

4939

APPEAL FOR PUBLIC DEBATE

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Dear Friend,

You are aware that in the recent past ominous hints have been thrown by important leaders of the ruling party saying in substance that our Constitution was drafted by an unrepresentative body which even included the princes. The suggestion is that it requires basic alteration and that if the Supreme Court comes in the way of altering the basic structure, a constituent Assembly may have to be convened for making basic changes. In the higher circles of the ruling party, a draft of such amendment is being privately circulated for consideration by important members of the ruling party.

That draft, according to the best of my information, is the one which I am annexing herewith.

A perusal of the draft will show that what is being proposed is :

1. Vast concentration of power in the hands of the President.
2. Virtual subordination of the judiciary to the Executive.
3. Judiciary to be robbed of the power to decide finally the interpretation of laws.
4. Fundamental rights made not justiciable - article 13 to be repealed.
5. Parliament not to be "too independent" of the executive.
6. End of seven freedoms guaranteed by article 19 (by deleting the word "reasonable" in article 19).
7. End of federalism (because no law of Parliament can be challenged in Courts even on the ground of legislative incompetence).
8. No safeguards against preventive detention.
9. Drastic curtailment in the rights of minorities.
10. Legalising administrative absolutism by deleting articles 32 and 226 - end of judicial review of administrative or legislative action.
11. Robbing the Government servants of constitutional protection.
12. Arming the executive with the power to ban opposition parties (see use of vague words "anti-national", "anti-social").

It is hardly necessary to comment on these proposed alterations. If permitted to be carried out these will spell the end of the fundamental liberties of the people and establishment of uncontrolled, unchecked, absolute authoritarian rule.

The worst feature is that such drastic changes are proposed without any public debate and behind the *pardah*.

Kindly give your thought to this and raise your voice of protest if you feel that the great democratic Constitution of India is sought to be totally destroyed by power hungry politicians.

These basic changes may be carried out in the ensuing session of Parliament unless public opinion asserts itself.

Yours faithfully,
(Sd.) C. T. DARU.

A FRESH LOOK OF OUR CONSTITUTION

SOME SUGGESTIONS

The present system of Government, most will agree, has not come upto the expectation of the common man of our country. Some variation is, therefore, warranted in the light of the experience of the working of democracy in our country during the past 25 years. The pattern subsequently may have to be changed if the ideal of development of the common man, socially, educationally, culturally and economically within the frame-work of democracy is to be achieved. Towards this end, among other things, the unobstructed working of the executive, in the interest of the people within the full period of the mandate that they give to the executive at the time of the free and fair elections, must be ensured, so that the nation's chief Executive Officer puts the requisite authority to the fullest use of the nation without let or hindrance, fear or favour, according to his wisdom and conscience. The time of the Chief Executive should not be allowed to be frittered away in fruitless debate and discussion and in attending to comparatively less important matters at the expense of major and vital decisions affecting the people as a whole both at the national and also at the international level. Having obtained therefore, the mandate of the people, having been consequently clothed with the necessary power and authority, all the time that is at his disposal, is the property of the nation to whose service it must be fully devoted.

Following are some of the suggestions to achieve the above objective :

I The President should be the Chief Executive of the Nation, as in the U.S.A., but whereas in the U.S.A. the President is elected by those elected—i.e. by electors—by each State for the purpose (and hence indirect election to some extent), our constitution should provide election of our President directly by voters at the time of Parliamentary poll; two boxes to be provided—one for Lok Sabha candidate and one for Presidential candidate. The term of office of the President should be six years. Thus our Chief Executive will get elected by tens of millions of voters.

II The Vice-President should also be elected for six years, but in the manner our President is today elected i.e. by M.P.s. and M.L.As. Such wider electorate - though indirect - is necessary even in the case of Vice-President, because it is he who has to take over the functions of the President in case of mid-term vacancy in the Presidency. Besides, he may exercise all powers and authority as may be delegated to him by the President from time to time.

III The term of the Lok Sabha shall be for six years and co-extensive with the President and Vice-President.

IV Since our President is thus elected by a popular direct mandate, he should, in the scheme of things, enjoy more authority and powers than even U.S.A. President.

V The President shall appoint a Chairman and other members of the Council of Ministers half of whom shall be the members of Parliament. Each Minister will be placed by the President in charge of one or more portfolios. The Council of Ministers shall be responsible and accountable to the President. The Chairman of the Council will preside over the meetings of the Cabinet unless the President summons a meeting in which case the President will preside.

VI Vice-President will preside over Rajya Sabha. The Lok Sabha will elect the Speaker from among its members; the Speaker will preside over the meetings of the Lok Sabha.

VII The President can thus establish a liason with the Legislature; and unlike in the U.S.A. the Legislature will not be too independent of the Executive.

"Every Minister and the Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings of, either House, and joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote."

VIII The President, in consultation with the Council of Ministers, shall make all appointments of the justices (judges shall be so designated) of the Supreme Court including its Chief Justice. The appointments of the judges (not Justices) of the High Courts including their Chief Judge (not Chief Justice as there should be only one Chief Justice) shall be made by the President in consultation with the Council of Ministers of the State concerned. All the powers that are exercised by the U.S.A. President and all those today exercised by the Union Cabinet will be exercised by the President. The President may, however, consult the Council of Ministers in such matters and in such manner as he may deem fit.

IX The Ministers who are members of Parliament can initiate any legislation including money bills and the constitutional amendments. The business in the House will be transacted as today and the Chairman of the Council of Ministers can, on behalf of the President, inform the Houses on the affairs of the State. President may, once in every year, give to the joint session of Parliament information of the State of the Union.

X There shall be a Superior Council of Judiciary (Please see Article 83 of the Constitution of France and Article 104 of the Constitution of Italy and Arts. 103 and 104 of the Constitution of Greece, at Annexure I hereto.) The President shall be the Chairman of the Superior Council of the Judiciary with the Chief Justice of India as its first Vice-Chairman and the Minister for Law and Justice shall be decided by the Council. Besides the Chairman and the two Vice-Chairmen, the Council will consist of two justices of the Supreme Court to be elected by all justices of the Supreme Court by secret ballot from among themselves and two Chief Judges from among the various State High Courts to be elected by secret ballot by all the Chief Judges. Four persons to be elected by Parliament in manner prescribed by law; and four persons to be nominated by the President. Besides, the ex-officio members of the term of other elected members shall be for six years. The President by virtue of his Office as the Chairman of the Superior Council of the Judiciary can punish for his own contempt. Besides deciding administrative matters pertaining to judiciary, this Council or its Committee for the purpose shall be deemed to be the authority to interpret laws and the Constitution, as also to determine the validity of any legislation. The decision given by this Authority shall be final and binding on all Courts. Thus Courts' jurisdiction to decide these matters is automatically taken away (Please see relevant provisions in the Constitution of Belgium, Greece, Guatemala and Art. 134 of Italy at Annexure II attached hereto). The Supreme Council or a Committee thereof, appointed for the purpose, will review the conduct of the justice and the judges of the High Courts and may recommend removal or even dismissal of any of the Judges/Justices to the President. It will review the performance of Judges. It will also hear complaints against the Justice and the Judges or shall suo moto inquire. The Council or its Committee will "ensure the discipline of these judges, their independence and the administrations of the Courts". (Please see the relevant provisions from the Constitutions of France, Italy, Greece and Japan in matters of enforcing discipline among the judiciary at Annexure III): Even though French President under 1946 Constitution is not directly elected by the people, he enjoys great powers and even his appointees—Council of Ministers too enjoy considerable powers.

XI Thus, our President should be armed with all the necessary powers and authority. To illustrate, following are the relevant provisions of the French Constitution—

Art. 29 : The President of the Republic shall be elected by the Parliament.

He shall be elected for seven years. He shall not be eligible for re-election more than once.

Art. 30 : The President of the Republic shall appoint in the Council of Ministers the councillors of State, the grand chancellors of the Legion of Honor, the ambassadors and special envoys, the members of the superior council and the committee of national defence, the Rectors of the universities, the prefects, the chiefs of the Central Governmental agencies, the general officers and the representatives of government in the overseas territories.

Art. 31 : The President of the Republic shall be kept informed of the progress of international negotiations. He shall sign and ratify all treaties.

The President of the Republic shall accredit ambassadors and special envoys to foreign powers, foreign ambassadors and special envoys shall be accredited to him.

Art. 32 : The President of the Republic shall preside over the Council of Ministers. He shall order the minutes of their meetings to be recorded and shall keep them in his possession.

Art. 33 : The President of the Republic shall preside in the same capacity over the superior council and the committee of national defence, and shall have the title of commander-in-chief of the armed forces.

Art. 34 : The President of the Republic shall preside over the Superior Council of the judiciary.

Art. 35 : The President of the Republic shall have the right of pardon in the Superior Council of the judiciary.

Art. 36 : The President of the Republic shall promulgate the laws within ten days after the text as finally adopted has been sent to the government. This interval may be reduced to five days if the National Assembly declares an emergency.

Within the time fixed for promulgation of a law, the President of the Republic may, in a message stating his reasons, ask that it be reconsidered by both chambers; this reconsideration may not be refused.

If the president of the Republic does not promulgate a law within the time limit fixed by the present Constitution, the President of the National Assembly shall promulgate it.

Art. 37: The President of the Republic shall communicate with the Parliament by means of messages addressed to the National Assembly.

Art. 38: Every act of the President of the Republic must be countersigned by the President of the council of ministers and by minister.

Art. 45: At the opening of each Legislature, the President of the Republic, after the customary consultations, shall designate the President of the Council.

The latter shall submit to the National Assembly the programme and the policy of the cabinet he intends to constitute.

The President of the Council and the ministers may not be formally appointed until the President of the Council receives a vote of confidence from the National Assembly by a roll call vote and by an absolute majority of the deputies, except when force majeure prevents the National Assembly from meeting.

The same procedure shall be followed during a legislative session in the event of a vacancy caused by death, resignation, or any other circumstances, except in the case set forth in Article 52 below.

No ministerial crisis occurring within the fifteen day period after the appointment of the ministers shall require the application of Article 51.

Art. 46: The President of the Council and the ministers chosen by him shall be formally appointed by a decree of the President of the Republic.

Art. 47: The President of the Council shall ensure the execution of the laws.

He shall appoint all civil military officials except those specified in Article 30, 46 and 84.

The President of the Council shall assume the direction of the armed forces and shall co-ordinate all measures necessary for the national defence.

The acts of the President of the Council mentioned in the present article shall be countersigned by the ministers concerned.

Art. 83: The Superior Council of the judiciary shall be composed of fourteen members:

The President of the Republic, president;

The keeper of the seals of minister of justice; vice-president;

Six persons elected for six years by the National Assembly, by a two thirds majority and chosen outside its membership, and six alternates elected under the same condition.

Six persons designated as follows:

Four judges elected for six years under the conditions determined by the law, and representing each category of the judiciary, and four alternates elected under the same conditions.

Two members appointed for six years by the President of Republic and chosen outside the membership of the Parliament and the judiciary, but from among the members of the legal profession, two alternates being designated under the same conditions.

The decisions of the superior council of the judiciary shall be taken by majority vote. In case of a tie, the President shall cast the deciding vote.

Art. 84: The President of the Republic shall appoint the judges whose names are submitted to him by the superior council of the judiciary, with the exception of the those in the office of the public prosecutor.

ANNEXURE II

BELGIUM

Art. 28 : "The authoritative interpretation of the laws shall belong only to the legislative powers."

GREECE

Art. 26 : "The authentic interpretation of the laws rests with the Legislative power".

GAUTEMALA

Art. 119 : "The following are also powers of Congress and limitations to which it is subject .

- (i) To decree, interpret, amend and repeal laws. No law may contravene the provisions of the Constitution."

ITALY

Art. 134 : The Constitutional Court judges :

"Disputes concerning the constitutional legality of laws and of acts having force of law enacted by the state and the regions :

Conflicts of jurisdiction between the powers of the State and conflicts between the State and regions and between regions ;

Charges preferred against the President of the Republic or the ministers in accordance with the provisions of the Constitution.

ANNEXURE III

ITALY

Art. 107 : Judges are irremovable. They may not be discharged or suspended from service or transferred to another office or function except by decision of the superior council of the magistrature adopted either for reasons and with the guarantee of defence provided for by the rules of the judicial organisation or with their consent.

The minister of justice is empowered to initiate disciplinary action

Magistrates are differentiated from each other only by the diversity of their functions.

Public prosecutors enjoy the guarantees assured to their office by the rules of the judicial organisation.

FRANCE

Art. 84 : The President of the Republic shall appoint the judges whose names are submitted to him by the superior council of the judiciary, with the exception of those in the office of the public prosecutor.

The superior council of the judiciary, in conformity with the law shall ensure the discipline of these judges, their independence, and the administration of the courts.

The presiding judges shall not be removable.

Art. 103 : Charges of wrongful administration of justice against members of the court of cassation, life members of the court of accounts and ordinary councilors of state are tried before a special tribunal of five members, composed in such manner as the law directs (of persons) chosen by lot from among those three bodies, from advocates, members of the supreme disciplinary council, and from the professors of the faculty of law of the university, one member being taken from each body.

Before the tribunal are also brought all preparatory proceedings, and no other permission is required.

The same tribunal may also be empowered by law to try charges of wrongful administration of justice against judges of first instance, judges of appeal, and public prosecutors.

The superior council of the judiciary, in conformity with the law, shall ensure the discipline of those judges, their independence, and the administration of the Courts.

The presiding judges shall not be removable.

XII Communal and fascist, anti-national and anti-social organisations must be banned (Pl. see Annexure IV here for provisions of the Constitution of Italy and Argentina).

XIII Besides the above major and basic changes, the other suggestions though not as basic and yet equally vital are given in Annexure V hereto Article-wise.

ANNEXURE I

FRANCE :

Art. 83 The superior council of the judiciary shall be composed of fourteen members;

The President of the Republic : President : The keeper of the seals of minister of justice, Vice-President; Six persons elected for six years by the National Assembly, by a two-third majority and chosen outside its membership, and six alternates elected under the same conditions :

Six persons, designated as follows :-

Four judges elected for six years under the conditions determined by the law, and representing each category of the judiciary, and four alternates elected under the same conditions ;

Two members appointed for six years by the President of the Republic and chosen outside the membership of the Parliament and the judiciary, but from among the members of the legal profession, two alternates being designated under the same conditions.

The decisions of the superior council of the judiciary shall be taken by majority vote. In case of a tie, the President shall cast the deciding vote.

ITALY

Art. 104 : The magistrature constitutes an order which is autonomous and independent of any other power.

The superior council of the magistrature is presided over by the President of the Republic.

The first president and the general prosecutor of the court of cassation are ex-officio members of the Council.

The other members are elected two-third by all the ordinary magistrates from members of the various categories of the magistrature, and one-third by Parliament in joint session from university professors of legal subjects and lawyers with fifteen years of practice.

The council elects a Vice-president from the members appointed by Parliament.

The elected members of the council remain in office four years and may not be re-elected immediately.

They may not, while they are in office, be registered in professional lists or be members of Parliament or of regional councils.

GREECE :

Art. 104 : The disciplinary authority over the members of the court of accounts, the court of cassation, and the council of state is also exercised by a council composed of two members of each of those bodies and two professors of the faculty of law of the University, all chosen by lot under the presidency of the minister of justice. To be omitted, as occasion requires, are those who belong to the body upon whose proceedings the council is called upon to pronounce, whether the whole of it or some only of its members are implicated.

13(2) No law shall be called in question in any Court on the ground of legislative competence or any other ground; the Committee of Parliament specially constituted for the purpose may decide this issue as also 13(1).

- (d) The word "reasonable" appearing in Article 19—wherever it appears - may be deleted.
- (e) "No law providing for restrictions on any of the rights specified in clause (i) of Article 19 shall be called in question in any of the Courts." (This should be added as new clause, Clause 7 to Article 19).

Article 22(4) : Advisory Board ?
three months ?

Article 22, better be deleted; the only amendment to carry the effect which need to be made is: In Article 21, in place of word "establish" the word "prescribed" be substituted.

Article 26 :

Article Clause (2) of Article 25 as clause (2) of Article 26.

Article 28(1) after the word "wholly" add 'or partly'.

Article 30.

Add Section (3) to the effect :

Nothing contained in this Article shall prevent the State from making any law or passing any order imposing in the interest of general public, restricting the exercise of this right. Article 31C: delete" "Specified..... article 39" and instead contained in part IV of this Constitution.

Article 32 : Delete

Part V postponed : except

Chapter IV—Union Judiciary.

GREECE :

Art 103 : Charges of wrongful administration of justice against members of the court of cassation, life members of the court of accounts and ordinary councillors of state are tried before a special tribunal of five members, composed in such manner as the law directs (of persons) chosen by lot from among these three bodies, from advocates, members of the Supreme disciplinary council, and from the professors of the faculty of law of the university, one members being taken from each body.

Before this tribunal are also brought all preparatory proceedings, and no other permission is acquired.

The same tribunal may also be empowered by law to try charges of wrongful administration of justice against judges of first instance, judges of appeal and public prosecutors.

CHAPTER IV UNION JUDICIARY

Article 124 (1) : Delete : until Parliamentother Judges, and substitute by "such other judges as the President may from time to time deem it necessary to appoint."

Article 124 (2) : Delete - "after.....proposed" Consultation with judges in appointment of Judges nowhere at all. First proviso to 12-(2) should be deleted :

(b) to proviso two : Delete "in clause (4)" and substitute by:
by law to be made by Parliament.

Article 124 (4) (5) : Clauses 4 and 5 to be deleted.

Art. 104. The disciplinary authority over the members of the court of accounts, the court of cassation, and the council of state is also exercised by a council composed of two members of each of those bodies and two professors of the faculty of the law of the university, all chosen by lot, under the presidency of the minister of justice. To be omitted, as occasion requires, are those who belong to the body upon whose proceedings the council is called upon to pronounce, whether the whole of it or some only of its members are implicated.

JAPAN

Art. 79: The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law, such judges, excepting the chief judge, shall be appointed by the Cabinet.

The appointment of the judges of the Supreme Court shall be reviewed by the people at first general election of the House of Representatives following their appointment, and shall be reviewed again at the first general election of the House of Representatives after a lapse of ten years, and in the same manner thereafter.

In cases mentioned in the foregoing paragraph, when the majority of the voters favours the dismissal of a judge, he shall be dismissed.

Matters pertaining to review shall be prescribed by law.

The judges of the Supreme Court shall be retired upon the attainment of the age fixed by law.

All such judges shall receive at regular stated intervals, adequate compensation, which shall not be decreased during their terms of office.

ANNEXURE IV

ITALY

Art. 18: Citizens have the right freely to form associations, without authorization, for ends which are not forbidden to individuals by penal law.

Secret associations and those which pursue even indirectly, political ends through organisations of a military character are prohibited.

ARGENTINA

Art. 21. The Constitution may be amended entirely or in any of its parts. The necessity for a reform must be declared by Congress with the vote of two-thirds of its members present; but it shall not be affected except by a convention called for the purpose.

A special law shall establish the punishment for those who in any way advocate or propagate methods or systems proposing the use of violence to suppress or change the constitution or any of its basic principles and those who organise, establish, direct or belong to an association or entity which has as its visible or concealed purpose the accomplishment of such ends.

ANNEXURE V

Preamble

- (a) Sovereign, individual, secular, socialist and democratic republic.
- (b) Article 5, Also naturalisation of Citizenship.
- (c) Article

13(1)	to be deleted.
13(2)	to be deleted.
13(3)	to be to Article 12.

Thus, in effect, Article 13 stands deleted. In the circumstance, Article 13 to be substituted by Article 28 of the Belgian Constitution, to the effect; namely that

"13(1) should a dispute arise between Government, State or Union and the superior courts as to the correct purport and interpretation of any of the provisions of this Constitution, the interpretation given by Parliament by way of resolution shall be final and conclusive and binding on all those concerned, including the Supreme Court and the High Courts.

- Article 140 : Add contral article 235 with suitable modifications here so as to put High Court under the administrative control of the Supreme Court and number this as Clause (1) : existing clause to be numbered clause (2).

Also add with suitable modifications contents of article 227 in relation to the Supreme Court and High Court.

Part IV postponed except Chapters V. VI.

HIGH COURTS

- Article 217 : Delete consultations with two Chief Justices. Proviso (b); reference to clause (4) of article 124 be deleted and identical provision as in the case of Supreme Court be made.
- Article 218 : Delete.
- Article 220 : Word "permanent" be deleted.
- Article 225 : Delete "the jurisdiction.....including". Proviso to 225 be deleted.
- Article 226 (1) or : Delete wholly.
- Article 226 (1) : Delete "including.....in appropriate cases only"
(a) Substitute by "excluding"
(b) Delete "and for any other purpose" OR.....
- Article 226 (f) : At least delete "and for any other purpose".
- Article 226 (IA) : Delete "to any Government".
- Article 226 (2) : Delete.
- Article 233 (1) : Delete "in consultation.....such state".
- Article 233 (2) : Delete "and is.....for appointment."
- Article 234 : Delete "after consultation.....such state".
or
- Article 234 : Delete atleast "and with the High Court.....such state".
- Marginal note : After "appoint" also "promotion",
- Article 233 : Add "and promotions" after "appointments".
- Article 235 : Delete "and promotion of".
- Article 311 : Add "or reduced in rank" after "removed".

Add the following at the end of clause (1) "and unless such dismissal removal or reduction in rank in accordance with the procedure prescribed by the appropriate Government.

- Article 311 : Delete clauses (2) to (3) both inclusive and substitute by new clause 2 as follows :

"No order passed under clause (i) above can be called in question in any court on any ground whatsoever".
(Perhaps Administrative Tribunal can be a better forum).

It is interesting to note that like the fact of there being no provision of any constitution of any country of the world for consulting chief justice or judges before the appointment of the judges of the Superior courts; so also there is no provision anywhere in any Constitution on the lines of our Article 311; all over services are regulated by law without any protection from the Constitution provision.