

THE CONSTITUTION - TWENTY FIVE YEARS LATER

BY M.R. MASANI

I

280

The lapse of a quarter century is perhaps not a bad time to cast a glance back at the birth of our Constitution on January 26, 1950, and to consider what has been happening to it since. A legitimate exercise for any student of history, this may prove an even more interesting one if undertaken by someone like myself who was privileged to be one of the Founding Fathers of the Republic and who played a part, albeit a modest one, in the framing of the fundamental law of the country. It is only natural that when such a review is made several surprises await one.

The Constitution of a country, it has been said, "provides only the skeleton of the body politic. It is politics which provides the flesh and blood." The protection of the Constitution calls for the exercise of eternal vigilance. Dr. B.R. Ambedkar, one of the architects of the Constitution, in one of his many speeches to the Constituent Assembly placed the onus of the successful working of the Constitution squarely on the shoulders of the people and particularly on those of the political leaders. "If things go wrong with the new Constitution," he said, "the reason would not be that we have a bad Constitution. What we will have to say is that Man was vile."

There is a school of thought in this country which holds the view that, with the flux of time and the need for change, the provisions of our Constitution have become somewhat anachronistic. I do not happen to share this view. Indeed, I enjoyed reading the reply given to this comment by Mr. N.A. Palkhivala in his recent book "Our Constitution - Defaced and Defiled" when he wrote, "In fact it is good faith and the sense of decency and honour which have unfortunately become anachronistic in our public life today."

Be that as it may, let us have a look at the two aspects of the Constitution as it was framed and the way in which it has worked out: the Federal Structure, and the Role of the President and the Governors.

FEDERAL STRUCTURE AND STATES' RIGHTS

The subject of the Federal Structure and States' Rights is one in which my interest dates back to my membership of what was described as the Union Powers Committee of the Constituent Assembly which was appointed on a motion by Rajaji on 24th January 1947 to examine the scope and content of the subjects that should be allotted to the Centre.

It was in this Committee that, perhaps for the very first time, an issue which was later to develop into a major dividing line in Indian politics came up in an embryonic way. I recall a significant passage at arms that took place between Pandit Jawarhal Nehru, our Chairman, and myself. When Nehru asked for an expression of members' views as to which list Planning should figure in, I promptly answered it should be in the States' list. Nehru glared at me and said he entirely disagreed; it should be in the Union List. This was to be the first of many arguments he and I were to have about the nature of Planning, since he believed in Soviet-style, comprehensive planning and I in the Gandhian concept of a decentralised economy. Nehru, of course, won and the subject was placed in the Concurrent List covering matters in regard to which both the Union and the States could legislate. [The report of our Committee observed: "We have included planning in the above list for the reason that although authority may rest in respect of different subjects with the units, it is obviously in their interest to have a co-ordination machinery to assist them."]

All the same, the States' List included three important entries, namely, Industry, Trade and Commerce and the production, supply and distribution of goods. On the other hand, the Union List included only "industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war" and "industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest."

The way in which this allocation of subjects has worked out has unfortunately upset the balance of our Federal structure. Not only did Parliament enact the Industries (Development and Regulation) Act in 1951 specifying the list of industries which should be controlled by the Centre but, in course of time, more and more industries were added to the list and, for all practical purposes, the subject of Industries was virtually shifted from the State to the Union List. The Annual Survey of Industries shows that, in so far as undertakings with a fixed capital of Rs.2.5 million and over are concerned, the Centre has now asserted its control over as many as 93 percent of such industries as computed by the value of their output. It has been sarcastically pointed out that Parliament has used its power to hold that the public interest demands that among the industries which it should control are the production of articles of such vital and strategic importance as razor blades, gum, shoes, cosmetics and toilet requisites!

This is only one of the ways in which 'socialist' policies and the series of Five-Year Plans has contributed to the erosion of the autonomy of the States and made them little more than glorified District, Local Boards or Municipalities. Similar distortions have taken place in regard to Law and Order, Education, Industry, Agriculture and Labour, all of which are primarily State subjects. Yet, in respect to each of these subjects, there is a full fledged Ministry in the Union Government duplicating these functions, each with an unproductive bureaucracy eating into the country's scarce resources.

Yet another example of this trend is the manner in which the Centre has monopolised the media of mass communications. All India Radio and Television, which should really be public services at the disposal of the Union Government/State Governments, not to mention voluntary associations and the public at large, is run departmentally by a Ministry of the Union Government. The only way in which the rights of the States could be asserted and these important means of communication freed from the dominance of the Centre would be to give effect to the recommendation of the Chanda Committee that the Broadcasting and Television Services should be placed in charge of autonomous statutory corporations like the BBC and ITA in the United Kingdom.

If there is one country that needs a Federal structure more than others, it is India with its area, population and wide diversities of race, religion and ways of life. Even the maintenance of a free and pluralistic society cannot be assured in such conditions except on the basis of genuine Federalism and the guarantee of States' rights. The Constitution when it was framed established what was described as a tight Federation with less autonomy for the States than in most federal Constitutions of the world, such as those of Switzerland, Australia and the U.S.A. It is unfortunate that the balance has been tilted further during the last twenty-five years in the wrong direction.

ALIENATION

In this context one has to take note of a growing sense of alienation from the Centre which is stronger in some states like Kashmir, Nagaland, Tamilnadu and Goa than in others. To this list, Sikkim will now have to be added. This alienation has legitimate historical and economic aspects. In a country of this size, regional aspirations as also linguistic and other tensions are all too real. They cannot be wished away. They need to be handled with sympathy, understanding and imagination. Sheikh Abdullah, the Vazir-e-Azam of the State of Jammu and Kashmir, has quite rightly urged that the claim for more autonomy by the States should not be interpreted as inconsistent with the integrity of the country and he has deplored the tendency in certain quarters to dub as "sessionists and traitors" anybody who pleads for greater autonomy for the States of the Union. *None*

What then is to be done to rectify the imbalance? I for one am convinced that no Amendment of the present Constitution is called for, since it is not the Constitution which is defective. I am glad that in April this year the Union Government has announced its agreement with the Administrative Reforms Committee that no amendment is necessary for ensuring proper relations between the Centre and the States. What is needed, is the acceptance of appropriate conventions to reflect the spirit as well as the letter of the Constitution. There is ample scope within our Constitution for Federalism provided there is a continuing process of consultation with the States, the Union Government scrupulously avoids any suspicion of partisanship in dealing

with a particular State and a continuous search is made for associating the States in the decision-making processes of the Union.

[In so far as the economic imbalance is concerned, this can be put right by assuring the States of a steady pre-determined flow of resources on the basis of leaving no room for arbitrary discretion on the part of the Union Government. The principles of allocation of central assistance for the Four Year Plan that had been laid down by the National Development Committee constitute a useful starting point. The actual allocation of resources in the light of these criteria should be undertaken by the Finance Commission with a permanent secretariat ensuring continuity of its functions.]

'STRONG CENTRE'

In dealing with this subject, one comes up against the fear or prejudice to which Sheikh Abdullah has referred that the assertion of the States by their autonomy would mean a weakening of the Centre and that what India needs is what is popularly known as a 'strong centre.' This is a fallacy which is not peculiar to this country. It led Mr. McGeorge Bundy, now the President of the Ford Foundation, to write his stimulating book called The Strength of Government. "Not only is there no contradiction," writes Mr. Bundy, "between strength in Washington and strength at the State house and in city hall - the three kinds of strength are in fact mutually indispensable. We must reorganise our thinking so as to understand this necessary partnership of effective power."

Mr. Bundy goes on to make another interesting point that the root of this confusion is the myth that strong government means big government. How accurately this remark applies to the current thinking in New Delhi! According to Mr. Bundy, it is important that a government should not "confuse strength with size, or effectiveness with a passion to do everything itself."

ONE PARTY DOMINANCE

Perhaps the biggest single factor that has made for the erosion of States' rights and which comes in the way of their restoration has been the dominance of one political party at the Centre and in most of the States during the past quarter century. Not only is such pre-dominance bad for democracy, it is specifically bad for the maintenance of the federal system.

[There was indeed a break in this for a short time when, as a result of the General Elections in 1967, the ruling party lost its control over several States and remained in power at the Centre only by a wafer-thin majority. Unfortunately, thanks to the unprincipled and opportunistic behaviour of the opposition political parties who joined in the SVD governments which disgraced themselves all the way from the Punjab to West Bengal, the short spell of genuine federal polity in India came to an end.]

The conclusion to which one comes is that the establishment of sound conventions for the restoration of the federal system and of the States' rights that go with it will have to await a better distribution of political power in the country and the existence at any given time of several State governments of a different colour from that of the party which may be in office in New Delhi.

68

MRM:rs
6.5.75

THE CONSTITUTION - TWENTY FIVE YEARS LATER

BY M.R. MASANI

II

ROLE OF PRESIDENT AND GOVERNORS

It was on 21st July 1947 that Jawaharlal Nehru moved for the consideration of certain draft principles concerning the powers of the President and the Governors. He did so in a speech which revealed the beginnings of the ambiguity and the confusion which were to prevail on this subject and which still continue. "We want to emphasise," he said, "the ministerial character of the Government, that power really resides in the Ministry and in the Legislature and not in the President as such. At the same time we did not want to make the President just a mere figure-head like the French President. We did not give him any real power but we have made his position one of great authority and dignity. You will notice that he is also the Commander-in-Chief of the Defence Forces just as the American President is."

Pandit Nehru's ambivalent attitude reflected in fact the consensus that emerged in regard to the role of the President. This was that he should not be a mere titular Head of State like the British Crown on the one hand nor an executive President like the President of the United States on the other. The President we wished to create for ourselves was to be someone mid-way between these two. While we decided for a Parliamentary as opposed to a Presidential form of Government, the kind of office of President we contemplated was rather like what President De Gaulle created for himself when he took over as President at the end of the Fourth Republic.

The terms of the Constitution are clear and unambiguous. It provides by Article 74(1) that "there shall be a Council of Ministers, with the Prime Minister at the head, to aid and advise the President in the exercise of his functions." Article 75 goes on to provide that "the Prime Minister would be appointed by the President and the Ministers would hold office during the pleasure of the President."

Similarly Article 163(1) provides in respect of the Governor of a State that there should be a Council of Ministers, with a Chief Minister at the head, to aid and advise the Governor in the exercise of his functions, "except in so far as he is by or under this Constitution required to exercise his functions or any of them at his discretion." Article 163(2) lays it down that the decision of the Governor in his discretion in regard to whether or not he can act in his discretion in any particular matter should be final and cannot be called into question. Article 164 goes on to say that the Chief Minister would be appointed by the Governor and that the Ministers would hold office "at the pleasure of the Governor."

One would have thought that the terms of the Constitution were clear

enough. According to the Concise Oxford Dictionary, the term "to aid" means "to help" and the words "to advise" mean "to offer counsel to." The essence of advice is that it leaves the person advised free to accept or reject it. In a Parliamentary form of government, it is well understood that the Head of the State would normally be guided by the advice of the Cabinet or the Council of Ministers, but that does not take away his legal or constitutional right to override the Cabinet whenever he feels called upon to do so and to face the consequences. Indeed, Dr. Rajendra Prasad, the President of the Constituent Assembly, gave expression to this view as early as May 23, 1949, when he said that Article 74(1) (which was then draft Article 61(1)) "does not lay down that the President is bound to accept advice."

PRESIDENT VS. PREMIER

It was not long after the Constitution was enacted that the issue came to a head. On September 18, 1951, President Rajendra Prasad sent Prime Minister Nehru a note in which he expressed a desire to act on his own judgement when giving assent to Bills, when sending messages to Parliament and when returning Bills to Parliament for reconsideration. This move was obviously inspired by the concern caused to Dr. Rajendra Prasad personally by the Hindu Code Bill which had just been introduced in the Provisional Parliament. The Prime Minister referred the matter to the Attorney-General, Mr. M.C. Setalvad, for opinion and the latter on September 27, 1951, opined that under Article 74(1) the President is required to act in all matters with the aid and advice of his Council of Ministers. It may be noted that the opinion is somewhat peculiarly worded. It does not say that the President was bound to abide by the advice of the Cabinet, though that undoubtedly was what was suggested. As it happens, Dr. Rajendra Prasad did not persist in his view.

Notwithstanding the fact that the President is designated by the Constitution as the Supreme Commander of the Defence Forces, Dr. Rajendra Prasad also allowed himself to be ignored by the Prime Minister in a dispute between Defence Minister V.K. Krishna Menon and General Thimaya, Chief of the Army Staff. Though a member of Parliament, I was not then in Delhi and followed the developments through the press, but I felt that the Prime Minister had been unfair to the General and had behaved in a way which was bad for the morale of the armed forces.

I asked for an interview with Dr. Rajendra Prasad whom I had known from as far back as 1934. I told the President during our talk that I felt aggrieved about his not asserting his rights as the President and Supreme Commander of the Defence Forces. I was interested to find that the President appeared to be rather pleased at the grievance I had made and was in agreement with my view. He pleaded his helplessness, but thanked me for my concern.

Later Dr. Rajendra Prasad was to raise the issue publicly. Addressing the Indian Law Institute on November 28, 1960, he said: "There is no provision in the Constitution which in so many words lays down that the President shall be bound to act in accordance with the advice of his ministers." He criticised attempts "to invoke and incorporate into our written Constitution by interpretation the conventions of the British Constitution, which is an unwritten Constitution."

THE 1967 CONTEST

It was not till the Presidential elections of 1967 that I found myself involved again in this particular aspect of the Constitution. The Congress Party had put up Dr. Zakir Hussain as their nominee and as leader of the United Opposition which included not only my own Party (the Swatantra Party), but all the other six opposition parties namely, the Jan Sangh, the DMK, the two Socialist Parties and the two Communist Parties, it fell to me to nominate former Chief Justice K. Sabharwal as our candidate.

I had to enter into a certain amount of correspondence with the Prime Minister over these rival nominations and I had occasion in my letter to her dated 26 April 1967 to write:

"In our view, the election of the President should be viewed against the background of the changed political situation resulting from the recent General Elections, with particular reference to the coming into existence of State Governments of political colours different from that of the Union Government. This, in our view, demands that the President of the Republic should act as a true interpreter and defender of the Constitution. Another relevant development is the composition of the new Lok Sabha where your Party enjoys only a slight edge and where situations similar to those which recently arose in certain States may well develop. A great deal will depend upon the judicious and democratic approach that the President brings to bear and the objective and dispassionate manner in which he acts in such circumstances."

The considerations then urged by me continue to apply with particular force to such acts of the President as the declaration of an emergency and the promulgation of an Ordinance. Article 352 lays it down that "if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect."

Similarly, Article 123 lays it down that "If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require."

WHOSE SATISFACTION?

The important question arises whether the satisfaction that to be experienced by the President that certain circumstances exist which make it necessary for him to promulgate an Ordinance or proclaim an Emergency should be that of the President himself or that of his Council of Ministers. So far, all Presidents have behaved as if they had no personal responsibility for judging the merits of the situation and they have acted as rubber stamps of the Prime Minister and the Cabinet. In my view this is a mistaken understanding of their responsibilities since the satisfaction has to be that of the President himself who should rely on his own judgement as to whether or not the advice of the Cabinet is sustainable on the merits.

As it happened, an opportunity arose for me to do my bit to get this point tested in the Supreme Court when President Giri promulgated an Ordinance nationalising fourteen major banks on the afternoon of Saturday 21st July, 1969, notwithstanding the fact that the Lok Sabha was due to meet on the morning of Monday, 23rd July. I felt that this was a fraud on the Constitution and a violation of the President's responsibilities. Mr. N.A. Palkhivala, who agreed with me, drafted a petition challenging the validity of the Ordinance. It was filed in the Supreme Court on 23rd July, my friend Balraj Madhok, then Deputy Leader of the Jan Sangh joining me as a co-petitioner. We alleged that our rights as members of Parliament to consider the issue of the nationalising of the banks on its merits and in debate had been filched by President Giri's action in facing us with a fait accompli. We claimed that the grounds that were necessary for the promulgation of an Ordinance did not in fact exist since Parliament was to meet within thirty-six hours. Unfortunately, our petition never came up for hearing on the merits and the question that we had sought to raise still remains unanswered in so far as the Supreme Court is concerned.

"PHONEY" EMERGENCY

Even more grave considerations apply in the case of the proclamation of Emergency. On more than one occasion this power has been grossly misused by the President being persuaded wrongly by the Prime Minister and Cabinet to continue a State of Emergency long after the occasion for it has disappeared. This was so in the case of the emergency which was proclaimed during the Chinese Communist invasion of India in 1962. So it is today in the case of the current Emergency proclaimed in connection with the war with Pakistan which, despite the restoration of peace, has been going on ever since for no reason except the convenience of those in office. It is clear that under the Constitution, the Proclamation of Emergency should only last so long as the conditions prescribed in Article 352 of the Constitution obtain and a former Attorney-General Mr. C.K. Dapthary has rightly referred to the present

State of Emergency as "a phoney emergency."

It is relevant to point out that one of the sinister consequences of an undue prolongation of such a Proclamation is that, under the proviso to Article 83 of the Constitution, the life of the House of the People can be extended by Parliament for a period not exceeding one year at a time and such extensions may last for a period of six months even after a Proclamation has ceased to operate.

In the light of what has happened recently in Ceylon and Bangla Desh, the apprehension that has been expressed that this phoney emergency may some day be used to prolong the life of the Lok Sabha beyond its legal term cannot be dismissed as far-fetched. Mr. Jayprakash Narayan is therefore perfectly justified in making this one of the issues of his campaign and one of the demands of the Charter which he presented to the Speaker of the Lok Sabha and the Chairman of the Rajya Sabha on 6th March, 1975.

2162

MRM:rs
7.5.75