

## **Indian Constitution – A case of Rethinking**

Includes excerpts from speech at The Indian Association Kolkata on Saturday 24th Feb. 2001

I am glad that the topic for discussion at this workshop is aptly worded. “The Constitution of India – a case for Rethinking”. Therefore the first issue to be decided is whether there is a need for re-examination of the Constitution at all and if so whether there should be a wholesale change rewriting a new Constitution to replace the present one or only select changes to meet the needs of the problems faced by country.

We may recall that though the constituent Assembly was not elected by adult franchise but was elected indirectly by the elected state Assemblies, it was fully representative of all sections of the people. The members were eminent patriots with deep knowledge, wide experience and wisdom and were drawn from different political persuasions. The Constitution itself is a comprehensive document. Any attempt to write a new constitution in the place of the existing one would open Pandora’s Box and may lead to confusion and chaos. Nor is it necessary to do so as most of the salient features of the Constitution like the chapters on fundamental rights and directive principles of state policy, the judiciary, election machinery etc., have stood the test to time. Our aim should, therefore, be to identify the areas where the Constitution has proved inadequate or faulty and to rectify or supplement the provisions with appropriate changes.

It is an axiom of political science that the state comes into being for life i.e. the protection of life and liberty of the citizen but it exists for good life i.e. for welfare of its people. The primary aim of any constitution is to ensure stability in administration. The founding fathers of the Constitution envisaged a strong centre run by national parties guided by national interest without parochial bias, dealing fairly and equitably with all states in all matters social, economic, educational and cultural. Through planning the Union Government pledged itself to correct regional imbalances created by the commercial interests of an alien rule. Today the situation has turned upside down. Regional parties decide who should be the Prime Minister, name the members of the Cabinet and their portfolios regardless of the competence of those nominees.

During the last ten years there had been seven governments at the centre. These minority governments have been unable to provide a stable government and stable policies. Barring Narasimha Rao government which had a precarious existence for a full term of five years others were in office for a few months each. I had the dubious distinction of appointing three and working with four Prime Ministers during the term of 5 years. Governments depending on the whims and fancies of small parties, supporting from inside or outside were all the time striving to survive in office and had no time to serve the people or the nation. Recently the situation had deteriorated so much that the smaller parties had begun to blackmail the leadership with threats of disruption of the government. Truly the tail has started wagging the head.

No progress economic, social, cultural or other can be achieved unless there is internal stability and continuity of policies. Nor can incentives for production and exports and tax concessions for industry and trade entice investment unless there is a stable government pursuing sound economic policies. For instance India made striking progress in industrial development during the first fifteen years of our Republic when we had a stable government under the enlightened leadership of Jawaharlal Nehru. In contrast France had 22 governments in 12 years during 1946-1958 until De Gaulle ushered the new constitution which was approved by the people at a referendum in 1958. Since then, France has been making striking all round progress.

India on becoming independent deliberately chose the Westminster type of parliamentary democracy. Most of the leaders of the struggle for freedom were from the legal profession with skills to match the foreign government in knowledge and debate. Many among them have had their education, general and legal, in England and had imbibed the liberal traditions of Mill and Laski. Besides, Britain in their days was a super power spread over the entire globe and it used to be said that the sun never set in the British Empire. Authors and pundits extolled the British Parliamentary system so profusely that it appealed to many intellectuals in the world as an unerring model for others to follow. Ivor Jennings described the British constitution as one of the strongest if not the strongest in the world. Dr. K. N. Munshi one of the architects of our constitution summed up the prevalent thinking at the time in his speech in the constitution Assembly. He said "Most of us and during the last several generations before us, public men in India have looked up to the British model as the best. For the last thirty or forty years some kind of responsibility has been introduced in the governance of this country. After this experience why should we go back on the tradition that has been built for over 100 years?"

No wonder, we adopted the Westminster type of parliamentary democracy with the addition of a few chapters such as Fundamental Rights and Directive Principles of State Policy etc. During the first decade, when the stalwarts of the freedom movement brewed in selfless dedication, service and sacrifice held sway of the country; India functioned as a mature democracy and elicited the admiration of the entire world including that of the skeptics who doubted the chances of adult franchise working satisfactorily among unlettered people. In international forums like the United Nations and others we were heard with respect and attention. Our felicity of expression in the international language namely English gave us an added advantage over the others. That decade provided stability and growth to the central and state governments.

Our experience during the last decade has proved that minority government based on the support of small parties, either from inside or outside the government, has been an exercise in self-deception. The minority governments had not been able to act freely and have had to look over their shoulders all the time nervous, anxious and uncertain as to how the supporting parties will behave. The minority governments had to spend all the time placating their supporters and making unconscionable concessions and compromises. Very often the supporting partners had brought down the government on trivial and inconsequential issues.

There are two ways of meeting the situation. One is to educate the masses on their duties and responsibilities to the State. This of course is the Gandhian path resting on self improvement, an ideal one. But this can be achieved only in the long run. By that time generations would have passed away and as Keynes said, “in the long run we are all dead”.

The other course adopted by all countries in the world is to enact laws preventing abuses and malpractices and enforcing conduct necessary for an orderly society. For instance defection in our Parliament became a menace to democracy. We enacted the Anti - Defection Law. It has proved ineffective since we penalised individual defection and approved mass defection. We did not realise that defection by one or many is a violation of the manifesto on which they have been elected. Similarly a law debarring the criminals and the corrupt from contesting elections may cleanse our political system. Laws are enacted for the purpose of maintaining an orderly society. It was only to prevent misdeeds that the Indian Penal Code was enacted. Nobody opposed it saying that the people should reform themselves. Likewise when the political system of the nation shows cracks, it is incumbent on the present generation to repair it with changes in the statutory and fundamental laws of the land.

It is argued that accountability more than stability is the hallmark of democracy and that parliamentary system ensures the highest accountability of the Executive. This is absolutely correct and incontrovertible. But this proposition implies there is an executive to account to Parliament. If, as I have stated earlier there were 22 governments in 12 years as in France, and 7 governments in 10 years as in our country, there will be no government to render account. Stability without accountability is dictatorship. Accountability without Stability is chaos. Therefore, the question is not Stability *or* Accountability but Stability *and* Accountability that should be achieved by the Constitution. This has been accomplished by the United Kingdom, and it is worth delving into the reasons for its success.

## TWO PARTY SYSTEM

The Westminster type of Parliamentary Democracy on which our Constitution has been modeled has many attractive features. The Prime Minister being the leader of the majority party in Parliament is able, unlike the American President, to carry out his policies and programmes without any hindrance. Besides, the chances of conflict between the legislature and the executive are minimal. Furthermore, Executive's accountability to Parliament is total and the continuance of the government itself depends on the support of the majority in Parliament. However, if the major parties, Conservatives and Labour, split into two each, all tangles which plague Indian Parliament will be re-enacted in Britain also. Ivor Jennings dealing with prerogative of the Crown to decline the Prime Minister's advice for dissolution of the House in limited cases in his book “Cabinet Government” (3<sup>rd</sup> edition pp.427 and 428) has said that while the Queen's personal prerogative to dissolve the House is maintained in theory there are hardly any circumstances in which it could be exercised in practice. He added that this assumed a continuance of the two party system. “If major parties break up, the whole balance of the constitution alters and then possibly the Queen's prerogative become important.” (*vide* Hood Philips Constitutional and Administrative Law – 7<sup>th</sup> Edition page 154 &155). Ivor Jennings himself concedes that the British model is based on a two-party system and the whole balance of the British Constitution will change if the major parties in Britain break up like ours.

Therefore, if the present Constitution should function satisfactorily two reforms, (1) change in the electoral system and (2) de-recognition of more than two political parties are indispensable. Most of the current discussions on electoral reforms address themselves to issues like regulation of parties, regarding their constitution, registration audit and disclosures or regulation of election expenses, party spending on candidates, state funding etc., The relative merits of the direct election of members by territorial constituencies and by proportional representation by parties or an admixture of both also comes up for discussion. But the basic principle of representative democracy barely receives necessary in depth study.

In ancient history Greece and Rome had city states where people directly approved or disapproved the proposals of the government. With the advent of larger states, governments constituted by the peoples` representatives came into vogue in democratic countries. A parliamentary democracy requires representative government, which will truly reflect the public opinion or as Mill called the “General Will” of the people. An ideal democracy is one which functions in consonance with the Public Opinion in the country. A house constituted by electoral malpractices such as booth capturing, rigging, bribery or coercion of the electorate can hardly be “representative” of the people. Likewise an electoral system which does not reflect the majority view of the electorate cannot be called democratic notwithstanding the holding of periodical elections and maintaining the trappings of democracy.

#### CHANGE IN ELECTORAL SYSTEM :

In a multi-party system no candidate to the legislature normally secures more than 50% of the votes cast in his constituency. Each candidate usually secures say 35%, 30%, 25% of the votes cast and the candidate who gets the largest number of votes is declared elected. Similarly if in all the other constituencies the candidate with the largest number of votes (but not a majority) is elected, the House so constituted reflects the minority and not the majority of the voters. In a two party system such an aberration does not occur as one or other party has to secure a majority of the votes in every constituency. In none of the general elections held in India since 1952 did the ruling party ever get a majority of the votes cast. For instance the Congress party which secured a massive 415 seats in Lok Sabha in 1984 polled only 48.1% of the votes cast. Likewise the Janata Government in 1977 which secured 296 seats in Lok Sabha polled only 43% of the votes cast. For the last 50 years India had been governed by a minority of votes. This defect has been remedied in France where if no candidate to the National Assembly (Parliament) secures more than 50% of the votes cast, there is a “Run Off” a repoll between the top two candidates and the successful candidate is declared elected. By this process the National Assembly always represents the majority of votes cast. This may be effected by amendment to the Peoples Representation Act and will not call for the amendment of the Constitution.

Objections have been raised to the proposal for a second vote on the grounds

- a) that the second vote will delay the constitution of the national Parliament
- b) that it will be almost like a second general election as none of the candidates will be elected on the first count and
- c) that it will involve enormous expenditure.

I am of the view that as the second vote is like a re-poll in certain constituencies. With no revision of electoral roles and no fresh nominations, with the same polling booths and the same original set up, it should not cause a delay of more than a week. Secondly, though initially i.e. till the candidates understand the system there may be large number of the constituencies where there may be a second vote, this will correct itself as the candidates will learn that they cannot make it to the top two positions and will not gamble in the elections. And if, as I had suggested elsewhere, severe penalties like debarring those who forfeit deposits from contesting for any statutory office for six years are adopted frivolous candidates will gradually disappear from the scene.

Thirdly, I agree that the second vote will cause extra expenditure but it is worth spending in order to ensure that the Parliament and the government represents the majority of the votes cast in the election. After all there can be no bargain between Democracy and cheaper form of government.

The Law Commission has fully taken note of the weakness in direct election through territorial constituencies in a multi-party system. To remedy the hiatus between votes polled and seats secured the Law Commission has suggested adoption / adaptation of the German electoral system which provides for 50 per cent seats to be filled by territorial constituencies and the other half by proportional representation, from the list filled by parties, according to the votes polled in the general election. The Commission has suggested that the Lok Sabha be enlarged by 25% of its present strength and that 25% be filled by proportional representation according to votes polled by the parties. Apart from the scheme being too complicated for our electorate, I am not sure that 25% of seats filled by proportional representation will correct the distortion caused by 75% of seats elected on the principle of First Past the Post. Secondly a person chosen from the list by proportional representation may be undesirable, criminal or corrupt. The citizen has no right or opportunity to vote him down. The Lok Sabha is the custodian of the national finances and it is the House that has power to appoint or dismiss a government. Lok Sabha Members are answerable to the electorate. To induct into the Lower House a member who has no constituency to face and no direct obligations to the people is to dilute the primacy of Lower House recognised in all democracies in the world. I am not sure whether this rule in Germany is part of the Constitution drafted by the occupying powers or a later amendment. I wonder if there is any other democracy which has indirectly elected members in the Lower House.

## DE-RECOGNITION OF MORE THAN TWO POLITICAL PARTIES :

Under our electoral system the Election Commission is empowered to recognise and de-recognise political parties. The de-recognised parties lost certain privileges, the most important of which is the right to a common symbol for their candidates. In order to reduce the number of recognised parties to two, it may be statutorily provided that all parties which secure less than 10% of the votes cast in the next Union General Election shall be first de-recognised and that thereafter the party that secures the lowest number of votes in each general election shall be de-recognised until the number of recognised parties is reduced to two.

The present parliamentary form envisaged in the constitution may be expected to work satisfactorily if the electoral reform and recognition of only two parties are incorporated in the present constitution.

This scheme, I am advised, will not be violative of the Fundamental Right to form associations or unions, since the scheme does not interfere with formation of political parties but will only restrict their right to recognition for electoral purposes. Even a constitution amendment, if necessary, will be in the best interest of the Nation.

I am not sure whether even a two party system will ensure stability in government in our country. It is still possible for a chunk of the ruling party to cross the floor and defeat the government. It first happened in Kerala and thereafter in other states also. Perhaps a more stringent Anti Defection Law debarring every defecting member, whether one or one-third of a party, from any election to any statutory body from Panchayat to the President for six years may put a sense of responsibility in the minds of the legislators.

## CONSTRUCTIVE VOTE

One immediate measure to reduce kaleidoscoping changes in government, which does not require any constitutional amendment or other elaborate changes is to provide in the Rules of Procedure of the Lok Sabha that a motion of no confidence against the ministry should in the same motion name the Prime Minister to succeed the present incumbent if the motion was carried. This system the constructive vote prevails in Germany where there is a multi party system. The motion for the removal of the Chancellor should name the successor in the motion itself so that if the motion was carried there would be another Chancellor already chosen by the House. The constitution of India prescribes that the Council of Ministers shall be collectively responsible to the House of People. It is the Rules of Procedure which define the mode of removal of the ministry. The Lok Sabha is therefore fully competent to adopt the aforesaid rule.

Democracy is a government by the citizens themselves. The people should realise that they are responsible for choosing the right and proper persons to represent them in the national affairs. In colonial administration the Government was different from the people. Those

governments ruled without the consent and concurrence of the people. This old concept still persists in the masses today. They do not realise that the general election is the occasion for them to choose a government for themselves. On the contrary, the masses feel that the franchise is a patronage to be conferred on their kith and kin, or the local candidate, or one of their caste and religious fraternity. In mature democracies people who change his party affiliation or cross the floor seldom get reelected by the electorate. They do not trust him to stand firm by the policies and programmes proposed by him. In India, a person who was in the Congress Government and immediately thereafter in the Janata Government and then in Chandrasekar Government was reelected and came once again into the Congress Government.

The electorate votes for a criminal or a corrupt candidate and bemoans that they have a bad government.

Furthermore, the electorate does not realise that even as they contribute to their own household expenditure, they have to contribute to their country's governance. They are easily misled by unscrupulous promises of political parties of free food, free clothes, and free electricity, free everything. Even enlightened people plead for tax concession, subsidies and incentives oblivious of the fact that they are met by borrowing which in turn imposes burdens indirectly on themselves.

Besides in true democracy the people voluntarily observe the laws rules and regulations as they are forged by themselves in the interest of good governance. It is only because 90% of the people abide by the laws and 10% transgress them that the state is able to maintain order and harmony. If the situation were reversed with 90% transgressing the law and 10% abiding by it, there can be no organised society, no peace and harmony. Some of the advanced countries notably Switzerland have perhaps the highest degree of compliance. A mere board stating that the road is closed will be complied with by 100% of the people.

Therefore, the chief malady that afflicts our democracy is absence of responsible electorate. We have an electorate consisting mostly of illiterate, uninformed, poor and starving masses. The struggle for existence obliterates all the finer qualities of man.

Rome was not built in a day nor a democracy in a century. Britain became a mature democracy after 800 years from the days of Magna Charta. Britain went through a prolonged persistent struggle for devolution of authority from the crown to the people. She had also patches of nepotism and corruption during the period of the struggle. Students of British Constitutional history will recall the notorious statement of Prime Minister Walpole that every man had a price.

Unfortunately, India did not try to educate its masses on its duties in a democracy. Our leaders assumed that the masses were all Nehrus, Patels and Azads. Had we introduced in all schools subjects like citizenship duties and moral instructions, the present generation of voters would at least be conscious of the duties of a citizen in a democracy. During the discussions on the People's Representation Bill in the Provisional Parliament in 1951, I had pleaded for compulsory voting by the electorate so that the citizen may realise that it is a duty to the state and

not a patronage to be conferred on their favourites. Even now it is not too late to introduce compulsory voting for the central and state Assemblies. Australia had introduced compulsory many years ago.

As a result of all these short comings, the sovereign people of the country and even intellectuals want the failures to be cured by legislation. They vote for the criminal or the corrupt but want a law to prevent criminals and the corrupt from standing for elections. The law makers search for a definition of a criminal and the jurists come to the conclusion that only a man convicted of a crime can be called criminal. Since it takes years to get a conviction and get it confirmed in the highest court, the criminal (in common parlance) will have a merry time for two or three terms in the legislature.

A new menace has appeared in our electoral process in recent times. It is the plethora of non-party candidates filing nominations in general election. In recent times, the ballot paper has run to two or three pages. Increasing security deposits will hurt genuine candidates. It may, therefore, be provided statutorily that a candidate will forfeit deposit if he polls less than 20% of the votes cast and one who forfeits deposit in the National and state elections shall be debarred from contesting for any elective post in a statutory body from Panchayat, cooperatives to the President for a period of six year. This will enable smoother election for offices of national importance.

I have been suggesting in a number of forums that nascent Democracies should form a national government consisting of all the eligible parties in Parliament. In my view the problems of poverty, disease, destitution and death cannot be handed by a single party and that all the parties should face these problems in unison. The politics of confrontation between government and opposition does not suit countries struggling to keep the body and soul together.

Since that is separate topic I am refraining from going into the scheme. There are other issues of importance:

1. Like electoral reforms
2. Transferring some items from Directive Principles of State Policy to enforceable fundamental rights
3. The powers of the President
4. The Role of Governors
5. Parliamentary Privileges vis-à-vis Judicial Review
6. The expanding jurisdiction of the judiciary
7. Judicial reforms
8. Centre – State relations particularly Political and financial relations .

These require an in depth study by groups of experts. That these areas require review in the light of our experience during the last 50 years cannot be denied. There are critics who bemoan that we had amended the constitution far too frequently, unnecessarily and unwisely. It is true that the constitution has been amended 78 times in 50 years; but these figures do not prove anything. A close scrutiny of these amendments reveal that 24 amendments relate the reorganisation of States, creation of new ones or inclusion of language in the schedule 16 amendments deal with financial limits, number of seats in legislature prescription age which had been embodied in the constitution itself instead of relegating to ordinary legislation. A few amendments relate to those enacted during emergency and their subsequent repeal and some amendments bring certain legislation under the protection of the ninth schedule of the amendment. Only 26 amendments were of a substantial nature which by no stretch of imagination may be called extravagant.

No constitution is perfect nor can it envisage future changes in concepts and conditions of the Society. The constitution must move with the times.