

the same publication on 7 January 1950 reports the issuance of the order. There is, on the other hand, no report that the Constituent Assembly proclaimed the constitution. *The Gazette of India Extra-ordinary* of 26 January 1950, rather, reports that, at 10.30 a.m. on 26 January 1950, at the Durbar Hall of the Government House, the Governor-General made the following proclamation:

Whereas the people of India, having solemnly resolved to constitute India into a sovereign democratic republic, adopted, enacted and gave to themselves on the twenty-sixth day of November 1949, in their Constituent Assembly, the constitution of India;

And whereas it has been declared by the said constitution that, India, that is, Bharat, shall be a union of states, comprising within the union the territories which were hitherto the Governor's provinces, the Indian states and the Chief Commissioners' provinces;

And whereas this, the twenty-sixth day of January 1950, has been fixed for the commencement of the said constitution;

Now, therefore, it is hereby proclaimed that on and from this, the twenty-sixth day of January 1950, India, that is, Bharat, shall be a sovereign democratic republic, and the union and its component units, the states, shall exercise all powers and functions of government and administration in accordance with the provisions of the said constitution.

Apparently, Jennings and Wheare were not posted with such details that imply complete concurrence of the British government with the process of transfer of power in India through the constitution. But that does not suggest that the Indian constitution evolved out of the British imperial authority or colonial practice. The character of a constitution lies not in its origin but in its function.

Ref. The Making and Working of the Indian Constitution - Sibani Kinkar Chawla, National Book Trust, 2009

III

THE SPIRIT OF THE INDIAN CONSTITUTION

The Preamble

Ever since the formation of the United States of America liberal democracies in the world have put a preamble to their constitution. This is in keeping with the juristic tradition over the world according to which legislations are prefaced by a statement of its objectives primarily to guide the executive and the judiciary in the interpretation and proper application of law. A constitution being the supreme law of a country a statement of its objectives is of profound importance.

The 1936 constitution of the Union of Soviet Socialist Republics did not bear any preamble. Joseph Stalin, the main draftsman of that constitution, explained that a constitution is not a programme of the people; it is the record of their achievements. There should be nothing in a constitution that is not mandatory. The 1977 constitution of that country had an initial statement of general objectives of the constitution without using the word 'preamble'. The 1954 constitution of the People's Republic of China did not have a preamble. But the 1978 constitution of that country had a preamble.

Sir Ernest Barker, an idealist political thinker of Britain, was so impressed by the preamble to the Indian constitution that he opened his book, *Principles of Social and Political Theory*, published in 1951, the year following the proclamation of the constitution of India, with the preamble to the Indian

constitution without comment. It is in the preamble that the spirit, if not the essence, of a constitution is spelt out. It is, therefore necessary to examine the preamble to the Indian constitution to understand its spirit.

The following is the language of the preamble:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC, and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity,

And to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Two clusters of words in this preamble are later additions.

The 42nd amendment in 1976 added these two clusters—‘socialist,’ and ‘and the unity and integrity of the nation.’ It should be noted that the 42nd amendment, passed by the Parliament of India during an emergency, came in for sharp criticism. Several parts of the amendment were revised after the emergency by a government that had replaced the earlier government, by the 43rd and the 44th amendments. However, these clusters of words were retained. This means that there is an acceptance of these words by all major political parties of the country. We shall discuss the implications of these words later. Before that the original preamble needs to be discussed.

Worth of the Preamble

Several judgements of the Supreme Court of India have held

that the preamble to the constitution, by itself, does not have a direct legal value. On the other hand, the preamble spells out the basic philosophy of the constitution in the light of which the articles of the constitution will have to be interpreted. The Supreme Court, however, has not pointed out the political value of the preamble. A constitution is as much a political document as it is legal. Nowhere in the constitution is this politics more manifest than in the preamble.

To begin with, the constitution of India is adopted, enacted and given to themselves by the people of India. It is not granted by a 'benevolent', native or foreign, king or dictator. This announcement distinguishes the Indian constitution from those of Britain's dominions like Canada or Australia as well as from several 'guided democracies' scattered over the third world. In spite of its indirect election, on the basis of restricted franchise, the Constituent Assembly of India could reasonably claim to represent different sections of the people, if not different economic classes.

This last shortcoming is largely remedied by the words 'equality,' 'liberty' and 'fraternity'—slogans lifted from the historic French revolution that represented the aspirations of the common people all over the world and at all times. The French revolution could not achieve them—no revolution in history has achieved them in full—but they have remained the eternal goal of humanity.

The Question of Sovereignty

The first significant word in the preamble's declaration is the sovereignty of the country marking a departure from the 'independent dominion' set up by the Indian Independence Act, 1947. It raised the status of the country to that of the free states of the West and the East. A question arose about the continued membership of sovereign India in the British Commonwealth of Nations. In a conference of the

Commonwealth Prime Ministers in 1949 the question was answered. The word British was dropped from the nomenclature of the organization and the organizational structure was modified. It was decided that a dominion could continue within the commonwealth even after declaring itself a republic. The British Queen/King (not the queen/king in Parliament) would formally remain the organization's head. The Commonwealth of Nations turned into a functional association of Britain with her former colonies on a purely voluntary basis involving no allegiance to the British crown. This voluntary character has been further underlined by occasional departures, expulsions and readmission of some member states.

It should be stressed here that membership of any regional association, like the South Asian Association for Regional Cooperation, or a functional association, like the United Nations Organization, does not affect the sovereignty of a country. Neither does any treaty, entered into voluntarily by a state, in the modern age of international cooperation. In fact, promotion of international peace and security is a directive principle of state policy in the constitution of India (Art. 51).

The Meaning of a Republican Democracy

Of profound legal-political significance is the phrase 'democratic republic'. Etymologically the two words mean almost the same thing, but not quite. 'Democracy' comes from the Greek word 'demos' (meaning 'power of the people'). 'Republic' comes from the Latin word 'Res Publicus' (meaning 'of the people'). By a republic the Romans distinguished a people's state from a dynastic state (*regimen*). Today all democracies are not republics (e.g. the United Kingdom) and all republics are not democracies as will be seen in several third world countries. A democratic republic is a democracy headed by an elected official. All powers of such elected heads are derived only from the constitution. There is nothing like

an inherent power/‘prerogative’ of the head of the government.

The Indian constitution does not use the word ‘prerogative.’ There are, on the other hand, a set of words that are used in the constitution with reference to the powers of the executive. The word ‘advice’ is crucial among them. The President and the Governors act according to the advice of their respective councils of ministers. This term, adopted from the British constitutional practice, has mandatory significance. It means that the President and the Governors exercise their authority only according to the will of their councils of ministers. The next important term is ‘discretion’ adopted from the Government of India Act, 1935 and suggests a sphere of activity beyond the advice of the ministers. The Governors have this power; the President does not. This means that all powers of the President are actually exercised by the ministers. But the Governors, normally acting according to the advice of their ministers, may in extraordinary circumstances act without their advice. In some of the northeast Indian states this discretion is specifically sanctioned to the Governors. In some of those states, too, the governors were, subsequent to the commencement of the constitution, authorized to act in their individual judgment. That is to say, they would, in certain matters, consult their ministers but would not be bound by their opinion.

These terms are significant. In the parliamentary form of democracy that India has adopted, the council of ministers is responsible to the popularly elected legislature. To abide by their advice would mean for the chief executive bowing to the will of the people. In any case, no one has an inherent right—prerogative. Discretion in a republican democracy may only be conferred by the constitution sanctioned by the people.

The point may be illustrated by referring to four other terms: (1) pleasure, (2) recommendation, (3) consultation and (4) views. (1) The council of ministers hold office during the

pleasure of the President at the Union and of the Governors at the state levels. This term refers only to the tenure of the council of ministers. (2) Certain bills—the money bills and the bills for reorganization of states—may be moved in Parliament only on the recommendation of the President. In practice, it is the council of ministers, in the name of the President, that moves such bills. In the second place, such bills may not be moved in the legislature without the President's recommendation. This means that the executive takes responsibility for the bill and no private member of a legislature may move it. (3) The President consults senior judges of the country in the matter of appointment of the judges of the Supreme Court and state High Courts. In practice, it is the Union council of ministers which really consults the senior judges. In the second place, consultation is not taking advice; it has no binding effect. (4) Before recommending the introduction of a bill for reorganization of state the President must seek the views of the legislatures of concerned states, but (s)he is not bound by such views. Of course, in practice, it is the Union council of ministers which seeks the views of the concerned states' legislatures.

Ideologies

The ideas that are hitherto explained belong to the domain of liberal democracy. The word 'socialist' somehow goes beyond this liberal democratic framework. The word 'socialist' was first used in the Soviet Russian constitution after the Bolshevik revolution. Subsequently, the East European countries and China that passed under the control of the communist parties after World War II used it (No liberal democratic country before India put the word 'secular' in their constitution either). It will be interesting to note that, during the framing of the Indian constitution, two members of the Constituent Assembly, one belonging to the Muslim League, Syed Hasrat Mohani, and

another (Hindu) to the Congress party, Professor K.T. Shah, proposed the inclusion of the words 'secular, socialist' in the preamble. The drafting committee turned down the proposal about socialism; the reason offered being that a constitution is a political document and does not lay down any social ideology. It was silent on the question of secularism. During discussion on the right to education in the Constituent Assembly, however, Dr K.M. Munshi, a member of the drafting committee and a Congress leader involved in the States People's Movement, confessed that some princely rulers were apprehensive about the principle of secularism as their thrones were linked up with divinities and temples.

The main problem with these words is that they are subject to differing interpretations. Though the term 'socialist' was never judicially defined in India, random opinions have been thrown about as in the case of *Nakara v. the Union of India* (1983), with the Supreme Court holding that Indian socialism is a blend of Marxism and Gandhism, leaning heavily towards Gandhian socialism. Yet, the word has a global historical bearing stretching over more than a century and a half. Originally, it stood for the science of society and became the springboard of what later came to be known as sociology. Then it came to mean an economic order that was informed by a degree of equity. With Karl Marx it became a transformational ideology based on the theory of class contradiction. After his death, a moderate wing of the followers of the ideology watered down the element of contradiction and emphasized democracy and solidarity. All these trends, however, had one common article of faith: welfare of the large society preceded the interest of the individual. This welfare philosophy runs through the veins of the Indian constitution.

The specific words 'justice', 'liberty', 'equality' and 'fraternity' have been explicated in some detail. They are given shape primarily in Part III and Part IV of the constitution in

the form of fundamental rights and duties, and directive principles of state policy, respectively.

On Secularism

The term 'secularism' was coined much later. It means attachment to the secular affairs of life. It does not deny the sacred or spiritual side of human activities; it simply confines itself to the 'this worldly' business. It is not atheism. Human life mostly consists of both secular and sacred affairs. There are very few atheists in the world. Therefore, society comprises the secular as well as sacred elements. Only institutions can be secular. It is just that some institutions, like a football club or a bank, are engaged in secular activities. The state is also an institution. Those states which engage themselves in secular affairs only believe that religion is a private affair of an individual or a group of individuals and is best left to them. If a state dabbles in the religious faiths of people or is influenced by religious considerations, it splits society and invites trouble. It is quite possible for a state to have a large proportion of its population following a particular religion; it is impossible for a modern state to have a population following only one religion or belonging to one sect of a religion.

This is the reason why the United States of America, which had its origin in the settlement of religious refugees, decided to prohibit state interference in religious affairs. The very first amendment to the US constitution, enacted in 1791, ordained that the congress shall not legislate on any matter pertaining to religion. As the executive cannot spend any money without a congressional legislation, the amendment meant the prohibition of any state support to a religion. Nor could the state discriminate against a religious order. Thus, though the people of the USA are as much religious as the people of any other country are, the state does not support or discriminate against any religion by law or executive action.

including financial patronage.

The constitution of India has made the difference between the sacred and the secular explicit in its body. It will be seen that Article 25, that guarantees the freedom of religion, itself contains this distinction. But, for historical reasons, strict abstention from religious affairs has not been possible for the government and the philosophy of secularism has been interpreted in a way that means equal respect for religion (*sarva dharma samabhava*). Dr S. Radhakrishnan, India's philosopher-statesman, in a 1956 lecture on *The Recovery of Faith*, presented this syncretistic view of secularism in the following words:

When India is said to be a secular state, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the state assumes divine prerogatives We hold that not one religion should be given preferential status This view of religious impartiality, or comprehension or forbearance, has a prophetic role to play within the national and international life.

In 1964, V.P. Luther called India a 'jurisdictional state.' The state's equal patronage to all religions—particularly, in matters of pilgrimage and places of worship—has drawn some controversy. Indeed, the constitution itself has provided for grant from the consolidated fund of certain states to *devaswom* (divine property) trusts as a consequence to the merger agreement with the Travancore and Cochin states [Article 238(10)(f) in the original constitution, recast as Article 290A by the seventh amendment in 1956, following the states reorganization]. To cap the confusion, the authorized Hindi translation of the constitution has translated 'secular' as *panth nirapeksha*, which literally means independent of sects.