INDIAN CONSTITUTION AT CROSS ROADS : THE ROLE OF REVIEW COMMITTEE

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The Constitution Review Commission, in its first meeting has identified eight core areas for scrutiny. Among the identified areas, the Commission proposes to examine enlargement of Fundamental Rights in Part III by specific incorporation of the freedom of the media, right to compulsory elementary education, right to privacy and right to information.[1]

I. JUDICIAL APPROACH TOWARDS IDENTIFIED CORE AREA

In respect of the above four items with great respect it is submitted that there is little to be done in these areas since the Supreme Court has already pronounced upon each one of them and they have become the law of the land. Any enlargement of Fundamental Rights may not be called for at this juncture. In *Sakal Papers* v. *U.O.I.*[2] the court has said :

> The right to freedom of speech and expression carries with it the right to publish and circulate ideas, opinions and views with complete freedom and by resorting to any available means of publication subject to such restrictions as could be legitimately imposed under clause (2) of Article 19. Our Constitution does not expressly provide for the freedom of the press but this freedom is included in the "freedom of speech and expression" guaranteed by clause (1) (a) of Article 19.

Daily Newspaper (Price & Page) Act 1956 and the Daily Newspaper (Price & Page) Order, 1960 sought to control the pricing of Daily papers and the number of pages published. The Constitution Bench of the Supreme Court, headed by Chief Justice B.P. Sinha struck down the Act and the order as infringing Article 19(1) (a) of the Constitution.

Regarding right to compulsory elementary education in *Mohini Jain* v. *State of Karnataka*,[3] the Court said, speaking through Justice Kuldip Singh who headed the bench:

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1. Newspapers report of the first meeting of the Review Committee dated 23.3.2000.
2. AIR 1962 SC 305.
3. AIR 1992 SC 185.

> Right to life is a compendious expression for all those rights which the courts must enforce because they are basic to the full range of conduct which the individual is free to pursue. The right to life under Article 21 and the dignity of the individual cannot be assured until it is accompanied by the right to education. The State government is under an obligation to make endeavor to provide educational facilities at all levels to its citizens.

Article 41 of the Directive Principles of State Policy clearly enunciates the policy of the state to ensure education to all.

Right to privacy has been declared to be an integral part of right to movement enshrined in Article 19(1) (d) and the right to life enshrined in Article 21 of the Constitution. In *Kharak Singh* v. *State of U.P.*,[4] the Apex Court declared :

> The freedom of movement must be a movement in a free country i.e. in a country where a citizen can do whatsoever he wants, meet people of his own choice without any apprehension subject of course to the law of social control.

Right to privacy has been further reiterated and affirmed in *Govind* v. *State of M.P.*[5] and *State of Maharashtra* v. *Madhukar.*[6]

Likewise the citizens rights to information has been amplified and enlarged in *S.P. Gupta and others* v. *President of India and others.*[7] A bench of seven judges headed by Justice Bhagwati has held:

> The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1) (a). Therefore, disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception justified only when the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspects of public interest.

Emphasizing the importance of the right to information the seven judge bench held that communications and correspondence exchanged between the Union Law Minister and the Chief Justice of India in regard to High

4. AIR 1963 SC 1295.
5. AIR 1975 SC 1378, para 24.
6. AIR 1991 SC 207, para 8.
7. AIR 1982 SC 149, para 66.

Court judges was not privileged and the public had the right to know about their deliberations. Consequently, the entire exchange of correspondence between the high dignitaries was made public in court. Much water has flown since the days of *Sodhi Sukhdev Singh* v. *U.O.I.*[8] when such notings would have been held to be beyond the ken of public scrutiny.

The law being well settled in regard to the above four items, the Review Committee may engage its attention to more important aspects which have become the subject of focus during the last several years. The other core items identified by the Review Committee (again from the newspaper reports)[9] are the strengthening of institutions of parliamentary democracy including the examination of the "persisting menace of unprincipled defections", working of Article 356, appointment and removal of governors, decentralization and devolution of powers, effective implementation of Directive Principles of State Policy, fiscal and monetary policies and the size of the Government and its expenditure.

Of these, questions of governmental policy, its governance, size and expenditure would be matters of routine administrative concern and would not in any manner pertain to the role of the Review Committee. The functioning of Article 356 has been discussed at length in *S.R. Bommai's* case[10] and what the Review Committee does will be a mere reiteration of the existing law. A bench of nine judges headed by S. Ratnavel Pandian has laid down that Article 356 is justiciable. The majority consisting of Pandian J. (para 2), Sawant and Kuldip Singh, JJ. (para 153) and Jeevan Reddy and Aggarwal, JJ. (para 435) has however laid down the extent of judicial review permissible of the proclamation under Article 356. It is limited to examine whether there was any material at all, whether it is relevant and that it is not tainted by malafide, perverse or irrational exercise of power. All of the judges nevertheless agree that the exercise of power under Article 356 is subject to judicial review.

Defection law undoubtedly calls for a change and any person who has come to Parliament/Assembly on the vote of people as a member of one party defecting to another party should suffer disqualification for election from panchayat to President for a period of six years. A defection is morally wrong and detracts from the moral stature of a parliamentarian.

This again will be a matter of reform in the electoral law. Similarly the implementation of directive principles, appointment and removal of governments are all in the realms of proper implementation of what is already available in the Constitution.

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8. AIR 1961 SC 493.
9. *Supra* n. 1.
10. 1994 (3) SCC 1.

II. Stable Government

The real function of the Review Committee is to study and report on how to give stability to the Government so that the elected Parliament is able to complete its full term in office. It is common knowledge that the people of India are anxiously looking for stability and they do not want general elections at short durations. Why is it that the parliamentary form of Government which has been a success in Britain, Australia, Canada and Newzealand is unable to survive in India? We have had seven governments in ten years. Why is it again that we are unable to have a government won on majority vote? An analysis of the elections to the Lok Sabha from 1952 shows that at no time our Lok Sabha was represented by a majority vote.

The nation has been ruled during the entire period of 50 years since the inception of the Republic by a Government which has secured a minority of the votes cast. Such an aberration does not occur if there is a two party system where one or the other party necessarily wins the majority vote.

Our effort should therefore be to see that the parliamentary system works effectively and efficiently. If parliamentary democracy has to succeed there has necessarily to be a two party system — the majority and the minority. The majority is the ruling party and the minority is the opposition. If there are multi parties unable to secure even 20% of the votes polled then parliamentary democracy will function as we have seen in the last decade— governments changing frequently, fall of the Government on flimsy grounds and parties unable to fulfill their avowed goals and manifestoes because of pulls and pressures of their coalition partners. The need of the hour, therefore, is to de-recognize the smaller parties which fail to secure less than 20% of the votes. Even in Britain, if the two major parties Conservatives and Labour split into two each all tangles which plague the Indian Parliament will be re-enacted in Britain also. Sir Ivor Jennings[11] has said "If major parties break up, the whole balance of the constitution alters and then possibly the Queen's prerogative becomes important".

Such a de-recognition would not be challengeable, because the right to form associations/parties would not be curtailed in any manner and the matter of recognition of parties would be governed by the electoral law of the country. The number of parties will be reduced to 2 if the party getting the lowest number of votes would be de-recognized in every successive general election. No one can complain against this since this would be a measure to strengthen parliamentary democracy which has been declared to be a basic structure of the Constitution by the Supreme Court.

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11. Cabinet Government 3rd ed. at 427-28.

III. Making Constitution Workable by Review

The Chairman of the Review Commission appears to have clarified that the task of the Review Committee is only to review the working of the Constitution and not to re-write it. With respect, it is pointed out that every amendment of the Constitution is a re-writing of a particular article, every interpretation given by the Supreme Court is a re-writing through the judicial process. The Constitution, therefore, has been re-written seventy nine times as on date. The Review Committee has been appointed not merely to review the working of the Constitution but to suggest comprehensive amendments which will make the Constitution workable in the best interests of the country.

There is no magic in the words "Parliamentary Democracy" and "Presidential form of Government". Our Government is Presidential in so far as we have a President and there is a Federal structure headed by the Central Executive Government. There are many other presidential features which are not being enumerated for want of space and time. The parliamentary structure is equally important in our Constitution in so far as we have a Parliament headed by the Prime Minister and a Council of Ministers to advise the President. Therefore, even if the Review Committee is of the view that the two party system is not feasible in our country and that the head of the Government namely the Prime Minister is to be elected directly for a fixed term, it will not in any manner jeopardize the parliamentary system because only the method of election will change. The basic fundamental concept of the Constitution that the elected leader should head the Government which is the essence of a representative Government will not change.

IV. Clarification as to Question of Origin of the Candidates

The Review Committee should also consider the question whether persons of foreign origin ought to occupy high positions of public importance such as being President, Vice-President, Prime Minister, Judges of the High Courts and Supreme Court, heads of public sector undertakings and other important positions. Article 102(1)(d) of our present Constitution[12] clearly enunciates that persons owing allegiance or having connection with any foreign power

12. Article 102 (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament -

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign state, or is under any acknowledgement of allegiance or adherence to a foreign State.

or country are debarred from becoming members of Parliament under our Constitution.

The Review Committee should take the lead from Article 102(1)(d) of the Constitution and suggest an amendment to enlarge the scope of the debarment as indicated above and not leave this question as being contentous or controversial. The salutory principle underlying this principle is that a person of foreign affinity is liable to have divided loyalties particularly if there is a conflict between India and their country of origin.

V. Equality Clause

The Supreme Court has held that the equality clause is a basic feature of the Constitution[13] and therefore it would stand to reason that the Review Committee concerns itself with the elimination of discrimination of all forms. The existence of Article 370 of the Constitution is the most manifest form of discrimination which enables the government of J&K to deprive the inhabitants of other states from owning property in their State, even though all of them are Indian citizens. The inhabitants of J & K are free to purchase property and settle anywhere in India whereas other inhabitants of other states do not enjoy this privilege. This anomaly is the result of the fact that all Indian laws are not applicable to J & K and as per Article 370 they can be made applicable only with the consent of State Government.

Similarly, great injustice is caused to men and women alike because personal laws vary according to the religion they belong to. Discrimination on grounds of religion is a taboo under the Constitution — it is a total violation of Articles 14 and 15 of the Constitution. The Supreme Court has alluded to this fact and urged the State to enact a Common Civil Code applicable to all the citizens in a like manner.[14] The Review Committee should take serious note of this anamolous situation and do away with the glaring discrimination and there by strengthen the basic framework of the Constitution.

13. *Keshvananda* v. *State of Kerala*, AIR 1973 SC 1461.
14. *Sarla Mudgal* v. *Union of India*, AIR 1995 SC 1531.