therefore, it seemed that the Framers had indeed made a wise choice by opting for a centralised form of government. However, their hope that the Panchayat system would be simultaneously developed remained unfulfilled. Though efforts at developing a Panchayati Raj system were initiated, they did not lead to the development envisaged by the Framers.

Before we analyse the position as it exists today, it would be to our benefit to study the nature of the Indian Federation and how it sought to harmonise Centre-State relations.

The Federal Nature of the Republic of India

Constitutional analysts have, for long, struggled to find adjectives to describe the nature of the power-sharing scheme of the Indian Constitution. It has been variously described as "quasi-federal", "unitary with subsidiary federal characteristics" and by a host of other ambiguous terms. There is, however, general agreement that the structure of the power-sharing scheme within the Indian Constitution is, in many ways, unique.

A striking difference between the approach of the Framers and the experience of Constitution-makers in America, Australia and Canada is that, unlike in the latter cases, the Framers did not view the issue of power-sharing as being one of conflict between those in favour of a "strong-Centre" and those in favour of autonomy for the Provinces. That is why certain elements essential to traditionally Federal Constitutions, characterised by conflicts between "Centralists" and "Provincialists", are absent in our Constitution. For instance, the concept of dual citizenship is conspicuous by its absence in the Indian Federation. The members of the Assembly sought to create an environment of inter-dependence between the central and regional governments, while avoiding a scenario where the Provincial Governments would function as mere administrative agencies for central policies.

Dr. Ambedkar had described the nature of the Constitution as "a Federal Constitution in as much as it establishes what may be called a dual polity" consisting of "the Union at the Centre and the States at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution". He averred that the Constitution avoided the "tight mould of Federalism" in which the

American Constitution was caught and was capable of being "both unitary, as well as, federal according to the requirements of time and circumstances."

We have already examined some of the reasons which caused the Framers to lean in favour of a form of government that allowed the Centre to be vested with great powers. It is interesting to note that these reasons had origins ranging from ancient times to events which occurred contemporaneously with the framing of the Constitution. The Framers were conscious of the fact that one of the main reasons why India had, since ancient times, been prone to succumbing to foreign invasions was the continued absence of a strong centralist power; at the same time, they were conscious of the fact that the complexity of industrial, commercial and financial conditions of the modern world, and the need for large scale defence programmes, had encouraged other nations to strengthen their Federal Governments.

Against this backdrop, some of the salient features of Indian Federalism may now be examined. Part XI of the Constitution, entitled Relations between the Union and the States, outlines the distribution of powers between the Union and the State Governments. This chapter of the Constitution has two further sub-divisions: "Legislative Relations" and "Administrative Relations". The provisions in the chapter relating to "Legislative Relations" outline the legislative competence of the Union and the State Legislatures, as elaborated in the legislative lists provided in the Seventh Schedule. Another provision vests residuary legislative power in the Union, while a separate one states that in case of repugnancy, it is the Union law which will prevail over a State law. It is, therefore, evident that the Framers wanted to vest the Union Government with very broad legislative powers. They did so in an attempt to ensure that the Indian Constitution would retain flexibility and not suffer the fate of certain other Constitutions, whose Federal Governments lacked concurrent powers of legislation. Another purpose that this legislative scheme sought to serve was to ensure that the Union would be able to undertake comprehensive and uniform social and economic reforms encompassing the entire nation, which would become necessary from time to time. It was this spirit that prompted the Framers to bestow upon the Union, in the shape of the present Article 252, the power to legislate on subjects which were exclusively provincial in normal times if and when they became "a matter of national concern". The provisions in Chapter II of Part XI deal with the executive powers of the Union and the States. Two of these provisions empower the Union Executive to instruct a State Government to ensure that the State Executive complies with the laws of the Union.

The Emergency Powers, enshrined in Part XVIII of the Constitution, provide for the situation mentioned by Dr. Ambedkar, where the Constitution would become unitary. Under circumstances specified in this chapter, the Union has been vested with overriding powers. The justification advanced for these provisions was that "the residual loyalty of the citizen in an emergency must be to the Centre and not to the Constituent States". The Framers believed that it is only the Central Government which can work for a common end and for the general interest of the country as a whole. Of the Emergency Provisions, the ones relating to "President's Rule" within the States became controversial in subsequent years, and I shall later refer to the difficulties created by them.

The provisions of the Constitution which relate to the distribution of revenues between the Union and the States starkly illustrate the difference between our Constitution and those that are strictly Federal. In Constitutions of the latter kind, the constant endeavour is to ensure that both Central and Provincial Governments have under their own independent control, financial resources sufficient to perform their exclusive functions. Under the framework of the Indian Constitution, while both the Union and the State Government have independent powers to levy taxes, in a disproportionately large number of cases, it is the Union Government which collects the proceeds of such taxes and thereafter distributes them to the States. The reason advanced by the Framers for such an arrangement was their belief that the allocation of the proceeds of such levies to the States should be on the basis of their legitimate needs and requirements. The Framers believed that the responsibility for making an estimate of the needs of individual States should be entrusted to the Union Government. However, in order to ensure that the distribution of revenues amongst the State would not be left entirely to the discretion of the Central Authorities, and to facilitate periodic reviews, the Framers incorporated Articles 280 and 281 within the Constitution. These Articles provide for the appointment of an independent statutory Finance Commission which has been vested with the duty to regulate, co-ordinate and integrate the finances of the Government of India and the various State Governments.

Articles 2 and 3 of the Constitution vest the Union Parliament with special powers. By virtue of these provisions, the Parliament can, without the concurrence of the concerned State or States, change State boundaries or increase or diminish the area falling within a State or even change its name. These provisions show that in the matter of constitution of States, Parliament is paramount. This scheme substantially differs from the federal set-up established in the United States of America. The American States were independent sovereign States and the territorial boundaries of those independent States cannot be touched by the Federal Government. It is these independent sovereign units which together decided to form into a Federation unlike in India where the States were not independent sovereign units but were formed by Article 1 of the Constitution and their areas and boundaries could, therefore, be altered, without their concurrence, by Parliament. While Articles 2 and 3 were inserted to facilitate the absorption of the Princely States into the Indian Union and to meet the demands for the linguistic reorganisation of States, they provide further evidence of the intention to create a strong Centre.

The Constitutional and political history of Independent India can be studied by regarding the Eleven General Elections held so far as milestones to gauge how Indian Federalism has worked in practice.

The period spanning the years of the first three General Elections, held in 1952, 1957 and 1961 respectively, can be considered to be one of uniform characteristics. In all the three elections, the Congress, under the strong leadership of Pandit Nehru, won absolute majorities in all but a few States and also secured a winning majority in Parliament. That being so, the State Governments did not hesitate to accept the direction and, indeed, the leadership exerted by the Union Government. The policies that were implemented across the nation acquired such a degree of harmonisation that it prompted a political commentator to remark that the Constitutional distribution of powers between the Union and the States was "rendered irrelevant and inconsequential".

This period, which witnessed a strong unitary bias, saw the introduction and implementation of wide ranging social and economic reforms. Two bodies of great Federal import, the Planning Commission and the National Development Council began to function in earnest towards attaining the goals enshrined in the Constitution.

The Fourth General Elections, held in 1967 after the death of Pandit Nehru, left the Congress with a reduced majority in Parliament, as well as, in the State Assemblies. Consequently, a number of issues affecting Centre-State relations, which had hitherto remained suppressed, began to surface. The Federal scheme of the Framers was subjected to its first severe test. The Constitutional position of the Governor came to be the subject of a fierce political debate. Other issues such as those relating to finances and national planning were also contested. Subsequently, a split in the Congress and Mrs. Gandhi's consequent reliance on regional political parties, helped to improve the bargaining power of the States.

However, the landslide victory of the Congress-I in the Fifth General Elections in 1971 heralded the return of centralist policies. Demands for greater Provincial autonomy went unnoticed. The Emergency Years witnessed an era of near-complete centralisation. The Forty-Second Amendment to the Constitution was an expression of the manner in which a Government which temporarily enjoyed great powers at the Centre, could mould the Constitution to suit its convenience.

The Sixth General Elections held in 1977 marked, for several reasons, a turning point in Indian political history. Though the Janata Government rode to power professing a firm belief in the policy of co-operative Federalism, amongst its first acts was to dissolve nine State Assemblies through the use of powers enshrined in Article 356. Although, through the Forty-Fourth Amendment, it effaced much of that enacted by the Forty-Second Amendment, the Janata Government's actions did not project it as a great believer in the tradition of co-operative Federalism.

When Mrs. Gandhi's Congress-I was returned to power in the Seventh General Elections held in 1980, several State Assemblies consisting of non-Congress Governments were similarly dismissed. However, it was becoming increasingly evident that multi-party polity, characterised by the existence of different political parties holding power at the Central and Provincial levels, had come to stay in the Indian political scenario. This phenomenon was reiterated through the results of the Eighth, Ninth, and Tenth General Elections conducted in 1984, 1989 and 1991. The recently concluded Eleventh General Elections have, for the second time - the first being after the 1989 Elections - led to the formation of a coalition Government at the Centre with many of the regional parties forming Governments independently or with the help of other parties in different States.

These events clearly indicate that the political equations existing in the country today, and the situation that is likely to emerge in the years to come, demand that efforts at attaining true co-operative Federalism be strengthened. In this regard, it would be to our benefit to examine the views of eminent persons who have been specifically entrusted with this onerous task. The Sarkaria Commission, which was constituted in 1983 to review the working of arrangements between the Union and the States with regard to powers, functions and responsibilities in all spheres and to recommend appropriate measures, delivered its much awaited report in 1989. The Commission came to certain important conclusions. The first of these was that the option exercised

by the Framers in favour of a "strong Centre" accompanied by a Federal distribution of powers, is as relevant in present times as it was at the time of Independence. The Commission then stated that the Fundamental provisions of the Constitution had stood up reasonably well to the stresses and strains of a heterogeneous society moving towards its developmental goals. It, therefore, felt that it was neither advisable nor necessary to make any drastic changes in the basic character of the Constitution. The Commission, however, took note of the practical reality which indicated that the fora envisaged by the Framers for creating an environment of co-operative Federalism had not always worked well. The Commission strongly felt that there was a need for understanding properly the spirit of co-operative Federalism and for inspiring mutual confidence between the Chief Executives of the Union and the States. The Commission stated its belief that the remedy lies not so much in amending the Constitution as in bringing about a number of changes in the functional aspects of Centre-State relations. However, the Commission did recommend some significant amendments and also made some very innovative recommendations.

It is my belief that for ensuring harmonious Centre-State relations, it is imperative that genuine and concerted efforts be initiated towards attaining a spirit of co-operative federalism and to this end, the Sarkaria Commission's recommendations need to be closely analysed.

The Due Process Clause and Article 21 of the Constitution

Article 21 of the Constitution, which has the distinction of being one of its shortest provisions, reads as follows:

"21. Protection of life and personal liberty. — No person shall be deprived of his life or personal liberty except according to procedure established by law."

This seemingly innocuous proposition has been at the heart of a Constitutional maelstrom since the time when it was first conceived in the Note on Fundamental Rights prepared by the Constitutional Adviser, Sir B.N. Rau in September 1946. Much of the Constitutional jurisprudence evolved by the Supreme Court over the past two decades hinges upon the interpretation accorded to this provision. The story of why it has been so worded, and how it has come to be interpreted differently at different points of time, makes very interesting reading. This account needs to be closely examined by Constitutional scholars to gain an insight into the manner in which, over time, the interpretation given to a particular provision by the Framers may need to be changed to adapt to changed circumstances.

The provision owes its origin to the Fifth Amendment of the U.S. Constitution, the relevant portion of which reads, "....nor shall any person....be deprived of life, liberty or property without due process of law....". This last clause, known as the 'due process clause', had come to attain a very significant meaning in American Constitutional Law. The U.S. Supreme Court had used this clause to expand its power of judicial review many times over. Though initially, the phrase was looked upon as a limitation only upon the procedural aspect of legislations, in time, the Apex American Court came to wield it as a means of limiting substantive legislative power. Through this avenue, the judges bestowed upon themselves the power to decide when a law was unjustly encroaching upon the individual rights of citizens.

When the Fundamental Rights Sub-Committee of the Constituent Assembly deliberated the issue, K.M. Munshi submitted his own draft which read:

"No person shall be deprived of his life, liberty or property without due process of law."

In the deliberations, it was decided that there would be a separate provision for the right of property. In October 1947, when the Drafting Committee considered the Draft of the Article, it read as follows:

"No person shall be deprived of his life, or personal liberty without due process of law, nor shall any person be denied equality before the law within the territories of the Federation."

Towards the end of 1947, Sir B.N. Rau undertook a journey to the United States, Canada, Ireland and England to exchange ideas with jurists about the framing of the Indian Constitution. While he was in the United States, Justice Felix Frankfurter of the U.S. Supreme Court shared with Sir B.N. Rau his view that the due process clause was undemocratic in that it allowed a few judges to veto legislations enacted by elected representatives of citizens; he also believed that the due process clause placed an unfair burden on the judiciary. This exchange convinced Sir B.N. Rau that the Indian Constitution would benefit from the absence of the due process clause in its text. When the Draft Constitution was placed before the Drafting Committee, the due process clause found express mention in it. However, due to Sir B.N. Rau's efforts, in the Draft Constitution placed for consideration before the Constituent Assembly, the due process clause had been replaced by the words, "procedure established by law". This substitution was brought about to ensure that Courts would not raise objections as to the substantive justness of legislations enacted validly, but would only seek to ensure that the procedural safeguards provided in those legislations had been complied with. In this manner, it was hoped that social welfare legislations which would be necessary for the development of the nation and may incidentally infringe individual rights, would not suffer a premature, judicially ordained death.

When draft Article 15, which would go on to become the present Article 21, was placed before the Assembly, its wording became the bone of contention in a fierce debate which raged between the supporters and the opponents of the due process clause.

The supporters of the due process clause pointed out that in its eagerness to ensure that social reform legislations initiated by the new governments of independent India were not impeded, the Assembly must not neglect the need for protecting the personal liberty of individual citizens. K.M. Munshi stressed the fact that while considering an enactment which entitled the government to take away the personal liberty of individuals, Courts would, by virtue of the due process clause, consider whether the law which had been passed was required under the specific circumstances, and, thus, strike a balance between individual liberty and social control. Other supporters of the due process clause considered it to be a vital safeguard for saving citizens from the tyranny of the Legislature and the Executive.

However, the due process clause had powerful and influential opponents in the Assembly. The unsettled conditions of the nation had convinced many members that Preventive Detention laws which would necessarily infringe individual rights, were the need of the hour to combat the wave of communal violence that was coursing through

the nation at the time of Independence. These members believed that the due process clause would act as a stumbling block for the successful implementation of such laws. Moreover, they believed that the legislature ought to be trusted not to make bad laws and were loathe to allow the judiciary to sit in judgement over the will of the elected representatives of the people.

Ultimately, the Assembly decided in favour of excluding the due process clause from the text of the Constitution. However, it was a hard decision to make and even its final resolution did not put to rest all doubts. Dr. Ambedkar's comment, "no part of our Draft Constitution has been so violently criticised by the public outside as Article 15" i.e., the present Article 21, is an indication of this aspect.

As we have already seen, the years immediately after Independence were times of great optimism and hope. Pandit Nehru's Congress Government set about achieving the goals outlined for the nation and the citizens reposed great faith in the Executive and the Legislature. Under these circumstances, in the first year after Independence, the Supreme Court had occasion to decide Gopalan's case, (AIR 1950 SC 27), where it was asked to test the correctness of the procedure established under the Preventive Detention Act, 1950 upon the touchstone of the principles of natural justice. Conscious of the fact that this was precisely the issue that was so fiercely contested in the Constituent Assembly, the Court deferred to the view finally accepted by the Framers, and refused to test the substantive correctness of the validly enacted Parliamentary law. Many jurists expressed their disappointment with the ruling of the Supreme Court and pointed out that the judicial affirmation of such an authority given to the government was a potential danger to liberty. However, in the years that followed, that authority was exercised with creditable restraint and, for more than a decade, few could accuse the Executive of having wielded it for partisan purposes.

However, as the years unfurled and the idealistic optimism of the freedom struggle waned, the citizens began to lose some of their unquestioning faith in the sanctity of the actions of the Legislature and the Executive. Meanwhile, the Supreme Court had become involved in a fierce struggle with the Legislature and the Executive over the issue of the right to property and was no longer convinced that the Executive was, at all times, the best guardian of individual liberty. It was against this backdrop that the Court decided the Bank Nationalisation case, (AIR 1970 SC 1318), where, for the first time, it cast an aspersion on the correctness of the ruling in Gopalan's case. As that eventful decade in Indian history progressed, more instances of individuals being made to forego their individual liberties as a direct consequence of questionable Executive acts began to surface. During the emergency years, this trend reached the stage where the executive authorities showed scant respect for the Constitutionally-protected rights of individual citizens. These executive actions proved to be eye-openers which activated the Court in the years to come.

These and other circumstances influenced the rendering of the landmark decisions of the Supreme Court in Maneka Gandhi's case, (AIR 1978 SC 591), where it over-ruled its decision in Gopalan's case. In that case, the Supreme Court authoritatively stated that for a law to pass the test of Article 21, it must be reasonable, just and fair and not arbitrary, fanciful or oppressive. This is precisely the effect that the due process clause had achieved in the United States. Many commentators have pointed out that through the Maneka ruling, the Supreme Court had intentionally overlooked the final view of the

Framers on the issue, to reintroduce an element of Constitutional jurisprudence that had specifically and expressly been jettisoned by them.

Sir B.N. Rau had pointed out that, at the time of our Independence, 50 per cent of the litigation before the U.S. Supreme Court had, during the preceding fifty years, centred around the due process clause. He argued that to include the due process clause within the Constitution would lead to a surfeit of litigation. These fears found, to some extent, justification in factual grounds in the years that followed the Maneka ruling, as litigation before the writ courts did increase as a direct consequence. However, nearly two decades after the decision, most Constitutional experts believe that the Supreme Court was justified in treading a path that was expressly forbidden by the Framers; they argue that the exigencies of the times that we inhabit demand such a consideration.

It must, however, be emphasised that the expansion of the scope of Article 21 would not have been possible but for a similar liberal interpretation accorded to Article 14 of the Constitution which reads as under:

"14. Equality before law. - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

In the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification. The view taken was that Article 14 forbids discrimination and there would be no discrimination where the classification justifying the difference fulfills two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that the differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. This view held sway for nearly a quarter of a century.

However, in Royappa's case, (AIR 1974 SC 555), the Supreme Court broke new ground when it enlarged the scope of Article 14 and held that it embodied a guarantee against arbitrariness. In subsequent decisions, chiefly the International Airport Authority (AIR 1979 SC 1628) and Ajay Hasia's case (AIR 1981 SC 487), the Supreme Court reiterated the all-embracing scope of Article 14 and held that equality is a dynamic concept with many dimensions which cannot be 'cribbed, cabined or confined' within traditional and doctrinaire limits. It was emphasised that all State action would have to be tested against accepted principles of reasonableness.

Article 21 has been given a wider amplitude by the Supreme Court in the context of the Directive Principles, but that aspect must be analysed only after a brief study of the Constitutional history of Chapter IV of our Constitution.

The Directive Principles of State Policy

Part IV of our Constitution contains the Directive Principles of State Policy. The provisions comprising this part of the Constitution were drafted by the Framers with the hope that, through their implementation, India would attain an equitable social and economic order. It is indeed unfortunate and ironic that the Directive Principles have, at times, been conceived as being in conflict with the Fundamental Rights enshrined in Part III of the Constitution. If one were to closely analyse the evolution of these provisions, one would realise that they were intended to supplement each other and to work in concert towards achieving true liberty for all citizens.

Parts III and IV of the Constitution have to be understood as imposing obligations upon the States towards attaining an egalitarian society, characterised by the existence of true freedom. Part III, by and large, contains negative prescriptions, mandating the State not to interfere with specific liberties of individual citizens. Similarly, Part IV contains positive prescriptions which exhort the State to implement measures that would ultimately allow individuals the power to choose their own destiny, while being free from social and economic disabilities.

During the Independence movement, our leaders laid equal stress upon the positive and negative obligations of the State. At the Karachi Session of the Congress held in March 1931, the Resolution on Fundamental Rights and Economic and Social Change came to be adopted. This document emphasised the positive obligations of the State to provide citizens with the economic and social environment which would enable them to savour the freedoms specified in the negative obligations.

The 1940s saw a growing consciousness of the need for human rights being accepted across the globe. Even the framing of the United Nations Charter was greatly influenced by this trend. It was, therefore, evident that the Indian Constitution would contain a codified system of rights. However, a view which was equally accepted was that it is the State which bears the primary responsibility for the welfare of its citizens. Swami Vivekananda had, in an earlier era, expressed this belief and contemporary Western Political Thinkers had vociferously added support. Thus, both negative and positive obligations were expected to be imposed on the State conceived by the Indian Constitution.

However, when the ambit of these positive and negative obligations, and the scheme by which their attainment could be facilitated, came to be considered in the Fundamental Rights Sub-Committee of the Constituent Assembly, problems began to surface. Some of the members felt that the positive obligations should, like the negative obligations, be justiciable. Others, however, pointed out that it was inherent in the nature of the positive obligations that it be left to the State to decide how they were to be attained and to leave such decisions to be decided by Courts, which were ill-equipped for the purpose, would be unwise. The latter group was, therefore, of the opinion that such positive obligations should be set out as moral precepts for the Governments and that the jurisdiction of the ordinary Courts should be barred in these matters.

As the deliberations progressed, it was realised that some of the obligations were more amenable to enforcement by Courts than others and it was, therefore, agreed that the obligations would be divided into separate categories: the negative obligations were to be classified as justiciable and the positive obligations would fall under the category of non-justiciable rights.

Other factors that influenced such a decision of the Framers was their realisation that, in the years immediately after Independence, India would be confronted with a host of threats to its internal security and stability. They, therefore, felt that it would not be prudent to provide for a situation where the Government would be forced to launch programmes of reform even before the stability of the nation had been secured. The Framers hoped that the political institutions of the future would devote themselves to the task at an appropriate time, but, nevertheless felt constrained to impose an obligation upon them.

The provisions of Part IV of the Constitution owe their immediate origin to Article 45 of the Irish Constitution of 1937 where they are referred to as 'Directive Principles of Social Policy'. The provisions in the Irish Constitution are in the nature of matters of general guidance to the Irish Legislature. Article 37 of the Indian Constitution, however, makes a substantial departure in this regard and reads as follows :

"37. Application of the principles contained in this Part. - The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

(Emphasis added)

In the years after Independence, the Supreme Court of India was, on several occasions, required to interpret the provisions of Part III and Part IV of the Constitution. When Pandit Nehru's Congress Government began implementing programmes with a view to achieving the objectives of Part IV of the Constitution, several individuals approached the Supreme Court for the protection of their Fundamental Rights. In the first two decades, the Supreme Court tended to lean in favour of upholding the rights enshrined in Part III of the Constitution. Some commentators believe that, during that phase, the Court, being overly sensitive to the Fundamental Rights, had failed to give due importance to the Directive Principles; in their view, the Supreme Court was suffering from the misconception that the non-justiciable obligations were in some manner inferior to, and therefore less binding than, those which were justiciable.

However, by the early 1980s, the Supreme Court had veered around to the view that "harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution." (Minerva Mills case, AIR 1980 SC 1789). Since then, the Supreme Court has exhibited great sensitivity towards the objectives outlined in Part IV and has, at times, given the Directive Principles a justiciable context by reading them into the Fundamental Rights. It is because of this approach that the ambit of the word "life" appearing in Article 21 has been given an expanded meaning.

Despite the fact that Article 37 expressly makes the provisions contained in part IV of the Constitution unenforceable by any Court, the Supreme Court has in a few cases invoked these provisions in formulating its directions to the Government which did evoke criticism from some quarters. In this behalf, a recent case invoking Article 45 of the Constitution may be usefully quoted. This Article enjoins the State to set up a system to provide compulsory education to all children below 14 years within ten years from the commencement of the Constitution. Since more than thirty years after the prescribed time this objective had yet to be achieved, a Constitution Bench of the Supreme Court in Unnikrishnan's case, 1993 (1 SCC 645), elevated the status of this right to a Fundamental Right under Article 21 and the executive was directed to ensure compliance.

While such judicial measures have been largely welcomed, it must be remembered that the purpose of making the Directive Principles non-justiciable was to prevent a situation where the judiciary substitutes its wisdom for that of the legislature. The very reason for not including these matters in Part III of the Constitution was that the Constitution makers were aware that they were not capable of immediate enforcement because of existing constraints and it would be necessary to wait till the constraints had

disappeared. These constraints were social, political, as well as, economic. For example, in the case of Article 45, the constraint was an economic one. The object of Directive Principles is to embody the concept of a welfare State and therefore it was left to the State to decide when the time was ripe to introduce the same. That is why it was held that a violation of any principle by the State while framing a law would not invalidate the law. However, in some cases the Supreme Court has applied some of these principles as supplemental to Fundamental Rights. It is emphasised that Directive Principles and Fundamental Rights should be harmoniously construed. To that end, it has been suggested that even in the case of Article 45, a Supreme Court ought to have verified whether the Government had the necessary resources to implement the provision.

Moreover, the executive has raised objections against directions which require implementations of the Directive Principles even though they have no bearing on the Fundamental Rights. In this respect, some scholars have pointed out that the judicial attitude towards Article 44, which requires the State to consider the feasibility of a Uniform Civil Code, indicates the dangers inherent in such a trend. From time to time, certain judicial decisions have attempted to impel the executive to secure a Uniform Civil Code. In view of the nature of the debate surrounding the issue, this may not be constitutionally justifiable. This is for the reason that not only is Article 44 not capable of being read into the Fundamental Rights but, what is more, it has the potential of coming into conflict with some of the Fundamental Rights themselves. Articles 25 to 28, contained in Part III of the Constitution specifically vest in all persons the right to freedom of religion. Article 44 cannot be construed in a manner which adversely affects the ambit and scope of the rights conferred by Articles 25 to 28. It must not be forgotten that secularism is one of the highest ideals of our constitution and has been specifically identified as part of its inviolable basic structure. The concept of secularism has been inextricably woven into our constitutional fabric; so much so that it led scholars to describe the move to introduce the word 'secular' within the Preamble to our Constitution as wholly unnecessary. Article 44 cannot therefore be construed as impinging on or whittling down Articles 25 to 28. Such a construction would have grave socio-political ramifications. Unless the policy-makers think that the time is ripe for introducing reform in this direction, it would be hazardous for the courts to give directions in this behalf. Experience has strengthened this belief.

Conclusion

In the course of this lecture, I have endeavoured to focus on a few specific aspects of our Constitution with a view to ascertaining whether the values prescribed in it have been assimilated within the Indian ethos. It is my belief that the choices made by the Framers for the Indian populace were ones characterised by the exercise of great wisdom and that they continue to hold good in our present times. I am aware of the fact that in some respects, the Constitutional scheme has not worked as was envisaged. However, I believe that the solutions to these problems lie more in finding new ways of making the present system work efficiently than in seeking radical Constitutional changes. My views in this regard coincide with those expressed by Dr. Rajendra Prasad as he presided over the last session of the Constituent Assembly :

"Whatever 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.... 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.... We can only hope that the country will throw up such men in abundance."

Before I conclude, I would once again like to thank Dr. Wadhwa and others from the Gokhale Institute who have organised this lecture, for providing me with the opportunity to share with you my views on certain aspects of our Constitution. I hope that my endeavour in this regard will motivate scholars more qualified than I to undertake more comprehensive studies of this most vital subject.

R.B.R.R. KALE MEMORIAL LECTURES

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